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RELIABLE IDENTIFICATION: COULD THE SUPREME COURT TELL IN *Manson v. Brathwaite*?

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*Manson v. Brathwaite*,¹ decided by the United States Supreme Court in 1977, is the leading case concerning criteria for the accurate identification of criminals.² Despite its significance, the decision is disappointing because the Court reached its conclusions without discussing relevant psychological studies.³

The Court held that an identification resulting from suggestive police procedures should be suppressed only if the identification is unreliable,⁴ and the Court listed factors to be analyzed in reaching a determination of reliability. Obviously, the *Manson* Court believed that analysis of those factors could lead to a rational conclusion about an identification's trustworthiness. The Court, however, did not set forth reasons for this belief and it cited no authority to establish the efficacy of these factors.⁵ Although an increasing body of scientific work has examined human perception in general and eyewitness identification in particular, the Court did not utilize this in-

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2. Misidentifications pose a double threat to our system of justice. If a misidentification is made, not only is an innocent man convicted and perhaps deprived of his freedom, but also, the real criminal remains at large, perhaps to continue his antisocial activities. As Justice Marshall said in his dissenting opinion in *Manson*:

   Indeed, impermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law . . . . For if the police and public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

432 U.S. at 127.


4. See text accompanying notes 12-20, infra.

5. According to the Court, the relevant factors were set out in Neil v. Biggers, 409 U.S. 188, 199-200 (1972). In *Biggers*, the Court justified its selection of those particular factors by merely stating that they were "indicated by our cases . . . ." *Id.* at 199.
formation. Instead, it relied on its own intuitions to determine whether an identification is reliable.

Eyewitness identifications present a special problem in criminal cases because witnesses frequently make mistakes in identifying criminals and because juries cannot be expected to discern the incorrect identifications. Although the Supreme Court set forth guide-

6. See P. Wall, Eye-Witness Identification in Criminal Cases (1965). In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court surveyed several studies documenting mistaken identifications and concluded, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Id. at 228. Scientific studies consistently support these conclusions. Several years ago, for instance, a noted psychologist showed a videotape of a staged purse snatching on a local New York City television channel. The "crime" was not atypical; it lasted about twelve seconds, and the thief ran towards the camera for a second or two. Immediately thereafter, a six-man lineup was shown and the viewers were told that the thief might be one of the six. Viewers were given a special telephone number so they could record their identification if they wished. Over two thousand calls were made, and only 14.1% picked the correct person. Since there were seven choices—the six in the array plus the alternative of "none"—pure guessing would have led 14% of the viewers to the correct conclusion. Slightly less than a quarter of them selected the "none" option while 65% selected an innocent person. See E. Loftus, supra note 3, at 135-36. Similar tests have produced similar results. For example, fifty-two witnesses to a staged, live crime saw two videotape lineups three weeks later. One of the lineups included the "criminal"; the other did not, but did include someone who resembled him. Slightly more than a quarter of the witnesses chose the correct person, but then half of those went on to select another out of the second array. Those who changed their correct selection had great confidence in their accuracy. (See text accompanying notes 42-44 infra for a discussion of the correlation between confidence and reliability.) Nineteen percent picked no one, while 44% chose an innocent person. See A.D. Yarmony, supra note 3, at 156.

Other studies support the conclusion that jurors are greatly influenced by eyewitness identification testimony even if it has been powerfully discredited. For instance, in one experiment a set of subjects was divided into three groups. The first group was given a hypothetical case based totally on circumstantial evidence, and only 18% of the group would have convicted. The second group was given the same facts with the addition of an identification by the "victim"; and the conviction rate soared to 72%. The final group was given the circumstantial evidence with the identification plus the additional fact that the eyewitness had vision worse than 20/400 and was not wearing his glasses at the time of the crime. Sixty-eight percent voted for conviction. See E. Loftus, supra note 3, at 10.

In another study, witnesses watched a staged crime, made identifications, and rated their selections according to the degree of confidence they had in the accuracy. These witnesses were then cross-examined in front of mock jurors. The jurors believed the witnesses approximately 80% of the time, and believed the inaccurate identifier as often as the accurate one. The verdicts, therefore, were not correlated to reliability but to the confidence of the witnesses. Jurors were sure of witnesses who were sure of their own perceptions. See E. Loftus, supra note 3, at 18-19. (The nature of the cross-examination was not set out, so the study can be challenged by claiming that more effective questioning would have revealed flaws in the identification. Certainly trial lawyers, confident in their own craft, would like to believe that, but this author has found no studies to support the proposition that cross-examination can assist jurors in separating correct and incorrect identification. In fact, all evidence is to the contrary.)

Scientists have established, then, that people make frequent mistakes in identification, that jurors give great weight to identification testimony, and that jurors are not always able to distinguish the accurate identifier from the inaccurate. In other words, as Wade noted, the
lines for determining the accuracy of identifications, it provided no reasons why its methods for divining accuracy were any better than those practiced by the average juror. Indeed, the Court would have had difficulty providing those reasons, for the relevant scientific studies indicate that the Manson Court's self-confidence in its ability to discern reliable identifications was egregiously misplaced.

A fresh look at Manson is needed. This article seeks to examine Manson v. Brathwaite in light of the psychological studies analyzing identifications, to discuss some scientific findings concerning suggestive identification procedures, and to present a method of objectively evaluating the suggestiveness of lineups.

THE Manson DECISION

In the majority of identification cases, a suspect's only constitutional protection comes from the line of Supreme Court cases culminating in Manson v. Brathwaite. Basing its decision on due process, the Court in Manson held that testimony about unnecessarily sug-

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7. 432 U.S. 98 (1977). In Stovall v. Denno, 388 U.S. 293 (1967), decided the same term as United States v. Wade, 388 U.S. 218 (1967), and California v. Gilbert, 388 U.S. 263 (1967), the Court held that even when the right to counsel does not attach to an identification procedure, that procedure must still meet the requirements of due process to be admissible at trial. Due process is violated when, judged by the "totality of the circumstances," the conduct of the identification procedure is "unnecessarily suggestive and conducive to [an] irreparable mistaken identification . . ." 388 U.S. at 302. On the facts before it, the Court held that while the identification procedure was suggestive, circumstances justified its use. Thus, the identification procedure was not unnecessarily suggestive and due process had not been denied. Although the due process test was also used in Simmons v. United States, 390 U.S. 377 (1968), Foster v. California, 394 U.S. 440 (1969), and Coleman v. Alabama, 399 U.S. 1 (1970), it was not until Neil v. Biggers, 409 U.S. 188 (1972), that the Supreme Court specifically addressed the question whether due process requires that the out-of-court identification resulting from an unnecessarily suggestive procedure be treated differently from the subsequent in-court identification. The Court held:

It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." . . . While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.

409 U.S. at 198. The Court went on to reject the contention that, in the case before it, testimony about the unnecessarily suggestive out-of-court identification had to be automatically excluded. The Court stated that the purpose of such a stringent remedy was deterrence, but since the contested procedure and trial took place before Stovall, no deterrent function would be served by applying that remedy in Neil v. Biggers.
gestive identification procedures would be excluded only if that procedure led to an unreliable identification. The *Manson* Court rejected the *per se* exclusionary rule accepted by the Second Circuit Court of Appeals in its *Manson* decision.

Judge Friendly, writing for a unanimous panel of that court, stated that due process requires different tests for the out-of-court identification and for the in-court identification. If the police or prosecutor used an unnecessarily suggestive out-of-court procedure to obtain an identification, the Constitution forbids trial testimony about that identification. If an in-court identification, however, would be allowed even if it followed an unnecessarily suggestive out-of-court procedure if it could be shown that the in-court identification "stemmed from the original observation of the defendant rather than the tainted identification." The Second Circuit concluded that this two-part test with the automatic exclusion from trial of all unnecessarily suggestive procedures was essential as a deterrent to insure that the authorities would endeavor to use fair procedures: "No rule less stringent than these can force police-administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification."

The Supreme Court reversed, rejecting this automatic exclusionary rule. Instead, it adopted an approach that relies on the totality of the circumstances. This test "permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability."

Justice Blackmun, writing for the Court, contrasted the *per se* approach and the totality approach. First, he noted that the Supreme Court cases concerning identification

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9. The Supreme Court summarized the Second Circuit's holding: "The first, or *per se* approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggestive confrontation procedures." 432 U.S. at 110.
10. 527 F.2d at 367. These standards track the holdings of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967). In those two cases, the Supreme Court held that if a suspect is unconstitutionally deprived of counsel at a lineup, the prosecution is barred from presenting evidence about the lineup at any subsequent trial. An in-court identification will not be excluded if the prosecution can "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." 388 U.S. at 240.
11. 527 F.2d at 371.
12. 432 U.S. at 110.
reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable.

The third factor is the effect on the administration of justice. Here the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free.3

The Supreme Court's holding in Manson means that neither out-of-court nor in-court identifications will be excluded merely because unnecessarily suggestive procedures were used. Rather, exclusion will follow only if the result of those procedures is an unreliable identification. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ."14

While Manson v. Brathwaite may assure admission of reliable identifications at trial, it will provide little deterrence to the use of suggestive procedures.6 Indeed, the Manson Court expressed no

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13. Id. at 112.
14. Id. at 114.
15. At least two practical effects of this test make it unlikely that authorities will be deterred from the use of suggestive identification procedures. First, regardless of how specifically opinions define what is unnecessarily suggestive, a police officer can never know whether he is violating a suspect's constitutional rights when he is conducting an identification procedure. That can be determined only when the indicia of reliability are examined. These factors may not be known to the officer and certainly cannot be controlled by him. The Court's approach leaves the officer without any firm rules as to what conduct violates the Constitution. If the officer has no way of knowing what actions are forbidden, he can hardly be deterred from those actions.

The second reason that the Court's test will not prove a significant deterrent relates to the fact that the test is the same for both in-court and out-of-court identifications. To suppress either, a defendant must show that the procedure was unnecessarily suggestive and that an unreliable identification resulted. Thus, the granting of one motion would seem to require the granting of the other. The suppression of the out-of-court identification may have important consequences at trial. See, e.g., Brathwaite v. Manson, 527 F.2d at 367 n.6.
concern about this possibility, for it felt that juries generally could detect questionable procedures:

We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.\(^\text{16}\)

**The Reliability of Identifications**

Whatever efficacy the *Manson* approach may have will be lost, however, if courts are unable to discern suggestive identification procedures or are unable to interpret signs of reliability correctly. The *Manson* Court did not have to determine whether the identification procedure used in that case was suggestive because the parties agreed that it was.\(^\text{17}\) Instead, the Court addressed the question of whether the identification obtained was reliable.

Brathwaite had been convicted in a Connecticut state court of the sale and possession of heroin. The chief evidence against him came from Jimmy Glover, a black undercover narcotics officer. A few minutes before sundown one day, Glover, accompanied by an

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Important though it may be, exclusion of the out-of-court confrontation by itself will not mean that a prosecution has to be dropped. On the other hand, if the in-court identification is suppressed, it is likely that no provable case will remain, since that identification is often relied upon to prove essential elements of the crime. Indeed, *Manson* itself would seem to be an example of such a case. Thus, under the Supreme Court's approach, a court's determination that an identification must be suppressed will mean the suppression of both identifications; this will often be equivalent to dismissing the case. Most courts are reluctant to recognize constitutional violations when the remedy is so drastic. As one writer has stated in discussing the dismissal remedy for denial of a speedy trial:

The severity of this remedy, and the fear of dangerous criminals going free on technicalities, has made courts loathe to find a deprivation of this right in all but the most extreme circumstances. One commentator has noted that the dismissal remedy has converted the speedy trial right from the right of any criminal defendant to have a speedy trial into the right of a few defendants, those most egregiously denied a speedy trial to have the criminal charges against them dismissed.

C. Whitebread, *Criminal Procedure: An Analysis of Constitutional Cases and Concepts* 476 (1980) (citing Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stanford L. Rev. 525 (1975)). The result will be the same here. Since finding a violation of due process under the Supreme Court's approach will often result in the dismissal of the case, courts will seldom find a constitutional violation. Thus, few suggestive practices by the police or prosecutor will be deterred.

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17. "Petitioner at the outset acknowledges 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].'" 432 U.S. at 109.
RELIABLE IDENTIFICATION

informant, knocked on a third-floor apartment door. The door opened about a foot-and-a-half. Glover could see a man standing inside the doorway by the natural light coming through a window in the hall. Glover asked for heroin and gave money to the man at the door. The door closed. When it reopened, Glover was handed the heroin. The entire transaction took between five and seven minutes.

At police headquarters, Glover stated that he did not know the seller's identity, but he described the seller as "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, with high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt."18

A backup officer suspected that Brathwaite might be the seller. He found a police photograph of Brathwaite and put it on Glover's desk. Two days after the sale, Glover saw this picture and identified the person depicted therein as the seller.

The Supreme Court analyzed the reliability of the identification in light of several criteria. The first of these was whether there was adequate opportunity to view the criminal. The Court stressed that there was sufficient light to see19 and that Glover had two to three minutes to observe the seller at a distance of only a few feet. Psychologists confirm that the less time one looks, the less accurately one perceives. Subjects can, for example, remember faces better after viewing them for thirty-two seconds than after seeing them for ten.20 Therefore, in this respect, the Court's assessment of the importance of length of observation happened to coincide with psychological evidence.

Had the Court been familiar with perception studies, however, it would have made another inquiry. The majority stressed that the undercover officer observed the drug dealer for two to three minutes. The Court did not state how this duration was established, but it apparently came from the witness himself.21 The Court needed to

19. The Court of Appeals came to a different conclusion on this issue. That court said, "Although Glover testified that the hallway was well lit by sunlight, we can take judicial notice that on [the day of the sale] sunset at Hartford took place at 7:53 p.m." 527 F.2d at 371. The transaction occurred at about 7:45 p.m.
20. E. Loftus, supra note 3, at 23.
21. The dissent challenged this conclusion about the time and concluded that the length of observation could have been less than half a minute: "Careful review of the record shows that he could see the heroin seller only for the time it took to speak three sentences of four or five short words, to hand over some money, . . . and later after the door reopened, to receive the drugs in return. . . . The entire face-to-face transaction could have taken as little as 15 or 20 seconds." 432 U.S. at 129.
deal also with the witness's ability to perceive time. While many people would consider estimates of time to be in the same category as estimations of height, weight, distance, and speed, time estimates are in fact different. While estimates of height and weight might be high or low, estimates of distance long or short, and estimates of speed fast or slow, estimates of the duration of an event are invariably incorrect in one direction: people believe events last longer than they do. The duration of an observation cannot be judged by the observer's estimate. He will state that it lasted longer than it did, and if a court relies on such an estimate, the court will give the observer more credence than he deserves. In this case, "two to three minutes" was probably longer than the actual observation.

The Court did analyze the degree of Glover's attention to the man at the door. The Court noted that Glover was black and therefore concluded that Glover was unlikely to perceive only the general features of the black seller. If the Court was accepting in an off-hand manner the proposition that it is harder to recognize the face of a person belonging to another race than one's own, the Court's conclusion is borne out by experimental data. The Court went on to stress, however, that Glover "was a trained police officer on duty . . . [and], that as a specially trained, assigned, and experienced of-

22. Experimenters have discovered that most people have particular difficulty making accurate estimates of speed. For instance, in one study, Air Force personnel who knew in advance that they would be asked about the speed of a vehicle, gave estimates ranging from ten to fifty miles per hour when the actual speed was twelve. E. Loftus, supra note 3, at 29. See also A.D. Yarmey, supra note 3, at 40.

23. E. Loftus, supra note 3, at 29-30. See also J. Marshall, Law and Psychology in Conflict 55, 71 (1966) for examples of events estimated to last two-and-a-half times longer than they did.

24. E. Loftus, supra note 3, at 137; A.D. Yarmey, supra note 3, at 130-31. See also J. Marshall, supra note 23, at 55. The studies do not all agree on what effects racial prejudice or experience with other races have on the ability to identify members of another race. Loftus summarizes studies involving blacks and Caucasians: "[C]ontrary to widely held assumptions, racial attitude and amount of interracial experience were not related systematically to recognition accuracy for subjects of either race." E. Loftus, supra note 3, at 139. Yarmey, however, cites studies which do support the conclusions that attitudes and experience do affect the ability to recognize people from other races. A.D. Yarmey, supra note 3, at 130-34. Both authors concur on the general proposition that whites have more trouble recognizing blacks than other whites, and blacks can more easily discern blacks than whites.

In our multi-racial society, understanding the relative difficulty of making a cross-racial identification will often be crucial to a criminal case. This concept, however, has hardly reached universal knowledge. A survey of college students, for instance, found that only a bare majority understood the effect of cross-racial identifications on accuracy and that 13% thought it easier for a white to identify a black than another white. E. Loftus, supra note 3, at 173. This information hardly supports the Manson Court's faith in the ability of juries to decide identification cases accurately. See text accompanying note 16 supra.
officer, he could be expected to pay scrupulous attention to detail, for
he knew that subsequently he would have to find and arrest his ven-
dor." The Court, therefore, assumed that the perceptions of a
trained police officer are more reliable than the perceptions of those
not so trained. Unfortunately, this assumption is unwarranted. Stud-
ies do not support the idea that police make more reliable witnesses
than civilians or that their training in any way improves their ability
to make identifications. Thus, in one major study, both police and
civilians were shown a film of a street scene. Police "saw" many
more crimes that had in fact not occurred than the civilians, while
the police were no more accurate than the civilians in correctly re-
porting the true crimes. 26

In another study, identification tests were given to subjects who
had undergone a program specifically designed to increase the ability
to identify faces. The results showed "absolutely no evidence for any
effect of the training course on the ability of subjects to remember
photographed faces . . . ." 27

Finally, in mentioning the assignments of the trained under-
cover officer, the Court characterized them as "specialized and dan-
gerous . . . ." 28 The Court did not explicitly attach any significance
to this description. Perhaps the Court implicitly reasoned that since
the officer was on a dangerous mission, he must have been especially
alert; therefore, his observations were reliable. If, however, Glover's
job were very dangerous, he performed his duties under great stress.
While the Supreme Court might think that danger heightens aware-
ness, psychologists have known for some time that stress does not aid
perception and learning, but inhibits them. 29 Thus, the Court may

25. 432 U.S. at 115.
26. A.D. YARMey, supra note 3, at 159-60; E. Loftus, supra note 3, at 165. In a sepa-
rate study, remarkably similar results were found. J. Marshall, supra note 23, at 75.
27. E. Loftus, supra note 3, at 168. Yarmey states that some evidence suggests that
training in cross-racial recognition can improve accuracy. A.D. YARMey, supra note 3, at 135-
36. Loftus does not exclude the possibility that better training could improve identification
accuracy. E. Loftus, supra note 3, at 170. The fact remains, however, that no study shows
that any training as now given improves the accuracy of identifications.
28. 432 U.S. at 115.
29. E. Loftus, supra note 3, at 33. This is the Yerkes-Dodson Law, first noted in 1908,
which states that mild levels of arousal can produce alertness and increase learning, but high
levels inhibit accurate perception. See also J. Marshall, supra note 23, at 31.
Studies have consistently shown that the more stress a crime produces, the more in-
complete and inaccurate are the perceptions about it. Thus, witnesses of a violent event recall less
about the incident than those who view a non-violent one. E. Loftus, supra note 3, at 31-32.
Apparently, fear and other strong emotions restrict attention to an event's central factors while
the peripheral go on without notice. A.D. YARMey, supra note 3, at 79. Thus, when a weapon
have incorrectly assessed the effect of the dangerousness of Glover's duties on the reliability of his observations.\(^8\)

As a third indication of reliability, the Court believed that the specificity of the undercover officer's initial description supported the reliability of his subsequent identification:

Glover's description was given . . . within minutes after the transaction. It included the vendor's race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that Bratwaite did not possess the physical characteristics so described.\(^9\)

It would seem logical that one who is able to give a highly detailed and accurate description of another would be more likely to recognize the other person than somebody who cannot give such a description. Unfortunately, this common-sense conclusion has no scientific support, and indeed may be false. A. Daniel Yarmey states that not many studies have been done in this area, but the results of those that have been done are consistent: "[A]lthough faces easily evoke verbal labels as word associates, ease of labeling was not related to accuracy of facial recognition."\(^9\) In fact, an early study found that "subjects who were most accurate in the recognition test were the poorest in verbally recalling details of the faces."\(^9\) How-

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30. If the Supreme Court did not understand these effects of stress, it is not alone in its ignorance. In an attempt to find out whether potential jurors truly understood some of the factors which might make identifications unreliable, 500 students at the University of Washington were surveyed. Less than 20% knew that observations of a violent event would be less accurate than those of a non-violent one, while 66% thought just the opposite. Similarly, less than a majority knew that "weapon focus" makes an identification more difficult. E. Loftus, supra note 3, at 174-75. Obviously, many people mistakenly believe that stress heights awareness and makes observations more accurate than they usually are. Once again, this fact hardly supports the Manson Court's faith in the ability of juries to correctly assess the accuracy of identifications.

31. 432 U.S. at 115. The dissent found this description to be valueless: "[T]he description given by Glover was actually no more than a general summary of the seller's appearance" which would have fit many Blacks in the community. 432 U.S. at 131.

32. A.D. Yarmey, supra note 3, at 138.

33. A.D. Yarmey, supra note 3, at 114. Yarmey flatly concludes, "[O]bservers' ability to verbally describe faces is not predictive of their ability to recognize these faces." A.D. Yarmey, supra note 3, at 139.

Marshall's work also supports the conclusion that an accurate description shortly after the event does not indicate that a subsequent identification is reliable. In his experiment, subjects saw a film of a suspicious occurrence. The subjects then were asked to give their own narrative of what happened. Later they were interrogated about their perceptions. Marshall discovered
ever, the Supreme Court, ignorant of these studies, erroneously concluded that a description indicated the reliability of a subsequent identification.

The majority in *Manson v. Brathwaite* also found the certainty with which Glover made his identification to be an indication of reliability. In response to a question whether the photograph was that of the seller, Glover said, "There is no question whatsoever." Once again, the evidence does not support the Court's assumption. Although studies have found some relationship between confidence of a response and its accuracy, this correlation does not hold true for identifications. Yarmey summarizes: "The expressed confidence of an eyewitness does not mean that his or her identification is necessarily accurate. In fact, research indicates no relationship."

Finally, the Court considered the time lapse prior to the identification and concluded that the forty-eight hours between the sale and Glover's viewing of the photograph supported reliability. It is commonly believed that as time goes on, one is able to remember less and less about an event. While science generally confirms this notion, it has been shown that forgetting does not always correlate directly with the passage of time. Instead, the "forgetting curve" shows that most of the memory loss occurs shortly after the learning and then tapers off. The rapidity of memory loss can be startling. In one test, subjects achieved ninety percent accuracy in describing an event immediately after its conclusion, while two days later, recall was just slightly better than mere guessing. Of course, not everything is forgotten that quickly. In fact this pattern of forgetting...

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"that the more accurate witnesses were often those who after interrogation said that they wanted to change the testimony that they had given in their free reports . . . [and] that those witnesses who wished to change their testimony tended to be more accurate than others . . . ." J. MARSHALL, *supra* note 23, at 109.

34. 432 U.S. at 115. The dissent characterized reliance on the witness's certainty as "worthless." 432 U.S. at 130.

35. E. LOFTUS, *supra* note 3, at 100-01. Loftus cites one study in which those making incorrect identifications were as confident in their accuracy as those who were correct and another in which those who were incorrect in their responses were more confident than those who were correct.

36. A.D. YARMEY, *supra* note 3, at 180; see also id. at 150-51.

37. Psychologists do not agree whether the passage of time alone causes loss of memory. Some evidence indicates that forgetting is the result of interference with other learning or memories. This interference can come after or before the perception of the event in question. See A.D. YARMEY, *supra* note 3, at 72-73; and E. LOFTUS, *supra* note 3, at 55. Whatever the cause, studies indicate that forgetting follows the general pattern described in the text.


might be subject to an exception of crucial significance to criminal law: it may not pertain to the recall of faces. Evidence exists for the proposition that recall of faces may improve with time.\textsuperscript{40} For instance, in one study, the recollection of pictures improved over time, while over that same span the recall of words dropped.\textsuperscript{41} In another experiment, subjects were shown candid photos and then later shown front bust views for identification. Accuracy remained constant in tests conducted four minutes after the viewing and one week after the viewing.\textsuperscript{42}

Once again, however, the \textit{Manson v. Brathwaite} Court was ignorant of this important evidence. Thus, in concluding that the identification resulting from the suggestive procedures was reliable, the Court stressed that the disputed showing of the picture came only two days after the crime, not weeks or months later.\textsuperscript{43} As discussed above, there is evidence indicating that recall may be lost within a period as short as forty-eight hours.\textsuperscript{44} On the other hand, the Supreme Court could have bolstered its conclusion by citing the studies showing no loss of memory over time for visual images. The Court chose neither of these approaches but instead relied on its own intuitive conclusions.

In \textit{Manson v. Brathwaite}, the Supreme Court said that reliability was the "linchpin" in determining whether an identification could be constitutionally admitted into evidence and then went on to list factors which should be considered in determining reliability. As discussed, however, the Court's analysis of these factors was greatly flawed. In finding that the identification was trustworthy, the Court relied on evidence having no bearing on reliability and, even worse,

\begin{footnotesize}
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  \item 40. A.D. Yarmey, \textit{supra} note 3, at 118.
  \item 41. A.D. Yarmey, \textit{supra} note 3, at 77-78.
  \item 42. A.D. Yarmey, \textit{supra} note 3, at 121. This area is one of many where more psychological study is needed. Indeed, if these anomalous results are correct, much of the current thinking about identifications must be re-evaluated. For instance, Yarmey concludes, "Police investigators and the courts must be cautious in rejecting the testimony of witnesses who claim they cannot remember who or what they saw soon after its occurrence, but can remember it minutes, hours, or perhaps even days later." A.D. Yarmey, \textit{supra} note 3, at 78.
  \item 43. 432 U.S. at 115-16.
  \item 44. In his dissent, Justice Marshall displayed some awareness of the relevant science. He concluded:
    The fact is that the greatest memory loss occurs within hours after an event. After that, the dropoff continues much more slowly. Thus, the reliability of an identification is increased only if it was made within several hours of the crime. If the time gap is any greater, reliability necessarily decreases.
  \item 432 U.S. at 131 (Marshall, J., dissenting). Justice Marshall's opinion, however, makes no mention of the conflicting evidence collected by Yarmey.
\end{itemize}
\end{footnotesize}
RELIABLE IDENTIFICATION

the Court found support for reliability in facts which actually tended to show that the identification was unreliable. The "linchpin" as defined by the Court is obviously and dangerously weak.

If the Court's mode of analysis is followed, very few identifications will be suppressed. In fact, use of this "intuitive" approach will mean that many unreliable identifications will be admitted into evidence. Since the admission of unreliable identifications has to be correlated with unjust convictions, the Court's approach in *Manson* means that innocent people will go to jail while guilty ones remain free. 46

SUGGESTIVE IDENTIFICATION PROCEDURES

Untrustworthy identifications will be admitted if the courts do not understand what criteria truly indicate reliability. Untrustworthy identifications will also be admitted if courts cannot discern suggestive identification procedures. Scientific studies indicate that two prevalent identification procedures, looking at mugshots and lineups, are often suggestive. 47 One of the reasons for their suggestiveness

45. See note 15 *supra*.
46. See note 2 *supra*.
47. Suggestiveness, of course, not only affects identifications; it can affect many areas of litigation. For example, the suggestiveness of questioning by police officers investigating a crime or lawyers preparing a witness for trial can alter a witness's memory of an event. Thus, in one set of experiments, subjects were shown a film of a moving automobile. Some were then asked, "How fast was the white sports car going while traveling along the country road?" Others were asked, "How fast was the white sports car going when it passed the barn while traveling along the country road?" No barn was visible in the film. A week later, all the subjects were asked whether they remembered seeing a barn in the movie. Of those given the misinformation, 17% remembered the nonexistent structure, while only 3% who had been asked the neutral question said they saw it. E. LOFTUS, *supra* note 3, at 60.

Questioning does not have to be this blatant to produce a similar effect. One set of subjects who had viewed a film of a car accident was asked to estimate the speed of the cars when they "smashed." The other set was asked to give the speed when they "hit." Later, all subjects were tested on their memory of seeing broken glass in the collision. Nearly 33% of those whose question included the word "smashed" reported broken glass; only 14% of the other set did. No broken glass was evident in the film. E. LOFTUS, *supra* note 3, at 77-78.

Limitations on these distortions have been discovered. For instance, the memory can be affected mainly about peripheral items, not central items. E. LOFTUS, *supra* note 3, at 63. Furthermore, once a witness resists blatantly false information, his resistance to other misleading suggestions also increases. E. LOFTUS, *supra* note 3, at 125. The timing of the suggestive questioning also affects the distortion. The greater the lapse of time between the perception and the suggestion, the greater the likelihood of memory alteration. If the suggestion occurs shortly after the perception, both the memory of the event and the suggestion will fade. Loftus summarizes:

Longer retention intervals lead to worse performance, consistent information improves performance, and misleading information that is given immediately after an event has less of an impact on the memory than misleading information that is
relates to the psychological phenomenon of unconscious transference: a face seen in one situation is mistakenly remembered to have been seen in another. In one study, two or three days after a staged crime, witnesses looked at mugshots. Some of the pictures were of “criminals” from the event, while others were of people the witnesses had never before seen. Four or five days after the photos were inspected, a corporeal lineup was held. “18 percent of the persons in the lineup who had never been seen before were mistakenly identified. However, if a person’s mugshot had been seen in the interim, this percentage rose to 29 percent.”

It frequently happens in criminal cases that a few days after a crime the witnesses thumb through pictures and are later asked to make identifications from a lineup. Unconscious transference might cause an innocent person to be positively identified in a lineup simply because his picture was in police files. Several things can be done to protect against this effect. For instance, if a suspect is identified at a lineup and his picture was viewed earlier by the witness who did not identify that picture as depicting the criminal, the identification procedure should be regarded as suggestive.

No determination about this unconscious transference can be made, however, if there is no way to ascertain what pictures the witness saw. Often the witness looks through large books or file drawers of photos, and the police usually have no records of what is in those books or drawers. By the time an identification is challenged in delayed until just prior to the test. Apparently, giving the event information a chance to fade in memory makes it easier to introduce misleading information.

E. LOFTUS, supra note 3, at 66. In practical terms, then, the greatest danger is not with the police investigating immediately after a crime, but with attorneys preparing witnesses for trial.

The mere wording of a question designed to elicit recall, however, can affect the recollection given. For instance, one half of a group of subjects was asked how “tall” a person was and gave an average answer of seventy-nine inches. The other half was asked how “short.” The average answer to that question was “sixty-nine inches.” Similarly, how “long” was a movie brought the reply, “130 minutes;” how short, “100 minutes.” E. LOFTUS, supra note 3, at 94-95. Of course, leading questions are controlled in court, but not before. The time before trial is the crucial period. Once an answer is stamped upon one’s memory, subsequent attempts to recall the memory may not elicit the original memory, but only the response to an earlier question. E. LOFTUS, supra note 3, at 86.

These studies, of course, only begin to provide the information needed to make litigation more just. Current data merely indicate some factors tending to cause inaccurate memories; it does not reveal whether a memory has been distorted in particular instances. See A.D. YARMEY, supra note 3, at 73. The studies do, however, provide guidance to those desirous of the fullest, most reliable recollections. Loftus suggests that the investigator interested in getting the most complete and accurate story should first solicit a free narrative and then follow up with questions to fill in the gaps. E. LOFTUS, supra note 3, at 91-92.

48. E. LOFTUS, supra note 3, at 151.
court, no one can discover whether the witness saw a picture of the defendant before the lineup identification. The starting point, then, should be to require police to keep accurate records of the mugshots shown to witnesses.

Some of the suggestiveness of showing pictures can be lessened by the use of control people. After a description is obtained from a witness, pictures of people who fit the description but who could not have committed the crime — police officers, for example — should be inserted with the other pictures to be viewed. At a subsequent lineup, the control people as well as the suspects should be present in the lineup. This would not eliminate false identifications, but it might lessen the chance of unconscious transference.

Another psychological phenomenon which can result in suggestive identifications is the “Rosenthal effect.” Simply put, this means that “the expectations or hypotheses of an authority can influence the behavior of others.” A lineup demonstrates the operation of this effect. The police officers conducting the lineup may think they know who the criminal is and may want the witnesses to select that particular person. The police are quite clearly the authority figures in the situation. The Rosenthal effect would cause witnesses to select the person that the police want them to select. To prevent this result, three protective steps should be taken. First, those conducting the lineup should not know who the suspect is. Second, the investigator who assembles the array should not be present when the witness views the people. Third, the witness must not know with certainty that a suspect is in a lineup. In one study, it was discovered that if witnesses were told that a suspect was in the lineup, thirty-eight percent of them made inaccurate identifications. If the witnesses were told merely that the suspect may or may not be present in the lineup, only four percent made errors. In practice, however, even if a witness is told that a suspect may or may not be in a lineup, the witness nevertheless may conclude that the police have picked up someone, or they would not go to the trouble of arranging a lineup. If the witness so concludes, the effect would be as if he had been told that

49. A.D. Yarmey, supra note 3, at 154.

50. “Since the police officer obtains his rewards and satisfactions from the successful identification of persons responsible for misconduct, and since such success is ‘confirmed’ through prosecution, conviction and sentencing, any interference with this sequence may be experienced as terribly frustrating.” Toch, Psychological Consequences of the Police Role, (paper presented at the annual meeting of the American Psychological Association, Sept. 1, 1963), quoted in J. Marshall, supra note 23, at 96.

51. A.D. Yarmey, supra note 3, at 156.
a suspect were present. Assembling multiple lineups, however, would be a simple means of offsetting this problem. In this scheme, no single lineup would ever be held. Instead, a lineup in which the suspect is placed would always be preceded or followed by a test lineup which does not include the suspect. Psychological studies clearly support the conclusion that a lineup which does not contain all three of these protections should be considered a suggestive identification procedure.

Elimination of unconscious transference and the Rosenthal effect will not necessarily preclude all possibility of suggestiveness. Elizabeth Loftus has suggested a practical method of determining the fairness of a lineup. She begins with the premise that if a lineup is fair, people who were not witnesses to the crime but who only heard the witnesses' description of the criminal should pick each person in the lineup with the same statistical frequency; that is, if six people are in a lineup, those "non-witnesses" should pick each person in the array one-sixth of the time. Thus, if each person in the lineup is picked at the same rate, then the lineup has not been arranged to single out any person. If, however, using the most extreme example, the description of the criminal included the fact that he was black, and only one black person appears in the lineup, then those knowing the description but not having seen the event would clearly pick this person every time. Similarly, if the description were of a tall person, and only one in the array was over 5'4", then that one person would always be selected. In any situation where the non-witnesses pick the defendant with great frequency, one must assume that suggestive influences existed in the lineup procedure.

In an actual case, for instance, the victim described the robber as male, 21 to 23 years old, 5'7" to 5'9" tall, 150 to 160 pounds, with black, medium length hair. Defendant was selected from a six-picture photographic lineup which he contended contained only one or two pictures of people with medium length hair. Twenty people not witnesses to the crime were asked to read the description and individually asked to identify the robber from the photographic array. If the lineup had been fair, only three or four should have picked the defendant; in fact, thirteen did. Loftus concludes that this lineup was biased, but points out that the prosecution "placed a police officer on the stand who testified that in his opinion the photo array was extremely fair."
In another case, two robbers were described as being "very neatly dressed, and rather good-looking and they looked enough alike to be brothers." The defendant was picked out of an array that included twelve others, but when twenty-one non-witnesses viewed the same array after hearing the description, eleven picked the defendant, while four others chose him as their second choice. The control subjects decided that the defendant must be the criminal because he was the best looking person in the group. The victim, remembering her description, may have unconsciously done the same.\textsuperscript{55}

Loftus believes that part of the value of using non-witnesses is that it results in an objective measure of the fairness of a lineup. First, she calculates the ratio of the number of control subjects in the test to the number who chose the defendant. This ratio she calls the "functional size." In the first case cited above, this size was 20/13, or 1.5. In the second example, the functional size was 21/11, or 1.9. This functional size should be compared to the actual number of people in the lineup to determine if the procedure was fair. "If the functional size of a lineup is found to be two, and there were only two persons in the lineup, one could conclude that there were not obvious clues as to whom the police suspected. On the other hand, if the functional size is found to be two but the lineup actually contains six persons this would suggest that there were considerable clues available to actual witnesses as to whom the police suspected."\textsuperscript{56} In the cited cases, then, even though the lineups supposedly gave six or twelve choices to the witnesses, the arrays were no more challenging than an exhibition of just one or two people would have been.

This technique seems readily transferable to the criminal justice system. It does not require great resources of time, money, or expertise, and would be an effective means of ascertaining whether lineups are, in fact, biased.\textsuperscript{57}

\textsuperscript{54} Id.
\textsuperscript{55} Among other things, Loftus concludes:
This study also demonstrates that people arranging lineups should take pains not only to have all participants in the lineup be the same sex, race, and approximately the same age, height, weight, and manner of dress, but to have the participants match, as much as is possible, any characteristic that was verbalized by a witness.
E. LOFTUS, supra note 3, at 148.
\textsuperscript{56} E. LOFTUS, supra note 3, at 148-49.
\textsuperscript{57} The calculation of the functional size of a lineup, however, would not show prejudice resulting from unconscious transference or the Rosenthal effect; and consequently, a lineup could be more biased than the functional size might indicate.
Conclusion

The United States Supreme Court did not draw upon psychological research in reaching its conclusions in *Manson v. Brathwaite*. A patent case could be expected to call on chemical or engineering knowledge; medical malpractice litigation would not ignore scientific conclusions about human anatomy. Why, then, did the Court fail to consider the increasing body of knowledge about perception and memory in an identification case when perception and memory are crucial to a just determination? Perhaps the reason for this is the Justices’ distrust of psychological evidence relating to memory and perception. That answer might be acceptable if the Court had displayed reasoned reluctance to accept specific studies or had pointed out the flaws in psychologists’ conclusions. Yet, the Court did not point out flaws; nor did it in any other way demonstrate distrust. Its failure to even mention these studies instead suggests total ignorance of the field.

This ignorance no doubt mirrors that of most lawyers. Criminal lawyers, especially, may feel that they already have a mastery of human nature, and that this scientific work is merely redundant. Until they, and all lawyers, are familiar with the psychological literature, however, that attitude is dangerously arrogant, for the literature indicates that many common-sense assumptions about identifications are incorrect. If these incorrect assumptions go unchallenged, innocent people will be imprisoned, and many of the guilty will remain free.