Suggestive Eyewitness Identification Procedures and the
Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later

Gary L. Wells and Deah Lawson

Iowa State University
Abstract

U.S. law concerning suggestive eyewitness identification procedures is largely dictated by the Supreme Court’s ruling in *Manson v. Braithwaite* (1977) and has not been revisited by the Court since that ruling. Meanwhile, a large experimental literature on eyewitness identification has emerged and DNA exonerations have shown that mistaken eyewitness identification is the primary cause of convictions of the innocent. In light of these developments, we analyzed the fit between the two-inquiry logic used in *Manson* and the science that has emerged. Several problems are discussed. Most importantly, we note, somewhat ironically, that suggestive identification procedures (determined in the first inquiry) boost the eyewitnesses’ standing on criteria (used in the second inquiry) that are used to decide whether the suggestive procedures were a problem. The net effect undermines the safeguards that were intended by the Court and destroys incentives to avoid suggestive identification procedures. Alternative approaches, such as a return to *per se* exclusion, shift of burden at suppression hearings, and jury instructions are discussed.
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Every day in the United States courts entertain arguments in pre-trial hearings that challenge eyewitness identification evidence based on suggestive eyewitness identification procedures. The arguments are familiar and the suggestive aspects common. They include using a show-up procedure (the suspect alone presented to the witness) when police could have conducted a lineup (embedding the suspect among fillers), conducting a lineup in which the suspect stood out, failing to tell the eyewitness that the culprit might not be in the lineup, showing the witness a photo of the suspect before conducting a lineup, telling a potentially non-confident eyewitness that their choice was correct, or conducting a second lineup procedure in which the only person in common was the suspect. The defense argument for suppressing the identification in light of even the most highly suggestive procedures almost never prevails (Loftus & Doyle, 1997). Instead, courts end up ruling that the suggestiveness of the procedure is outweighed by the “reliability test” articulated by the U.S. Supreme Court in *Manson v. Braithwaite* (1977). *Manson v. Braithwaite* is, in effect, the law of the land on eyewitness identification. Although some state courts have tweaked the reliability test in *Manson*, the core idea remains largely as it was laid out in 1977.

Interestingly, it was around the time of *Manson* that psychological scientists began to conduct programmatic experiments on eyewitness identification with a strong emphasis on suggestive identification procedures (Wells, 1978). Since that time, hundreds of eyewitness experiments have been published in peer reviewed journals,
many of which bear on issues in *Manson*. In addition, since time of *Manson*, forensic DNA testing was developed and has been used to test claims of innocence. More than 200 exonerations based on post-conviction DNA testing reveal that mistaken identification was involved in more of these DNA exonerations (over 75%) than all other causes combined (see Connors, Lundregan, Miller, & McEwan, 1996; Scheck, Neufeld, & Dwyer, 2000; Wells, Small, Penrod, Malpass, Fulero, & Brimacombe, 1998; see innocenceproject.org/ for an up-to-date count of these cases). All of the DNA exoneration cases had the benefit of *Manson* when they were tried,¹ which is at least some indication that *Manson* did not work to prevent their wrongful convictions.

The known DNA exoneration cases can only be a fraction of the innocent people who have been convicted based on mistaken eyewitness identification evidence. There are several reasons why the true numbers would have to be dramatically higher than the 200. First, in a large percentage of the old cases (in which convicted persons claim to have been misidentified) the biological evidence for DNA testing has deteriorated, or has been lost, or has been destroyed. Moreover, the DNA exoneration cases are virtually all cases that involved sexual assault because those are the cases for which definitive biological evidence (contained in semen) is available to trump the mistaken identification. Such biological evidence is almost never available for murders, robberies, drive-by shootings and other common crimes that have relied on eyewitness identification evidence. A recent study of lineups in Illinois indicates that only 5% of lineups conducted in Chicago, Evanston, and Joliet were sexual assault cases (Mecklenburg, 2006). Most lineup identifications were for non-sexual assaults, robberies,
and murders for which there is almost no chance that DNA would be available to trump a mistaken identification. Also, we would normally expect sexual assault victims to be among the most reliable of eyewitnesses because sexual assault victims usually have a longer and closer look at the culprit than other crime witnesses (compared to robberies, for instance). For these reasons, the DNA exoneration cases can only represent a fraction, probably a very small fraction, of the people who have been convicted based on mistaken eyewitness identification.

All things considered, we doubt that the Court had the same appreciation for the magnitude of the mistaken identification problem in pre-DNA 1977 that we have today. And, we certainly know that the eyewitness science that exists today was not available to the Court in 1977. Hence, with a new appreciation of the dominant role of mistaken identification in convictions of the innocent, we take a new look at Manson in light of the eyewitness science that has emerged. First, we review the Manson ruling, including both the majority and minority opinions. Then, we review the science on suggestive identification procedures followed by the science on the five Manson criteria. Then, we relate the science back to the two-inquiry logic of Manson to reveal a flaw in the two-inquiry approach. We then describe how this flaw serves to dismiss concerns about suggestive procedures, destroy incentives for ridding the system of suggestive eyewitness identification practices, and create an illusion of protection against wrongful convictions based on eyewitness identification testimony. Finally, we discuss various alternatives to the Manson approach.

Manson v Braithwaite

Prior to 1972, there was a presumption, based in large part on the U.S. Supreme
Court’s ruling *Stovall v. Denno* (1967), that unnecessarily suggestive eyewitness identification procedures should be excluded as evidence at trial. This became known as the *per se* exclusion rule. But the *per se* approach was effectively discarded in 1972 when the Court ruled in *Neil v. Biggers* (1972) and reaffirmed its ruling vigorously in 1977 in *Manson v. Braithwaite* (1977) based on what is sometimes called the *reliability* approach or the *totality* approach. In effect, the Court argued that the issue of exclusion should not rest with whether there was unnecessary suggestiveness per se but instead be based on the question of whether the identification was nevertheless reliable. Hence, the Court created a two-pronged test for exclusion. The first prong or inquiry is whether the procedure was unnecessarily suggestive. If it was not, then there is no issue. If it was unnecessarily suggestive, then a second inquiry must be held to decide whether the identification was nevertheless reliable. The Court spelled out five criteria for deciding whether the identification was reliable despite the suggestive procedure, which we will call the *Manson criteria* because, although they were first articulated in *Neil v Biggers*, it was *Manson v Braithwaite* that reaffirmed and clarified the Court’s two-pronged reliability approach. If the witness has good standing on the reliability criteria, then the identification should not be excluded even if the procedure was unnecessarily suggestive.

*Manson v. Braithwaite* was argued November 29, 1976 and the U.S. Supreme court issued its decision on June 16, 1977. Braithwaite had been convicted of the possession and sale of heroin based solely on identification evidence by undercover agent Jimmy Glover. The agent-witness did not know the person he bought the heroin from but, based on a description and the location of the apartment, a fellow officer, D’Onofio, produced a single photo of Braithwaite. Using this single photo, Agent Glover reportedly
made a positive identification of Braithwaite’s photo as being a photo of the man from whom he bought the heroin. Both the Second Circuit and the Supreme Court concluded that the identification procedure was impermissibly suggestive, but then continued to the second inquiry (following Neil v. Biggers, 1972) as to whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable mistaken identification.

This second inquiry is the reliability test, borrowed directly from Neil v Biggers. Having found that the identification procedure was unnecessarily suggestive, the Court asked whether the identification was reliable even though the procedure was suggestive. Five criteria were articulated for the reliability test concerning (1) view, (2) attention, (3) description, (4) passage of time, and (5) certainty. The majority of the Court concluded that there was no substantial likelihood of irreparable mistaken identification and cited the witness’s standing on the five factors outlined in Biggers:

1. **Opportunity to view**: Witness Glover was within two feet of the seller and the confrontation was at least “a couple of minutes.” There was natural light from the window or skylight.

2. **Attention**: Glover was paying attention because, as a trained police officer, he realized he would have to find and arrest the dealer.

3. **Description**: He gave a detailed enough description that it enabled D’Onofrio to pick a single photo that was later shown to witness Glover.

4. **Time to identification**: Only two days passed between the crime and the photo identification.
5. **Certainty**: Glover had “no doubt” that Braithwaite was the person who had sold him heroin.

Based on their analysis, the majority on the Court concluded that there as not a very substantial likelihood of irreparable misidentification. An even longer opinion, however, was written in dissent. In the dissenting opinion, written by Justice Marshall and joined by Justice Brennan, a different characterization emerged of the witness’s standing on the five factors outlined in *Biggers*[^3]. With regard to *opportunity to view*, Marshall wrote:

> “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 5 or 10 seconds.”

With regard to *attention*, Marshall wrote:

> “But during this time, Glover's attention was not focused exclusively on the seller's face. He observed that the door was opened 12 to 18 inches, that there was a window in the room behind the door, and, most importantly, that there was a woman standing behind the man. Glover was, of course, also concentrating on the details of the transaction -- he must have looked away from the seller's face to hand him the money and receive the drugs. The observation during the conversation thus may have been as brief as 5 or 10 seconds.” Marshall further notes that “the mere fact that he has been so trained [as a police officer] is no guarantee that he is correct in a specific case. His identification testimony should be scrutinized just as carefully as that of the normal witness.”

[^3]: Referenced case
Regarding the two-day time from confrontation to identification, Marshall wrote:

“While such temporal proximity makes the identification more reliable than one occurring months later, the fact is that the greatest memory loss occurs within hours after an event. After that, the drop-off continues much more slowly. Thus, the reliability of an identification is increased only if it was made within several hours of the crime.”

Regarding the description given by Glover, Marshall wrote:

“…the description given by Glover was actually no more than a general summary of the seller's appearance. We may discount entirely the seller's clothing, for that was of no significance later in the proceeding. Indeed, to the extent that Glover noticed clothes, his attention was diverted from the seller's face. Otherwise, Glover merely described vaguely the seller's height, skin color, hairstyle, and build. He did say that the seller had "high cheekbones," but there is no other mention of facial features, nor even an estimate of age. Conspicuously absent is any indication that the seller was a native of the West Indies, certainly something which a member of the black community [which Glover was] could immediately recognize.” Marshall further notes that D’Onofrio, who did not witness the transaction, had acted on a “wild guess” based on Glover’s vague description and that D’Onofrio thought that the drugs had been purchased at a different apartment than the one that Glover actually went to.

Finally, regarding Glover’s apparent certainty, Marshall wrote:

“…the witness' degree of certainty in making the identification -- is worthless as an indicator that he is correct. Even if Glover had been unsure initially about his
identification of respondent's picture, by the time he was called at trial to present a
key piece of evidence for the State that paid his salary, it is impossible to imagine
his responding negatively to such questions as "is there any doubt in your mind
whatsoever" that the identification was correct.”

It is not a primary purpose in this article to contrast the majority opinion’s assessment
of the witness’s standing on the Manson criteria with that of the minority. And it certainly
is not the purpose of this article to debate whether Braithwaite was factually innocent or
guilty. But, the sharply differing views between the two assessments are striking and it
highlights some of the problems that we see with the Manson criteria. Notice, for
example, that majority opinion tends to take the witness’s self-reports at face value
whereas Marshall does not. For instance, the majority opinion states that the time to view
was at least a couple of minutes because that is what Glover said in his testimony.
Marshall, in contrast, uses reasoning to estimate that the functional exposure time to the
seller’s face might have been as little as 5 or 10 seconds. Similarly, the majority opinion
states that the witness had “no doubt” in his identification whereas Marshall suggests that
the witness might have been unsure in his initial identification and grew to be certain as a
function of later psychological processes. Notice as well that the majority was impressed
with the description because it did not significantly differ from Braithwaite’s appearance
and was good enough to lead D’Onofrio to the photo that he showed to witness Glover.
Marshall, on the other hand, noted conspicuous absences in the description and dismissed
D’Onofrio’s pulling of Braithwaite’s photo as a wild guess. Notice as well that the
majority thought that two days was a short period of time between the confrontation and
the identification and compared it to months whereas Marshall thought it was a long time
and compared it to hours.

Back to the First Inquiry

The different assessments of the majority versus minority opinions in the *Manson* case helps make clear that reasonable people can disagree about whether the witness’s standing on the *Manson* criteria are strong or weak. But this is even further complicated by the fact that any assessment of the second inquiry (the reliability inquiry based on application of the *Manson* criteria) would necessarily require a full appreciation of the power of the suggestive influences found in the first inquiry. Indeed, some of the differences between the majority view and the minority view of the witness’s standing on the *Manson* criteria in *Braithwaite* might be attributable to differences in the presumed power of the suggestive procedure itself. Recall that courts are supposed to first decide whether the identification procedure was impermissibly suggestive. If it is, then the second inquiry begins (i.e., the assessment of the witness’s standing on the *Manson* criteria). Although the majority opinion in *Braithwaite* was that the procedure was impermissibly suggestive, the majority was also somewhat dismissive of the power of the one-photo procedure:

“we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D'Onofrio had left the photograph at Glover's office and was not present when Glover first viewed it two days after the event. There thus was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection.”
Hence, the majority, in some respects, appeared close to thinking that the procedure was not im-permissibly suggestive in the sense that it did not seem to account for the witness’s positive decision. Marshall, in contrast, wrote:

> With good reason, such single-suspect procedures have "been widely condemned." *Stovall v. Denno*, 388 U.S., at 302. They give no assurance that the witness can identify the criminal from among a number of persons of similar appearance, surely the strongest evidence that there was no misidentification. In *Simmons v. United States*, our first decision involving photographic identification, we recognized the danger that a witness seeing a suggestively displayed picture will "retain in his memory the image of the photograph rather than of the person actually seen. Subsequent identification of the accused then shows nothing except that the picture was a good likeness."

In fact, Marshall wrote much more extensively on the suggestive procedure than did the majority, including:

> “The use of a single picture (or the display of a single live suspect, for that matter) is a grave error, of course, because it dramatically suggests to the witness that the person shown must be the culprit. Why else would the police choose the person? And it is deeply ingrained in human nature to agree with the expressed opinions of others -- particularly others who should be more knowledgeable -- when making a difficult decision. In this case, moreover, the pressure was not limited to that inherent in the display of a single photograph. Glover, the identifying witness, was a state police officer on special assignment. He knew that D'Onofrio, an experienced Hartford narcotics detective, presumably familiar with
local drug operations, believed respondent to be the seller. There was at work, then, both loyalty to another police officer and deference to a better-informed colleague. Finally, of course, there was Glover's knowledge that without an identification and arrest, government funds used to buy heroin had been wasted.”

Fundamental Majority versus Minority Disagreement about Deterrence

The *Manson* opinion contains only brief allusions to the deterrent value of the reliability approach. Does the reliability approach adopted in *Manson* serve to deter police from using suggestive procedures? Even though they acknowledged that the *per se* exclusion approach that preceded it had the stronger deterrent value, the majority clearly believed that the reliability approach does have a significant deterrent effect. Simply put, the majority wrote that “the police will guard against unnecessarily suggestive procedures under the totality [reliability] rule…for fear that their actions will lead to the exclusion of identifications as unreliable.” Marshall’s dissenting opinion on the deterrent aspect was equally brief. Marshall noted that the deterrence consideration “favors the *per se* rule. Indeed, it does so heavily, for such a rule would make it unquestionably clear to the police that they must never use a suggestive procedure when a fairer alternative is available. I have no doubt that the conduct would quickly conform to the rule.”

The relatively short-shrift given to the deterrence issue in *Manson* stands in considerable contrast to the centrality of deterrence considerations that we bring into the current analysis. In particular, we argue that psychological science on suggestive procedures uncovered since *Manson* give us strong reasons to believe that there is little disincentive for police and prosecutors to avoid suggestive procedures under *Manson* and might even have a positive incentive for using suggestive procedures when the reliability
approach is applied.

**The Science**

The science on eyewitness identification began to unfold in a programmatic way in the late 1970s. But, despite the temporal contiguity to *Manson*, which was decided in 1977, the science did not develop in response to *Manson* or any other ruling by courts. In fact, even though the late 1970s is generally regarded as the birth of modern eyewitness research, psychological scientists have been questioning the accuracy of eyewitnesses and trying to get the attention of the legal system for over 100 years (see the excellent historical treatment by Doyle, 2005). The development of programmatic research on eyewitness identification in the mid to late 1970s was driven at least in part by the provocative experiments of Elizabeth Loftus, who showed that interesting theoretical questions about memory could be examined using procedures that were relevant to the legal system’s heavy use of eyewitness evidence (Loftus, 1979). Also in the late 1970s, a framework emerged for distinguishing between variables that were under control of the justice system, called system variables, and those that the justice system could not control, called estimator variables (Wells 1978). The psychological scientists who began programmatic studies of eyewitnesses were mainly cognitive psychologists and social psychologists. For the most part, their work did not appear in law reviews or other publication outlets readily accessible to legal practitioners or legal policy makers, but instead appeared in mainstream peer-reviewed journals in psychology.

**Methods and Criticisms of the Science**

The science that emerged operated primarily on the experimental model that psychology long ago borrowed from other sciences, such as biology and physics.
Specifically, researchers created events (e.g., live staged crimes or video simulations of crimes) that unsuspecting people witnessed. At that point, people had become eyewitnesses. These witnesses could then be questioned about what they witnessed, shown a lineup, and so on. Because the events were created by the researchers, there was no ambiguity about the actual events that were witnessed, including the actions of the actors, words that were spoken, and the identity of the culprit. Accordingly, witness errors could be scored. Within this basic experimental paradigm, systematic manipulations could be made to witness characteristics, viewing conditions, lineup structure, and so on, to study how these variations affect eyewitness errors. A typical experiment will have anywhere from 100 to 300 or more participant-witnesses so as to stabilize the data and test various hypotheses among subsets of the sample.

It is important to understand that the primary purpose of these experiments, which now number in the hundreds, has been to establish cause-effect relations among variables. For example, one experiment used live staged crimes to see whether placing an innocent person among dissimilar fillers in a lineup would lead to higher rates of misidentification than if the innocent person were placed among similar fillers (Wells, Rydell, & Seelau, 1993). The researchers did not claim that the obtained rate of misidentifications in the dissimilar-fillers condition (47%) represents a rate that would be expected in actual cases. Instead, the authors noted that obtained rate was significantly higher than the rate obtained in the similar-fillers condition (11%). Hence, the conclusions from experiments concern cause-effect relations (poorly selected lineup fillers increase rates of misidentification) that relate to relative risk, not rates of absolute risk that can be applied to actual cases. At the same time, researchers generally conclude
that the cause-effect relation itself can be applied to what would be expected in actual cases.

Those in the legal system who resist conclusions from eyewitness identification experiments generally note several arguments. One, for instance, is that eyewitness identification experiments commonly use college students as witnesses whereas eyewitnesses to actual crimes would rarely be a college student. It is true that college students are the most common subjects in these experiments, in large part out of convenience. But, many studies have used young children, adolescents, middle-age persons, and the elderly. Findings in these studies consistently show that college students outperform these other populations (see reviews by Pozzulo, 2006; Bartlett & Memon, 2006). College students are less influenced by suggestive procedures, more likely to make accurate identifications, and so on. So, if anything, college students as witnesses underestimate the magnitude of the problem. Another criticism is that the witnesses in experiments do not experience the type of stress and fear that often accompanies actual crime witnessing, which could make their memories more reliable. It is true that experiments are constrained by ethical considerations from drawing guns on people or otherwise inducing extreme stress. But, experiments that have managed to induce significant stress have shown that stress interferes with, rather than helps, the formation of reliable memories (e.g., Morgan et. al., 2004). Finally, critics contend that the experimental witnesses know that a mistaken identification has no serious consequences whereas eyewitnesses in actual cases would be too cautious to make these errors. On this point, archival studies of actual eyewitnesses to serious crimes show that, among eyewitnesses who select someone from a lineup, they select a known-innocent filler 30%
of the time on average (Behrman & Davey, 2001; Behrman & Richards, 2005; Slater, 1994; Valentine, Pickering, & Darling, 2003; Wright & McDaid, 1996; Wright & Skagerberg, 2007). Clearly, the fact that these were real cases with serious consequences did not lead these witnesses to be too cautious to identify an innocent person. In any case, these criticisms miss the point of the research. The point of the research is to show cause-effect relations, not overall levels of mistaken identification.

**Key Findings Relating to Manson**

The eyewitness identification literature is much too large to review in detail in this article. The *Manson* case, however, provides a focus on a subset of the eyewitness science literature because it is somewhat circumscribed around a six key concepts, namely, procedural suggestiveness, eyewitness certainty, view, attention, passage of time, and verbal descriptions. We discuss each in turn.

*Procedural Suggestiveness in Lineups*

From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a lineup identification (a suggestion by commission), fails to relieve pressures on the witness to make a lineup selection (a suggestion by omission), cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect. The most common ways in which eyewitness scientists have studied suggestiveness in lineup procedures have been to look at pre-lineup instructions, lineup composition, and suggestive behaviors of lineup administrators.

*Pre-lineup instructions* have focused primarily on whether or not the witness is told prior to viewing the lineup that the actual culprit might not be in the lineup. At its
simplest level, instructing the eyewitness that the culprit might not be in the lineup can be thought of as a procedure to relieve pressure on the eyewitness to make a selection. Indeed, lineups sometimes do not include the actual culprit, which means that the correct answer is sometimes “none of the above.” To the extent that eyewitnesses naturally assume that the police have the real culprit in the lineup, the suggestiveness is implicit in the procedure itself. Although a failure to instruct the eyewitness that the culprit might not be in the lineup is not suggestiveness by commission (action), it is suggestiveness by omission (inaction). On this point, the research findings are very clear: Mistaken identifications from culprit-absent lineups are significantly higher when the witness is not given the pre-lineup instruction than when the witness is given the pre-lineup instruction (see meta-analysis by Steblay, 1997). Importantly, this instruction has little effect on rates of accurate identification when the actual culprit is in the lineup. The suggestiveness of the situation (and, hence, rates of misidentification in culprit-absent lineups) is further enhanced by any active pre-lineup suggestions that the culprit is in the lineup, such as telling the eyewitnesses that the culprit has been found, that the police know who did the crime, or that they already have plenty of evidence against the person.

*Lineup composition* refers to the qualities of the fillers in the lineup. A lineup filler is a known-innocent person who is in the lineup to help make the procedure fair. A proper lineup has only one suspect (who might or might not be the culprit) and the remaining lineup members are fillers. One of the ways to think about the role of fillers is that they help to establish whether the witness’s memory is reliable enough to avoid selecting a filler. But, a dominant reason for using fillers is to help ensure that the
procedure is not suggestive of which person is the focus of the police investigation.

Accordingly, the qualities of these fillers are presumed to be critical to maintaining low levels of suggestiveness. Research consistently supports the view that using fillers who do not fit the eyewitness’s previous verbal description of the culprit dramatically increases the chances that an innocent suspect who dies fit this description will be mistakenly identified (e.g., Clark & Tunnicliff, 2001; Lindsay & Wells, 1980; Wells et al, 1993). For this reason, psychological scientists have drawn a sharp distinction between the *nominal* size of a lineup and the *functional* size of a lineup and have devised ways to measure functional size (Wells, Leippe, & Ostrom, 1979). Nominal size refers to a mere count of the number of lineup members (e.g., six if there are five fillers and one suspect) whereas functional size refers to the number of lineup members who fit the description of the culprit. The issues are somewhat more complex than they first appear, however, because there are circumstances in which using the eyewitness’s verbal description of the culprit for selecting fillers is not an adequate suggestiveness safeguard. Suppose, for instance, a man became a suspect because he resembles the culprit’s image from a surveillance video. In such a case, fillers would have to be selected because they are similar to the video image rather than merely because they fit the general verbal description given by the eyewitness.

*Show-ups* are not lineups at all, but instead are procedures in which the eyewitness is shown only one person or a photo of one person without any fillers. Recall that *Manson v Braithwaite* was a show-up procedure and the Court found that it was unnecessarily suggestive but, based on the second prong (the reliability test), did not exclude it from evidence. Here, the results of experiments have led psychological
scientists to refine the nature of what is meant by suggestiveness as it relates to show-ups in contrast to lineups. Whereas courts have generally construed of show-ups as a form of pressure on the witness to make a positive identification, eyewitness experiments tend to show that rates of positive identification are actually lower for show-ups than for lineups (see meta-analysis by Steblay, Dysart, Fulero, & Lindsay, 2003). Show-ups, however, are suggestive in a different way, namely they suggest to the witness which person to choose. The advantage of a lineup is that errors in choosing will be distributed across the fillers (a relatively harmless error) instead of loading up on the suspect whereas errors in a show-up will always be the more consequential error of identifying an innocent suspect. As a result, a show-up is worse than a good lineup (i.e., a lineup that has at least five good fillers) but better than a bad lineup (e.g., one in which there are two or fewer good fillers).

*Lineup administrator suggestiveness* refers to verbal or nonverbal behaviors of the lineup administrator that can influence which person the witness identifies or how the witness feels about the identification. [For reasons that will become apparent, we will delay discussion of the latter aspect (influencing how the witness feels about the identification) for our later sections on eyewitness certainty, view, and attention.] It is important to note that most initial identifications of criminal suspects are obtained using photo-lineups rather than live lineups. Unlike live lineups, which might suppress lineup administrator suggestiveness if defense counsel is present, there is no right to defense counsel at photo-lineups. Instead, photo-lineups are almost always conducted by the case detective who directly interacts with the witness in what is, in effect, a conversation about photos. This creates a situation very similar to one that has been extensively studied by
psychological scientists in other contexts in which a tester’s knowledge or expectations influence the person being tested in a direction that is consistent with the tester’s knowledge or expectations (see Rosenthal, 2002 and Rosenthal & Rubin, 1978 for extensive reviews and treatments). These effects of the tester on the person being tested are the reason that double-blind procedures are used in scientific experimentation. There is no presumption that these tester effects are the result of intentional efforts by the tester or that the tester is aware of influencing the person being tested. Of course, there could be intent, such as placing a thumb on the suspect’s photo when handing the array to the witness. But the concern here is with the kinds of influences are unintentional, natural byproducts of the interaction. There are many ways that a lineup administrator can influence an eyewitness’s identification decision. For instance, the eyewitness might call out the number of a filler photo and the lineup administrator, knowing that the photo is a mere filler, might urge the witness to make sure she has looked at all the photos before making a decision. Whether intended or not, the message is clear to the witness that the suspect is one of the other photos. In contrast, the mere utterance of the number of the suspect’s photo could yield a very different reaction from the lineup administrator, such as “Good, tell me what you remember about that guy.” That would lead the witness to stick with that photo even if she had uttered the numbers of filler photos previously. Even without speaking, a lineup administrator can influence an eyewitness through facial expressions and body movements such as head nodding or head shaking. Furthermore, the lineup administrator has a great deal of discretion in deciding when the identification session is over. If the witness picks a filler, the tendency might be to wait to see if she changes her mind or ask if there is anyone else who stands out but if the witness picks the
suspect, the session is quickly ended. Experimental studies in which lineups administrators are led to believe (erroneously) that a particular lineup member is the culprit show that witnesses are influenced by what the lineup administrator was led to believe (Haw & Fisher, 2004; Phillips, McAuliff, Kovera, & Cutler, 1999). The double-blind lineup procedure was developed to prevent these suggestive influences of the lineup administrator (Wells, 1988; Wells et al, 1998). A double-blind lineup is one in which a neutral lineup administrator (one who does not know which person or photo is the suspect and which are fillers) administers the lineup to the eyewitness.

Multiple presentations of the suspect are yet another way in which a procedure can suggest strongly to the eyewitness which person to identify. This type of situation can occur in a variety of ways. For instance, the eyewitness might first be shown a photo-lineup from which no identification was made. Later, a live lineup is used in which the only person in common to both procedures is the suspect. [It is nearly always true that the only person in common between the photo-lineup and a live lineup is the suspect because fillers from photo-lineups would rarely be available or findable for a live lineup.] Sometimes, an eyewitness will fail to identify the suspect from a photo-lineup and be shown a second photo-lineup later with that same suspect but new fillers. This will sometimes occur when the police think that the first photo might not have resembled the appearance of the suspect very well and later come across one that they think is better. Here, again, the procedure is highly suggestive to the extent that the witness can discern which person is common to both photo-lineups. Precisely this type of effects have been found in eyewitness identification experiments: Witnesses who encountered a innocent person’s photo in an initial identification procedure were more likely to misidentify a
different photo of him in a second procedure even if they did not misidentify him in the first procedure (Hinz & Pezdek, 2001; also see Brigham & Cairns, 1988; and Gorenstein & Ellsworth, 1980).

Additional remarks on suggestiveness. The findings of controlled experiments on suggestiveness effects in eyewitness identification are not surprising to psychological scientists. And, as far as we can discern, many of these suggestiveness effects are not likely to surprise actors in the legal system. We note, for example, that most courts consider show-ups to be suggestive and that they routinely consider the quality of fillers used in lineups to be a legitimate concern. We are less certain that the legal system appreciates the ways that lineup administrators influence the results or fully appreciate the import of proper pre-lineup instructions. Furthermore, there is an apparent belief that damage from an unfair identification procedure can be undone by simply following it with a fair procedure. Even Justice Marshall, in his dissenting opinion in *Manson v. Braithwaite* claimed “When a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup under scrupulously fair conditions.” This “retesting” view is diametrically opposed to the dominant view among psychological scientists that, once an eyewitness has mistakenly identified someone, that person “becomes” the witness’s memory and the error will simply repeat itself. But, perhaps the biggest difference between the views of psychological scientists and those in the legal system is the legal system’s belief, inherent in *Manson v. Braithwaite*, that concerns about suggestive identification procedures can be trumped by the types of considerations used in the second prong (the reliability test using the *Manson* criteria).

Research Related to the Manson Criteria
Recall that the analysis of suggestiveness is only the first prong in deciding the admissibility of eyewitness identification evidence. If the court rules that the procedure was not unduly suggestive, the identification evidence is admitted. If the procedure was found to be suggestive, then the court is to consider the question of whether the identification was reliable nevertheless based on five criteria. In principle, there is nothing inherently flawed about the idea of a two-pronged test of this sort. Imagine, for instance, that a victim-witness had been abducted and held for three months during which the culprit’s face was never covered and there was full light (repeated opportunity to view), the victim studied the face repeatedly (repeated attention), the victim described the face in great detail, including unique features (excellent description), and the witness identified the suspect with total certainty within minutes after escaping. Surely, in this case we would not care if the identification procedure had multiple characteristics of a highly suggestive procedure (e.g., a show-up, failure to warn the witness that this might not be the culprit, and so on). Therefore, we concede that at some level these reliability factors (e.g., three months repeatedly studying the face) would appropriately trump concerns about suggestive procedures. But, these are not the situations in which the Manson reliability criteria are being applied on an everyday basis and not the situation in the Manson case. Justice Marshall estimated that the witness in Manson v. Braithwaite likely saw the person for only 5 or 10 seconds, there were distractions from others in the apartment, the door was barely open, the identification occurred days later, the witness might not have been certain at all at the time of the single photo identification, and the description was very weak.

In this section, we examine the Manson reliability criteria in the context of the
science that has emerged since *Manson*. It is important to note that there are three themes in this analysis. One theme concerns the fact that three of the five *Manson* criteria, namely view, attention, and certainty, are what psychological scientists call *retrospective self-reports*. Psychological scientists are highly skeptical of retrospective self-reports because of well-known tendencies for such reports to be at odds with objective facts. It has been well established, for example, that people retrospectively report that variables affected them that did not affect them and to report that variables did not affect them that did affect them (Nisbett & Wilson, 1977). Psychological scientists have largely abandoned reliance on retrospective self-reports except when there is no other way to measure the concept. Part of the problem is that retrospective self-reports are highly malleable in response to even slight changes in context (e.g., who is asking the question), the social desirability of the responses, the need to appear consistent, and reinterpretations of the past based on new events. At another level, psychological scientists find it somewhat odd that an eyewitness, whose credibility as a witness is being assessed, would be asked to report on his or her own credibility.

A second theme running through this analysis of the *Manson* factors is the precarious nature of the relation between the *Manson* factors and eyewitness identification accuracy. Some of these relations clearly are not linear and the *Manson* factors themselves are not independent of each other.

A third theme that runs through this analysis of the *Manson* factors, and perhaps the most important one, is that at least three of the *Manson* factors are not independent of the suggestive procedure itself. In other words, the use of suggestive procedures can lead
the eyewitness to enhance (distort) his or her retrospective self-reports in ways that help ensure the witness’s high standing on the Manson criteria, thereby leading to a dismissal of the suggestiveness concern. We will call this latter process, in which suggestiveness causes inflated status on the Manson factors, which in turn causes courts to discount the suggestiveness, the suggestiveness augmentation effect. We believe that the suggestiveness augmentation effect is a very serious problem for the two-prong totality approach guiding Manson. We believe that the suggestiveness augmentation effect accounts at least in part for the rarity of suppressing identifications obtained from highly suggestive procedures and we believe that the suggestiveness augmentation effect creates a disincentive for police and prosecutors to jettison suggestive procedures.

View

There can be no doubt that the witness’s opportunity to view the culprit is relevant at some level. For example, if the witness was a kilometer from the culprit’s face, humans could not store a reliable visual image. But, what is a reliable distance? The relation between distance and face perception is not linear. For instance, there is no diminishing effect of distance up to 25 feet. After 25 feet, face perception diminishes and accurate face identification for people with normal vision drops to zero at approximately 150 feet (Loftus & Harley, 2005). The maximum, 150 feet, probably would surprise most people because they recall experiences in which they seem to have recognized a familiar person’s face from distances much greater than 150 feet. But, in some very clever experiments, researchers have shown that people are subject to a visual hindsight illusion. Specifically, when people were told ahead of time the identity of the person observed from a distance, they estimated that the face was clear and recognizable at distances that
simulated several hundred feet. When actually tested under conditions in which they were not told the identity ahead of time, however, performance reached zero at approximately 150 feet (see Harley, Carlson, & Loftus, 2004; Loftus & Harley, 2005). If you already know the identity of the person, the mind can be pretty good at “filling in” the image at several hundred feet. But this is not the situation for the typical eyewitness who is looking at a stranger’s face from a distance.

Commonly, opportunity to view is assessed by asking the eyewitness to estimate exposure time (e.g., "How long was the culprit's face in view?") and occlusions (e.g., "Was your view blocked during any part of this time?"). In fact, however, eyewitnesses estimates of time during witnessing are greatly overestimated (e.g., Shiffman and Bobko, 1974), especially when there is stress or anxiety at the time of witnessing (e.g., Sarason & Stroops, 1978). Furthermore, the proportion of time that a person's face is occluded is greatly underestimated by eyewitnesses (Wells & Murray, 1983). Sometimes, it is possible to rely on something other than the self-report of the witness to determine issues of visual occlusion. For instance, if it can be established exactly where the witness was standing and where the culprit was, analyses of the actual scene might show that a tree, building or some other fixed object occluded the witness’s view. But this still requires a self-report about where the witness was standing in relation to the culprit and would fail to account for ephemeral occlusions such as another person standing in the way or a car being parked at a particular location at that time.

Although estimates of distance, exposure time, and reports of visual occlusions are commonly sought from witnesses, the usual shortcut question to get to the bottom line is something like “Were you able to make out details of the culprit’s face from where you
observed the event?” Here is where things get especially interesting. In a series of published experiments across a variety of psychological laboratories, witnesses to simulated crimes were shown lineups that did not include the culprit and made mistaken identifications. After their mistaken identification, a suggestive remark was made by the lineup administrator that seemed to confirm their selection (“Good, you identified the suspect in the case”) or no suggestive remark was made by the lineup administrator. Later, all of the witnesses were asked “How good was the view that you had of the culprit?” and “How well could you make out details of the culprit’s face while witnessing the crime?” Of course, all of these witnesses had the same (quite poor) view of the culprit. And, those who were not given the confirmatory suggestive remark seemed to understand rather well that their view was very poor. In the original experiment by Wells and Bradfield (1998), for instance, none reported that their view was good or excellent. Among those who were given the confirmatory suggestive remark, however, 27% said that their view was good or excellent. Similarly, among those who were not given the confirmatory suggestive remark, none reported that they could easily make out details of the face. Among those given the suggestive remark, in contrast, 20% reported that they could easily make out details of the face. Hence, the suggestive remark managed to lead a fairly large portion of mistaken eyewitnesses who had very poor views and little or no ability to make out face details to self-report that they had a good view and could easily make out details of the face. This means that a suggestive procedure actually served to enhance the witnesses’ standing on a Manson reliability factor.

Attention

Clearly, attention is necessary for the processing of any stimulus. But the Court
seems to equate the amount of time that the witness spent looking at the culprit’s face with attention. Generally, the amount of time spent looking at a stimulus has not been considered to be a particularly strong predictor of the ability of the witness to process the stimulus. Instead, psychological scientists have emphasized the type of processing that is occurring while attending to a stimulus to be much more important. In the case of faces, for example, devoting attention to specific facial features (e.g., nose, eyes, chin, mouth) can take a considerable amount of time when compared to making a global or holistic judgment of the face. And yet, it is the holistic judgments, which can occur fairly rapidly, that lead to a better ability later to recognize that face among filler faces (e.g., Bower & Karlin, 1974; Patterson & Baddeley, 1977). On the other hand, for purposes of being able to reconstruct the face (e.g., using a composite drawing system), attention to specific facial features is superior to the global judgments (Wells & Hryciw, 1984).

Humans have a limited capacity for processing information. As a result, attention paid to one stimulus necessarily results in a reduction of attention paid to other stimuli (Kahneman, 1973). The weapon focus effect illustrates this phenomenon. Eyewitness experiments have consistently shown that the presence of a weapon (e.g., a gun or knife in the hand of the culprit) leads to a reduced ability to later recognize the face of the culprit (see Steblay, 1992, for a meta-analysis of these studies). The dominant explanation is the weapon draws attention, thereby pulling attention away from the culprit’s face. Consistent with this limited attention resources notion, controlled studies have shown that the better the eyewitness can describe peripheral aspects of the crime scene (e.g., there was a Coke on the table, I noticed that the window was open), the poorer their ability to identify the culprit from a lineup (Wells & Leippe, 1981).
Attention matters, but the issue of how to assess the amount of attention and type of attention that the eyewitness engaged in is very unclear. The legal system takes the very straightforward approach of simply asking the eyewitness with questions such as “Did you attend to the culprit’s face?” or “Where did you direct your attention?” or “How much attention did you pay to the appearance of the culprit?” Hence attention is a self-report. The system is even more reliant on self-reports for the attention variable than it is for the view variable because at least some aspects of view can occasionally be checked against external assessments of the crime scene (checking distances and lighting conditions).

Attention is a purely psychological variable that cannot be checked against any objective facts in an actual case\(^6\). Accordingly, the question arises as to whether self-reports of attention are reliable as indicators of eyewitness identification accuracy. The question is much more difficult to answer than it appears, but there is one consistent finding that bears directly on this question as it relates to a Manson-type test of reliability in the context of suggestive identification procedures. Specifically, numerous experiments show that confirmatory suggestive remarks following a mistaken identification (e.g., “Good, you identified the suspect”) lead witnesses to inflate their estimates of how much attention they paid to the culprit during the witnessed event (Bradfield, Wells, & Olson, 2002; Dixon & Memon, 2005; Douglass & McQuiston-Surrett, 2006; Hafstad, Memon, & Logie, 2004; Neuschatz, Preston, Burkett, Toglia, Lampinen, Neuschatz, Fairless, Lawson, Powers, & Goodsell, 2005; Skagerberg, 2007; Smith, Lindsay, & Pryke, 2000; Wells & Bradfield, 1998; Wells & Bradfield, 1999;
Wells, Olson, & Charman, 2003; see meta-analysis by Douglass & Steblay, 2006). In effect, this consistent finding means that witness’s reports of their attention are not only malleable, but also that reports of how much attention was paid are affected by suggestive procedures, in this case suggestive feedback. Again, we see that a suggestive procedure actually enhances the appearance of the eyewitnesses' standing on a *Manson* reliability factor.

*Certainty*

The certainty that an eyewitness expresses in his or her identification is one of the most researched variables in the eyewitness identification literature. This is because almost any eyewitness identification experiment includes questions of the eyewitness about their certainty after they make an identification. The wording of the key question varies from experiment to experiment (e.g., “How certain are you that you identified the right person?” “How confident are you in your identification?”), but concept being measured is how much faith the eyewitness has in his or her own identification. And, even without of the status that the Court has given to certainty in the *Manson* reliability test, certainty plays a central role in eyewitness identification evidence. The certainty of an identification is going to affect decisions as to whether to charge the suspect with the crime, whether to proceed to trial, and whether the testimony will have a strong impact on jurors (e.g., Bradfield & Wells, 2000; Fox & Walters, 1986; Wells, Lindsay, & Ferguson, 1979; Wells, Ferguson, & Lindsay, 1981; Whitley & Greenberg, 1986). Hence, the question of the relation between eyewitness identification accuracy and witness certainty is important at several levels, not just for purposes of deciding the admissibility of the identification.
Calculations of the relation between certainty and accuracy in eyewitness identification experiments can be done a number of ways, but the most common method is the use of the point-biserial correlation coefficient. Based on a large number of eyewitness identification experiments conducted in dozens of different labs, a meta-analysis of the certainty-accuracy correlation showed that the average correlation could be as high as .41 if the analysis is restricted to only those witnesses who made an identification (Sporer et al., 1995). If non-identifying eyewitnesses are included (i.e., those who erroneously rejected the lineup and those who correctly rejected the lineup), then the correlation is considerably lower than .41. What does a .41 correlation mean? One way to think about a .41 correlation is to compare it to something with which people have some experience. For instance, the correlation between height and gender in humans is greater than .41. That means that we could better predict whether someone was male or female based on their height than we could predict whether a witness was accurate or inaccurate based on their certainty. At the same time, however, a .41 correlation is far from being useless. Suppose, for instance, we took 100 eyewitnesses, half of whom had made an accurate identification and half of whom had made a mistaken identification. If the certainty-accuracy correlation is .41, then approximately 70% the witnesses who are above average in certainty would be accurate (30% mistaken) and only 30% of those who are below average in certainty would be accurate (70% mistaken). These figures, however, change depending on what the presumed base rate is for accuracy, so things begin to get complex and at some point are unsolvable without knowing several other things that we cannot actually know in a real case. Suffice to say that psychological scientists have generally concluded that eyewitness certainty can have some diagnostic
value.

Despite the acknowledgement that eyewitness identification certainty can have some diagnostic value, the diagnostic value of eyewitness identification certainty in cases where there have been suggestive procedures represents a very different situation. The problem with using eyewitness certainty as a second-prong reliability factor in *Manson*-type situations is that it has already been determined (under the first prong) that a suggestive procedure was used with this eyewitness. As with view and attention, we know that confirmatory suggestive remarks from the lineup administrator consistently inflate eyewitness certainty for eyewitnesses who are in fact mistaken (Bradfield, Wells, & Olson, 2002; Dixon & Memon, 2005; Douglass & McQuiston-Surrett, 2006; Hafstad, Memon, & Logie, 2004; Neuschatz, Preston, Burkett, Toglia, Lampinen, Neuschatz, Fairless, Lawson, Powers, & Goodsell, 2005; Semmler & Brewer, 2006; Semmler, Brewer, & Wells, 2004; Skagerberg, 2007; Wells & Bradfield, 1998; Wells & Bradfield, 1999; Wells, Olson, & Charman, 2003; see meta-analysis by Douglass & Steblay, 2006). In one study, for example, fewer than 15% of eyewitnesses who had mistakenly identified someone stated that they were positive or nearly positive in their identification. However, when given a suggestive statement that appeared to confirm their identification (“Good, you identified the actual suspect”), a full 50% of the mistaken eyewitnesses said that they were positive or nearly positive in their identification. It is important to note that the question asked of the eyewitnesses was “How certain were you *at the time of your identification* that you had identified the right person?” Because the suggestive remark occurred *after* their identification, the suggestive remark could not have influenced how certain they were at the time of their identification. Hence, the suggestive remark is
distorting their recollections of certainty; they no longer remember that they were uncertain at the time of the identification and instead think that they were certain all along. It is important to note as well that this suggestive confirmatory effect is stronger for mistaken eyewitnesses than it is for accurate eyewitnesses, thereby making inaccurate eyewitnesses look more like accurate eyewitnesses and undermining the certainty-accuracy relation (Bradfield, Wells, & Olson, 2002). A suggestive lineup procedure (e.g., suspect stands out as the only lineup member who fits the description) has similar effects; witnesses are more confident in their identifications of the suspect when the suspect stands out than when the suspect is surrounded by appropriate fillers, regardless of whether the suspect is guilty or not (Wells, Rydell, & Seelau, 1993).

Once again, we see that suggestive procedures distort an eyewitnesses standing on a Manson reliability factor. Because the Manson reliability factors come into consideration once it is already determined that a procedure was suggestive, courts are using the Manson reliability factors under precisely the conditions that make the Manson criteria questionable and likely misleading.

**Descriptions**

The Court made a curious and interesting error in phrasing the description criterion as “the accuracy of the description.” Clearly, the accuracy of the eyewitness’s pre-lineup description can only be determined if that description is compared to the physical characteristics of the culprit. Saying that the description is accurate because it fits the physical characteristics of the defendant presumes that the defendant and the culprit are the same person. And yet, that presumption is the exact proposition under contention. Undoubtedly, the Court meant to say that the criterion was one of consistency
between the physical appearance of the culprit and the witness’s pre-lineup description and the amount of detail that was contained in the witness’s description. Hence, a witness would have a poor standing on the description criterion if there were significant inconsistencies between the description and the characteristics of the defendant and/or the description was vague and general.

What does the science say about the relation between description consistency and eyewitness identification accuracy and between description completeness (number of descriptors used) and eyewitness identification accuracy? In general, there appears to not be much of a relation. Piggot and Brigham (1985) found no meaningful correlation between descriptions and eyewitness identification accuracy. Wells (1985), using a much broader sample of 88 faces, found no correlation between description completeness and identification accuracy but a statistically significant (albeit low) correlation of .19 between description consistency and identification accuracy. Importantly, however the correlation between description completeness and identification accuracy was not attributable to good describers being good identifiers, but instead was attributable to the fact that faces that are easier to describe are also easier to identify.

The general failure of verbal descriptions to predict eyewitness identification accuracy is not surprising to memory scientists. Eyewitness identification is a form of recognition memory and verbal description is a form of recall memory. Recognition memory occurs when a stimulus is presented to a person and the person decides whether it is the same stimulus that was experienced earlier or not. Recall memory occurs when a person is given some general context (e.g., yesterday or two months ago) and then is asked to generate words, drawings or some other reproduction of the previously-
experienced stimulus. In the case of faces, studies suggest that the psychological processes that give rise to good recall and those that give rise to good recognition are not the same. For instance, Wells & Hryciw (1984) found that having people study the individual features of a face (e.g., nose, eyes) made them good at describing the face but poor at recognizing the face whereas having people make global judgments of the face made them good at recognizing the face but poor at describing the face.

But even a small relation between description consistency and identification accuracy, like that shown by Wells (1985), fails to capture two very important dynamics in actual cases that should give pause to relying much on consistency between the description and the characteristics of the identified person. First, the pre-lineup description that the eyewitness gave of the culprit commonly is used by police investigators to decide which person they consider to be a likely suspect in the first place. Imagine, for instance, an innocent person like Kirk Bloodsworth, the first person who was sentenced to death and later exonerated by DNA (Junkin, 2004). Bloodsworth had never been in trouble with the law, but Bloodsworth so closely matched the witness’s descriptions of the culprit (and the composite drawing) that he became the suspect because of that similarity and was identified in a photo lineup. Obviously, in the Bloodsworth case the consistency between the pre-lineup description and the physical characteristics of the defendant (Bloodsworth) were striking. But this striking consistency was not the result of an accurate eyewitness but instead was the byproduct of a natural suspect-generating process that is bound to show this consistency regardless of whether the suspect is guilty.

The second important dynamic in actual cases that should give pause to relying
much on consistency between the description and the characteristics of the identified person is the fact that eyewitness misidentifications from lineups are not random. Eyewitnesses tend to select the person who looks most like their memory of the culprit (Wells, 1984) and will readily select an innocent person if that person fits the eyewitness’s pre-lineup description better than do the lineup fillers (e.g., Lindsay & Wells, 1980; Wells et al. 1993). In other words, when misidentifications occur, they tend to load up on someone who fits the eyewitness’s pre-lineup description of the culprit.

Imagine now a hearing in which a line up was found to be suggestive in first inquiry of *Manson* because the fillers did not fit the eyewitness’s pre-lineup description (the classic biased lineup). Hence, the second inquiry focuses on the description criterion of *Manson* and it is noted that the description was good because it fits (is consistent with) the characteristics of the defendant. Here, we see that the reliability factor is used to decide that the suggestiveness was not a problem and yet this is precisely the kind of consistency between description and identification that would be expected even if he was not the culprit.

*Time between Crime and Confrontation*

Justice Marshall’s dissenting opinion was correct in noting that the greatest memory loss following an event occurs soon after the event. More specifically, the shape of the forgetting curve is negatively-deceleration function of time. This means that each time frame (whether measured in minutes, hours, or days) produces a greater loss in memory than the time frame that preceded it. Hence, more memory is lost in the first hour than in the second hour, more in the first day than the second day, more in the first week than in the second week, and so on. This forgetting function is one of the oldest
phenomena in scientific psychology, dating back more than 100 years (e.g., Ebbinghaus, 1885).

There are nevertheless two problems with making good practical use of the forgetting curve. First, although the shape of the curve is generally reliable, the absolute numeric quantities of memory loss that apply to given time (e.g., after one day, two days, etc) vary dramatically from situation to situation. For some situations (such as remembering a person’s name), the percentage of memory loss might reach 50% after only a few minutes, for other situations (such as remembering the name of a movie) it might take a few months, and for other situations (such as remembering an old phone number) it might take several years. The shape of the curve is presumed to be constant, but the time frame itself is not. The second problem is that the rate of forgetting is readily altered via rehearsal and related cognitive processes. A person’s name might be readily forgotten (even within seconds) if an individual were distracted immediately after hearing the name or it might be retained for years if the individual rehearsed the name repeatedly and regularly over a long period of time.

In general, eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications (see Cutler & Penrod, 1995). But this is one area that has not received a great deal of attention by eyewitness scientists. Most of the studies reviewed tended to compare identification performance after seconds or minutes with an hour or a day. There is little data on what happens after months or even weeks. Those in the legal system might think it curious that the passage of time has not been studies more by eyewitness identification researchers,
but we suspect that there are two reasons for this. First, such studies are much more costly than the typical eyewitness identification experiment because they require relocating and retesting participant-witnesses months later. Second, we suspect that eyewitness identification researchers find the passage of time to be a relatively uninteresting variable because we obviously know the direction of the effect (memory does not get better with time). Accordingly, eyewitness researchers have generally been more interested in studying the effects of events that witnesses experience during the passage of time rather than the passage of time per se. The important work of Elizabeth Loftus (1979), and the numerous researchers who have followed her lead in the study of post-event influences on memory, exemplifies this emphasis on studying the effects of events that occur during the memory retention interval.

Post-event influence refers to the fact that eyewitnesses’ recollections of an event can be affected by “information” acquired well after the witnessing event has occurred. For example, after witnessing a clean shaven person commit an act, participant-witnesses who were given information suggesting that he had a moustache incorporated that information into their later descriptions of the person (Loftus & Greene, 1980). People will even extract information from questions in ways that change their later testimony. For instance, after viewing a car-pedestrian accident, people who were asked “Did another car pass the red Datsun while it was stopped at the stop sign?” were later much more likely to report that they saw a stop sign than were those not asked that question, even though it was a yield sign (Loftus, Miller, & Burns, 1978). The point of post-event influence as it relates to the time interval between the witnessed event and the identification is that greater amounts of time permit greater opportunity for post-event
influences to affect memory: Detectives can inadvertently insert information into their questions; witnesses can have their memory contaminated by other witnesses; witnesses can glean “facts” from newspaper stories about the crime, and so on. Hence, it is not just forgetting that is a problem with the passage of time, it is also the fact that time passage permits events that can create changes in how the witness remembers the original event. Later, witnesses cannot effectively parse what they actually saw from what they might have acquired later.

Finally, it should be noted that there is an interaction between the passage of time and susceptibility to post-event influences. The longer the time between the witnessed event and the introduction of misleading post-event information, the greater the effect of the misleading information on witness’s subsequent reports (Loftus, et al, 1978).

The Manson Test in Light of the Science

Suggestive Procedures

The science clearly supports the Court’s concern about the use of suggestive identification procedures. Mistaken identifications are readily obtained by procedures suggesting that the culprit is in the lineup (or failing to warn that he might not be) when the culprit is in fact absent, exposing the witness to an innocent person’s image and later conducting an identification test with that person, using fillers in lineups who fail to fit the description of the culprit, and letting the case detective (or someone else who knows which image is the suspect and which are fillers) conduct the identification procedure. If eyewitness science and the courts have a difference of opinion about these suggestive procedures, it is probably in the effect-permanence of suggestive procedures and in the breadth of suggestive procedures. In terms of permanence, eyewitness scientists do not
believe that a suggestive identification procedure can be “erased” or corrected simply by following it with a fair identification procedure. Courts, on the other hand, seem to assume that a mistaken identification resulting from a suggestive procedure can somehow be corrected later by using a fair procedure. Even Justice Marshall, in his dissenting opinion in *Manson*, made a claim that strikes eyewitness scientists as implausible. Marshall stated:

Identification evidence … can by its very nature be readily and effectively reproduced… when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions. Since the same factors are evaluated in applying both the Court's totality test and the *Wade-Simmons* independent-source inquiry, any identification which is "reliable" under the Court's test will support admission of evidence concerning such a fairly conducted lineup. The evidence of an additional, properly conducted confrontation will be more persuasive to a jury, thereby increasing the chance of a justified conviction where a reliable identification was tainted by a suggestive confrontation. At the same time, however, the effect of an unnecessarily suggestive identification -- which has no value whatsoever in the law enforcement process -- will be completely eliminated.

Eyewitness scientists, on the other hand, do not generally accept the idea that a mistaken identification, whether it arises from a suggestive procedure or not, can be corrected by a subsequent identification test, no matter how “fair” that subsequent test might be. This difference of view goes to the very heart of the Court’s conception of an
“irreparable” error and accounts for why the Court would permit an in-court identification even if the suggestive out-of-court identification was suppressed.

Eyewitness scientists generally believe that a mistaken identification taints the witness’s toward the identified person. There remains some debate as to precisely how this tainting occurs. For example, does a mistaken identification result in the identified person’s image replacing the witness’s memory of the actual culprit, or does it result in the formation of a second image that competes with the original memory, or does it result in a blended image that has features of the culprit plus features of the identified person? In any case, the initial mistaken identification is almost certain to be repeated in a second identification task.

The other way that psychological science might differ somewhat from the Court’s view of suggestive procedures is that psychological scientists have tended to construe of suggestive procedures somewhat more broadly than have the courts. The best example of this is the relatively-recent but extensive work on the post-identification feedback. Whereas courts have appropriately shown concern with what the lineup administrator or others might say to the eyewitness immediately before or during the identification procedure, there has been almost no concern with what the lineup administrator might say to the eyewitness immediately after the witness makes a lineup choice. In effect, courts have tended to focus almost exclusively on suggestive aspects of the identification that might account for which person the eyewitness chose without a comparable concern for how the certainty of the eyewitness might have been manufactured by reactions from the lineup administrator (“Good, you got him!”). The certainty-inflating properties of this type of post-identification feedback can transform what might have been construed as no
identification at all (“It might be number three, but I cannot say for sure”) to a robust positive identification (“There is no doubt in my mind”).

The DNA exoneration case of Ronald Cotton illustrates both the permanency of the mistake and the certainty inflation that comes from post-identification feedback. Jennifer Thompson was sexually assaulted and identified Ronald Cotton from a photo lineup as being her attacker. At trial, she was positive in her identification of Cotton and gave profoundly convincing testimony about her view, the attention she paid to the physical characteristics of her attacker, and recounted her description that fit Cotton. But, it was not Ronald Cotton who sexually assaulted Jennifer Thompson, it was Bobby Poole. Cotton served X years in prison before DNA exonerated Cotton and definitively implicated Poole. Interestingly, however, after Cotton’s conviction and before DNA testing there were credible suspicions that Poole was her attacker. Hence, a court-coordinated event was staged in which Poole was brought to the courtroom for Thompson to view and she was asked if Poole looked familiar to her. Thompson readily rejected Poole and indicated that she had never before seen the man. Even after DNA had exonerated Cotton and Thompson accepted the fact that Poole was her attacker, she had no memory of Poole’s face and, when thinking back to the attack she says “I still see Ronald Cotton.” (see www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html). Why was Thompson so certain? According to Thompson, “When I picked him out in the physical lineup and I walked out of the room, they looked at me and said, ‘That's the same guy,’ I mean, ‘That's the one you picked out in the photo.’ For me that was a huge amount of relief.” Why would Thompson be relieved if she the certainty she came to express in her
identification was something that she experience at the time of her identification? The post-identification feedback effect seems to be the explanation here. Had she been required to state her certainty at the time of the identification, prior to the confirmatory statement, it might have been clear that she was not certain. Clearly, suggestive procedures are not restricted to explaining just the identification itself, they also can account for false certainty.

_The Second Inquiry: The Reliability Test of Manson_

Perhaps the most serious discrepancy between eyewitness science and _Manson_ is evident in the second inquiry, which comes into play when an identification procedure is found to be suggestive. The Manson criteria (view, attention, certainty, time, description) were meant to clarify the idea that the ultimate issue is the reliability of the identification, not suggestiveness per se. Reasonable people can disagree, but we believe that the Court’s general conceptualization was appropriate and defensible. At the extreme, imagine a victim-witness who had been abducted and held for 10 days by a culprit who never covered his face and was continuously exposed to the victim in good light from optimal distances. In such a case, we would expect the victim-witness’s memory of the culprit’s face to be too deep and clear to be affected by a suggestive identification procedure. Hence, in theory we see no reason why a set of criteria could not be justifiably used to trump concerns about a suggestive identification procedure. The problem is that almost no cases are this clear. Consider, for instance, Justice Marshall’s accounting of Glover’s view and attention that the majority of the Court nevertheless found sufficient to trump the suggestiveness of the single-photo identification procedure.
In fact, federal courts under the logic of *Manson* have applied the Manson reliability test to dismiss profoundly suggestive identifications when the eyewitness observed the gunman’s face for two or three seconds from underneath a table and was not certain in her identification until she was heavily coached and told by detectives that she had the right man (*United States v. Wong*, 1994). Even identifications that occur months later and were based on viewings that lasted only seconds, highly suggestive procedures have been found acceptable based on the application of Manson reliability factors (e.g., *State v. Johnson*, 2005).

Although we do not take issue with the broad assumption of the *Manson* Court that some set of reliability factors might justifiably trump concerns about suggestiveness in a given case, the science on the five factors in *Manson* point to very serious problems. First, none of the five criteria are unequivocally related to the accuracy of identifications. But, the most serious problem is that three of the five criteria (certainty, view, and attention) are self-reports by the eyewitnesses that are themselves products of suggestive procedures.

The failure of the three self-reported Manson criteria to be independent of the suggestive procedure creates an “ironic test” in the second inquiry. Figure 1 depicts the nature of the irony. A suggestive procedure occurs, which has the effect of inflating the witness’s standing on the three self-report criteria in Manson. At the Manson hearing, the witness displays these inflated statements of certainty, attention, and view through testimony that probes the Manson reliability factors. The court notes the good standing of the witness on these three criteria, thereby leading the court to conclude that the suggestive procedure is not a problem in this case because the witness has such a good
standing on the Manson criteria. This strikes us as an ironic test because these Manson reliability factors comes into consideration under precisely the circumstances in which they are least likely to be indicators of reliability due to their having been distorted by the suggestive procedure itself.

Another way to describe this is to say that the three self-report Manson criteria can be mere indicators of the power of the suggestive procedure rather than indicators of the notion that the suggestive procedure was not a problem in this instance. And, careful questioning at the Manson hearing is not likely to get around this problem. After making mistaken identifications and receiving confirming feedback, experimental witnesses were asked if the feedback affected how they answered questions about their certainty, view, and attention (Wells & Bradfield, 1998). Most denied that it had any effect even though they were just as affected as the minority who admitted that it might have had an effect.

Deterrence Implications

The Manson Court was justifiably concerned with the question of whether application of the Manson test would effectively deter police from using suggestive procedures. The majority, although acknowledging that the per se approach had the stronger deterrent effect, nevertheless concluded that the totality approach contained in Manson would serve the deterrent function:

“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.”

Justice Marshall did not directly argue that the Manson approach would be an ineffective
deterrent, instead noting his clear preference for the deterrent effect of the per se exclusion rule:

“Deterrence of police use of unnecessarily suggestive identification procedures favors the per se rule. 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. I have no doubt that conduct would quickly conform to the rule.”

The science we have reviewed here is relevant to the issue of deterrence. For deterrence to work, the use of a suggestive procedure must lower the chances that the witness will receive a passing score in the second inquiry of Manson. But, as we have seen, the suggestive procedure actually raises the scores of the witness in the second inquiry of Manson. As a result, there is almost no threat of exclusion resulting from the use of suggestive procedures. In other words, the inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion, thereby undermining incentives to avoid suggestive procedures.

We believe a case can be made that the Manson approach not only undermines incentives to avoid suggestive procedures but actually provides an incentive to use suggestive procedures. As any police officer knows, the ideal witness for purposes of obtaining a prosecution is one who is certain and who describes the witnessing conditions in a favorable light. If the Manson hearing is not going to result in the exclusion of the identification anyway, then why not use suggestive procedures so as to make sure that the witness picks the suspect and expresses high certainty at trial? We recognize that this analysis might appear cynical or accusatory. We do not intend it to be so. Police are just
people and people respond to contingencies and incentives, often without an explicit awareness of what they are doing or why they are doing it. A justice motive, resulting from a belief that they have the right person and need to help the witness along, might very well be behind the continued prevalence of suggestive procedures. As long as the Manson test continues to be applied the way it is today, there is no reason to expect the contingencies and incentives themselves to somehow reduce the use of suggestive identification procedures.

Problems in the Application of Manson

Although the logic of Manson is flawed because of the ways that suggestive procedures affect three of the five Manson criteria, the problem is often compounded in the ways that lower courts apply the criteria. We find it very interesting that Manson (and its predecessor Biggers) clearly stated that the certainty criterion referred to the “certainty demonstrated at the confrontation.” The key phrase here is “at the confrontation,” by which the court presumably meant at the time of identification. It is unclear to us whether the Court was prescient on this point or was simply turning a phrase, but we prefer to believe that the Court understood that the certainty expressed by the witness has some diagnostic properties at the time of identification but later expressions of certainty might be indicators of something other than the reliability of the witness’s memory. This is precisely what eyewitness scientists have discovered, as we noted in an earlier section of this article. Given no feedback at all, a witness’s expression of certainty at the moment of the identification is in fact correlated (albeit imperfectly) with the accuracy of the identification. But, later expressions of certainty are the product of numerous non-memorial sources, such as the witness’s beliefs about other evidence against the accused
or their beliefs about what others believe. And yet, during a Manson hearing, judges often accept the witness’s current certainty statement or the witness’s retrospections about how certain they recall being when they made their identification. Eyewitness science has shown how these retrospections are distorted by “information” that the witness picks up after the identification, but courts treat them as though they were pristine indicators of the level of uncertainty that the eyewitness had at the time of identification. Some jurisdictions simply refuse to collect a certainty statement at the time of identification if the witness seems uncertain because they know that the witness will become more certain at a later point in time, especially after they have been reassured that they identified the “right” guy. As a result, the courts are robbed of any reliable record of uncertainty that the witness might have had “at the confrontation.” Hence, in this respect, the Manson criteria themselves are better than the way they are often applied.

A related problem often occurs with descriptions. It seems to us that the Court clearly intended that the prior description of the criminal be exactly that: a prior description. And yet, courts sometimes permit the use of descriptions given after the identification or after having viewed the defendant in court. Not surprisingly, later descriptions tend to become more detailed and become more consistent with the identified person. It is difficult to keep these post-computed descriptions out when the witness says “I had forgotten about the scar…but as I thought about it further and cast my mind back…”

Another problem with how the Manson criteria are actually used is that some criteria are relegated to a “nevertheless” status if the witness looks strong on some other criterion. In general, it appears that any of the criteria can be low and yet the witness
passes the reliability test as long as the witness is certain. Consider the time-since- 
witnessing factor. Biggers was identified seven months after the crime, nevertheless the 
witness was certain and hence the identification was permitted. Consider the view factor. 
In a 1997 case, a man was convicted of murder based on the highly certain identification 
testimony of someone who was 450 feet away, which exceeds the capability of the 
human visual system (Loftus and Harley, 2005). Consider the attention factor. In State v. 
Ledbetter (1981) the court said that even a “fleeting glance” might be sufficient and noted 
the high level of certainty of the witness to justify admission of the identification. If there 
is no level of attention, view, or passage of time that is so poor that the identification is 
excluded (as long as the witness is certain), then perhaps the criteria are just too flexible 
to be meaningful. It raises the serious question of whether the Manson criteria are too 
easily applied in an outcome-oriented manner in which the desired outcome (I want to 
admit this evidence) can be achieved in virtually every instance.

**Alternatives to Manson**

The primary purpose of article is to articulate the problem in Manson and stimulate a 
dialog rather than propose the specific solution. And, it would be foolish to believe that 
there is a solution that will prevent all wrongful eyewitness-based convictions and still 
serve well the interests of convicting the guilty. Nevertheless, Manson is flawed and it is 
not at all foolish to think that we could do better.

Alternatives to Manson should have several characteristics that are absent in Manson. 
First, unlike Manson, they must provide an incentive to avoid suggestive procedures and 
ever reward suggestive ones. This means that there has to be some real threat of 
suppression or some other cost to the government when unnecessarily suggestive
procedures are used. Second, alternatives to *Manson* must recognize that suggestive procedures, whether unnecessary or not, confound the fact-finding process and require a much deeper analysis than the check-listing heuristic that characterizes *Manson*. Third, whatever the criteria for deciding to admit a suggestive identification, those criteria need to be independent of the suggestive procedure itself, which means that self-reports of the eyewitness are not likely to ever be good criteria unless it can be shown that they were assessed prior to the suggestive event.

*Per se Exclusion?*

Clearly, one approach would be a return to the *per se* exclusion idea in which unnecessarily suggestive procedures result in exclusion without consideration of the notion that the identification might nevertheless be reliable. In fact, however, it is unclear that this type of *per se* exclusion was ever endorsed by the Court. Although the Court’s 1967 Wade trilogy (*United States v. Wade*, 1967; *Gilbert v. California*, 1967; *Stovall v. Denno*, 1967) seemed to endorse a *per se* exclusion notion, the Court made it clear the following year that the overriding issue was whether it was likely that the eyewitness misidentified the suspect (*Simmons v. United States*, 1968). Hence, the idea that reliability (rather than suggestiveness) is the ultimate issue was in place even before *Biggers* and *Manson*.

The great advantage of some version of *per se* exclusion is that it would largely jettison unnecessarily suggestive practices. It has become increasingly clear that police take direction form prosecutors on eyewitness identification procedural issues because it is the prosecutors who have to make the evidence work in court (Wells, Malpass, Lindsay, Fisher, Turtle, & Fulero, 2000). A prosecutor who experiences an exclusion
based on unnecessarily suggestive procedures is likely to pressure police to make systemic reforms. In fact, there are now well-articulated systems for eyewitness identification procedures based on the available science, including a guide from the National Institute of Justice (Technical Working Group for Eyewitness Evidence, 1999), and these are readily adaptable to individual jurisdictions across the county. Given what is known today and the development of workable systems to prevent suggestive procedures, it is unclear why unnecessarily suggestive procedures persist except for the fact that Manson has not created the proper incentives.

Despite the strong incentive to clean up suggestive procedures inherent in a *per se* exclusion approach, there are two primary reasons to not favor a hard and fast *per se* exclusion approach. First, witnessing conditions can exist that would make the use of a suggestive procedure a moot consideration because the strength of the witness’s memory would outweigh the suggestiveness factors (recall our abduction example). Clearly, this particular situation would result in a guilty person going free. Second, even if a *per se* exclusion approach were adopted, it would apply only to cases in which the procedure was *unnecessarily* suggestive. But, from a scientific perspective, whether the suggestive procedure was necessary or not necessary has no bearing at all on the power of the suggestive procedure to induce mistaken identifications. Accordingly, the fact that a lineup was not possible and, therefore, a show-up was necessary (Stovall v. Denno, 1967) does not make the show-up any less powerfully suggestive. What is needed is an approach that helps protect against mistaken identification regardless of whether the suggestive procedure was necessary or not.

*Shift of Burden with Special Onus in the Context of Suggestive Procedures?*
The current approach in *Manson* is one in which the defense must request a hearing on the identification and attempt to show that the identification was not reliable. The burden clearly rests with the defense to show that the identification was not reliable and failure to do so results in admission of the identification evidence. But, it is unclear why the burden rests with the defense to show unreliability rather than with the prosecution to show reliability. It is unlikely that a shift in burden would matter much to the prosecution, of course, as long as the prosecution was able to continue to use the current *Manson* criteria in the context of trumping suggestive procedures. But, in the absence of suggestive procedures, the Manson criteria might be quite reasonable. For instance, if there was no suggestiveness in the procedure and prosecution can show that the witness was certain at the time of identification, had a good view, and paid close attention, then perhaps a good case for reliability can be made. Note, however, that there have to be assurances that the certainty statement, the view statement, and the attention statement were made in response to a fair lineup procedure and obtained prior to the witness learning whether the identified person was the suspect in the case or merely a filler. Preferably, the view and attention statements would have been obtained prior to conducting the identification procedure and the certainty statement collected using a double-blind lineup procedure.

Under the shift-of-burden notion, the prosecution would have to make the case that the identification was reliable regardless of whether a suggestive procedure was necessary or unnecessary. The irrelevance of the “necessity” aspect of suggestive procedures seems to us to comport better with the Court’s own reasoning on these matters that “reliability is the linchpin in determining the admissibility of identification
testimony” along with our observation that the power of suggestive procedures is not moderated by whether the suggestiveness was necessary.

In the context of a suggestive procedure, the prosecution would not be able to make the case for reliability based on certainty, view, or attention statements of the witness unless it could be demonstrably shown that these self-reports of the witness were not influenced by the suggestive procedure. This means that the onus would be on the prosecution to find evidence of reliability that is independent of the suggestive procedure.

This disallowance of witness self-reports would likely permit many highly suggestive identifications, such as our hypothetical of the abducted person, because the case for a reliable memory can clearly be established through known facts (e.g., the abducted witness clearly had long and repeated view of the culprit). But, the presence of suggestive procedures and the absence of such obviously-reliable circumstances, the onus on the prosecution would be significantly greater than currently exists. One of the effects is likely to be to pressure police to collect statements from witnesses regarding their viewing conditions and attention early in the investigation, prior to the possibility of suggestive influences, a good practice that too often does not occur. Prosecutors can then use these statements to support the reliability claim even if there is a later suggestive procedure because they were obtained prior to the suggestive event. Notice as well the deterrent properties of this approach because the ability to use certainty, view, and attention statements (or other self-reports by the eyewitness) to show reliability are precluded when they are obtained subsequent to a suggestive procedure.

**Limits to Testimony**

Another approach would be to consider limits to the testimony of the eyewitness
in cases where outright exclusion is too extreme of a remedy. Suppose, for instance, that the eyewitness received confirming feedback at the lineup and the only certainty statement was taken after the feedback. A judge might rule that the witness could testify about the identification, but could not testify about his or her certainty. Likewise, suppose that an eyewitness gave a vague pre-lineup description of the culprit but began to give more detailed descriptions after the identification. A judge could rule that the witness can testify as to the pre-lineup description but not the post-lineup description. Or, suppose that a witness made a tentative identification and then was shown a second lineup in which the only person in common was the defendant and positively identified him. A judge could rule that only testimony regarding the initial tentative identification could be used at trial. Every case would be a different set of facts, but the point is that total exclusion is not the only option in some cases.

*Jury Instructions*

Another alternative to exclusion is for the judge to instruct the jury that the presence of a suggestive identification procedure lessens the reliability of the identification testimony and can be legitimately considered in assessing the reliability of that testimony. Although defense attorneys can always make their own arguments to the jury regarding suggestive identification procedures, defense arguments ring hollow in juries’ ears and appear as ploys. Whether jury instructions 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.

*Final Remarks about Alternatives to Manson*
We admit that our discussion of alternatives to *Manson* is woefully underdeveloped. In large part, this is because the entire *Manson* approach is predicated on the concept of *postdiction*. Postdicting eyewitness identification accuracy has proven to be extremely difficult and precarious (see review by Caputo and Dunning, 2006). Perhaps the most promising of the postdictors is decision time. Research consistently shows that accurate identifications from lineups are made faster than are mistaken identifications (e.g., Dunning & Perretta, 2002; Dunning & Stern, 1994; Smith, Lindsay & Pryke, 2000; Sporer, 1993; Stern & Dunning, 1994; Weber, Brewer, Wells, Semmler, & Keast, 2004). Note that this decision time refers to situations in which the witness is unaware that time is being measured and it refers to actual time, not self-reports by the eyewitness. Because these decision times are not self-reports, they avoid many of the problems that we have discussed about certainty, attention, and view. Of course, such data are not being collected in actual cases and this would require the use of new equipment and controlled environments. Furthermore, the relation between decision time and accuracy is not as useful as it might first appear because what constitutes a short time and a long time depends on numerous variables, including the presence or absence of suggestive procedures themselves (Weber et al., 2004).

In casting the forgoing paragraph, we were struck by our own observation that the measurement of decision time would require police to acquire and implement new equipment that would measure decision time. This sets up our final observation about alternatives to *Manson*. Why not simply take the extra care needed to jettison unnecessarily suggestive procedures in the first place? We have provided a partial answer
to this question in when we analyzed the deterrent function of *Manson* and concluded that its deterrent value was largely absent (because the reliability factors routinely trump suggestiveness) and in fact the incentives for police and prosecutors might actually favor the maintenance of suggestive procedures (because they yield more identifications of the suspect and higher levels of certainty). But, serious questions need to be raised about why the courts are being so passive and accommodating in continually being asked to make rulings on unnecessarily suggestive procedures with these *Manson* hearings. Why are courts so tolerant of unnecessarily suggestive procedures that raise the chances of mistaken identification, waste the time of the court, and intrude on everyone’s sense of a fair identification procedure? Today, police carry out very complex evidence collection procedures with physical evidence such as blood, hair, and fiber that have to conform to precise protocols and careful documentation. Clearly, police would capable as well of carrying out careful non-suggestive protocols with eyewitness identification evidence as well if courts were more assertive in demanding it.

**Concluding Comments**

*Manson* was a reasonable proposition in 1977, but we know much more today. *Manson* lacks the architecture to serve two functions intended by the court, namely the safeguard against wrongful convictions function and the incentive to avoid suggestive procedures function. Both biological science (via DNA) and social science (via eyewitness identification experiments) have shed new light on the eyewitness identification problem and revealed it to be a much bigger problem than the 1977 Court could have surmised. Now, 30 years later, we are all wiser. In a joint effort between social science and the legal system, we should be able to create a system that provides
stronger incentives to eliminate unnecessarily suggestive procedures without excluding reliable identifications. We now know that the Manson approach is not such a system.
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Author Notes

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Footnotes

1 Or the benefit of the nearly identical ruling, *Neil v. Biggers* (1972), on which *Manson* was based.

2 The current article uses the word “reportedly” as a qualifier to the “positive identification” claim that has been used repeatedly in previous writings about Glover’s identification of Braithwaite’s photo. In fact, no one but Glover was present when Glover first viewed the photo and the only record comes from later testimony from Glover. Glover’s later claims the identification was positive and immediate must be treated with some caution given what we know today about retrospective memory distortions of the certainty and immediacy of identification decisions when later information appears to confirm the identification (e.g., Wells & Bradfield, 1998). Braithwaite was later arrested in the apartment where Glover made the purchase, which might itself have constituted a form of confirming feedback.

3 Although originally spelled out in *Neil v. Biggers* (1972), this article will refer to the five criteria used in the second inquiry (view, attention, certainty, time, description) as the Manson criteria, or the Manson factors, or the Manson reliability test.

4 It is not known how often the suspect is the actual culprit, but absence of the culprit in the lineup simply means that the police have focused their investigation on the wrong person. Because there is no reasonable-cause criterion for placing a suspect in a lineup, police are free to conduct a lineup on a mere hunch, which can lead to fairly high rates of culprit-absent lineups being shown to witnesses (Wells, 2006). In all of the DNA exoneration cases involving lineups, the actual culprit was not in the lineup and the witnesses made identifications nevertheless.
5 Happiness, for example, can only be measured by asking people how happy they are (Gilbert, 2006).

6 In laboratory experiments, non self-report measures, such as directed gaze and eye movements can be measured to study attention. But actual cases are necessarily dependent on retrospective self-reports of attention.

7 Postdiction is a term that psychological scientists have used to refer to “backward predictions” in which some set of facts currently available is used to estimate the chances that something happened in the past.
Figure 1 Caption: The Irony of Manson: Suggestive Procedures Cause Inflated Standing on Manson Factors, which Leads to a Conclusion that Suggestive Procedures Outweighed by Good Standing on Manson Factors
Suggestive identification procedure

Inflated certainty
Inflated report of view
Inflated report of attention

Witness says "I'm certain, I had a good view, and I paid close attention"

Admit identification because of witness's good standing on Manson criteria