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Lawrence Rosenthal

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EYEWITNESS IDENTIFICATION AND THE PROBLEMATICS OF BLACKSTONIAN REFORM OF THE CRIMINAL LAW

LAWRENCE ROSENTHAL*

A substantial number of wrongful convictions are attributable to inaccurate identifications of perpetrators, stemming from the difficulties that eyewitnesses can experience in accurately perceiving and later recalling faces. Many have argued that courts should employ prophylactic rules to prevent the admission of unreliable identification evidence. Yet, most jurisdictions continue to follow the deferential approach to the admission of eyewitness identification evidence taken by the United States Supreme Court in Manson v. Brathwaite. *Commentators have universally condemned this state of affairs.*

This Article offers a departure from the existing commentary by taking seriously the possibility that courts have good reason for their reluctance to embrace prophylactic rules excluding evidence thought to present unduly high risks of convicting the innocent.

The case for reform is rooted in Blackstone's admonition that the law should be wary of admitting evidence of guilt, preferring erroneous acquittals to wrongful convictions. It is difficult, however, to construct a Blackstonian case for the exclusion of evidence thought to be unduly likely to produce wrongful convictions. Given our limited knowledge about the error rates that inhere in most types of evidence, Blackstonian reform has no ascertainable stopping point; excluding evidence that poses what is thought to be an undue risk of wrongful conviction could result in the exclusion of virtually all evidence of guilt. To illustrate the point, this Article considers an issue on which the lower courts have split—the role of corroborative

* Professor of Law, Chapman University, Dale E. Fowler School of Law. The author has benefitted from the incisive comments of Kevin Cole, Donald Kochan, Scott Howe, Eric Miller, Ric Simmons, Jonathan Witmer-Rich, and those who attended the presentation of earlier drafts at Crimfest at Cardozo Law School and Southern California Criminal Justice Roundtable held at the University of California, Irvine School of Law. The author is also grateful to Rachel Cherny-Santos, Joseph Hernandez, Kaylee Sauvey, Jaime Traxler, Sherry Leysen and the staff of the Rinker Law Library for invaluable research assistance.

evidence in assessing the admissibility of an eyewitness's identification. Although Blackstonian prophylactic rules reject the consideration of corroborative evidence, the reliability of most evidence cannot be assessed in isolation. Reliability can usually be assessed only in the context of all pertinent evidence. Thus, totality-of-the-circumstances tests, such as the approach reflected in the Supreme Court's decisions on eyewitness identification, are about the best we can do—as prophylactic evidentiary rules designed to reduce rates of wrongful conviction turn out to be deeply problematic.

INTRODUCTION

More than a half-century ago, the Supreme Court wrote: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[1] Time has done little to alter this assessment; analyses of wrongful convictions continue to identify inaccurate eyewitness identification as a leading cause of the conviction of the innocent.[2]

The reasons why eyewitness identifications lead to wrongful convictions can be briefly summarized.[3] A large volume of research has disclosed a substantial error rate in witnesses' efforts to identify a suspect accurately, stemming from the difficulties that witnesses can experience in accurately perceiving and later recalling faces.[4] In particular, individuals have a tendency to select the individual in a lineup or other identification procedure who most resembles their recollection of the suspect, which injects a substantial risk of error into identification evidence.[5] The research also identifies a heightened risk of error when suggestive identification procedures are employed—for example, when only the suspect or his picture is shown to a witness (a "showup"), or the use of a lineup of individuals (actual or photographic) in which only the suspect fits the witness's previous description of the perpetrator, or when witnesses receive instructions or

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[1] United States v. Wade, 388 U.S. 218, 228 (1967) (footnote omitted).

[2] *See, e.g.*, Russell D. Covey, *Suspect Evidence and Coalmine Canaries*, 55 AM. CRIM. L. REV. 537, 546–48, 547 tbl.2 (2018); Brandon L. Garrett, *Convicting the Innocent Redux*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 40, 45–46, 46 fig.3.3 (Daniel S. Medwed ed., 2017); Samuel Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 769–73 (2017); Andrew M. Smith & Brian L. Cutler, *Introduction: Identification Procedures and Conviction of the Innocent*, *in* REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 3, 7–11 (Brian L. Cutler ed., 2013) [hereinafter REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES].

[3] A more detailed account of those aspects of the pertinent research most directly applicable to this Article is found in Part II.A.1 below.

[4] *See, e.g.*, COMM. ON SCI. APPROACHES TO UNDERSTANDING & MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATIONS IN LAW ENF'T & THE COURTS, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 45–101 (2014) [hereinafter IDENTIFYING THE CULPRIT]; ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 13–78 (5th ed. 2013); BOAZ SANGERO, SAFETY FROM FALSE CONVICTIONS 182–85 (2016); Gary L. Wells, *Eyewitness Identification*, *in* 2 REFORMING CRIMINAL JUSTICE 259, 263–68 (Erik Luna ed., 2017).

[5] *See, e.g.*, Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768–69 (1995) (summarizing research).

feedback encouraging them to make an identification.[6] Moreover, studies have found that jurors have limited ability to assess the reliability of eyewitness identifications and, instead, tend to over-believe eyewitnesses and discount the risk of eyewitness error.[7] As one commentary put it:

> Unlike accomplice witnesses, the typical eyewitness [to a crime] is a passerby who has no motive to lie. Unlike circumstantial evidence, eyewitness testimony is directly probative of guilt and frequently expressed with a high degree of certainty. Unlike expert testimony, eyewitness testimony is immediately understood by even the most confused, inattentive, or ignorant juror. And unlike many other kinds of evidence, eyewitness testimony is rarely the subject of any cautionary instruction from the judge . . . .[8]

In light of these problems, many have urged reforms to reduce the risk of error created by potentially suggestive identification procedures, such as training officers to avoid suggestive identification procedures; utilizing double-blind procedures in which witnesses and lineup administrators are unaware of the identity of the suspect; and instructing witnesses during

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[6] *See, e.g.*, BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 113–36 (1995) (discussing risks of error related to lineup instruction bias, lineup construction, and lineup administrator bias); Steven E. Clark & Ryan D. Godfrey, *Eyewitness Identification and Innocence Risk*, 16 PSYCHONOMIC BULL. & REV. 22, 29–33 (2009) (discussing risks of error related to lineup construction, showup identifications, lineup instructions, and simultaneous versus sequential lineups); David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 270–74 (2010) (discussing suggestiveness in showup identifications, lineup construction, and administrator bias); 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, 6–9 (2009) (discussing risks of error related to lineup instructions, lineup composition, showup identifications, and administrator bias).

[7] For discussions of the pertinent research, see, for example, CUTLER & PENROD, *supra* note 6, at 181–96; DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 150–57 (2012); Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1147–52 (2010-11); Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 346–53 (1997); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177, 193–205 (2006); Dan Simon, *On Juror Decisionmaking: An Empathic Inquiry*, 15 ANN. REV. L & SOC. SCI. 415, 419–20 (2019); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 152–60 (2011); and Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW. & HUM. BEHAV. 603, 620–21 (1998).

[8] Jed S. Rakoff & Elizabeth F. Loftus, *The Intractability of Inaccurate Eyewitness Identification*, 147 DAEDALUS, Fall 2018, at 90, 91; *cf.* Perry v. New Hampshire, 565 U.S. 228, 260 (2012) (Sotomayor, J., dissenting) ("[J]urors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness' false confidence in the accuracy of his or her identification.").

lineups that the suspect or the suspect's picture might not be present and that they are free to make no identification.[9]

In *Manson v. Brathwaite*,[10] the Supreme Court addressed the question of whether an unreliable eyewitness identification can deprive a criminal defendant of the constitutional right to a fair trial under the Due Process Clause. The Court concluded that even when investigators utilize unnecessarily suggestive procedures, an ensuing identification should not be excluded from evidence absent a finding that it is unreliable in light of "the totality of the circumstances"—rejecting "a strict exclusionary rule or new standard of due process."[11] Under this approach, "if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."[12] *Manson* rarely results in the exclusion of eyewitness identification evidence; a review of federal cases available on the Westlaw database from the date *Manson* was decided in 1977 until January of 2010, for example, found that identification evidence was excluded under *Manson* in only 3.54% of cases, despite the use of suggestive identification procedures in 57.10% of cases.[13]

Manson reflects the predominant approach to judicial scrutiny of eyewitness identification evidence; as one recent survey concluded: "[A] large proportion of law enforcement agencies . . . have not made significant reforms and most courts in the United States still use some version of the *Manson* approach to dealing with eyewitness identification evidence."[14]

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[9] For discussions of recommended reforms along these lines, see, for example, IDENTIFYING THE CULPRIT, *supra* note 4, at 106–07; Rakoff & Loftus, *supra* note 8, at 94–95; and Wells, *supra* note 4, at 277–78.

[10] 432 U.S. 98 (1977).

[11] *Id.* at 113 (internal quotation and citation omitted).

[12] *Perry*, 565 U.S. at 232.

[13] Nicholas A. Kahn-Fogel, Manson *and Its Progeny: An Empirical Examination of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175, 209–11, 211 tbl.1 (2012). The prevalence of suggestive procedures fell only slightly over time. *See id.* at 220 ("[N]ear the middle of the time period, the probability of a case in the data set involving verifiable suggestion was about 60%, but it was about 66% near the beginning of the time period and only about 52% near the end."). Moreover, despite the mounting social science evidence illustrating the dangers of suggestive procedures, the willingness of courts to suppress evidence under *Manson* in cases involving suggestion actually decreased over time. *See id.* ("[E]ven isolating only the 840 cases in which suggestion was evident, courts were significantly less likely to suppress in-court identification evidence as time went on.") (footnote omitted).

[14] Wells, *supra* note 4, at 276; *see also* Nicholas A. Kahn-Fogel, *The Promises and Pitfalls of State Eyewitness Identification Reforms*, 104 KY. L.J. 99, 120 (2015-16) ("[T]he vast majority of jurisdictions have followed *Manson*.")

Commentators, however, have uniformly condemned *Manson* as inconsistent with the large body of research that has emerged since that decision, disclosing the perils of eyewitness identification.[15] The academic commentary on eyewitness identification evidence contains nary a defense of *Manson*.[16]

The attacks on *Manson* as tolerating the admission of evidence thought unduly likely to produce convictions of the innocent call to mind Blackstone's famous admonition: "[E]vidence of felony should be admitted

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[15] For helpful examples of the substantial volume of commentary criticizing *Manson*, see JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 74–75 (2000); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 53–54, 62–79 (2011); Clark, *supra* note 7, at 1135–42; Deborah Davis & Elizabeth F. Loftus, *Inconsistencies between Law and the Limits of Human Cognition*, *in* MEMORY AND LAW 29, 49–53 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 449, 467–75 (2012); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 608–21 (2010); Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications after* State v. Henderson *and* State v. Lawson, 105 J. CRIM. L. & CRIMINOLOGY 947, 971–73 (2015); 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, 125–32 (2006); Benjamin F. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 275–97 (1990-91); Sonenshein & Nilon, *supra* note 6, at 274–78; Wells & Quinlivan, *supra* note 6, at 14–17; Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 815–19 (2007).

[16] About the only defense of *Manson* that can be found in the literature comes in a brief passage in a much longer article written by a prominent judge:

> [C]ommentators have argued for, and some courts have even agreed to, broad restrictions on the admissibility of eyewitness testimony . . . . Not only might it ultimately decrease the accuracy of criminal verdicts – by taking fact-finding away from diverse juries and giving it to singular judges – but it also impinges on the jury's democratically grounded role as fact-finder. Nor are such broad, judicially created rules of exclusion necessary. The Sixth Amendment dictates confrontation rather than exclusion as the appropriate approach to eyewitness testimony. The Confrontation Clause augments the jury's role, and it is hardly up to judges to diminish it. Of course . . . the Confrontation Clause excludes the out-of-court testimonial statements of witnesses who do not testify at trial, unless that witness is "unavailable" and the defendant "had a prior opportunity for cross-examination." As a general matter, however, eyewitness testimony should not be subject to a judge's decision as to admissibility but should instead go through the adversary process and be left to the jury's determination of its value and weight.

J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1161–62 (2014) (footnotes omitted). This argument fails to confront the evidence suggesting that eyewitness identification evidence comes with a risk of error that is unlikely to be appreciated by jurors. If this is the case, the availability of a jury trial would not constitute an adequate response to the risk of error injected into the criminal process by suggestive identification procedures.

cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[17] Indeed, commentators frequently invoke Blackstone's ratio to argue for more vigorous judicial policing of eyewitness identification evidence.[18]

Rather than adding to the chorus of criticism condemning *Manson* and the prevailing approach to the admission of eyewitness identification evidence, however, this Article offers a different perspective—by taking seriously the possibility that courts have good reason for their reluctance to embrace Blackstonian reform of criminal evidence law.

Part I reviews the development of the *Manson* test, as well as the alternatives adopted by a handful of jurisdictions. It concludes that even those jurisdictions that have embraced alternatives to *Manson* have not achieved much in the way of meaningful reform.

Part II demonstrates that the virtues of *Manson* lie in the difficulties presented by the alternatives, which involve the use of prophylactic rules thought to minimize the risk of error. It is fiendishly difficult to know whether such measures have benefits that exceed their costs. To illustrate the point, Part II focuses on an issue on which the lower courts have split—the role of corroborative evidence in assessing the admissibility of eyewitness identification evidence. Blackstonian prophylaxis focuses on the procedures employed to obtain an identification rather than on whether it is corroborated. Any effort to assess the reliability of eyewitness identification evidence in isolation, however, is deeply problematic. The reliability of evidence rarely can be assessed in a vacuum; in the main, reliability is properly assessed in light of the totality of the circumstances—including the available corroborative evidence, or lack thereof. By disclaiming inquiry into corroboration, accordingly, prophylactic rules would exclude a great deal of reliable evidence.

The Blackstonian response to these difficulties rests on the view that we should prefer false acquittals of the guilty to false convictions of the innocent. Accordingly, if eyewitness identification evidence presents special risks to the innocent, its admission should be viewed with special caution, even if this will increase the rate at which the guilty go free. To be sure, a Blackstonian preference for false acquittals over false convictions undoubtedly underlies the heavy burden of proof that the prosecution must

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[17] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352.

[18] *See, e.g.*, D. Michael Risinger, *At What Cost? Blind Testing, Eyewitness Identification, and What Can and Cannot Be Counted as a Cost of Reducing Information Available for Decision*, 58 HOW. L.J. 333, 359 (2015) ("[T]he perceptive reader will hear an echo of the Blackstone ratio . . . . [I]t is to be used as an approach to taking reformatory actions that will improve the performance of a system-in-being at the margins.").

shoulder in a criminal case.[19] It is a separate question, however, whether additional safeguards are required when it comes to the admission of eyewitness identification evidence. As Part II demonstrates, we know little about the error rates that inhere in most types of evidence; the perils of eyewitness identification evidence may not be unusual. There is, accordingly, no identifiable stopping point for Blackstonian prophylactic rules that exclude evidence giving rise to a risk of wrongful convictions. That risk inheres in virtually all evidence. There is, therefore, little basis for erecting special prophylactic exclusionary rules designed to screen out evidence regarded as especially unreliable. Totality-of-the-circumstances tests are about the best we can do.

I. *MANSON V. BRATHWAITE* AND THE LIMITED SCOPE OF JUDICIAL GATEKEEPING IN THE ADMISSION OF EYEWITNESS IDENTIFICATION EVIDENCE

The predominant view taken by courts as they assess the admissibility of eyewitness identification evidence remains the highly deferential rule of *Manson v. Brathwaite*.[20] There is, however, a minority view that demands a more substantial showing of reliability before an eyewitness identification can be placed before the jury.

A. *MANSON*'S APPROACH TO EYEWITNESS IDENTIFICATION EVIDENCE

The traditional rule governing the admissibility of eyewitness identification evidence was straightforward: "The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury."[21] On this view, accordingly, judges played essentially no gatekeeping role—it was up to the jury to assess the reliability of otherwise relevant eyewitness identification evidence.[22]

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[19] *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525–26 (1958) ("Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."). For a more general discussion of the basis for the prosecution's burden of proof beyond reasonable doubt in criminal cases, see *In re* Winship, 397 U.S. 358, 361–64 (1970).

[20] 432 U.S. 98 (1977).

[21] Stovall v. Denno, 388 U.S. 293, 299–300 (1967) (citation omitted).

[22] *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 245 (2012) ("[T]he jury, not the judge, traditionally determines the reliability of evidence.").

1. The Road to Manson

The Supreme Court first broke with the traditional view in *United States v. Wade*.[23] After observing 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,"[24] the Court worried that "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'"[25] The Court therefore characterized the lineup at which Wade was identified as the perpetrator of the crime as a "critical stage of the prosecution" at which Wade was entitled to the assistance of counsel under the Sixth Amendment.[26]

Wade was something of a false start. Its practical significance was limited five years later, when the Court held that the right to have counsel present at an identification procedure did not extend to identifications occurring before formal criminal charges are filed.[27] Subsequently, the Court concluded that even for post-charging identifications, no right to counsel attaches to the use of photographic identifications because of the ease with which a photo array can be preserved for subsequent inspection.[28] But even putting aside *Wade*'s limited scope, there is reason to doubt the efficacy of its reliance on the presence of counsel as a vehicle for enhancing the reliability of eyewitness identifications. At best, the presence of defense counsel might assist the defense in identifying potential flaws in the process, and perhaps deter overt misconduct. But even when defense counsel is present, the absence of standards that require reliable identification

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[23] 388 U.S. 218 (1967).

[24] *Id.* at 228.

[25] *Id.* at 235–36.

[26] *Id.* at 236–38. In pertinent part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In a companion case decided the same day as *Wade*, the Court held that the admission of an in-court identification without inquiry into whether it was tainted by a prior lineup conducted in the absence of counsel in violation of the Sixth Amendment was also constitutional error. *See* Gilbert v. California, 388 U.S. 263, 271–74 (1967).

[27] *See* Kirby v. Illinois, 406 U.S. 682, 688–90 (1972) (plurality opinion); *id.* at 691 (Powell, J., concurring in the result).

[28] *See* United States v. Ash, 413 U.S. 300, 313–21 (1973).

procedures means that the attorney would have few tools available to ensure that reliable procedures are employed.[29]

A more straightforward approach to reducing the risk of error created by unreliable eyewitness identifications would involve regulating the process of eyewitness identification itself to reduce the risk of error. Indeed, there is a line of cases that points in that direction, beginning with the Supreme Court's decision—announced the same day as *Wade*—in *Stovall v. Denno*.[30]

Stovall, the suspect in the case, was brought to the hospital room of a stabbing victim in the custody of police officers—Mrs. Behrendt—who identified him as the individual who had attacked her and killed her husband.[31] While acknowledging that an identification of an alleged perpetrator could be "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law[,]" the Court concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative."[32] After all, "[n]o one knew how long Mrs. Behrendt might live."[33] *Stovall*'s implication was that the use of evidence derived from an unnecessarily suggestive identification procedure could deprive the accused of due process of law. Subsequent cases, even as they rejected due process claims, continued to leave open that possibility.[34]

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[29] *Cf.* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 656 (1999) ("[T]he right to counsel approach does not focus on the underlying problems with the reliability of the evidence. Giving the suspect a lawyer before a lineup does . . . what? The lawyer can testify as a witness about suggestiveness later on, but any accurate recording of the session could achieve that much.") (ellipsis in original and footnote omitted); Garrett, *supra* note 15, at 466–67 ("[H]aving the right to a lawyer present at a lineup is not a significant protection . . . . 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."); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 328 (1984) ("The presence of an attorney at certain identification procedures enhances the illusion of accuracy while doing little to remedy the problems identified by perceptual psychologists.").

[30] 388 U.S. 293 (1967).

[31] *Id.* at 295.

[32] *Id.* at 302.

[33] *Id.* (quoting United States *ex rel*. Stovall v. Denno, 355 F.2d 731, 735 (2d Cir. 1966), *aff'd sub nom. Stovall* v. Denno, 388 U.S. 293 (1967)).

[34] *See, e.g.*, Simmons v. United States, 390 U.S. 377, 384–85 (1968) (upholding use of identifications of photographs of suspects by observing that "it is not suggested that it was unnecessary for the FBI to resort to photographic identification" since "the perpetrators were

Stovall's implication became a square holding in *Foster v. California*.[35] In that case, the sole witness to a robbery viewed Foster in a three-person lineup in which Foster was much taller than the fillers and wore a jacket similar to the one the witness had seen the robber wearing, yet the witness was unable to make a positive identification then, or at a subsequent showup that only included Foster; but she finally identified Foster at a second lineup, in which Foster was the only individual who had also appeared in the first one.[36] Citing *Stovall*, the Court wrote: "[t]he suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify [Foster] whether or not he was in fact 'the man.' . . . This procedure so undermined the reliability of the eyewitness identification as to violate due process."[37]

Foster established that a conviction resting on evidence derived from unnecessarily suggestive identifications could deprive an accused of the right to a fair trial under the Due Process Clause. The limits of this holding, however, became clear in *Manson*.

2. The Holding in Manson

The facts of *Manson* were straightforward. After an undercover police officer provided narcotics officers with a description of the individual who had just sold him heroin, a photograph was left on the undercover officer's desk, and two days later the officer identified the photograph as depicting the seller.[38] While the majority conceded that "the procedure in the instant case was suggestive because only one photograph was used and unnecessary because there was no emergency or exigent circumstance,"[39] the Court rejected the view that evidence obtained through unnecessarily suggestive procedures "automatically is to be excluded."[40] The Court reasoned that "[t]he standard, after all, is that of fairness required by the Due Process Clause," and, therefore, courts must consider "the totality of the circumstances."[41] For the Court, "reliability is the linchpin in determining

still at large," and adding that "there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons").

[35] 394 U.S. 440 (1969).

[36] *Id.* at 441–42.

[37] *Id.* at 443.

[38] Manson v. Brathwaite, 432 U.S. 98, 99–101 (1977).

[39] *Id.* at 109 (citations and internal quotations omitted).

[40] *Id.* at 113.

[41] *Id.* (citation and internal quotations omitted).

the admissibility of identification testimony"[42] and, when assessing reliability, the relevant factors

> include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.[43]

Applying those factors, the Court wrote that the identification enjoyed adequate indicia of reliability,[44] adding that "we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.'"[45]

3. The Critique of Manson

Even though *Manson*'s requirement of reliability review for proffered eyewitness identification evidence produced by potentially suggestive procedures represents a break from the general rule that the reliability of otherwise relevant evidence should be assessed by the trier of fact, *Manson* has been subject to fierce criticism for failing to erect an adequate barrier to the admission of unreliable identifications.

Perhaps the primary ground of attack is that *Manson*'s account of reliability is inconsistent with the growing body of research studying the reliability of eyewitness identifications. For example, commentators have argued that *Manson*'s direction to assess reliability in light of the witness's initial description of the suspect is inconsistent with subsequent research finding little correlation between the accuracy of a suspect's initial

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[42] *Id.* at 114. To support this novel requirement of judicial inquiry into the reliability of proffered evidence in the face of official suggestion, the Court cited *Neil v. Biggers*, 409 U.S. 188 (1972). *Manson*, 432 U.S. at 114. In *Neil*, the Court had upheld the use of a showup identification of the suspect by concluding that the identification "was reliable even though the confrontation procedure was suggestive." *See Neil*, 409 U.S. at 199–201. As the Court acknowledged in *Manson*, however, *Neil*'s precise holding did not control since, in that case, "the challenged procedure occurred pre-*Stovall* and that a strict rule would make little sense with regard to a confrontation that preceded the Court's first indication that a suggestive procedure might lead to the exclusion of evidence. One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-*Stovall*." *Manson*, 432 U.S. at 107 (citation omitted).

[43] *Manson*, 432 U.S. at 114.

[44] *Id.* at 114–16.

[45] *Id.* at 116 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). Subsequently the Court held that the Due Process Clause does not entitle an accused to a hearing outside the presence of the jury on the admissibility of eyewitness identification evidence. *See* Watkins v. Sowders, 449 U.S. 341, 346–49 (1981).

description and the accuracy of a subsequent identification.[46] Similarly, *Manson* is attacked because subsequent research has disclosed that other factors *Manson* relied upon to establish reliability, such as a witness's opportunity to view the perpetrator, degree of certainty, and degree of attention, are often difficult to assess and are themselves subject to manipulation by suggestive identification procedures.[47] Critics also charge that *Manson*'s multi-factor test permits courts to admit eyewitness identification evidence even when critical factors identified in the research suggest a heightened risk of unreliability, such as when the witness had a poor opportunity to view the perpetrator or made an identification after substantial time has passed.[48] Some add that *Manson* ignores research disclosing the special risks of cross-racial identifications,[49] the risk of error created by the tendency of witnesses to focus on the presence of weapons,[50] the stress of witnessing a violent crime,[51] or the special risks in identifications by child or juvenile witnesses.[52]

Beyond *Manson*'s claimed inconsistency with the pertinent social science research, critics argue that *Manson*'s focus on reliability encourages courts to overlook unnecessarily suggestive identification procedures if they are convinced the defendant is guilty.[53] And critics also contend that the reliability review contemplated by *Manson* is insufficiently protective of the innocent because it permits unreliable identifications to be admitted in evidence as long as the suggestion can be characterized as somehow necessary to the investigation.[54]

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[46] *See, e.g.*, GARRETT, *supra* note 15, at 69–70; Sonenshein & Nilon, *supra* note 6, at 276.

[47] *See, e.g.*, GARRETT, *supra* note 15, at 71–72; Thompson, *supra* note 15, at 610–11, 613; Kahn-Fogel, *supra* note 14, at 115–17; Rosenberg, *supra* note 15, at 276–79; Sonenshein & Nilon, *supra* note 6, at 275–76, 277; Wise et al., *supra* note 15, at 815–16, 817–18.

[48] *See, e.g.*, GARRETT, *supra* note 15, at 70–71, 72; Sonenshein & Nilon, *supra* note 6, at 277–78.

[49] *See, e.g.*, GARRETT, *supra* note 15, at 72–74; Thompson, *supra* note 15, at 605–06, 613; Kahn-Fogel, *supra* note 14, at 117; Rosenberg, *supra* note 15, at 279.

[50] *See, e.g.*, Thompson, *supra* note 15, at 613; Kahn-Fogel, *supra* note 14, at 117; Rosenberg, *supra* note 15, at 279–80.

[51] *See, e.g.*, Thompson, *supra* note 15, at 616, 618; Kahn-Fogel, *supra* note 14, at 117; Rosenberg, *supra* note 15, at 278.

[52] *See, e.g.*, GARRETT, *supra* note 15, at 75–77.

[53] *See, e.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 83–85.

[54] *See, e.g.*, Thompson, *supra* note 15, at 610, 614–16. Although *Manson* contained no square holding on this precise point, the Court subsequently held that a defendant may not challenge the admission of eyewitness identification evidence without establishing unnecessarily suggestive police conduct. *See* Perry v. New Hampshire, 565 U.S. 228, 240–48 (2012).

B. STATE-LAW ALTERNATIVES TO *MANSON*

Despite the manifold attacks on *Manson*, as we have seen, its approach to the admission of eyewitness identification evidence continues to be followed by the vast majority of jurisdictions.[55] The courts in some jurisdictions, however, have taken a different road.[56]

1. Henderson *and its Progeny*

Likely the leading example of an alternative to *Manson* is *State v. Henderson*.[57] In that case, the New Jersey Supreme Court reviewed research demonstrating the large risk of error in eyewitness identifications, the increased risk of error that may result from the manner in which identification procedures are conducted ("systems variables"), and the circumstances under which the witness viewed the subject ("estimator variables"), as well as the risk that the jurors do not appreciate the risks of misidentification.[58] While acknowledging that "[w]e have no authority, of course, to modify *Manson*," the New Jersey Supreme Court rested its decision on the due process rights guaranteed by the state constitution.[59] The court held that when a defendant can discharge "the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification,"[60] the burden of proof shifts to the prosecution "to show that the proffered eyewitness

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[55] *See supra* note 14 and accompanying text.

[56] Some jurisdictions that have undertaken legislative or administrative reforms in identification procedures that do not call for the exclusion of evidence obtained in violation of recommended procedures. For a helpful discussion of these reforms, see Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 411–51 (2016).

[57] 27 A.3d 872 (N.J. 2011).

[58] *Id.* at 894–912.

[59] *Id.* at 919, n.10.

[60] *Id.* at 920. The court added that "concerns about estimator variables alone cannot trigger a pretrial hearing; only system variables would." *Id.* at 922. To support this conclusion, the court reasoned that "eyewitness identification evidence will likely not be ruled inadmissible at pretrial hearings solely on account of estimator variables," "courts cannot affect estimator variables; by definition, they relate to matters outside the control of law enforcement," "suggestive behavior can distort various other factors that are weighed in assessing reliability. That warrants a greater pretrial focus on system variables," and, finally, that "to allow hearings in the majority of identification cases might overwhelm the system with little resulting benefit." *Id.* at 923. In a companion case involving a suggestive identification involving no official conduct, the court "ma[d]e one modification to *Henderson* in applying it to cases where there is no police action: we require a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of *highly* suggestive circumstances as opposed to simply suggestive conduct." State v. Chen, 27 A.3d 930, 942–43 (N.J. 2011). In this sense, the court apparently prioritized regulating investigative conduct over policing the reliability of evidence. As we will see, policing the reliability of evidence is a fraught enterprise.

identification is reliable—accounting for system and estimator variables . . . ."[61] The court identified the relevant "system" variables to be such considerations as whether there was blind administration of the identification procedure, pre-identification instructions, lineup construction, feedback from investigators, the witness's degree of confidence, the number of viewings, whether suspects were viewed simultaneously or sequentially, whether the witness produced a composite sketch of the suspect prior to the identification procedure, and whether a showup identification took place.[62] The court identified the relevant "estimator" variables as whether the witness was under stress at the time of the underlying events, whether a visible weapon was used, the duration of the witness's opportunity to view the perpetrator during the underlying events, distance and lighting at that time, the witness's age and level of intoxication during the underlying events, the perpetrator's age, the perpetrator's characteristics, the time elapsed between the underlying events and the identification, whether cross-racial identification is involved, whether multiple witnesses could have contaminated an identification, and the speed of the identification.[63]

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[61] *Henderson*, 27 A.3d at 920. Although the pertinent federal and state constitutional provisions employ somewhat different formulations, there is no apparent textual basis that explains the New Jersey Supreme Court's decision to impose more stringent requirements than are found in *Manson*. *Compare* N.J. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."), *with* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). Moreover, in *Henderson*, the court relied on its supervisory power over the administration of justice to require that law enforcement officers "make a full record—written or otherwise—of the witness' statement of confidence once an identification is made," 27 A.3d at 900, and that "police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants." *Id.* at 909. It is accordingly difficult to read *Henderson* as being rooted in the peculiarities of New Jersey law. Instead, it seems to reflect the court's disagreement with *Manson*'s approach.

[62] *Henderson*, 27 A.3d at 896–903.

[63] *Id.* at 904–10. The court also directed that "enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case." *Id.* at 924. In another decision announced on the same day, the court added: "[W]e make one modification to *Henderson* in applying it to cases where there is no police action: we require a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of *highly* suggestive circumstances as opposed to simply suggestive conduct." *Chen*, 27 A.3d at 942–43.

Henderson has received fulsome praise from commentators.[64] It has influenced other jurisdictions as well. In *State v. Lawson*,[65] for example, the Oregon Supreme Court, relying in significant part on *Henderson*,[66] interpreted its rules of evidence to require that when there is evidence of police suggestion, "the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures."[67] Even when the state discharges this burden, a court may nevertheless find that "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."[68] Subsequently, the Alaska Supreme Court, relying on its supervisory power over the administration of criminal justice as well as *Henderson*, held that when a defendant adduces evidence of official suggestiveness, a trial court must hold an evidentiary hearing and consider evidence on all relevant system and estimator variables.[69] Similarly, the Connecticut Supreme Court adopted *Henderson*'s holding as an interpretation of the Connecticut Constitution's due process clause.[70]

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[64] *See, e.g.*, Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 738–51 (2013); GARRETT, *supra* note 15, at 493–94; Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 333–36 (2013); Wells, *supra* note 4, at 275; Robert Couch, Comment, *A Model for Fixing Identification Evidence after* Perry v. New Hampshire, 111 MICH. L. REV. 1535, 1542–46 (2013); Amy D. Trenary, Comment, State v. Henderson*: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257, 1295–300 (2013); Dana Walsh, Note, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement To Ensure Fundamental Fairness*, 36 B.C. INT'L & COMP. L. REV. 1415, 1449–53 (2013).

[65] 291 P.3d 673 (Or. 2012).

[66] *Id.* at 685 n.3.

[67] *Id.* at 693. The court based its holding on the requirements in the Oregon Rules of Evidence that lay opinion testimony be rationally based on the witness's perceptions, helpful to the trier of fact, and not unfairly prejudicial, reasoning that suggestive identifications are in tension with these requirements. *Id.* at 693–95. Given that the *Manson* Court regarded its approach as placing only reliable evidence before the jury, like *Henderson*, it is difficult to understand *Lawson* as based on some peculiarity of state law as opposed to a substantive disagreement with *Manson.*

[68] *Id.* at 697. The court added that expert testimony is appropriate to inform the trier of fact about the variables that can affect the reliability of identification testimony. *Id.* at 695–96.

[69] *See* Young v. State, 374 P.3d 395, 412–28 (Alaska 2016).

[70] *See* State v. Harris, 191 A.3d 119, 133–47 (Conn. 2018). With respect to the estimator variables to be employed in assessing reliability, the court indicated that "the trial court should consider the eight estimator variables that this court identified in *State v. Guilbert*, [49 A.3d 705 (Conn. 2012)], which overlap considerably with the estimator variables identified in

2. Per se Exclusionary Rules

Some jurisdictions have adopted approaches even more skeptical of eyewitness identification evidence. The highest courts in Massachusetts and New York, for example, have embraced a per se rule of exclusion of any identification resulting from the use an unnecessarily suggestive identification procedure under the due process clauses of their state constitutions.[71] The Wisconsin Supreme Court once held that because showup identifications are suggestive, evidence resulting from them should be suppressed absent a showing that the procedure was necessary, although it later retreated from that view.[72] A number of commentators have also embraced robust rules of exclusion when identifications are made through unnecessarily suggestive procedures.[73]

Henderson. As we recognized in *Guilbert*, these variables are neither 'exclusive' nor 'frozen in time.'" *Id.* at 144 (footnote omitted) (citations omitted).

[71] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1259–65 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981).

[72] *See* State v. DuBose, 699 N.W.2d 582, 591–99 (Wis. 2005), *overruled by* State v. Roberson, 935 N.W.2d 813 (Wis. 2019).

[73] *See, e.g.*, Dripps, *supra* note 29, at 657–64 (requiring exclusion unless identification procedures comport with best practices and permitting defense counsel to participate when the suspect is in custody); 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) (advocating prophylactic rules requiring the use of non-suggestive procedures for identifications); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices To Protect the Innocent*, 42 CREIGHTON L. REV. 595, 624–31 (2009) (advocating exclusion of all identifications obtained through suggestive procedures); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1408–12 (2007) (advocating per se exclusion of identifications obtained without complying with procedures designed to minimize suggestiveness); O'Toole & Shay, *supra* note 15, at 136–44 (advocating use of prophylactic guidelines reflecting best practices identified through empirical research); Chase T. Rogers, *Putting Meat on Constitutional Bones: The Authority of State Courts to Craft Prophylactic Rules under the Federal Constitution*, 98 B.U. L. REV. 541, 573–77 (2018) (advocating prophylactic rules governing the admissibility of in-court identifications of the defendant); Rosenberg, *supra* note 15, at 297–314 (advocating per se exclusion of identifications obtained through unnecessarily suggestive procedures and exclusion of identifications obtained through other suggestive procedures unless they satisfy a proposed standard of probativeness, and guaranteeing the defense a right to expert testimony on eyewitness identification); Wise et al., *supra* note 15, at 842–65, 868–71 (advocating use of prophylactic guidelines reflecting best practices identified through empirical research); Suedabeh Walker, Comment, *Drawing on* Daubert*: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Evidence*, 62 EMORY L.J. 1205, 1234–41 (2013) (advocating heightened reliability screening for identification evidence); *see also* GARRETT, *supra* note 15, at 488–91 (advocating exclusion of in-court identifications of the defendant as impermissibly suggestive); Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 420–21 (1996).

3. Incremental Reforms

Other states have undertaken more modest reforms. The Utah Supreme Court has interpreted the due process clause of its state constitution to require that reliability be assessed not merely in light of the factors mentioned in *Manson*, but instead by reference to all factors that have been shown to affect the reliability of an identification.[74] The Kansas Supreme Court subsequently followed Utah's approach.[75] The Maine Supreme Court has held that even when there has been no showing of unnecessary official suggestion, Maine's rules of evidence require a court to determine whether an identification is reliable.[76] By statute, North Carolina regulates identification procedures to minimize the risk of suggestiveness—requiring, in particular, that lineups be conducted by blind administrators when practicable, the sequential presentation of suspects, and the use of fillers that match the suspect's description.[77] Additionally, the statute authorizes courts to suppress identification evidence obtained without complying with the statutory requirements.[78] Ohio has enacted a more limited statute requiring the use of blind administrators when practicable, and permitting courts to suppress identification evidence obtained in violation of the statute.[79]

C. THE LIMITED SIGNIFICANCE OF THE STATE-LAW ALTERNATIVES TO *MANSON*

It is unclear whether the limitations on the admissibility of eyewitness identification evidence that various states have adopted have much in the way of teeth. Indeed, there is reason to believe that they will rarely result in the exclusion of evidence.

1. Henderson *and its Progeny*

Consider again *Henderson*. Even as it adopted what purported to be a more robust rule of exclusion than *Manson*, *Henderson* cautioned, "[I]n the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high."[80] Then, citing *Manson*, the court added that "the ultimate burden remains on the defendant to prove

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[74] *See* State v. Ramirez, 817 P.2d 774, 779–81 (Utah 1991).
[75] *See* State v. Hunt, 69 P.3d 571, 573–77 (Kan. 2016).
[76] *See* State v. Davis, 191 A.3d 1147, 1155–57 (Me. 2018).
[77] *Id.*
[78] *See* N.C. GEN STAT. ANN. § 15A-284.52 (West 2016).
[79] *See* OHIO REV. CODE ANN. § 2933.83 (West 2016).
[80] State v. Henderson, 27 A.3d 872, 928 (N.J. 2011).

a very substantial likelihood of irreparable misidentification."[81] That sounds a great deal like *Manson*, which rejected suppression absent "a very substantial likelihood of irreparable misidentification."[82] That is reason enough to question the practical significance of *Henderson*. Indeed, the facts and actual outcome of the *Henderson* litigation illustrate its limited significance.

Start with the facts. After Rodney Harper and James Womble spent New Year's Eve drinking wine and champagne and smoking crack cocaine in the apartment of Womble's girlfriend, Harper left the apartment around 10:15 P.M., returning around 2:00 A.M., and soon after his return, two men forced their way inside.[83] Womble knew one of them, George Clark, who took Harper into another room while the stranger trained a gun on Womble, telling him, "Don't move, stay right here, you're not involved in this."[84] Womble "remained with the stranger in a small, narrow, dark hallway," and later "testified that he 'got a look at' the stranger, but not 'a real good look.'"[85] Womble then overheard an argument between Clark and Harper in the other room, followed by a gunshot.[86] Womble walked into the room, saw Clark holding a handgun, and "[a]s Clark left, he warned Womble, 'Don't rat me out, I know where you live.'"[87]

On January 11, Detective Luis Ruiz and Investigator Randall MacNair interviewed Womble, who told them that while he was in the apartment, he heard two gunshots outside, and then found Harper slumped over his car in a nearby parking lot, where Harper told Womble that he had been shot by two men he did not know.[88] The next day, the officers confronted Womble with inconsistencies in his story, and Womble claimed that the officers threatened to charge him in connection with the murder.[89] Womble "admitted that he lied at first because he did not want to 'rat' out anyone and 'didn't want to get involved' out of fear of retaliation against his elderly father."[90] Womble

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[81] *Id.* at 920.

[82] Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (internal quotation and citation omitted).

[83] *Henderson*, 27 A.3d at 879.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* In particular, the evidence at the ensuing trial was, "Womble smoked two bags of crack cocaine with his girlfriend in the hours before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was 'pretty dark' in the hallway where Womble and [Henderson] interacted . . . ." *Id.* at 882.

[88] *Id.*

[89] *Id.*

[90] *Id.*

then "led the investigators to Clark," who ultimately gave a statement and identified his confederate as Larry Henderson.[91]

On January 14, Womble viewed a photo array at the prosecutor's office conducted by Detective Thomas Weber pursuant to guidelines issued by the New Jersey Attorney General providing that "primary investigators should not administer photo or live lineup identification procedures 'to ensure that inadvertent verbal cues or body language do not impact on a witness.'"[92] The array consisted of seven "filler" photos and one photo of Henderson.[93]

After viewing the array, Womble eliminated six photos, but "said he 'wasn't 100 percent sure of the final two pictures.'"[94] Detective Weber left the room and told Inspector MacNair and Detective Ruiz that Womble could not make a final identification, and at that point, MacNair and Ruiz entered the interview room believing, according to MacNair's subsequent testimony, that Womble "was holding back—as he had earlier in the investigation—based on fear."[95] Inspector MacNair testified that he "just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against [him] would be put to rest by the Police Department," and Detective Ruiz told Womble to "just do what you have to do, and we'll be out of here."[96] According to MacNair's testimony, at that point Womble said he "could make [an] identification."[97] MacNair and Ruiz then left the interview room, and Weber returned and again displayed the photos to Womble sequentially, but this time, when Womble saw Henderson's photo, he made an identification.[98] Womble never recanted that identification, although he later testified that "he felt as though Detective Weber was 'nudging' him to choose [Henderson]'s photo, and 'that there was pressure' to make a choice."[99]

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[91] *Id.* at 879–80. Specifically, Womble "advised that the man who shot Harper was known as 'Bubbles,' and he indicated where 'Bubbles' lived. A database search of this address generated a photograph of co-defendant Clark, whom Womble positively identified as 'Bubbles.'" State v. Henderson, 937 A.2d 988, 992 (N.J. Super. Ct. App. Div. 2008), *aff'd as modified*, 27 A.3d 872 (N.J. 2011).

[92] 27 A.3d at 880 (internal quotation and citation omitted).

[93] *Id.* All of the photos were headshots of African American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and, according to Weber, possessing similar facial features. *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

After the New Jersey Supreme Court's decision in *Henderson*, on remand the trial court conducted a hearing, made findings regarding each of the relevant systems and estimator variables, and then denied the motion to suppress Womble's identification.[100] On appeal, that ruling was upheld by the New Jersey intermediate appellate court.[101] The New Jersey Supreme Court denied Henderson's petition seeking further review.[102]

Viewed in terms of systems and estimator variables, this is an extraordinary result. As for estimator variables, when Womble viewed the perpetrator, he had been drinking and smoking crack, the hallway was dark, the incident was brief, Womble equivocated about whether he had a good look at the perpetrator, the lineup did not occur until two weeks after the shooting, and during the lineup, Womble was initially unable to make an identification.[103] As for systems variables, Womble was threatened with prosecution after his initial statement, and Womble could not make an identification until after he was confronted by the same investigators who had previously threatened him, in contravention of applicable guidelines requiring blind lineup administration.[104]

If an identification is deemed admissible in the face of so many systems and estimator variables suggesting unreliability as were present in *Henderson* itself, *Henderson*'s protections may prove illusory.[105] At a minimum, it seems clear that *Henderson* erects a highly permeable barrier to the admission of identifications obtained through suggestive procedures. In *State v. Wright*, for example, a New Jersey appellate court upheld a trial court's refusal to suppress a concededly suggestive showup identification made after officers told the victim of an armed robbery that they had arrested

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[100] *See* State v. Henderson, 77 A.3d 536, 540–41, 545–56 (N.J. Super. Ct. App. Div. 2013).

[101] *See id.* at 546.

[102] State v. Henderson, 91 A.3d 25 (N.J. 2014) (table).

[103] *See supra* text accompanying notes 82–86.

[104] *See supra* text accompanying notes 87–98.

[105] *E.g.*, Sandra Guerra Thompson, *Daubert Gatekeeping for Eyewitness Identifications*, 65 S.M.U. L. REV. 593, 632 (2012) ("At the same time, however, the [New Jersey] cases exemplify courts' continuing reluctance to implement reliability gatekeeping as a procedural norm. Rejecting the recommendations of the Special Master, the New Jersey high court established lofty burdens for defendants to even obtain pretrial hearings, downplayed the need for defense expert witnesses, and touted jury instructions as a cure-all."). Notably, the intermediate appellate court in New Jersey has read *Henderson* to permit the admission in an armed robbery case of a showup identification of a handcuffed suspect in police custody by a witness who had also been told that the witness's stolen cellphone as well as a gun had been recovered from the vicinity of the suspect. *See* State v. Wright, 133 A.3d 656, 659–60, 662–65 (N.J. Super. Ct. App. Div. 2016).

the perpetrator.[106] To be sure, *Henderson* is sufficiently recent that there are only a limited number of decisions illustrating its scope, and there are a handful cases in which a contested identification was suppressed under *Henderson*.[107] Still, it is unclear that *Henderson* has substantially altered the admissibility of identification testimony in New Jersey. Indeed, as we have seen, the *Henderson* standard for excluding an identification ultimately seems little different from the standard embraced in *Manson*.[108]

The Oregon Supreme Court's decision in *Lawson* may have little more in the way of teeth. Like *Henderson*, *Lawson* cautioned that its holding is unlikely to lead to frequent suppression of evidence.[109] Moreover, in one of the two cases before the court, it upheld the admission of an identification even though it involved a showup procedure in which robbery victims viewed an individual while handcuffed in the back of a police vehicle.[110] Subsequently, the court held that even when a witness identifies an individual for the first time in what is plainly an unnecessarily suggestive showup procedure—during her testimony in court—and even though she told police shortly after the shooting that she did not get a good look at the perpetrators, the showup identification was nevertheless admissible under *Lawson*.[111]

As for Alaska law, even as it followed *Henderson*, the Alaska Supreme Court cautioned, "Although the defendant must only identify a relevant system variable in order to obtain a hearing, the defendant retains the burden of proving at that hearing a 'very substantial likelihood of irreparable misidentification.'"[112] Similarly, when adopting *Henderson*, the Connecticut Supreme Court emphasized that once the state "offer[s] evidence demonstrating that the identification was reliable," the burden is on the defendant to "prove a very substantial likelihood of misidentification," and added that the factors courts should consider under *Henderson* are "generally

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[106] 133 A.3d 656, 662–65 (N.J. Super. Ct. App. Div. 2016); *cf.* State v. Pressley, 181 A.3d 1017, 1020–21 (N.J. 2018) (upholding admission of undercover officer's showup identification occurring shortly after the charged crime).

[107] *See* State v. Drew, No. A-0187-17T4, 2018 WL 2339509 (N.J. Super. Ct. App. Div. May 24, 2018); State v. Wyles, No. A-3471-16T4, 2017 WL 4558467 (N.J. Super. Ct. App. Div. Oct. 13, 2017).

[108] *See supra* text accompanying notes 79–81.

[109] The court wrote: "[W]e anticipate that the trial courts will continue to admit most eyewitness identifications . . . . [I]t is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification." State v. Lawson, 291 P.3d 673, 697 (Or. 2012).

[110] *Id.* at 681–82, 699–700.

[111] *See* State v. Hickman, 330 P.3d 551, 568–71 (Or. 2014).

[112] Young v. State, 374 P.3d 395, 428 (Alaska 2016) (quoting State v. Henderson, 27 A.3d 872, 920 (N.J. 2011) (citation omitted)).

comparable" to those employed in federal constitutional law.[113] This suggests little in the way of meaningful departure from the *Manson* standard.

Thus, there is considerable doubt as to the practical significance of the reforms adopted in these jurisdictions.

2. Per se Exclusionary Rules

Per se rules excluding suggestive identifications seemingly offer more certain protection against the use of suggestive identifications than cases like *Henderson* and *Lawson.* There is, however, reason to doubt that those states that have purported to adopt per se exclusionary rules have really done so.

For example, even though the Massachusetts Supreme Judicial Court purported to require the exclusion of all identification evidence obtained through unnecessarily suggestive procedures,[114] that court later upheld the admission of identifications obtained by an officer who knew the identity of the suspect, rather than by a blind administrator—despite acknowledging that these procedures increase the risk of suggestion[115]—an identification obtained after a non-blind administrator told the witness that a suspect had been apprehended before showing the witness a photo array,[116] and a showup identification of individuals visibly in police custody.[117] All of these seem like unnecessarily suggestive identifications, and yet none were suppressed. This is not to say that, in at least some of these cases, the likely effect of the deviation from practices that minimize the risk of suggestion may have been small, but it is still hard to square the outcome in these cases with a rule that purports to suppress all identifications obtained through any form of unnecessary suggestion.

Similarly, despite its prior holding that purported to brand as inadmissible all eyewitness identification evidence obtained through

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[113] State v. Harris, 191 A.3d 119, 131, 146 (Conn. 2018). The court added that inquiry it had adopted was "generally comparable to" the approach taken by federal due process doctrine and is "merely intended to 'more precisely define the focus of the relevant inquiry.'" *Id.* at 136 (internal quotations and citations omitted)).

[114] *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995) ("The rule of *per se* exclusion . . . states that the defendant bears the burden of demonstrating, by a preponderance of the evidence, that the 'witness was subjected by the State to a confrontation that was unnecessarily suggestive and thus offensive to due process.' If this is established, then the prosecution is barred from introducing that particular confrontation in evidence at trial." (citations omitted) (quoting Commonwealth v. Botelho, 343 N.E.2d 876, 880 (Mass. 1976)).

[115] *See* Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 311–12 (Mass. 2009).

[116] *See* Commonwealth v. Watson, 915 N.E.2d 1052, 1057–60 (Mass. 2009).

[117] *See* Commonwealth v. Meas, 5 N.E.3d 864, 872–73 (Mass. 2014).

unnecessarily suggestive procedures in *People v. Adams*,[118] the New York Court of Appeals subsequently upheld the admission of a showup identification of a suspect handcuffed in the back of a police car who had already been identified by another witness, despite acknowledging that this procedure "[wa]s suggestive and not preferred. It presses judicial tolerance to its limits."[119] In another case, the court upheld the use of a showup procedure in which the suspect was in custody and the identification was made in the presence of other witnesses, despite acknowledging that "the better practice when feasible is not to conduct a showup before a group of witnesses, procedures that are less than ideal may . . . be tolerable in the interest of prompt identification."[120]

In Massachusetts and New York, in short, it seems that a rule requiring the suppression of any unnecessarily suggestive identification has merely meant that those courts will find a great deal of suggestion as necessary. As for Wisconsin's supreme court, the court has even more plainly retreated from a rule that would require the suppression of unnecessarily suggestive identifications. While seeming to find all unnecessarily suggestive identifications as inadmissible in its earlier decision in *State v. DuBose*,[121] the court subsequently held this rule inapplicable to suggestive identifications made through photographic arrays,[122] suggestive identifications not arranged by the authorities,[123] and suggestive identifications that occur during judicial proceedings.[124] In light of these developments, *DuBose* seemed ripe for overruling. That is indeed what the Wisconsin Supreme Court eventually did, finding *Dubose* unwarranted and in irreconcilable tension with subsequent Wisconsin precedents.[125]

3. Incremental Reforms

As for the rule adopted by the Utah Supreme Court, it is unclear that it differs from *Manson*. In terms that seem to track *Manson*, the court explained

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[118] 423 N.E.2d 379, 383–84 (N.Y. 1981) ("Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent . . . . [I]f the jury finds the in-court identification not entirely convincing it should not be permitted to resolve its doubts by relying on the fact that the witness had identified the defendant on a prior occasion if that identification was made under inherently suggestive circumstances.").

[119] People v. Duuvon, 571 N.E.2d 654, 656–57 (N.Y. 1991).

[120] People v. Love, 443 N.E.2d 948, 949 (N.Y. 1982) (memorandum) (citation omitted).

[121] 699 N.W.2d 582, 591–99 (Wis. 2005).

[122] *See* State v. Drew, 740 N.W.2d 404, 406–09 (Wis. 2007).

[123] *See* State v. Hibl, 714 N.W.2d 194, 199–202 (Wis. 2006).

[124] *See* State v. Ziegler, 816 N.W.2d 238, 256–58 (Wis. 2012).

[125] *See* State v. Roberson, 935 N.W.2d 813, 825–28 (Wis. 2019).

that its test "is whether, under the totality of the circumstances, the identifications were reliable."[126] The supreme courts of Kansas and Maine, while expanding the scope of reliability review, have embraced the same totality-of-the-circumstances test.[127] Moreover, the law in these states has proven no obstacle to the admission of showup identifications in which a victim who has witnessed a violent crime is asked to identify a suspect visibly in police custody.[128] As with *Manson*, this approach permits the use of identifications obtained even through unnecessarily suggestive procedures if a court, with the benefit of hindsight, is willing to deem them reliable.

The North Carolina and Ohio statutes also provide quite limited protections. In North Carolina, there is no authority that permits suppression of an identification as long as the trier of fact is made aware of the statutory violation.[129] Thus far, the Ohio statute has had even less effect; the intermediate appellate court has interpreted the statute to require suppression under what is effectively the *Manson* standard—when "the identification procedure used was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."[130]

Thus, exclusionary rules that purport to depart from *Manson* have not traveled very far.[131] Even these limited reforms, however, have been rejected by most jurisdictions. Most courts, when invited to depart from *Manson* as a matter of state law, have declined to do so.[132] Indeed, *Manson*'s reliability

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[126] State v. Guzman, 133 P.3d 363, 367–68 (Utah 2006) (quoting State v. Hubbard, 48 P.3d 953, 963 (Utah 2002) (footnote omitted)).

[127] *See* State v. Corbett, 130 P.3d 1179, 1190–91 (Kan. 2006); State v. Trammell, 92 P.3d 1101, 1107–08 (Kan. 2004); State v. Davis, 191 A.3d 1147, 1155–57 (Me. 2018).

[128] *See, e.g.*, State v. Cruz, 307 P.3d 199, 203–04, 208–11 (Kan. 2013) (murder); State v. Hoffhine, 20 P.3d 265, 266–69 (Utah 2001) (armed robbery); *cf.* State v. Davis, 191 A.3d 1147, 1155–57 (Me. 2018) (witness had seen booking photo of defendant published in a local newspaper reporting on defendant' arrest prior to making identification).

[129] *See, e.g.*, State v. Stowes, 727 S.E.2d 351, 357–58 (N.C. Ct. App. 2012); State v. Howie, No. COA13-553, 2014 WL1047373 at **9–10 (N.C. Ct. App. Mar. 18, 2014).

[130] State v. Shaw, 4 N.E.3d 406, 420 (Ohio Ct. App. 2013).

[131] For a similar assessment of the limited significance of the departures from *Manson* undertaken in some states, see Kahn-Fogel, *supra* note 14, at 160–62.

[132] *See, e.g.*, Small v. State, 211 A.3d 236, 244–47 (Md. Ct. App. 2019) (declining to follow *Henderson*); Smiley v. State, 111 A.3d 43, 51–52 (Md. 2015) (same); Batiste v. State, 121 So. 3d 808, 855 n.7 (Miss. 2013) (same); People v. Blevins, 886 N.W.2d 456, 462 (Mich. Ct. App. 2016) (same); State v. Moore, No. COA 15-52, 2015 WL 4898121 at *4 (N.C. Ct. App. Aug. 18, 2015) (same); State v. Discola, 184 A.3d 1177, 1187–89, 1189 n.5 (Vt. 2018) (declining to follow Massachusetts and New York law).

test for the admission of suggestive eyewitness identification evidence is utilized by the courts of some forty-one states and the District of Columbia.[133]

To what should we attribute the continued vitality of *Manson*, despite the many attacks launched against it? *Stare decisis* is not a satisfactory answer. As we have seen, *Manson*'s approach is utilized even by state courts when applying state law, despite the fact that *Manson*'s holding on the scope of the federal constitutional bar on the admission of eyewitness identification evidence does not prevent state courts from adopting broader rules of exclusion as a matter of state law.[134] It is to that question that we now turn.

II. THE DIFFICULTIES OF BLACKSTONIAN REFORM

Perhaps the most obvious difficulty a court faces when deciding whether to adopt a more robust gatekeeping role for eyewitness identification evidence is identifying a superior alternative to *Manson*. The costs and benefits of a different approach to gatekeeping are difficult to assess.

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[133] *See* Ex parte Frazier, 729 So. 2d 253, 257 (Ala. 1998); State v. Rojo-Valenzuela, 352 P.3d 917, 919–20 (Ariz. 2015); Kellensworth v. State, 644 S.W.2d 933, 935–36 (Ark. 1983); People v. Cunningham, 25 P.3d 519, 560–61 (Cal. 2001); Bernal v. People, 44 P.3d 184, 190–92 (Colo. 2002); Younger v. State, 496 A.2d 546, 550–51 (Del. 1985); Fields v. United States, 484 A.2d 570, 574–75 (D.C.1984); Grant v. Florida, 390 So. 2d 341, 343 (Fla. 1980); Gravitt v. State, 239 S.E.2d 149, 150–51 (Ga. 1977); State v. Masaniai, 628 P.2d 1018, 1024–26 (Haw. 1981); State v. Buti, 964 P.2d 660, 665–66 (Idaho 1998); People v. Manion, 367 N.E.2d 1313, 1316–17 (Ill. 1977); Slaton v. State, 510 N.E.2d 1343, 1348–49 (Ind. 1987); State v. Neal, 353 N.W.2d 83, 86–87 (Iowa 1984); Moore v. Commonwealth, 569 S.W.2d 150, 153–54 (Ky. 1978); State v. Brown, 907 So. 2d 1, 16–18 (La. 2005); Webster v. State, 474 A.2d 1305, 1314–16 (Md. 1984); People v. Thomas, 902 N.W.2d 885, 886–87 (Mich. 2017) (order); State v. Ostrem, 535 N.W.2d 916, 921–22 (Minn. 1995); York v. State, 413 So. 2d 1372, 1382–84 (Miss. 1982); State v. Weaver, 912 S.W.2d 499, 520–21 (Mo. 1996); State v. Pendergrass, 586 P.2d 691, 695–96 (Mont. 1978); State v. Nolt, 906 N.W.2d 309, 322–23 (Neb. 2018); Gehrke v. State, 613 P.2d 1028, 1029 (Nev. 1980); State v. LaRose, 497 A.2d 1224, 1228–29 (N.H. 1985); Patterson v. LeMaster, 21 P.3d 1032, 1037–39 (N.M. 2001); State v. Harris, 301 S.E.2d 91, 95-96 (N.C. 1983); State v. Juene, No. COA18-526, 2019 WL 189866 at **1–2 (N.C. Ct. App. Jan. 15, 2019); In Re R.W.S., 728 N.W.2d 326, 332–36 (N.D. 2007); Reaves v. State, 649 P.2d 777, 779-80 (Ok. Ct. Crim. App. 1982); Commonwealth v. Johnson, 139 A.3d 1257, 1278 (Pa. 2016); State v. Austin, 731 A.2d 678, 681–83 (R.I. 1999); State v. Stewart, 272 S.E.2d 628, 629–30 (S.C. 1980); State v. Doap Deng Chuol, 849 N.W.2d 255, 261–62 (S.D. 2014); State v. Ferguson, 741 S.W.2d 125, 126–27 (Tenn. Ct. Crim. App. 1987); Delk v. State, 855 S.W.2d 700, 706–08 (Tex. Ct. Crim. App. 1993); State v. Porter, 103 A.3d 916, 923–25 (Vt. 2014); Delong v. Commonwealth, 362 S.E.2d 669, 674 (Va. 1987); State v. Sanchez, 288 P.3d 351, 378 (Wash. Ct. App. 2012); State v. Kennedy, 249 S.E.2d 188, 188–91 (W. Va. 1978); State v. Roberson, 935 N.W.2d 813, 828 (Wis. 2019); Campbell v. State, 589 P.2d 358, 362–65 (Wyo. 1979).

[134] *Cf.*, *e.g.*, Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("[T]his Court has no power to review a state law determination that is sufficient to support the judgment . . . ."); Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").

A. THE EFFECTS OF PROPHYLACTIC REFORM

Determining whether reforms to eyewitness identification procedures designed to reduce the risks of suggestion would improve the accuracy of the criminal process is no easy matter. There is little, if any, reason to believe that more rigorous identification protocols would improve the accuracy of eyewitness identification.

1. The Costs and Benefits of More Rigorous Identification Protocols

Critics of eyewitness identification evidence do not claim that it is akin to the categories of evidence considered unduly likely to unfairly prejudice a jury, such as evidence of an accused's supposed propensity to violate the law.[135] No commentator, for example, has argued for a rule that would bar all identification evidence as unfairly prejudicial—presumably all agree that some forms of identification evidence are sufficiently reliable to warrant admission. Rather, the advocates of more robust judicial gatekeeping take a surgical approach, arguing that eyewitness identification evidence should be viewed with special caution when particular factors are present that impinge on reliability, such as the use of suggestive identification procedures.[136]

A meta-analysis of published field and archival studies of lineups conducted by police in actual cases found that 40.8% of witnesses identified the suspect, 23.7% of witnesses identified an innocent filler, and 35.5% of witnesses identified no one.[137] Although there is no way to know whether the suspects in these lineups were the actual perpetrators, and although most studies did not track the manner in which the lineup was administered, the high rate of filler identification suggests that police frequently do not utilize procedures that minimize the risk of error. As the author of the meta-analysis observed, "The frequency with which witnesses identified fillers in these field studies raises the question of whether these eyewitnesses were properly instructed with the warning that the actual culprit might not be in the lineup

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[135] *See, e.g.*, Michaelson v. United States, 335 U.S. 469, 475–76 (1948) ("The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors . . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.") (footnotes omitted).

[136] *See supra* text accompanying notes 4–6, 47–51. The evidentiary gatekeeping rules that have been advocated are canvassed in Part I.B above.

[137] Wells, *supra* note 4, at 268–69, 269 tbl.1.

and whether they understood that they were free to make no identification."[138]

Experiments under laboratory conditions, in which the simulated "perpetrator" is known and identification procedures are fully documented, can offer some insight into the risk of error created when police fail to minimize the risk of suggestion. In laboratory experiments in which witnesses viewed simulated events and then are asked to make identifications, there is ample evidence that error rates rise when precautions are not taken to prevent suggestion, such as the use of fillers that resemble the suspect and blind administration.[139]

To be sure, there is reason to doubt the reliability of studies conducted under lab conditions. For example, as we have seen, the stress and fear of witnessing a violent crime can inhibit a witness's memory.[140] This is but one of a plethora of reasons that virtually all scholars who have addressed the matter have concluded that studies conducted under laboratory conditions provide limited insight to actual identifications in the field.[141]

Indeed, the available data from the field suggest that the costs and benefits of more rigorous identification protocols thought to minimize the risk of official suggestion are, at best, unclear. For example, what is perhaps the leading study on double-blind administration and non-biased witness instructions in actual lineups using both sequential and simultaneous identification protocols in four cities, produced the following results:

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[138] *Id.* at 269–70. For a discussion of the difficulties in assessing reliability based on the rate at which witnesses identify an individual that the police have designated as the suspect, see Ruth Horry et al., *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 LAW & HUM. BEHAV. 94, 96 (2014); and Daniel B. Wright et al., *Field Studies of Eyewitness Memory*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 2, at 179, 195–98.

[139] *See, e.g.*, Wells, *supra* note 4, at 265–66 (discussing laboratory research into lineups in which only the suspect resembles the description of the perpetrator, and the potential for confirming feedback offered by non-blind lineup administrators).

[140] *See supra* text accompanying note 49. For helpful discussions of the pertinent research, *see* IDENTIFYING THE CULPRIT, *supra* note 4, at 94–96; LOFTUS ET AL., *supra* note 4, at §§ 2–9; Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapons Focus Effect*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 339, 339–47 (Rod C.L. Lindsay et al. eds., 2007); and Ebbe B. Ebbenson & Vladimir J. Konečni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 EXPERT EVID. 1, 8–11 (1996).

[141] For more elaborate discussions of this problem, see Ebbenson & Konečni, *supra* note 140, at 4–6; and Wright et al., *supra* note 138, at 195–98.

Table 1[142]

Administration Method	Suspect Identified by Witness	Filler Identified by Witness	No Identification by Witness
Simultaneous	26.0%	17.8%	56.2%
Sequential	27.5%	12.3%	60.2%
Prior Archival and Field Studies	40.8%	23.7%	35.5%

These results reflect a reduction in the rate at which innocent fillers are identified when compared to prior field and archival studies in which protocols requiring double-blind administration and non-biased witness instructions were not employed, but they also reflect even larger reductions in the rate at which the suspect is identified, as well as a larger increase in the rate at which witnesses make no identification.[143] The authors argued that the reduced rate of filler identifications suggests that double-blind administration reduces the likelihood that an innocent person will be mistakenly identified.[144] Yet, the rate of filler identifications is a poor proxy for establishing the rate at which innocent individuals are convicted; after all, innocent fillers are not likely to be prosecuted since there is, presumably, no evidence linking them to the crime under investigation. Perhaps even more important, in this study, the rate at which the suspect was identified dropped by nearly one-third, and the rate at which no one was identified rose by more than one third. Because we do not know which of the suspects in the lineups were actual perpetrators, we cannot know if the reduced rate of identifications redounded primarily to the benefit of the innocent or the guilty. Perhaps more rigorous identification protocols reduce the rate of

[142] This study reflects the 494 double-blind photo lineups shown to actual witnesses in real cases in four cities (Charlotte-Mecklenburg, North Carolina, Tucson, Arizona, San Diego, California, and Austin, Texas). The top three rows of Table 1 are derived from the results reported in Gary L. Wells et al., *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of Sequential Versus Simultaneous Lineup Procedure*, 39 LAW & HUM. BEHAV. 1, 7–8, 8 figs. 1 & 2 (2015). For the details of the methodology employed in the study, see *id.* at 4–6. The last row reflects the historical rate identified in field studies. *See supra* text accompanying note 138.

[143] The authors noted the reduced rate at which identifications were made as compared to prior field and archival studies, and speculated that prior archival studies might be skewed by a failure to document non-identifications in case files, and that the use of double-blind administration and express instructions to the witness that the culprit might not be present and that the witness need not make an identification might depress the rate at which identifications were made. *See* Wells et al., *supra* note 142, at 10–11. They also found that the differences in the identification rates between sequential and simultaneous procedures were not statistically significant. *See id.* at 7–8.

[144] *Id.* at 12.

mistaken identifications by making it difficult for witnesses to make any identification at all—even accurate identifications.[145]

Also notable is another leading, albeit older, field study. In light of the tendency of witnesses to make identifications based on a relative judgment about which face in a lineup most resembles their memory of the perpetrator,[146] some have advocated the use of sequential lineups, in which witnesses view faces one at a time, and view all members of a lineup before they are asked to make an identification—in recognition of the fact that identification is often based on a relative and not an absolute judgment.[147] A study utilizing double-blind and sequential photographic lineups in real cases found that when compared to a then-recent field study used as a baseline, double-blind and sequential procedures produced a small increase in the rate that suspects were identified, while the rate at which innocent fillers were identified declined; but, the rate at which witnesses were unable to make any identification also rose:

Table 2[148]

Administration Method	**Suspect ID**	**Filler ID**	**No ID**
Double-blind & Sequential	54%	8%	38%
Archival Baseline	50%	24%	26%

As Table 2 illustrates, in this study, the use of double-blind and sequential identification procedures did not result in a reduction in the rate of suspect identifications compared to the archival baseline. The principal result, instead, was a substitution of filler identifications for no-identifications. Given that randomly-selected fillers are unlikely to be

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[145] *Cf.* Karen L. Amendola & John T. Wixted, *The Role of Site Variance in the American Judicature Field Study Comparing Simultaneous and Sequential Lineups*, 33 J. QUANTITATIVE CRIMINOLOGY 1, 8–12 (2017) (concluding that field study results are attributable to more conservative responding by witnesses in sequential procedures); Rakoff & Loftus, *supra* note 8, at 94 ("The sequential approach may simply lead to fewer identifications period, reducing both accurate and inaccurate identifications. At present, the debate and research designed to inform it continue, suggesting that it is not yet established that one approach is superior to the other.").

[146] *See supra* text accompanying note 5.

[147] *See, e.g.*, R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Presentation*, 70 J. APPLIED PSYCHOL. 556, 562–63 (1985).

[148] Table 2 is derived from Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 381, 396–98, 398 tbl.2 (2006). For an explication of the methodology of this study, see *id.* at 391–95.

prosecuted, converting filler identifications into no-identifications is unlikely to reduce the frequency of false convictions. Procedures that reduce the rate at which innocent suspects are identified would protect the innocent, but this study does not enable us to determine whether double-blind and sequential identifications reduce the rate at which innocent suspects are falsely identified as perpetrators.

Equally notable was that the study found that when witnesses were permitted multiple viewings of the photographic lineup, the rate of suspect identifications increased.[149] Of course, multiple viewings of the lineup facilitate relative judgments by the witness, as the authors of the study acknowledged.[150] Perhaps inhibiting relative judgments means that some witnesses are unable to make any identification—even an accurate one. In any event, given that the rate at which the suspect was identified did not significantly change from the archival baseline, these results offer little reason to believe that double-blind and sequential administration is likely to reduce the rate of false convictions, which are most likely to result when a witness identified the suspects, and quite unlikely when the witness identifies an innocent filler. Perhaps the consistent rate of suspect identification in this study suggests that double-blind administration makes little difference to false-conviction rates, which, after all, are not driven by the rate at which innocent fillers are identified, but instead by the rate at which innocent suspects are identified. Since this study did not alter the rate at which suspects are identified, these procedures are unlikely to reduce the rate at which innocent suspects are wrongly prosecuted and convicted.

Next, consider an Illinois field study involving three cities of varying populations, which compared identifications made through simultaneous and sequential, double-blind procedures.[151]

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[149] In particular, when witnesses in the study were permitted to view lineups multiple times, the rate at which the suspect was identified rose, as did the rate at which innocent fillers were identified, while the rate at which no identification was made declined, though it remained higher than the rate of non-identification in the California field study of 26%:

Laps	Lineups (n)	Suspect ID	Filler ID	No Choice
1	68	66%	3%	31%
2	42	50%	10%	40%
3	14	50%	14%	36%
4, 5 or 6	4	25%	75%	

Id. at 399 tbl.3.

[150] *Id.* at 398.

[151] *See* SHERI H. MECKLENBURG, ILL. ST. POL., REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION

Table 3[152]

	Simultaneous	**Sequential**
n=548	(319)	(229)
ID	59.9%	45%
Filler ID	2.8%	9.2%
No ID	37.6%	47.1%

The dramatic reduction in the rate of suspect identifications through double-blind, sequential procedures again suggests that witnesses have more difficulty making identifications when they are deprived of the ability to make relative judgments. To be sure, the Illinois study has been subject to fierce methodological attack.[153] Still, the evidence that more rigorous identification protocols reduce the rate at which suspects are identified is troubling, especially because we cannot know whether the reduced rate of suspect identifications disproportionately changed to the benefit of the innocent or the guilty.

Although, as we have seen, studies under laboratory conditions are problematic, field studies present problems as well. The difficulty with field studies is that one can never be sure if a witness, by identifying the individual that the police regard as the suspect, has in fact identified the actual perpetrator. Laboratory experiments in which researchers know the identity of a simulated "perpetrator" do not encounter this problem although, as we have seen, there is reason to be skeptical about eyewitness identifications under laboratory conditions.[154]

PROCEDURES 22–37 (Mar. 17, 2006) http://eyewitness.utep.edu/Documents/IllinoisPilotStudyOnEyewitnessID.pdf [http://perma.cc/CQA7-DNDC].

[152] *Id.* at 37–38, 38 tbl.3a.

[153] *See, e.g.*, James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 141–43 (2010); Daniel L. Schacter, et al., *Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3 (2008) (arguing study was flawed by using both double-blind and sequential administration as variables and discussing the suspiciously low rate of filler identifications in the control group); Nancy K. Steblay, *What We Know: The Evanston Illinois Field Lineups*, 35 LAW & HUM. BEHAV. 1 (2011) (discussing evidence that identifications do not reflect random assignment to control and intervention groups). For defenses of the study, see Sheri H. Mecklenburg et al., *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 LAW & HUM. BEHAV. 22 (2008); and Stephen J. Ross & Roy S. Malpass, *Moving Forward: Response to "Studying Eyewitness Identifications in the Field"*, 32 LAW & HUM. BEHAV. 16 (2008).

[154] *See supra* notes 142–143 and accompanying text.

A meta-analysis of published laboratory studies of various identification procedures concluded that the use of lineups, rather than showup identifications, reduced rates of false identifications while producing somewhat higher rates at which the perpetrator was identified, while all the other protocols examined in the literature that are thought to reduce the risk of suggestion (unbiased instructions to witnesses, sequential lineups, similar-looking fillers in lineups, and blind administrators), reduced the rate of both false and correct identifications—usually with larger reductions in the rate of correct as opposed to false identifications of perpetrators.[155] In particular, the studies considered in the meta-analysis reflected the following:

Table 4[156]

Condition	**Correct ID Rate**	**False ID Rate**
Lineup Instructions (n=23)		
Biased	.59	.15
Unbiased	.50	.09
Presentation Format (n=51)		
Simultaneous	.54	.15
Sequential	.43	.09
Lineup Filler Similarity (n=18)		
Lower	.67	.31
Higher	.59	.16
Administrator Influence (n=11)		
More	.58	.21
Less	.45	.11
Showups vs. Lineup (n=15)		
Showup	.41	.18
Lineup	.43	.11

These results, like the studies canvassed above, suggest that more rigorous identification protocols do not simply reduce error rates, but also

[155] *See* Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 PERSP. PSYCHOL. SCI. 238, 241–44 (2012). To similar effect, see Clark, *supra* note 7, at 1119–31; Steven E. Clark et al., *Legitimacy, Procedural Justice, Accuracy, and Eyewitness Identification*, 8 U.C. IRVINE L. REV. 41, 67–77 (2018).

[156] This table is derived from Clark, *supra* note 155, at 242 tbl.2. For a discussion of the methodology used to identify the studies included in the analysis, see *id.* at 241, 252–53.

make it more difficult for witnesses to make any identification, whether accurate or not.

Thus, a tradeoff between reduced rates of false identifications of innocent suspects and increased rates at which witnesses are unable to make identifications of guilty perpetrators has been seen both in laboratory and field studies. Perhaps what some label as suggestive identification procedures are better characterized as procedures that avoid those circumstances that make it unduly difficult for the witness to make an identification. When fillers look much like the suspect, for example, it may be too difficult for witnesses to select between them.

Consider what may be the simplest case for reform—the use of double-blind administration to eliminate the risk of administrator bias tainting an identification.[157] Even in that context, we have no idea what the ratio of false identifications caused by bias in non-blind administration to the loss of accurate identifications is.[158] Perhaps blinded procedures create additional stress for witnesses that inhibits their ability to make an accurate identification; perhaps what some label as suggestion can also be fairly characterized as taking care to avoid creating undue stress and difficulty for witnesses; and perhaps witnesses are far more resistant to being steered toward identifying an innocent suspect than a guilty one.[159]

To this, one might respond that if more rigorous protocols reduce identification rates, this is only because unreliable identifications are lost.[160] It may also be the case, however, that when identifications protocols become extremely rigorous, it becomes unduly difficult for some witnesses to make even reliable identifications. As a committee of the National Research Council explained, decisions based on memory rest on "two important parameters: the observer's memory sensitivity and the degree of evidence that the observer requires to make an identification."[161] The committee elaborated:

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[157] For a helpful discussion of the case for blind administration, see Margaret Bull Covera & Andrew J. Evelo, *The Case for Double-Blind Administration*, 23 PSYCHOL. PUB. POL'Y & L. 421 (2017).

[158] *Cf. id.* at 424 (referring to "the paucity of studies available").

[159] *Cf.* Clark et al., *supra* note 155, at 73–77 (suggesting that non-blind administrators may be more sensitive to witness reactions and accordingly more helpful to witnesses while rarely able to steer witnesses toward identifying innocent suspects).

[160] *See, e.g.*, Risinger, *supra* note 18, at 343–47 (arguing that identifications obtained by non-blind administrators are tainted by unnecessary suggestion and therefore lack probative value); Gary L. Wells et al., *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 PERSP. PSYCHOL. SCI. 264, 265–66 (2012) (arguing that identifications produced by suggestive procedures should not be regarded as legitimate).

[161] IDENTIFYING THE CULPRIT, *supra* note 4, at 80 (parentheticals omitted).

> If a witness sets a high bar for acceptable evidence—a conservative bias—then he or she will be unlikely to select anyone from the lineup (low pick frequency), meaning that they will have more misses (will be more likely to fail to select the suspect because they are less likely to make a selection at all) and fewer false alarms.
>
> Conversely, if a witness sets a low bar for acceptable evidence—a liberal bias—then she or he will be more likely to select from the lineup (a high pick frequency), meaning that he or she will have more hits and will make more false identifications.[162]

Thus, witnesses whose internal threshold for making an identification is relatively low would likely produce a higher error rate regardless of the identification protocols employed. We have little idea, however, how to identify the witnesses that utilize low internal thresholds for making identifications and therefore present an elevated risk of error. Conversely, witnesses who utilize a relatively high internal threshold might find more rigorous identification protocols unduly daunting. Given these complexities, outside of pristine laboratory conditions we have no way of knowing at what rate accurate and false identifications are lost when more rigorous identification protocols are employed.

Perhaps more important, even an identification based on a witness's relative judgment that a given suspect resembles the witness's recollection of the perpetrator might, coupled with other evidence, amount to reliable proof of guilt.[163] There is evidence from field studies, for example, indicating that identifications produced by simultaneous procedures—despite their greater likelihood to be based on relative judgments—were associated with stronger independent evidence of the suspect's guilt than identifications made using sequential procedures.[164]

Beyond that, if in the real world the perpetrator is likely to be present in lineups, then an identification based on a witness's relative judgment about which face most resembled the perpetrator could have considerable probative value, especially when combined with independent evidence of guilt.[165] In

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[162] *Id.* at 82.

[163] For an effort to demonstrate, using simulations, that eyewitness identifications based on relative judgments may not be materially less accurate than identifications based on absolute judgments, see Steven E. Clark et al., *Probative Value of Absolute and Relative Judgments in Eyewitness Identification*, 35 LAW & HUM. BEHAV. 364 (2011).

[164] *See* Amendola & Wixted, *supra* note 145, at 12–18 (analysis of field data from Charlotte-Mecklenburg, Tucson, Arizona, San Diego, and Austin suggesting that simultaneous identifications occurred in cases with stronger independent evidence of guilt and higher likelihood of an adjudication of guilt); John T. Wixted, et al., *Estimating the Reliability of Eyewitness Identifications from Police Lineups*, 113 PROC. NAT'L ACAD. SCI. 304, 308–09 (2016) (field study in Houston finding stronger independent corroborating evidence of guilty for suspects identified through simultaneous rather than sequential procedures).

[165] *Cf.* Michael A. Palmer & Neil Brewer, *Sequential Lineup Presentation Promotes Less-Biased Criterion-Setting But Does Not Improve Discriminability*, 36 LAW & HUM. BEHAV.

other cases, conversely, highly suggestive identification procedures could inject an unacceptable risk of error if a prosecution is based on little more than a superficial resemblance between a suspect and a perpetrator.[166]

Accordingly, assessing the costs and benefits of procedures that facilitate identifications, even if they also involve a potential for suggestion, most likely requires knowing the frequency at which identifications are made when (1) the actual perpetrator is in the lineup, and (2) there is independent evidence of guilt that, when combined with the identification, yields a reliable case against the suspect. In the real world, however, we have no idea how often that occurs.[167]

In sum, the available data suggests that more rigorous identification protocols involve some kind of rough tradeoff between reduced rates in which innocent suspects are falsely identified and increased rates at which witnesses are unable to identify the guilty. Beyond that, the data are noisy, sometimes inconsistent, and provide nothing approaching a clear indication that reforms that reduce the risk of suggestion are likely to have a meaningful effect on the rate of false identifications—much less benefits that exceed their costs. The data are chaotic, and the state of our knowledge about eyewitness identification reform remains primitive. Perhaps, over more time than is reflected in the studies canvassed above, police would learn to administer more rigorous identification protocols in a way that would reduce their costs; but, at present, there is no reliable evidence to support such speculation.[168]

247, 253–54 (2012) ("[I]n situations where culprit-present lineups are far more common than culprit-absent lineups, accuracy is maximized when responding is lenient, rather than unbiased. Conversely, when the base rate of culprit-present lineups is low, accuracy is maximized by conservative responding. Because the base rate of culprit-present lineups in actual police investigations is not known, we cannot be certain whether less-biased responding will produce greater accuracy in these settings.").

[166] *Cf.* Risinger, *supra* note 18, at 354 ("[A]t least in the case of targets who have been selected only because of a claimed resemblance to the perpetrator, the dangers of relative judgment are so great that simultaneous presentation ought never to be undertaken.").

[167] *Cf. id.* at 356 ("Unlike the situation where a target is chosen to be put in a lineup merely on the basis of some judgment of physical resemblance to the perpetrator, the normal lineup situation involves putting the target into the lineup for other reasons bearing on a likelihood of guilt greater than a random draw from a large population, such as a tip, etc. How often does such independent evidence result in the true perpetrator being in the lineup, and how often not? The answer is, we really don't know. There simply is no good empirical evidence on the issue.") (footnotes omitted).

[168] In this connection, it is worth noting that even after police have had decades to adjust to the rule requiring that they advise individuals of their rights during custodial interrogation announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), there is evidence that *Miranda* continues to reduce confession and clearance rates in criminal investigations. *See* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

Perhaps one day we will have carefully controlled studies demonstrating the effect of more rigorous identification protocols on the rates of both accurate and false identification. Yet, even if we could be confident about the rate at which more rigorous identification protocols screen out false rather than accurate identifications, the question remains: "What should the exchange rate be for correct identifications lost versus false identifications avoided?"[169] Even this formulation, however, likely understates the problem. Given the difficulties in quantifying the costs of both wrongful acquittals and convictions, cost-benefit analysis in this arena presents formidable difficulties.[170]

2. The Problematic Case for Blackstonian Prophylactic Rules

If jurors could accurately assess the reliability of an eyewitness identification, the use of potentially suggestive procedures would not be a problem. We would be able to avoid the potential loss of accurate identifications from rigorous identification protocols by permitting potentially suggestive procedures, confident in the jury's ability to assess the risk of error created by those procedures. As we have seen, however, the available research suggests that juries overestimate the reliability of eyewitness identifications once admitted in evidence.[171]

Although more extensive use of expert testimony and cautionary jury instructions might ameliorate this problem, the available research on mock juries suggests that providing them with additional information about the perils of eyewitness identification has limited effects.[172] If jurors' intuitions lead them to place great weight on the testimony of an eyewitness with no obvious motive to lie, it is far from clear that a counterintuitive lecture on the psychology of eyewitness identification is likely to eliminate the problem.[173]

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[169] Clark, *supra* note 155, at 248.

[170] *Cf.* IDENTIFYING THE CULPRIT, *supra* note 4, at 77–86, 104, 117–18 (the committee concluded that in light of the difficulties in assessing the costs and benefits of sequential identification protocols compared to sequential protocols, it could not make a recommendation between the two.).

[171] *See supra* text accompanying notes 7–8.

[172] *See, e.g.*, CUTLER & PENROD, *supra* note 6, at 257–63 (summarizing research); Kahn-Fogel, *supra* note 14, at 119–20 (same); Rakoff & Loftus, *supra* note 8, at 96–97; *see also* Wells & Quinlivan, *supra* note 6, at 21 ("Whether jury instructions . . . will have much impact on the jury is an open question, but it is likely to serve a deterrent function because prosecutors, who are motivated to keep such instructions away from the jury, will likely help bring pressure back on their police departments to avoid suggestive procedures in the future.").

[173] *Cf.* Peter J. Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237, 272–73 (1996) ("There is no scientific evidence that cautionary jury instructions, given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are effective. A powerful

And even if jurors heed the instructions, that may create new problems; studies of the jury instructions utilized in New Jersey since the *Henderson* decision indicate that the new instructions cause mock jurors to become more skeptical of all eyewitness identifications, regardless of the strength of the evidence.[174]

Because the risk of error in jurors' assessments of eyewitness identification may be ineradicable, a more robust rule of exclusion triggered by a failure to observe prophylactic safeguards against potentially suggestive identification procedures might seem the only effective way to reduce the rate of wrongful convictions attributable to eyewitness identifications.[175] Unlike *Manson*'s exclusionary rule, such an approach is not premised on a finding that a particular identification is unreliable and therefore likely to

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eyewitness' testimony may be so firmly embedded in the jurors' minds that the court's instructions days or weeks later may be unable to undo potential prejudice.").

[174] *See* Rakoff & Loftus, *supra* note 8, at 96–97 (concluding that the studies of the New Jersey instructions "suggest that such instructions may not adequately serve their intended function of enabling jurors to discriminate more accurately between reliable and unreliable eyewitness testimony").

[175] Likely the best-known instance of what could be regarded as a prophylactic rule of constitutional law is the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), rendering statements made during custodial interrogation inadmissible absent the provision of specified warnings and a valid waiver of the Fifth Amendment right to be free from compelled self-incrimination and its progeny. The Court and its members have sometimes characterized the rules derived from *Miranda* as prophylactic in character. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 103–06 (2010); United States v. Patane, 542 U.S. 630, 638–41 (2004) (plurality opinion); Chavez v. Martinez, 538 U.S. 760, 770–73 (2003) (opinion of Thomas, J.); Davis v. United States, 512 U.S. 452, 457–58 (1994); Oregon v. Elstad, 470 U.S. 298, 306–08 (1985); New York v. Quarles, 467 U.S. 649, 654–58 (1984); Michigan v. Tucker, 417 U.S. 433, 438–46 (1974); *cf.* Dickerson v. United States, 530 U.S. 428, 442 (2000) ("In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.") (citations omitted). Many commentators have defended *Miranda* in terms of prophylaxis. *See, e.g.*, Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 9–20 (2001); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471–76 (1999); Klein, *supra* note 73, at 480–88; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190–95, 208–09 (1988); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 447–53 (1987). Others, however, deny the legitimacy of *Miranda* as a prophylactic rule of constitutional law. *See, e.g.*, JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173–98 (1996). Still others doubt that *Miranda* is properly characterized as prophylactic in character, rather than as articulating a judicially administrable rule for identifying the presence of compelled self-incrimination within the meaning of the Fifth Amendment. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 114–36 (2004); Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889, 941–53 (2017).

produce a false conviction, but instead on reducing what is thought to be an elevated risk of error that exists when suggestive procedures are used to obtain the identification. Commentators advocate the use of prophylactic rules when the error rate in case-by-case adjudication is high and the benefits of prophylaxis are therefore likely to exceed its costs.[176]

As we have seen, however, there is reason to believe that requiring the use of more rigorous identification protocols to minimize the risk of suggestion is likely to increase the rate at which accurate identifications are lost, perhaps to an even greater extent than the rate at which false convictions are reduced. Accordingly, a more robust, prophylactic exclusionary rule might not decrease the overall error rate, although it could well reallocate error by increasing the rate at which witnesses fail to identify the actual perpetrator as it decreases the rate of false identifications. If prophylaxis does not reduce the overall error rate in assessing identification evidence, however, one could question the justification for a prophylactic rule requiring the exclusion of identification evidence because such evidence is thought to present an elevated risk of error. The available empirical evidence canvassed in Part II.A.1 above does not permit any confident conclusion that a prophylactic rule would reduce the overall error rate in assessing the reliability of eyewitness identifications when compared to *Manson*'s totality-of-the-circumstances test.

A Blackstonian response to these uncertainties is that the law—perhaps even the Constitution—tells us how to allocate the risk of error. The Supreme Court, for example, justified its holding that due process of law requires that the prosecution prove the defendant's guilt beyond a reasonable doubt by reference to the deeply rooted aversion to conviction of the innocent.[177] And as we know, Blackstone's ratio argues against the admission of evidence likely to produce wrongful convictions because "it is better that ten guilty persons escape, than that one innocent suffer."[178] As one commentator put it:

> [W]e embrace the value preference expressed by Blackstone's ratio . . . . While that ratio is not meant to create a rigid mathematical formula—indeed the acceptable ratio of wrongful convictions to failures to convict cannot be set with any mathematical

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[176] For defenses of prophylactic rules along these lines, see, for example, Caminker, *supra* note 175, at 6–9; Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 949–64 (1999); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1668–72 (2005); and Strauss, *supra* note 175, at 195–208.

[177] *See In re* Winship, 397 U.S. 358, 361–64 (1970).

[178] 4 BLACKSTONE, *supra* note 17, at *352.

> precision—the maxim does at least express a value preference that has been incorporated into constitutional doctrine.[179]

Blackstone's ratio is not uncontroversial; it is far from clear that it accurately captures the costs and benefits of error in the criminal justice system.[180] Even among those who favor some type of ratio to protect the innocent, there is no agreement on whether the correct ratio is 10-1 or something else.[181] One commentator, for example, offered a "Reform Ratio" that endeavors to acknowledge the costs of failing to convict the guilty:

> Any wrongful conviction that can be corrected or avoided without allowing more than one or two perpetrators of similar crimes to escape, ought to be corrected or avoided; in addition, system alterations (reforms, if you will) that there is good reason to believe will accomplish this ought to be embraced.[182]

Given the limited available data on the efficacy of eyewitness identification reforms canvassed above, however, it is doubtful that any of them satisfy any plausible reform ratio. In any event, even for those sympathetic to the Blackstonian preference from wrongful acquittal over wrongful convictions, invoking the Blackstonian ratio to support the case for a more robust, prophylatic eyewitness-identification exclusionary rule would considerably oversimplify matters.

A systemic protection for the innocent is already built into the heavy burden of proof that the prosecution must shoulder in a criminal case; that burden itself reflects a preference for false acquittals over wrongful convictions.[183] Whether additional protections are required when it comes to eyewitness identification evidence is, however, a separate question. After all, neither the burden of proof nor the general acceptance of the desire to minimize the rate of false convictions has produced the view that every conceivable precaution must be taken to prevent the conviction of the

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[179] Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 136 (2008) (footnotes omitted).

[180] For critiques of the Blackstone ratio arguing that it understates the costs of a ratio skewed in favor of acquittal, see, for example, Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008); and Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015). For a rebuttal, see Marvin Zalman, *The Anti-Blackstonians*, 48 SETON HALL L. REV. 1319 (2018).

[181] For a survey of the diverse views on this point, see Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

[182] Risinger, *supra* note 18, at 360.

[183] *See* text accompanying note 19.

innocent.[184] Nor has it taken the view that evidence may not be introduced if there is some risk that it is unreliable.[185]

Indeed, we have little idea what the error rate is for most types of evidence. Most evidence is not infallible—in fraud cases, sometimes alleged victims mischaracterize what they were told, innocently or intentionally; in arson cases, sometimes circumstantial evidence of the defendant's financial distress will not always accurately indicate that the defendant set a fire to collect insurance; in rape cases, sometimes alleged victims lie or are mistaken. The fact that a type of evidence of guilt is not infallible is no reason for its exclusion. After all, it is a perilous enterprise to assess in isolation the reliability of any evidence. Many types of evidence are of dubious reliability in the abstract, but when combined with the other evidence in the case, might produce what a jury could justifiably regard as a compelling case.

Accordingly, it is difficult to assess the reliability of any type of evidence in isolation. A fraud victim's testimony that she was swindled by a wealthy and respected investment advisor might, standing alone, seem unreliable in light of the victim's financial motive to gain a restitution payment; but in the face of compelling corroboration, the very same testimony might come to be seen as credible. The law does not insist that each individual piece of evidence offered against a defendant constitute reliable proof of guilt; the reliability of any particular item of evidence is, instead, appropriately assessed in light of the totality of the proof.[186]

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[184] *See, e.g.*, Patterson v. New York, 432 U.S. 197, 208 (1977) ("While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits . . . . Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

[185] *Cf.* Larry Laudan, *Eyewitness Identifications: One More Lesson on the Costs of Excluding Relevant Evidence*, 7 PERSP. PSYCHOL. SCI. 272, 272 (2012) ("[T]here is no rule of admissibility that will not occasionally lead to the conviction of an innocent defendant. Confessions are sometimes false. Should we exclude them? Expert testimony is occasionally mistaken. Should it be excluded? . . . . [T]he quest for evidence that infallibly indicates guilt (or innocence) is a snark hunt. It is provable in principle that there is no rule of evidence or procedure that will not occasionally lead to a false conviction (or a false acquittal). The fact that relevant evidence leads to fallible inferences is no argument for the former's exclusion.").

[186] *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 179–80 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence."); *cf.* Victor v. Nebraska, 511 U.S. 1, 16 (1994) (upholding a jury instruction defining proof beyond "reasonable doubt" as "that state of the case which, *after the entire comparison and consideration of all the evidence*, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.") (emphasis in original).

The likelihood that prophylactic rules that abjure inquiry into the totality of the circumstances will result in the exclusion of highly probative evidence, even when obtained through potentially suggestive procedures, may well explain difficulties courts have had in applying exclusionary rules purporting to be more robust than *Manson*. Consider *Henderson*. Recall that prior to Womble's contested identification of Henderson, Womble identified the accomplice of the man he later identified as Henderson—Clark—and Clark then identified Henderson as the individual who accompanied him to the scene of the crime.[187] Subsequently, upon his arrest, Henderson "admitted to the police that he had accompanied Clark to the apartment where Harper was killed, and heard a gunshot while waiting in the hallway. But [Henderson] denied witnessing or participating in the shooting."[188] Accordingly, there was compelling corroboration for Womble's contested identification of Henderson, including Henderson's own admission.

As we have seen, it is difficult to explain the ultimate decision to permit the use of Womble's contested identification in *Henderson* in terms of the systems and estimator variables that were supposed to be the basis for applying the prophylactic rule fashioned by the New Jersey Supreme Court.[189] The decision to admit Womble's identification is far more easily explained by the ample corroborative evidence demonstrating that Womble's identification of Henderson was reliable—not only did Clark (the shooter) also place Henderson at the apartment, but Henderson admitted he was there. It is difficult to conclude, in light of this evidence, that Womble's

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To be sure, in the context of the Sixth Amendment right of an accused "to be confronted with the witnesses against him," U.S. CONST. amend. VI, the Supreme Court has rejected consideration of corroborative evidence when assessing the admissibility of statements made in the absence of confrontation. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 823 (1990) ("[T]he use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility."). Confrontation Clause jurisprudence, however, presents a quite different problem from the admissibility of identification evidence when the witness making the identification is subject to cross-examination; as the Court later explained precisely because the Confrontation Clause identifies confrontation as a precondition for the admission of evidence: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford v. Washington, 541 U.S. 36, 68–69 (2004). If the confrontation requirement is satisfied, however, the Constitution prescribes no other test for assessing the reliability of evidence beyond the inquiry into the totality of the circumstances described above.

187 *See supra* text accompanying notes 87–90.

188 State v. Henderson, 27 A.3d 872, 880 (N.J. 2011).

189 *See supra* text accompanying notes 56–62.

identification was unreliable or somehow otherwise likely to lead the jury into error, even if the identification was obtained through a potentially suggestive procedure in which a blind-administration protocol was compromised.

For another example, consider *Commonwealth v. Meas*.[190] Despite purporting to require the exclusion of all identifications obtained through unnecessarily suggestive procedures,[191] in *Meas* the Massachusetts Supreme Judicial Court upheld the use of showup identifications of a suspect visibly in police custody. In this case, the corroboration included evidence that the suspect had been stopped in a vehicle matching the description and displaying a similar license plate number to that which had been provided to the police by witnesses, shortly after and in the vicinity of a shooting; when stopped, a loaded gun was found on the vehicle's floor and a spent shell casing was found where the suspect had been seated; the spent casing in the vehicle and another found at the scene of the crime were traced to the firearm found in the vehicle; and another of the vehicle's occupants, after pleading guilty to being an accomplice after the fact, testified that he witnessed the defendant shoot the victim.[192] There may have been no good reason that the police failed to arrange a lineup rather than using a suggestive showup procedure in *Meas*, but given the strength of the evidence, the identification created scant risk of error.

Similarly, despite its earlier holding purporting to exclude all unnecessarily suggestive identifications,[193] the New York Court of Appeals upheld a showup identification of an individual visibly in police custody after he had been apprehended near the scene of a robbery of a dry cleaner, corroborated by the independent identification of the manager who had chased the robber and caught up with police as they apprehended the suspect, and corroborated as well by the defendant's subsequent confession.[194]

In each of these cases, adherence to a prophylactic rule requiring the exclusion of any identification obtained through unnecessarily suggestive procedures would have been more likely to detract from, rather than enhance, the reliability of the fact-finding process. Once the contested identification is considered in light of the other evidence in the case, there is little reason to doubt its reliability. The rigidity of a prophylactic rule that would exclude the identification without reference to the other evidence in the case that bears on the perpetrator's identity may instead increase the risk of error.

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190 5 N.E.3d 864 (Mass. 2014).

191 *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1259–65 (Mass. 1995).

192 *Meas*, 5 N.E.3d at 869–75, 880–81.

193 *See* People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981).

194 *See* People v. Duuvon, 571 N.E.2d 654, 655–56 (N.Y. 1991).

In any event, even when prophylactic safeguards are taken, the admission of eyewitness identification evidence still creates a risk of wrongful conviction; in the studies canvassed above of identification protocols designed to reduce the risk of suggestion, none of the protocols was able to drive the rate of false identifications to zero or thereabouts.[195] Surely that does not suggest that all identification evidence must be barred because of the risk of false convictions that it induces—at some unknown ratio to the increased rate of false acquittals—into the criminal process.

To be sure, sometimes it is apparent that identification evidence is highly unreliable and should be excluded for that reason. Perhaps *Foster* is such a case; investigators undertook something of a campaign of suggestion directed at a witness who had repeatedly failed to identify Foster, and there seems to have been little evidence pointing to Foster beyond the contested identification.[196] Still, in all but the clearest cases—those where there is little, if any, evidence of identity beyond a highly suggestive identification—we do not know the extent to which the admission of any particular evidence increases the likelihood of a wrongful conviction. In most cases, moreover, there is no ready vehicle for assessing the risk of error injected by eyewitness identification evidence, or any other type of evidence. Most evidence is not infallible; surely it is rare that the admission of any type of evidence of guilt creates no risk of a wrongful conviction. There is, accordingly, no logical stopping point for exclusion of evidence that gives rise to a risk of wrongful convictions; this risk inheres in virtually all evidence.

We could reduce the rate of wrongful convictions to something approaching zero if we required the prosecution to use only the most unassailable types of evidence, impeccably corroborated—perhaps only cases involving videotapes of the offense and an ensuing, independent, and concededly voluntary confession—but, even most Blackstonians would likely view the resulting reduction in the rate at which the prosecution can convict the guilty as unacceptable. Surely reforms that increase the rate of false acquittals are justified only if they produce a sufficiently large reduction in the rate of false convictions to justify the resulting tradeoff.[197]

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[195] *See supra* Part II.A.

[196] *See supra* text accompanying notes 35–37.

[197] *Cf.* Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 855 (2018) ("[M]ore rigid requirements for a valid eyewitness identification may protect some innocent people from being mistakenly identified, but at the cost of preventing some guilty people from being properly identified. In assessing the tradeoffs involved in such reforms, the size of relative risks does matter.") (footnote omitted).

Indeed, the Blackstone ratio itself implies an awareness of a tradeoff—it may not be possible to minimize the rate of false convictions without unacceptably increasing false acquittals. Thus, even for Blackstonians, simply minimizing the rate of false convictions will not do. A fully informed assessment of a prophylactic rule requires consideration of not only the reduction in the rate of false convictions, but the potential reduction of the rate at which the guilty are convicted.[198] And, given the limited state of our knowledge about the ratio between false acquittals and convictions produced by pretty much all types of evidence, the best Blackstonians can do is insist on the stringent burden of proof in criminal cases. Assessing the error rate in each type of evidence offered by the prosecution to determine whether prophylaxis is justified is an impossible task.

Even a narrower claim that eyewitness identification evidence presents particular risks that warrant a particularly stringent rule of exclusion remains problematic. As we have seen, inaccurate eyewitness identifications have been identified as a leading cause of false convictions.[199] This point, however, is not as compelling as it might at first blush seem.

Although we can calculate the number of times that a defendant convicted on the basis of eyewitness identification evidence was later exonerated, we do not have reliable data about the number of accurate convictions based on eyewitness identifications; as a result, we cannot know that the error rate in these cases is unusually high.[200] Moreover, exonerations tend to cluster in the types of cases where DNA evidence can conclusively establish the identity of the perpetrator, such as cases resting on eyewitness identification evidence.[201] The rate of false convictions may be as high or higher in cases resting on accomplice testimony, the uncorroborated testimony of a victim, or circumstantial evidence; it is, however, quite difficult to ascertain the actual rate of false conviction in these cases. One

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[198] *Cf.* Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977) ("[T]he *per se* approach [requiring the exclusion of all evidence obtained by unnecessarily suggestive procedures] suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach, cases in which the identification is reliable despite an unnecessarily suggestive identification procedure reversal is a Draconian sanction.") (footnote and citations omitted).

[199] *See supra* text accompanying note 2.

[200] *See, e.g.*, Jennifer E. Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473, 1489 (2012) (reviewing GARRETT, *supra* note 15) (making this point).

[201] *See, e.g.*, Gross, *supra* note 2, at 766 ("If, somehow, DNA permitted us to identify robbers as effectively as it identifies rapists, we might have over 800 robbery exonerations rather than 100.").

survey, for example, made a powerful case that given the fallibility in witnesses' memories for conversations and jurors' tendency to believe confident witnesses, cases resting on the conversational memories of witnesses endeavoring to recall statements attributed to the defendant likely produce more false convictions than cases resting on eyewitness identifications.[202]

Given the advent of DNA evidence, false convictions are more readily detectable in eyewitness identification cases than many others, but that does not mean that we can reliably conclude that eyewitness identification evidence represents anything like a unique problem of reliability. Indeed, since the advent of DNA evidence capable of identifying false identifications, perhaps the rate of wrongful convictions in such cases is likely to be lower in the future than in other cases in which DNA evidence has less utility, such as those involving conversational memory.[203]

Accordingly, although courts may have a limited ability to identify unreliable identifications under *Manson*'s totality of the circumstances approach, it is unclear that there is any prophylactic alternative likely to improve matters. A prophylactic rule requiring the use of rigorous identification protocols does not even attempt to identify unreliable identifications, but instead identifies what is regarded as a proxy for reliability—the procedures used to obtain identifications. But because a prophylactic rule does not examine the other evidence in the case that might corroborate an identification, it may produce a higher error rate than *Manson*. Moreover, to justify prophylaxis on the Blackstonian ground that every precaution should be undertaken to exclude evidence that gives rise to a risk of false conviction is to adopt a rationale with no logical stopping point—one that could be used to bar most types of evidence.

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[202] *See* Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 6–45 (2007). There have been a number of efforts to 9estimate an overall rate of false conviction; *see, e.g.*, SANGERO, *supra* note 4, at 8–14 (estimating the rate of false convictions at 5–10%); Allen & Laudan, *supra* note 180, at 68–71 (estimating an overall wrongful conviction rate of 0.84%); Cassell, *supra* note 197, at 846–48 (estimating an overall wrongful conviction rate of 0.016–0.062%); Gross, *supra* note 2, at 784–85 (estimating an error rate for death sentences of 4.1% and for other violent felonies of "from one to several percent"); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 769–80 (2007) (estimating a wrongful conviction rate of 3.3–5% for capital rape-murders during the 1980s); George C. Thomas III, *Where Have All the Innocents Gone?*, 60 ARIZ. L. REV. 865, 872–79 (2018) (estimating a wrongful conviction rate in North Carolina of from one-eighth to one-half of one percent). Whatever the merits of these estimates and their underlying methodologies, they tell us nothing about the error rate that inheres in identification or other particular types of evidence.

[203] For a helpful discussion along these lines, see Cassell, *supra* note 197, at 837–38.

If neither the social science research, the Constitution, nor our legal tradition offers a workable rule for identifying evidence too unreliable to be admitted, then the determination whether the benefits of more restrictive identification procedures to protect the innocent are worth the costs that those procedures may impose in terms of the loss of identifications of the guilty seems like a policy and not a legal question. Indeed, this is a particularly difficult policy question given the difficulties not only in quantifying the costs and benefits of reform but also in assigning costs and benefits to both the conviction of the innocent and the acquittal of the guilty.[204]

In the face of the difficulties of assessing these costs and benefits, it should be unsurprising that courts have hewed to *Manson*'s deferential view. Politically accountable legislatures seem far better positioned to assess these issues—and to be held accountable for their errors.[205] By excluding evidence that poses only the most extreme risks to the innocent and relying on the traditional view that the jury is the appropriate body to assess the probative value of evidence, *Manson* may represent about the best we can do. Indeed, *Manson* reflects the approach one would expect in the absence of a justification for prophylaxis—requiring the defendant to demonstrate the unreliability of the identification on a case-by-case basis, under the totality of the circumstances.

The preceding discussion rests on the view that the appropriate objective of policy reform would be to reduce the rate at which factually innocent defendants are convicted on the basis of inaccurate identification evidence.[206] As we have seen, it is difficult to justify prophylactic rules thought to minimize the risk of wrongful conviction without logically

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[204] For helpful discussions of the difficulty in assessing the costs and benefits of identification procedures, see IDENTIFYING THE CULPRIT, *supra* note 4, at 76–91; and Clark, *supra* note 155, at 246–52.

[205] *Cf.* Medina v. California, 505 U.S. 437, 445–46 (1992) ("[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.").

[206] Perhaps this claim can even be framed in terms of a constitutional right to be free from factually inaccurate convictions. The Supreme Court has yet to squarely recognize such a right, although it has been willing to assume that it exists. *See, e.g.*, Dist. Att'y's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 71–72 (2009) ("As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence.' Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists.") (footnote omitted). *See generally* Jackson v. Virginia, 443 U.S. 307, 324 (1979) (recognizing a due process right to overturn a conviction on appeal "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt").

excluding virtually all evidence of guilt. Perhaps, however, this represents the wrong perspective on the problem of eyewitness identification.

A different Blackstonian argument is premised not on the desirability of a prophylactic rule, but rather on the right of all defendants not to have the prosecution unfairly manipulate the evidence. For example, under what is perhaps the most Blackstonian aspect of constitutional doctrine, aside from the burden of proof itself, the Supreme Court has held that the right to a fair trial under the Due Process Clause is violated when the prosecution suppresses material exculpatory evidence.[207] From this, one could argue that when investigators use unnecessarily suggestive procedures, they compromise the right to a fair trial by manipulating identification evidence through the use of suggestive procedures, thereby effectively depriving the defendant of the ability to obtain a potentially exculpatory non-identification that is not tainted by suggestion.[208]

Accordingly, if officials take steps to increase the likelihood that a witness will make a positive identification through official suggestion, one could argue that an accused is deprived of his right to a fair trial under the Due Process Clause. On this view, *Manson*'s rejection of a per se rule of exclusion of identifications obtained through unnecessarily suggestive procedures was a serious error. A per se rule of exclusion would not over-protect the right in a prophylactic sense, because any effort to manipulate the evidence is violative of the accused's rights, regardless of whether a resulting identification proves to be factually accurate. It is to this contention that we finally turn.

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[207] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 280–81 (1999) ("In *Brady* [*v. Maryland*], this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence . . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" (quoting Brady v. Maryland, 373 U.S. 83, 87 (1967), and Kyles v. Whitley, 514 U.S. 419, 437 (1995))) (citations omitted).

[208] *Cf.* Rosenberg, *supra* note 15, at 292–93 ("Conducting an unnecessarily suggestive pretrial identification procedure is analogous to creating one piece of evidence, the identification that results from the procedure, and destroying another piece of evidence, the identification, or failure of identification, that would have resulted from a correctly conducted process. Indeed, an unnecessarily suggestive procedure threatens to compromise all of the subsequent identification testimony by the witness . . . . Given the powerful anchoring effects of the suggestive procedure on any subsequent identification, as a practical matter a non-suggestive procedure cannot be conducted after a suggestive one.") (footnote omitted).

B. ASSESSING RELIABILITY IN LIGHT OF THE TOTALITY OF CIRCUMSTANCES

Some of the criticisms of *Manson* seem unwarranted. For example, some argue that *Manson*'s listing of the factors that bear on the reliability of an identification is inconsistent with research identifying a variety of other factors and casting doubt on the importance of some of the listed factors.[209] Yet, on this point, *Manson*, after observing that "reliability is the linchpin in determining the admissibility of identification testimony," added, "[t]he factors to be considered are set out in [*Neil v.*] *Biggers*."[210] *Neil v. Biggers*, in turn, stated that the relevant factors "*include* the opportunity of the witness to view the criminal . . . the witness' degree of attention, the accuracy of his prior description . . . the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[211]

Accordingly, *Manson* and *Neil* embraced an inclusive approach; they did not preclude inquiry into any factor with a demonstrable relationship to reliability, or evidence casting doubt on reliability. Indeed, *Manson* repeatedly described the rule it embraced as involving inquiry into "the totality of the circumstances."[212] Thus, it should be unsurprising that a number of lower courts have concluded that *Manson* does not forbid inquiry into any factors that bear on reliability, even if not expressly listed in the *Manson* opinion,[213] nor does it preclude courts from casting a skeptical eye on factors listed as relevant in the opinion, but which subsequent research suggests are of limited significance.[214]

On a related issue, however, there is greater uncertainty as to *Manson*'s meaning—when assessing the reliability of a suggestive identification, does *Manson* permit consideration of independent corroborative evidence, or only

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[209] *See supra* text accompanying notes 45–51.

[210] Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).

[211] *Neil*, 409 U.S. at 199–200 (emphasis supplied).

[212] *Manson*, 432 U.S. at 106, 110, 113.

[213] *See, e.g.*, State v. Kaneaiakala, 450 P.3d 761, 777–78 (Haw. 2019) (without rejecting *Manson*, the court held that lower courts should consider all factors shown to bear on reliability); State v. Almaraz, 301 P.3d 242, 251–53 (Idaho 2013) (explaining that courts applying *Manson* should consider all systems and estimator variables identified in *Henderson* when determining whether the use of identification evidence deprives a defendant of due process of law).

[214] *See, e.g.*, State v. Discola, 184 A.3d 1177, 1187–89 (Vt. 2018) (rejecting use of a witness's degree of certainty as a factor in due process challenges to eyewitness identification testimony despite its use in *Manson* in light of subsequent empirical evidence); *cf.* State v. Dickson, 141 A.3d 810, 824 (Conn. 2016) ("[F]irst time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court.").

evidence related to the reliability of the identification itself? Consideration of this issue, we will see, sheds considerable light on the difficulties of exclusionary rules for suggestive identifications more robust than *Manson*.

1. The Role of Corroborative Evidence

A per se rule requiring the exclusion of identifications obtained through what are regarded as unduly suggestive procedures, of course, would reject any inquiry into whether the identification is corroborated by other evidence. In *Manson*, with respect to the role of independent corroborative evidence, the Court wrote, "Although it plays no part in our analysis . . . assurance as to the reliability of the identification is hardly undermined by the facts that [Brathwaite] was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment."[215] Thus, in a single sentence, the Court both disclaimed reliance on corroborative evidence and suggested that corroboration bears on reliability. In contrast, in his separate opinion, Justice Stevens wrote: "[I]t is sometimes difficult to put other evidence of guilt entirely to one side . . . . [T]he Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself."[216] Yet, this seems an overstatement; the opinion of the Court, while treating the corroborative evidence as unnecessary to the outcome in that case, seemed to acknowledge that corroboration bears on reliability. It is difficult to read *Manson* as containing a square holding that corroborative evidence is irrelevant when assessing reliability under the totality-of-the-circumstances test.[217]

Indeed, when it comes to the role of corroborative evidence, the lower courts have split. Some have concluded that *Manson* permits consideration of only evidence relating to reliability of the identification itself, with corroborative evidence independent of the identification relevant only on the question whether the erroneous admission of identification evidence amounts to harmless error.[218] Others treat independent evidence that corroborates the

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[215] *Manson*, 432 U.S. at 116 (1977) (footnote omitted).

[216] *Id.* at 118 (Stevens, J., concurring) (footnote omitted).

[217] *Cf.* GARRETT, *supra* note 15, at 81–85 (discussing contrasting understandings of *Manson*'s application to corroborative evidence).

[218] *See, e.g.*, United States v. Greene, 704 F.3d 284, 308–10 (4th Cir. 2012); Raheem v. Kelly, 257 F.3d 122, 140–41 (2d Cir. 2001); United States v. Rogers, 126 F.3d 655, 659–60 (5th Cir. 1997); United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995); Green v. Loggins, 614 F.2d 219, 224–25 (9th Cir. 1980); Long v. United States, 156 A.3d 698, 707–08 (D.C. 2017); State v. Jones, 128 A.3d 1096, 1107–08 (N.J. 2016); Wise v. Commonwealth, 367 S.E.2d 197, 201–02 (Va. Ct. App. 1988); Campbell v. State, 589 P.2d 358, 364–65 (Wyo. 1979). For endorsements of this view, *see* Rosenberg, *supra* note 15, at 286–88; and Rudolf

reliability of a contested identification as bearing on its admissibility under *Manson*.[219]

There are, to be sure, reasons to resist the use of corroborative evidence when assessing the reliability of an identification. For one thing, corroborative evidence could distort the reliability inquiry by bootstrapping the reliability of an identification to other evidence.[220] For another, unnecessarily suggestive identification procedures, one could argue, advance no legitimate governmental interest, but instead degrade the reliability of the criminal process.[221] Beyond that, a per se exclusionary rule would incentivize investigators to utilize procedures that minimize the risk of

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Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1123–40 (2003).

[219] *See, e.g.*, United States v. Constant, 814 F.3d 570, 575–77 (1st Cir. 2016) (identification corroborated by defendant's confession and fit between description of shooter's gun and his weapon); United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996) (independent witnesses corroborated contested identification); United States *ex rel.* Kosik v. Napoli, 814 F.2d 1151, 1156–57, 1161 (7th Cir. 1987) (identification corroborated by independent witnesses' description of vehicle containing suspects); Graham v. Solem, 728 F.2d 1533, 1546–48 (8th Cir. 1984) (identification corroborated when defendants admitted to being together at the time and scene of the crime); McNary v. Sowders, 660 F.2d 703, 708–09 (6th Cir. 1981) (identification corroborated by recovery of pistol taken in robbery and thrown from vehicle in which defendant was riding); Lindsey v. State, 572 S.W.2d 145, 146 (Ark. 1978) (identification corroborated by recovery from defendant of cash in denominations identical to what was taken in robbery); People v. Lee, 502 N.E.2d 399, 407–08 (Ill. Ct. App. 1986) (identification corroborated by defendant's confession); St. Clair v. Commonwealth, 140 S.W.3d 510, 551–52 (Ky. 2004) (identification corroborated by independent testimony, forensic and circumstantial evidence); State v. Egana, 792 So. 2d 931, 935–37 (La. Ct. App. 2001) (identification corroborated by videotape); Commonwealth v. Hicks, 460 N.E.2d 1053, 1055–60 (Mass. Ct. App. 1984) (identification corroborated by recovery of fruits of robbery from defendant shortly after crime), *overruled on other grounds by* Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995); Johnson v. State, 354 P.3d 667, 676 (Nev. Ct. App. 2015) (identification corroborated when victim's cellphone was found in pocket on accomplice); State v. Halley, 637 N.E.2d 937, 941 (Ohio Ct. App. 1994) (identification corroborated because suspect was only male staying at the apartment where attack occurred and was found in clothes described by victim); State v. Brown, 589 S.E.2d 781, 785–87 (S.C. Ct. App. 2003) (identification corroborated when defendant was found where witness stated he would be)

[220] *See, e.g.*, Koch, *supra* note 218, at 1134 ("[I]f courts were to consider evidence of general guilt in determining whether an identification is reliable, that evidence would essentially be counted twice—first toward general guilt, then again toward admitting the identification, which would, in turn, act as further evidence of guilt. This evidence would therefore be weighted too heavily, to the point that outcomes could become distorted.").

[221] *See, e.g.*, Rosenberg, *supra* note 15, at 291 ("[A]n unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered.") (footnote omitted).

suggestion more effectively than a rule that tolerates suggestion as long as corroborative evidence is obtained.[222]

The arguments against the use of corroborative evidence are perhaps best considered by reference to particular facts, rather than in the abstract. To that end, consider once more the facts of *Henderson.* The extent to which Womble's identification of Henderson was corroborated was striking—not only did Clark (the shooter) also place Henderson at the apartment,[223] but Henderson himself admitted that he was there.[224] It is difficult to conclude, in light of this evidence, that Womble's identification was unreliable in the sense that it was likely to lead the jury into error.

Consider as well the question whether Detective Ruiz and Investigator MacNair engaged in anything that should be characterized as unnecessarily suggestive. Even if they put some pressure on Womble to make an identification, recall that Womble had previously lied to them about his knowledge of the shooting, and later admitted that he was afraid to make an identification because he had been threatened.[225] In high-crime communities, the threat of retaliation is often quite real; for example, the pertinent literature reflects the prevalence of intimidation tactics by urban street gangs as a means of inhibiting community cooperation with the police.[226] Indeed, researchers have found that "offenders in gang-related and drug-related homicides are much less likely to be arrested . . . in part due to lack of witness cooperation."[227] In light of this, when a witness who has previously admitted to being in proximity to a homicide, and who has expressed a fear of retaliation that has already compromised his candor with the authorities, then fails to make an identification during an ensuing identification procedure, it

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[222] *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 125 (1977) (Marshall, J., dissenting) ("[T]he Court acknowledges that one of the factors, deterrence of police use of unnecessarily suggestive identification procedures, favors the *per se* rule [requiring exclusion of identification obtained by unnecessarily suggestive procedures]. Indeed, it does so heavily, for such a rule would make it unquestionably clear to the police they must never use a suggestive procedure when a fairer alternative is available.").

[223] At trial, the court admitted Clark's videotaped statement which, while placing Henderson in the apartment at the time of the shooting, largely exculpated him. *Id.* at 882 & n.2.

[224] *Id.* at 880, 882.

[225] *See supra* text accompanying notes 87–89.

[226] *See, e.g.*, AL VALDEZ, UNDERSTANDING STREET GANGS 19–20 (3rd ed. 1997); Bruce D. Johnson et al., *Drug Abuse in the Inner City: Impact on Hard-Drug Users and the Community*, *in* CRIME AND JUSTICE.: A REVIEW OF RESEARCH 9, 35–37 (Michael Tonry & James Q. Wilson eds., 1990).

[227] Anthony A. Braga & Rod K. Brunson, *The Police and Public Discourse on "Black-On-Black" Violence*, *in* NEW PERSPECTIVES ON POLICING 2015, at 6 (Nat'l Inst. Of Just., Pub. No. 248588, May 2015).

is far from clear that it is inappropriate for investigators to confront the witness rather than simply giving up, especially when a jury will subsequently be able to assess all of the circumstances surrounding the identification, including the witness's initial reluctance.

The facts of *Henderson* suggest two important, if interrelated, difficulties with a per se rule requiring suppression of all identification evidence that results from unnecessarily suggestive procedures.

First, it will not always be obvious what should be characterized as unnecessary suggestion or an improper effort to tamper with identification evidence. In a great many cases, it will not be difficult for the defense to identify some additional precaution that could have been taken to avoid suggestion. Thus, defense counsel will likely be able to characterize many identifications as unnecessarily suggestive. Yet, determining whether some additional precaution was appropriate will often be challenging. Even though Detective Ruiz and Investigator MacNair compromised the double-blind protocol, it could well have been necessary for them to confront Womble to overcome his fear of retaliation. We cannot be confident whether the actions taken by the officers were necessary or not. Perhaps Womble was genuinely uncertain of his identification and yielded to police pressure; or perhaps Womble was unwilling to become the chief prosecution witness in a murder case in the face of a threat of retaliation. We cannot know for sure. The data set out above, however, suggests that more rigorous identification protocols will sometimes result in the loss of accurate identifications. Perhaps procedures that some might characterize as unnecessarily suggestive, others could justifiably believe are necessary to obtain probative evidence.

A rule requiring exclusion of unnecessarily suggestive identifications could be thought justifiable to the extent that it deters official misconduct.[228] It will frequently be difficult, however, to determine if an officer's response to a witness's failure to make an identification represents misconduct or a necessary prod to a reluctant or fearful witness. If a finding of unnecessary suggestion resulted in a rule of automatic exclusion, quite high stakes would be placed on the resolution of what, in the real world, is the difficult question of whether any particular tactic was necessary to obtain useful information from fearful witnesses.

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[228] *Cf.* Katherine R. Kruse, *Wrongful Convictions and Upstream Reform in the Criminal Justice System*, 3 TEX. A&M L. REV. 367, 382 (2015) ("As upstream reforms to eyewitness identification procedures gain momentum, the failure of law enforcement agencies to adopt, enforce, or follow them—especially in the face of statutory mandates—could be seen as a form of deliberate misconduct warranting a deterrent sanction.").

The point can be made in doctrinal terms. While the suppression of material exculpatory evidence violates the Due Process Clause, the use of what are regarded as suggestive identification procedures presents a different problem. Because we cannot know whether the witness would have made an identification had different identification protocols been used, the use of suggestive identification procedures deprives the accused of only *potentially* exculpatory evidence—we cannot know for sure, because the inquiry is counterfactual. The Supreme Court has held that when officials destroy or otherwise make unavailable potentially exculpatory evidence, due process is violated only if officials have acted in bad faith.[229] This is, accordingly, the doctrinal framework applicable to a failure to utilize more rigorous identification protocols. As we have seen, however, more rigorous identification protocols that minimize the risk of suggestion may also make it harder to obtain accurate identifications.[230] A failure to utilize prophylactic procedures may reflect bad faith, but it also could reflect an effort to avoid the unnecessary loss of important evidence.

In *Henderson*, for example, it is far from clear that Detective Ruiz and Investigator MacNair acted in bad faith, even if they undermined the prescribed double-blind identification protocol. Perhaps they had accurately perceived Womble's reluctance to become a prosecution witness in a homicide case and compromised the double-blind protocol only for that reason. To be sure, if courts announced a per se rule requiring exclusion of any identification obtained after blind administration had been compromised, then the detectives' conduct could be characterized as a bad-faith violation of a known legal duty, but one cannot justify such a rule merely by assuming that officers act in bad faith when they compromise blind administration in the absence of a per se rule demanding blind administration. Sometimes, officers may conclude that blind administration has impeded their ability to confront a recalcitrant witness who balks at making an accurate identification. If so, perhaps a decision to confront a potentially recalcitrant witness may have a fully sufficient law enforcement justification.

Second, and relatedly, *Henderson* also demonstrates that sometimes there will be little reason to doubt the accuracy of an identification even in the face of official suggestion. After all, Womble's identification was corroborated by both Clark and Henderson himself. Even if an identification made under suggestive circumstances might then induce police to seek corroborative evidence, this does not inevitably mean that the resulting corroboration is unreliable. There is no indication in *Henderson*, for

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[229] *See* Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988).

[230] *See supra* Part II.A.1.

example, that Clark's identification of Henderson, or Henderson's admission that he was present at the scene of the shooting, represents mere bootstrapping onto a suspect identification.[231] Even if a potentially suggestive identification causes the police to seek corroborative evidence, the resulting corroboration may well demonstrate the accuracy of the identification. The existence of corroborative evidence does not negate the fact that a suggestive identification procedure was used, but it can demonstrate that whatever the suggestion, it poses little risk of convicting an innocent suspect.

The point is not unique to *Henderson*. In *Stovall v. Denno*, for example, although Stovall was identified by the victim when he was brought to her hospital room in police custody under highly suggestive circumstances, police found a shirt at the scene of the attack containing keys that they traced to Stovall.[232] In *Perry v. New Hampshire*, Perry's contested identification as the individual who had been trying to break into parked cars occurred after he had been taken into police custody by an officer who found Perry standing between parked cars and holding two car amplifiers with a metal bat lying on the ground behind him, and then learned that the rear window of a nearby car was shattered and its speakers and amplifiers were missing.[233] In *Commonwealth v. Hicks*, although the victim made an identification only when police told him that they had apprehended the men who had robbed him, the suspects had been found near the scene of the crime and shortly after it occurred, in possession of the items taken in the robbery.[234] In each of these cases, the identification procedures were suggestive, but there was also little doubt that the identifications were accurate. Indeed, we have seen numerous cases in which corroborative evidence convincingly demonstrated the reliability of an identification obtained through what were likely unnecessarily suggestive procedures.[235] Whatever manipulation may have occurred in the identification process, its outcome in these cases was reliable. While there may be some cases in which an identification is mistaken despite corroboration, there are surely many others in which corroborative evidence will greatly reduce the likelihood that an identification was erroneous.

As it happens, one of the reforms that some critics have advocated to protect the innocent is a requirement that convictions that rest on eyewitness

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[231] *See supra* text accompanying notes 87–90, 183–184.

[232] *See* Stovall v. Denno, 388 U.S. 293, 295 (1967).

[233] Perry v. New Hampshire, 565 U.S. 228, 233–34 (2012).

[234] Commonwealth v. Hicks, 460 N.E.2d 1053, 1054–55 (Mass. Ct. App. 1984), *overruled on other grounds by* Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995).

[235] *See supra* text accompanying notes 183–190.

identification testimony not be sustained absent corroboration.[236] This position is based on the insight that corroboration is one way in which evidence can be shown to be reliable. Indeed, many types of evidence—the testimony of an accomplice offered leniency, or a jailhouse informant, or a confession exacted in the face of aggressive interrogation techniques—might be regarded as unreliable in the abstract, but once corroborated, can constitute powerful—and reliable—evidence of guilt.

2. Corroborated Identifications and the Right to a Fair Trial

As we have seen, it is difficult to assess the reliability of any piece of evidence in the abstract; it is frequently only when the totality of the evidence is assessed that it becomes possible to reach judgments about reliability.[237] It is not obvious why a defendant is denied a fair trial when convicted on the basis of evidence that proves reliable in light of the available corroboration.

Even if corroborative evidence is used twice during a prosecution—once to convince the judge of the admissibility of an identification under *Manson*, and again to convince the trier of fact of the defendant's guilt—that does not mean that the resulting conviction is not supported by appropriate proof. Corroborative evidence is often doubly considered in this fashion—for example, proffered hearsay is considered, together with corroborative evidence, both to determine its admissibility, and, subsequently, as substantive proof of guilt at trial.[238] Nor does the use of evidence in this fashion involve a logical bootstrap. If the reliability of evidence is to be considered both when it is admitted and again when determining whether the defendant's guilt has been proven, then corroborative evidence bearing on reliability is logically relevant at both stages.

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[236] *See, e.g.*, Kruse, *supra* note 228, at 388–92; Boaz Sangero & Mordechai Halpert, *Why A Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 90–94 (2007); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1523–43 (2008); *cf.* Wells & Quinlivan, *supra* note 6, at 20 (arguing that when suggestive procedures are used the burden should be placed on the prosecution to demonstrate reliability by evidence independent of the identification). There are, however, a great many difficulties in fashioning and administering a standard for corroboration. For an illustrative discussion, see David Crump, *Eyewitness Corroboration Requirements As Protection Against Wrongful Conviction: The Hidden Questions*, 7 OHIO ST. J. CRIM. L. 361 (2009).

[237] *See supra* text accompanying note 182.

[238] *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 179–81 (1987) (explaining that although hearsay is presumed unreliable, an alleged coconspirator's hearsay statements may be considered together with other evidence to determine both admissibility as the statement of a conspirator and as proof of guilt at trial).

To be sure, the courts that ignore independent corroborative evidence when assessing the admissibility of an identification still consider such evidence on the question whether the improper admission of identification evidence was harmless error.[239] Perhaps, in the examples canvassed above, the identifications should have been excluded, yet the convictions could have been upheld on the ground that the error in admitting the identifications was harmless in light of the corroborative evidence.

Nevertheless, even if erroneously admitted identification evidence is sometimes harmless error, an exclusionary rule more robust than *Manson*, or one that required the use of demanding identification protocols that reduce the rate at which even accurate identifications are made, could still have dramatic effects, even in cases with powerful corroborative evidence. After all, just as "the in-court testimony of an eyewitness can be devastatingly persuasive,"[240] an eyewitness's inability to provide such testimony might be of great significance as well, even in light of corroborative evidence. If the key witness is not able to identify the defendant, skillful defense counsel could persuasively argue that the lack of an identification by the key eyewitness suggests reasonable doubt, despite the remaining evidence. Indeed, some jurors may draw an adverse inference from a key witness's failure to identify the defendant—affording it perhaps greater weight than is warranted.[241] Under a regime in which trial courts exclude all suggestive identifications, conviction rates may well decline if jurors are troubled by the failure of the prosecution to adduce identification testimony from key witnesses.

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[239] *See supra* text accompanying note 214. The use of unconstitutionally obtained identification evidence is considered harmless if it is shown beyond reasonable doubt that the improper evidence had no effect on the verdict. *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 232 (1977) (citing Chapman v. California, 386 U.S. 18 (1967)).

[240] United States v. Greene, 591 F.2d 471, 475 (8th Cir. 1979).

[241] This problem arises both in cases in which witnesses are unable to make accurate identifications because of the use of more rigorous protocols, and in cases in which jurors are unaware that the witness actually made an identification because it was excluded from evidence prior to trial. In the latter cases, the problem is exacerbated because when an identification is excluded, all subsequent identifications must also be excluded unless based on an independent source, which is a difficult showing to make; *see, e.g.*, Thompson, *supra* note 15, at 627 ("Based on scientific studies about memory distortion, a strong argument can be made that an earlier suggestive identification procedure will permanently distort any later identification by the same witness, including an in-court identification. Thus, a suggestive pretrial identification procedure renders any in-court identification just as unreliable as the pretrial identification.") (footnote omitted). For this reason, a per se rule excluding all unnecessarily suggestive identifications is likely to taint any subsequent effort to obtain an identification from the witness.

Most important, however, is the question whether the use of a corroborated identification should be regarded as constitutional error in the first place. As we have seen, in terms of existing doctrine, governmental conduct that deprives a defendant of potentially exculpatory evidence violates due process only if undertaken in bad faith, and it is difficult to characterize the government's refusal to utilize identification protocols that make it more difficult for witnesses to make even accurate identifications as reflecting bad faith.[242] Even putting this point aside, it is difficult to understand why the use of a reliable identification—whether because it has been corroborated or for any other reason—somehow deprives a defendant of a fair trial.

For example, when the fillers in a lineup do not closely resemble the perpetrator, it may be difficult for a court or a jury to tell whether a resulting identification is tainted by suggestion. Even an identification based on a relative judgment that the suspect resembles the perpetrator, however, can represent probative evidence of guilt.[243] Moreover, when a witness's relative judgment about the similarity between the perpetrator and a suspect is corroborated in a meaningful way, it is hard to deny that even a relative judgment represents appropriate evidence of guilt, just as eyewitnesses who never see a perpetrator's face can be permitted to describe his height, or hair color. Again, there may be some cases in which even corroborated identifications prove mistaken, but surely substantial corroboration greatly reduces the risk of error. For this reason, it becomes difficult to conclude that the prosecution has deprived the defendant of exculpatory evidence merely because more rigorous identification protocols were not employed. The defense is free to argue that had different identification procedures been used, the result might have been exculpatory, but in light of the available corroboration, the trier of fact is surely entitled to credit the identification despite the use of potentially suggestive procedures. At a minimum,

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[242] *See supra* text accompanying notes 224–226.

[243] *Cf.* Clark et al., *supra* note 155, at 66–67:

> [T]he absolute-relative distinction is imprecise and may fail at both ends. At one end, a pure relative model makes a clearly false prediction: if a witness to an armed robbery (by any white male) were presented with a lineup consisting of George W. Bush and five penguins, he or she would identify the 43rd President with a high level of confidence. One may reasonably condemn as illegitimate all identifications based on such a pure relative judgment decision rule, but this might only provide guidance to condemn a decision strategy that almost no witnesses ever use. At the other end, a pure version of the absolute judgment strategy, with no relative component, may also fail as a psychological theory. With few extremely rare exceptions (i.e., perfect pitch), almost *all* human judgments involve relative judgments to some degree. Thus, it would not make sense to declare an identification to be illegitimate simply because it was based *in part* on relative judgments, as such a standard would render all eyewitness identifications to be illegitimate.

whatever the value of speculation that had more rigorous identification protocols been used, the defendant would not have been identified, counterfactual speculation of this character is far different from the prosecution's failure to disclose actual exculpatory information of which it is aware.

Of course, there is an argument for evidentiary rules that deter the use of unnecessarily suggestive identification procedures. A constitutional argument for deterrence, however, must be anchored in the accused's right to a fair trial, and not merely in an interest in punishing officials for their failure to utilize what might be regarded as best practices for identification.[244] After all, as we have seen in Part II.A.2 above, the purely prophylactic case for more rigorous identification protocols is a problematic one. Yet, establishing that a failure to utilize practices that minimize the risk of suggestion deprives an accused of the right to a fair trial is problematic.

As we have seen, assessing what constitutes unnecessary suggestion is a complicated business; the use of less rigorous identification protocols may be necessary to avoid the loss of even accurate identifications when more rigorous protocols make identifications more difficult to make.[245] Exclusion may deter misconduct, but it might also, in a case like *Henderson*, deter the police from doing what is necessary to convince a fearful witness to identify a violent offender. In any event, if corroborative evidence demonstrates that, despite the suggestiveness of the procedures employed, the identification is reliable, then the likelihood that suggestive identification procedures deprived the defendant of exculpatory evidence or otherwise facilitated the conviction of an innocent person is surely low.

A defendant convicted on the basis of reliable identification evidence—because it has been corroborated—will accordingly have difficulty demonstrating that he was unfairly deprived of exculpatory evidence by the use of potentially suggestive identification procedures. Instead, when the corroborative evidence is sufficiently powerful, it is far more likely that the use of more rigorous identification protocols would have made no difference, or, at most, would have prevented the prosecution from obtaining a reliable identification of a guilty perpetrator because, as we have seen in Part II.A.1 above, more rigorous identification protocols reduce the rate at which even accurate identifications are made.[246]

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[244] *Cf.*, *e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) ("The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.").

[245] *See supra* Part II.A.1.

[246] For this reason, anchoring a constitutional argument against the use of evidence obtained through unnecessarily suggestive procedures, but also corroborated by independent

3. The Difficulty of Abandoning Manson

The argument advanced above not only supports the use of corroborative evidence in applying *Manson*, but also demonstrates the difficulties of any Blackstonian approach to the admissibility of eyewitness identification evidence.

Once one departs from a test of reliability under the totality of circumstances, one necessarily enters the realm of prophylaxis. After all, a totality-of-the-circumstances test demands that a judge make the best assessment possible about the reliability of an identification in light of all available information. It is perhaps for this reason that even the states that purport to employ robust exclusionary rules seem to balk at hewing to those rules, as we have seen.[247]

The prosecution's burden of proof beyond a reasonable doubt already builds into the criminal process significant protection against convicting the innocent. We proceed further at our peril. As we have seen, there is no reliable way to gauge the costs and benefits of a prophylactic rule that would exclude evidence judges find to be reliable, even if produced by unnecessarily suggestive identification procedures. Indeed, we have also seen that it is even difficult to decide what is unnecessarily suggestive, given that more rigorous identification protocols seem not only to reduce the risk of false identifications, but also the rate at which guilty perpetrators are

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evidence, in the government's obligation not to suppress exculpatory evidence faces an additional doctrinal obstacle beyond the defendant's likely inability to establish bad faith. The suppression of even actual (not merely potentially) exculpatory evidence does not deprive a defendant of the constitutional right to a fair trial unless there is a reasonable probability that the suppressed evidence would have produced a different verdict. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 289–90 (1999) (To obtain relief, a defendant "must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* '[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" (citation omitted and brackets in original) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)). When there is adequate corroboration for an identification, it will be difficult for an accused to establish a reasonable likelihood that the use of an alternative identification procedure would have exculpated her.

[247] *See supra* Part I.C; *cf. Manson*, 432 U.S. 98, 112–13 ("[T]he *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach —cases in which the identification is reliable despite an unnecessarily suggestive identification procedure—reversal is a Draconian sanction.") (footnote omitted).

correctly identified.[248] Perhaps it is necessary to run some risk of false identification of the innocent to achieve an acceptable rate at which the guilty can be identified.

Nor is it easy to explain why due process prevents a conviction obtained by evidence that a judge finds reliable under the totality of the circumstances, even if it is possible that more rigorous identification protocols might not have generated the same evidence. After all, it is hard to know whether the different result that a more rigorous protocol might produce would reflect a false identification of an innocent, or a false exoneration of the guilty. In any event, any effort to assess reliability exclusively by reference to the procedures used to obtain an identification is a fool's errand. As we have seen, the reliability of most evidence cannot be assessed in a vacuum; reliability can be properly assessed only in light of the totality of the circumstances.[249] That is what makes *Manson* preferable to its prophylactic alternatives. A Blackstonian approach that resists any evidence thought to raise a risk of wrongful conviction, as we have seen, is one that could bar the use of pretty much any evidence of guilt. Without a stopping point, unvarnished Blackstonism becomes an engine for the destruction of the criminal justice system.

CONCLUSION

It is strong medicine for a court to bar an eyewitness—perhaps even a victim—from testifying that she sees the perpetrator sitting in the courtroom.[250] For that reason, it may be that *Manson* will inevitably be applied in a deferential manner; in all but the clearest cases, most judges are likely to balk at the idea of preventing an eyewitness from telling a jury what she saw. Perhaps expert testimony and jury instructions can sensitize juries to the risks of eyewitness identification evidence, although, as we have seen, there is reason to doubt that this will prove anything close to a panacea.[251] Even so, there is no good alternative.

Blackstonians could drive the risk of wrongful conviction on the basis of eyewitness testimony to zero by barring all of it; but few would regard that as an acceptable tradeoff. Surely *Manson* was correct to observe that our

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[248] *See supra* Part II.A.1.

[249] *See supra* text accompanying note 182.

[250] *Cf.* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 251 ("[I]magine looking a rape victim in the eye, one who swears that she can identify the man who violated her, and telling that woman she will not even be allowed to tell her story to a jury. It is no wonder that few identifications have been suppressed for due process violations.") (footnote omitted).

[251] *See supra* text accompanying notes 168–170.

conception of due process includes concern about preserving the ability of the prosecution to have a fair opportunity to convict the guilty.[252] Absent far clearer empirical evidence about the costs and benefits of prophylaxis than can be found in current research, *Manson*'s totality-of-the-evidence approach, with all its imperfections, is likely the best we can do.

As long as fallible people are involved in the administration of justice, there will be a risk of wrongful conviction. To be sure, there are ample reasons to endeavor to minimize the risk of wrongful conviction. It is no small feat, however, to design Blackstonian reforms that drive down the risk of wrongful conviction of the innocent without increasing the rate at which the guilty go free.

If the guilty must go unpunished to vindicate a constitutional limitation on the ability of the government to obtain evidence—such as the Fourth Amendment's prohibition on unreasonable search and seizure—then perhaps that is a price that the Constitution itself exacts.[253] No such constitutional limitation is at stake, however, when the objection to evidence obtained by the government is that it may be unreliable. If reliability is the constitutional concern, then a totality-of-the-circumstances test for reliability seems well-suited to address the problem. It is far from evident that a prophylactic approach would be superior. A totality-of-the-circumstances test will produce an error rate—especially given the reluctance of courts to exclude eyewitness accounts—but prophylaxis, by its nature, produces an error rate as well.

Perhaps *Manson* is doomed to be applied in a manner that renders it largely toothless except in the face of the clearest examples of official suggestion, but that may well be the best that we can expect when the judiciary must grapple with the difficult tradeoff between the risk of convicting the innocent if eyewitness testimony is wrong, and acquitting the guilty if the eyewitness testimony kept from the trier of fact. Perhaps due

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[252] *See Manson*, 432 U.S. at 111–13 ("There are, of course, several interests to be considered and taken into account," including "the effect on the administration of justice," and adding that "inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm.").

[253] *Cf.* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392–93 (1983) ("Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.") (footnotes omitted).

process must accommodate the reality that achieving an optimal balance between those two risks is a hopeless task. The jury may be an imperfect vehicle for assessing eyewitness evidence, but it is the vehicle for resolving guilt or innocence found in the Constitution. We can have little confidence that a judge-made substitute will do better.