REVISITING THE *MANSON* TEST: SOCIAL SCIENCE AS A SOURCE OF CONSTITUTIONAL INTERPRETATION

Benjamin Wiener[*]

INTRODUCTION

Over forty-five years ago, Justice William Brennan, writing for a majority of the Supreme Court observed, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[1] The advent of DNA exonerations has only reinforced this insight.[2] Indeed, in seventy-six percent of the first 250 DNA exoneration cases, the exoneree was identified by an eyewitness.[3] According to the Innocence Project, "[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide."[4]

Throughout the late 1960s and early 1970s, the Supreme Court defined the Due Process limitations on the admissibility of eyewitness identifications.[5] The Court ultimately settled on a test in *Manson v. Brathwaite*.[6] Since 1977, the Court's test has been roundly criticized in

* J.D. Candidate, 2014, University of Pennsylvania Law School; B.A., 2010, Dartmouth College. I wish to thank my advisor, David Rudovsky, for his guidance and support, Karen Newirth for inspiring me to write this Comment, and the editors and Board of the *Journal of Constitutional Law* for their help in the editing process. I would also like to thank my parents for their unwavering support and my fiancé, Anna Krigel, for her love and editing.

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

2 DNA testing began in the 1980s. Since that time, more than 250 people have been exonerated with the aid of DNA evidence. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (2011).

3 *Id.* at 48.

4 THE INNOCENCE PROJECT, EYEWITNESS MISIDENTIFICATION, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 22, 2013).

5 *See e.g.*, Neil v. Biggers, 409 U.S. 188, 199 (1972) (establishing a two-part test and identifying factors to be considered when evaluating the likelihood of misidentification); Simmons v. United States, 390 U.S. 377, 381–82 (1968) (considering eyewitness identification in the context of due process); Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (applying the due process standard to photographic eyewitness identification procedures). A more thorough discussion of the Supreme Court's eyewitness identification opinions is provided *infra pp.* 860–66.

6 432 U.S. 98, 106 (1977) ("The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identifica-

the legal[7] and social science[8] literature. Despite developments in social science that have augmented our understanding of eyewitness identifications, the Supreme Court has failed to readdress the issue.[9]

Some state supreme courts have responded to criticisms of the *Manson* test by revising the due process tests under their state constitutions to reflect developments in social science.[10] Most notably, the Supreme Court of New Jersey radically amended its due process test

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tion possesses sufficient aspects of reliability."). The Court identified five factors for courts to examine to determine whether an identification was sufficiently reliable:

> the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199–200.

7 *See e.g.*, GARRETT, *supra* note 2, at 63 (describing the Supreme Court's *Manson* test as "toothless"); Nicholas A. Kahn-Fogel, Manson *and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175, 191 (2012) (noting "unanimous opposition" among legal scholars to the Supreme Court's approach to eyewitness evidence); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 601 (2009) (excoriating the criminal justice system for "continu[ing] to tolerate eyewitness identification procedures that gratuitously increase the risk of convicting innocent persons"); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 121 (2006) ("The problems with the *Manson* rule of decision are fairly obvious in light of the psychological research . . . ."); David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Lets Give Science a Chance*, 89 OR. L. REV. 263, 274 (2010) (advocating for the abandonment of the *Manson* test); David E. Paseltiner, Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 606 (1987) (arguing that the Supreme Court's test does not meet its goals).

8 *See e.g.*, Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 1 (2009) (reviewing hundreds of studies and calling the *Manson* test into question); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 608 (1998) ("In legal theory, various safeguards are presumed to be operating within the justice system to prevent miscarriages of justice in the form of mistaken identification. These safeguards, however, fail to provide the intended protection."); U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1 (1999), https://www.ncjrs.gov/pdffiles1/nij/178240.pdf (noting that procedures developed by courts and other actors "have not integrated the growing body of psychological knowledge regarding eyewitness evidence with the practical demands of day-to-day law enforcement").

9 In 2012, the Court was presented with the opportunity to revise the *Manson* test in *Perry v. New Hampshire*, 132 S. Ct. 716 (2012). However, the Court decided that case on narrower state action grounds, holding that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 730.

10 "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." California v. Ramos, 463 U.S. 992, 1013–14 (1983).

for the admissibility of eyewitness evidence in *State v. Henderson*.[11] The Supreme Court of Oregon recently followed suit by rejecting the *Manson* test in *State v. Lawson*.[12]

This Comment considers whether or not the United States Supreme Court should use social science evidence as a source for reinterpreting the Due Process Clause as expressed through the *Manson* test. While many alternatives to the *Manson* test have been proposed in the academic literature, relatively little attention has been paid to the question of why social science findings are legitimate sources for interpretation of the Constitution in the case of eyewitness identifications.[13] The respondent and its amici argued in *Perry* that it would be inappropriate for the Court to consider this evidence in defining the due process limitation on eyewitness evidence.[14] In light of these arguments, it is necessary, as a threshold matter, to defend the legitimacy of social science research as a source of constitutional interpretation.

I argue that the Supreme Court should consider social science evidence in its interpretation of the Due Process Clause as it relates to

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11 27 A.3d 872 (N.J. 2011).

12 291 P.3d 673 (Or. 2012); *see also* United States v. Greene, 704 F.3d 298, 305 n.3 (4th Cir. 2013) ("The New Jersey and Oregon opinions represent a growing awareness that the continuing soundness of the *Manson* test has been undermined by a substantial body of peer-reviewed, highly reliable scientific research.").

13 Another student note has addressed the propriety of using social science evidence in assessing the due process standard for the admissibility of eyewitness identification evidence. Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681 (2002). Headley relies on an appeal to the philosophy of John Rawls to argue that justice requires making eyewitness identifications fairer. *Id.* at 693–94. My Comment will not depend on (nor address) Rawlsian philosophy.

14 *See* Brief for Respondent at 42, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974) ("[P]etitioner relies heavily upon the results of studies conducted by social scientists to argue that identification evidence is generally unreliable. . . . To the extent that the petitioner's arguments implicate state evidentiary rules or undermine the weight that identification evidence is assigned by the trier of fact in some cases, such rules and special jury instructions adequately address the concerns that he has raised."). In an amicus brief, the Criminal Justice Legal Foundation argued at length that it would be inappropriate for the Court to refine the *Manson* test to conform to social science evidence. Brief for The Criminal Justice Legal Foundation as Amicus Curiae in Support of Respondent at 17–18, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10–8974). They argued that it was inappropriate to base a "constitutional rule" on a "'decades-long research effort' . . . which has resulted in varying conclusions and recommendations." *Id.* at 17–18. They went on to argue that "[t]he changeable nature of the science is reflected in scientific literature," *id.* at 20, and that "[t]he research and theories are not solid enough on which to rest a constitutional standard," *id.* at 24. They concluded that, "even if the scientific and investigative community could agree on a process for obtaining the more reliable identifications, the courts are not commanded to accept the procedures as a requirement of due process." *Id.* at 24–25. I address these objections *infra*.

eyewitness testimony and revise the *Manson* test accordingly. In Part I, I outline the Supreme Court's eyewitness identification case law. In Part II, I discuss the approaches of state supreme courts that have augmented the federal standard. In Part III, I provide a framework for the use of social science data in constitutional interpretation generally, paying particular attention to the work of David L. Faigman. In Part IV, I apply the principles outlined in the prior part to eyewitness identifications, arguing that social science evidence is particularly relevant to this area of the law. Finally, I consider and reject some objections to the Court's use of scientific evidence to shape the test for excluding eyewitness evidence.

I. U.S. SUPREME COURT PRECEDENT

Beginning in the 1960s the U.S. Supreme Court constitutionalized restrictions on the admissibility of eyewitness evidence through the Due Process Clause. This line of cases culminated in *Manson v. Brathwaite*,[15] which established the current due process test for assessing such evidence.

A. The Wade *Trilogy*

The Supreme Court first considered the reliability of eyewitness identifications in the context of the Sixth Amendment's guarantee of the right to counsel.[16] The Court decided three cases on the same day, each of which contained a challenge to the admission of evidence of lineups conducted in the absence of the defense counsel.[17] In *Wade*, the Court held that a pretrial identification was a "critical stage" of the prosecution, at which defendants are entitled to have counsel present.[18] Recognizing the unreliability of eyewitness identifications, the Court observed, "[T]here is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and . . . presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial."[19]

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15 432 U.S. 98 (1977).

16 "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

17 United States v. Wade, 388 U.S. 218, 220–21 (1967); Gilbert v. California, 388 U.S. 263, 271–72 (1967); Stovall v. Denno, 388 U.S. 293, 295–96 (1967).

18 388 U.S. at 236–37.

19 *Id.* at 235–36; *see also id.* at 228 ("[T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiar-

The Court did not, however, require that identifications made at uncounseled lineups be excluded per se.[20] Instead, the Court allowed "the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."[21] If the government could make such a showing, the evidence would not be excluded.[22]

The same day that the Court decided *Wade*, it applied its holding in *Gilbert v. California*.[23] The Court held that it was "constitutional error" to admit "in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin."[24] The Court then held that the State was entitled to present evidence to prove that the eyewitnesses had "independent source[s]" for their in-court identifications of the defendant and remanded the case to the California Supreme Court to hold "such proceedings as [that court] may deem appropriate to afford the State the opportunity" to establish an independent source for the identification.[25] The Court also held that the witness's testimony regarding his out-of-court identifications was per se inadmissible and would result in reversal, unless the California Supreme Court determined that the admission was harmless error.[26]

In *Stovall v. Denno*, the Court held that the *Wade* and *Gilbert* decisions would not be applied retroactively.[27] As such, the Court did not apply *Wade* to the petitioner's case, since he raised his claims on a petition for writ of habeas corpus.[28] The Court also, for the first time, considered the due process[29] implications of the admission of eyewitness evidence. The petitioner claimed, "[T]he confrontation conducted in this case was so unnecessarily suggestive and conducive to

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ly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.").

20 *Id.* at 239–40.

21 *Id.* at 240.

22 *Id.* at 239–40.

23 388 U.S. 263, 265 (1967).

24 *Id.* at 272.

25 *Id.*

26 *Id at* 272–74.

27 388 U.S. 293, 297 (1967).

28 *Id.* at 301.

29 *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

irreparable mistaken identification that he was denied due process of law."[30]

In *Stovall*, the victim Dr. Frances Behrendt was stabbed eleven times.[31] Two days after the stabbing, the defendant, Theodore Stovall, was brought to the hospital where Behrendt was recovering from surgery.[32] Stovall was handcuffed to a police officer and brought into Behrendt's room.[33] He was the only black person present.[34] Behrendt identified Stovall as the perpetrator.[35]

The Court, without citing any authority, stated that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it."[36] The Court quoted the underlying opinion from the court of appeals and noted that under these circumstances, the showup[37] employed in this case was necessary and therefore, the admission of evidence derived from it did not constitute a due process violation.[38]

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30 *Stovall*, 388 U.S. at 301–02.

31 *Id.* at 295.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 302. The Court stated that a claim that "the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law" was "a recognized ground of attack upon a conviction independent of any right to counsel claim." *Id.* at 301–02. However, it cited only a single Fourth Circuit case, *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966), in support of this proposition. In *Palmer*, the Court relied on the principle that a court may not "rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction" without violating due process. *Id.* at 202. The court cited no authority for this proposition. *Id.* In his merits brief, Stovall cited only a Canadian case in support of his argument that the identification to which he was subject violated due process. Brief for Petitioner at 14–15, Stovall v. Denno, 388 U.S. 293 (1967) (No. 254) (citing Rex v. Smierciak, [1947] 2 D.L.R. 156, 157–58 (Can. Ont.)).

37 A "showup" is "[a] pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime. Unlike a lineup, a showup is a one-on-one confrontation." BLACK'S LAW DICTIONARY 1506 (9th ed. 2009).

38 *Stovall*, 388 U.S. at 302. The Court considered these factors in its totality analysis:

> Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.

Id. (quoting United States *ex rel.* Stovall v. Denno, 355 F.2d 731, 735 (1966)).

B. Developments in the Due Process Exclusion of Eyewitness Evidence

Just one year after the *Wade* trilogy was decided, the Court revisited and developed the due process status of eyewitness evidence in *Simmons v. United States*.[39] In *Simmons*, eyewitnesses had identified photographs of the petitioners.[40] Thomas Simmons claimed, "[I]n the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction."[41] As in *Stovall*, the Court evaluated Simmons's claim in light of the "totality of the surrounding circumstances."[42]

The Court listed some of the conditions that may lead to an improper identification.[43] The Court found, however, that cross-examination would be sufficient to remedy most of the dangers of erroneous identifications.[44] Thus, under the totality of the circumstances, Simmons's due process rights had not been violated[45] and that the identification procedure was not "unnecessary" since "[a] serious felony had been committed" and "[t]he perpetrators were still at large."[46] Moreover, the Court concluded, "[T]here was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons."[47] This was because the lighting during the robbery was good,[48] the robbers were not disguised,[49] five witnesses identified Simmons,[50] the photographs were shown to the witnesses "while their memories were still fresh,"[51] and law enforcement did not suggest to the defendants which people in the photographs were under suspicion.[52]

The next year, in *Foster v. California*,[53] the Court held, for the first time, that a lineup was so unfair as to violate due process. In *Foster*,

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39 390 U.S. 377, 384 (1968).

40 *Id.* at 382.

41 *Id.* at 383.

42 *Id.*

43 These included viewing the perpetrator for a short period of time; showing the witness a single photograph resembling their description; and the police telling the witness that they have corroborating evidence. *Id.* at 383–84 (citing PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 74–77, 82–83 (1965)).

44 *Id.* at 384.

45 *Id.*

46 *Id.*

47 *Id.* at 385.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 394 U.S. 440, 442–43 (1969).

the petitioner was the only person in the lineup wearing a leather jacket similar to that worn by the perpetrator.[54] The witness was unable to make an identification, so the police set up a one-on-one confrontation between the witness and the petitioner.[55] The witness was still unable to make an identification.[56] The police conducted another lineup three days later. The petitioner was the only person who was in both lineups. Only at this second lineup was he identified.[57] Under these circumstances, the Court held, "The suggestive elements in [the] identification procedure made it all but inevitable that [the eyewitness] would identify petitioner whether or not he was in fact 'the man.'"[58] As such, the Court held that the procedure was so unnecessarily suggestive as to violate the defendant's due process rights.[59]

The Court substantially refined the test, establishing the contemporary standard, in *Neil v. Biggers*.[60] According to the majority, "[s]ome general guidelines" could be gleaned from the Court's previous cases.[61] First, according to the Court, its past judgments were intended to avoid misidentifications.[62] A showing of suggestiveness was not, however, sufficient for a court to exclude the challenged evidence.[63] The Court held that eyewitness evidence should be admitted if "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[64] The Court then listed five factors to use in determining whether an identification is sufficiently reliable to be admitted in spite of a suggestive identification procedure: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the

54 *Id.*
55 *Id.* at 443.
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 409 U.S. 188, 198–200 (1972).
61 *Id.* at 196–98.
62 *Id.* at 198.
63 *Id* at 198–99.
64 *Id.* at 199.

confrontation.[65] The Court failed to cite any sources for these factors.[66]

The Court's final distillation of the due process test for the exclusion of eyewitness evidence came in *Manson v. Brathwaite*, where it clarified that the test consisted of two parts.[67] Evidence of an eyewitness identification is *not* excluded "per se" when the defendant shows that the lineup was impermissibly suggestive.[68] According to the Court, "[R]eliability is the linchpin in determining the admissibility of identification testimony."[69] Therefore, the Court should examine the totality of the circumstances, focusing on the factors outlined in *Biggers* in order to determine whether the evidence is sufficiently reliable to be admitted, despite the use of a suggestive identification procedure.[70]

Since 1977, the Court has not revised its due process test, despite numerous calls for it to do so.[71] In 2012, the Court declined to readdress the *Manson* framework in *Perry v. New Hampshire*.[72] Justice Sonia Sotomayor, in dissent, noted that "[a] vast body of scientific literature

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65 *Id.* at 199–200.

66 The Court may have been influenced by its Confrontation Clause jurisprudence. Two years prior to *Biggers*, the Court had engaged in a similar analysis in its interpretation of the Confrontation Clause in *Dutton v. Evans*, 400 U.S. 74, 88–89 (1970). According to the Court, a declarant's statements could be introduced even when the defendant had no opportunity to confront the declarant if they carried sufficient "indicia of reliability." *Id.* at 89. In *Dutton*, the disputed statement was one that identified the defendant. *Id.* at 88. According to the Court, "there was no denial of the right of confrontation as to this question of identity," since "the statement contained no express assertion about past fact," the declarant had "personal knowledge" of the identity of the defendant, "the possibility that [the declarant's] statement was founded on faulty recollection [was] remote in the extreme," and the "circumstances" gave no reason to suppose that the declarant was lying. *Id.* at 88–89. As in *Biggers*, the Court did not cite any sources to support its determination that these factors were indeed indicative of reliability. *Cf.* 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA 153 (2d ed. 1923) ("The theory of the Hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.").

67 432 U.S. 98 (1977).

68 *Id.* at 109, 113–14.

69 *Id.* at 114. That is to say, a defendant's due process rights are not violated simply by being subject to a suggestive police procedure. Due process is subverted only when that procedure results in the admission of unreliable evidence at trial.

70 *Id.*

71 *See supra* notes 7–8 and accompanying text.

72 132 S. Ct. 716, 724–25 (2012).

has reinforced every concern our precedents articulated nearly a half-century ago."[73] She went on to observe,

> The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.[74]

In spite of these observations, *Manson* continues to provide the test that federal courts use in assessing the constitutionality of admitting eyewitness evidence.

II. STATE SUPREME COURT PRECEDENT

Some state supreme courts have modified the United States Supreme Court's test.[75] New York and Massachusetts courts adopted the "per se" exclusionary rule that the United States Supreme Court rejected in *Biggers*. With regards to eyewitness evidence, the New York Court of Appeals has "interpreted the Due Process Clause of the New York Constitution differently" from the way the United States Supreme Court has interpreted the United States Constitution.[76] Evidence of an out-of-court identification derived from a suggestive lineup procedure is excluded per se.[77] However, witnesses are permitted to identify the defendant in court "if that identification is based on an independent source."[78] The test in Massachusetts is the same.[79]

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73 *Id.* at 738 (Sotomayor, J., dissenting).

74 *Id.* at 738–39 (footnotes omitted) (citations omitted) (internal quotation marks omitted).

75 *See* O'Toole & Shay, *supra* note 7, at 115 ("Some state courts have attempted to respond to the criticism of *Manson* by interpreting their state constitution or other state law to provide more protection than *Manson*.").

76 People v. Marte, 912 N.E.2d 37, 39 (N.Y. 2009).

77 People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981).

78 *Id.*

79 *See* Commonwealth v. Watson, 915 N.E.2d 1052, 1060 (Mass. 2009) ("If a defendant sustains his burden of showing that a given identification was unnecessarily suggestive, then the Commonwealth may not introduce a subsequent identification by the same witness absent clear and convincing evidence that the subsequent identification had an independent source and was not merely the product of the prior suggestive confrontation.").

A few states have responded more directly to criticism of *Manson*. Kansas and Utah have adopted tests that are similar to the *Manson* test, but have made modifications to the factors to be considered under the totality of the circumstances. The Utah Supreme Court, in *State v. Ramirez*, adopted the following five-factor test in place of the *Manson* test:

> (1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.[80]

The Kansas Supreme Court adopted the *Ramirez* test in *State v. Hunt*.[81]

The Wisconsin Supreme Court abandoned the *Manson* test in *State v. Dubose*.[82] The court began its analysis by recognizing the "new information" that had been assembled in the social science literature[83] and cited evidence from that literature calling into question the *Manson* test.[84] "In light of such evidence," the court adopted a new test.[85] According to the court, "[E]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary."[86] The court explained, "A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a

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80 State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (quoting State v. Long, 721 P.2d 483, 493 (Utah 1986)) (internal quotation marks omitted).

81 69 P.3d 571, 576 (Kan. 2003).

82 699 N.W.2d 582, 594 (Wis. 2005).

83 *Id.* at 591–92.

84 *Id.* (citing Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 LAW & HUM. BEHAV. 185 (2001); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523 (2003); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUMAN BEHAV. 603 (1998); Winn S. Collins, Comment, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529; U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf.; U.S. DEP'T OF JUSTICE, *supra* note 8).

85 *Dubose*, 699 N.W.2d at 592–93.

86 *Id.* at 593–94.

result of other exigent circumstances, could not have conducted a lineup or photo array."[87]

Perhaps the most significant reforms are those adopted by the Supreme Court of New Jersey in *State v. Henderson*.[88] The court, in considering whether to amend its due process test, appointed a Special Master to "evaluate scientific and other evidence about eyewitness identifications."[89] The Special Master heard testimony from seven experts and reviewed hundreds of scientific studies, which produced 2,000 pages of transcripts.[90] Based on this evidence, the court concluded, "[T]he current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate."[91]

The court then proceeded to review, in detail, the scientific literature relating to eyewitness identifications. In light of this evidence, the court fashioned a new test. "First, . . . a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification."[92] Second, "the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables."[93] Third, "the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification."[94] Then, "if after weighing the evidence presented a court finds from the totality of the circumstances that [the] defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence."[95]

More important than changing the structure of the test, the New Jersey Supreme Court identified a number of variables that social scientists have shown to be more closely tied to reliability for trial courts to examine in their "totality of the circumstances" inquiries. These include (1) blind administration, (2) pre-identification instructions, (3) lineup construction, (4) feedback, (5) recording confidence, (6)

87 *Id.* at 594.
88 27 A.3d 872 (N.J. 2011).
89 *Id.* at 877.
90 *Id.*
91 *Id.* at 878.
92 *Id.* at 920.
93 *Id.*
94 *Id.*
95 *Id.*

multiple viewings, (7) showups, (8) private actors, (9) other identifications made, (10) stress, (11) weapon focus, (12) duration, (13) distance and lighting, (14) witness characteristics, (15) characteristics of the perpetrator, (16) memory decay, and (17) race-bias.[96] These reforms were significant and based on a substantial degree of fact-finding by the New Jersey Supreme Court.

The Supreme Court of Oregon has also recently amended its due process test for eyewitness identifications in response to social science criticism of the *Manson* test.[97] The court revised its test to accommodate "considerable developments in both the law and the science on which this court previously relied in determining the admissibility of eyewitness identification evidence."[98] The court recognized, "Since 1979, . . . there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification,"[99] and took "judicial notice" of this social science data.[100] The court, however, revised its test based on evidentiary, rather than due process, grounds.[101]

As discussed *supra*, the United States Supreme Court has refused to acknowledge the social science data that calls into question the efficacy of its due process test. It has not, as the state supreme courts of New York, Massachusetts, Wisconsin, Kansas, Utah, New Jersey, and Oregon have done, reevaluated its standards for the exclusion of unreliable eyewitness evidence. The rest of this Comment will argue that the Supreme Court should reassess the *Manson* test in light of this data.

III. A FRAMEWORK FOR USING SOCIAL SCIENCE IN CONSTITUTIONAL INTERPRETATION

A. History of the Use of Social Science in Constitutional Interpretation

The United States Supreme Court has only recently begun to consider social science[102] in interpreting the Constitution. Before the 1920s, the Court's formalist normative commitments excluded social

96 *Id.* at 920–22.

97 State v. Lawson, 291 P.3d 673 (Or. 2012).

98 *Id.* at 678.

99 *Id.* at 685.

100 *Id.*

101 *Id.* at 696–97.

102 According to Amy Rublin, "'Social science' refers to the work of people from myriad fields who utilize different methods to analyze and explain social phenomena and rest their explanations on a scientific basis." Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 179–80 (2011).

science as a relevant area of judicial inquiry.[103] Michael Rustad and Thomas Koenig argue that the rise of the realist movement changed this paradigm.[104] In his famous article *The Path of the Law*, Oliver Wendell Holmes, Jr. heralded the paradigm shift, declaring,

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.[105]

Early proponents of using social sciences in the law included Hugo Mustenberg, Karl Llewellyn, and Benjamin Cardozo.[106]

In a brief filed in *Muller v. Oregon*,[107] Louis Brandeis used social science evidence to argue in favor of the constitutionality of a law limiting women's working hours.[108] After *Muller*, the Court grew more receptive to using social science evidence in constitutional interpretation.[109] In *Brown v. Board of Education*,[110] the Court relied on social science studies to justify its holding.[111] Since *Brown*, the Court has relied on social science data in decisions "concerning school desegregation, obscenity, segregation by gender, jury size, discriminatory death penalty, death-qualified juries, juvenile delinquency, discrimination, and Eighth Amendment death penalty challenges."[112]

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103 Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100–01 (1993).

104 *Id.* For a more thorough examination of realist jurisprudence, see generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

105 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

106 Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 106 (2003).

107 208 U.S. 412 (1908).

108 Rustad & Koenig, *supra* note 103, at 105–06. The "Brandeis brief" included "extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization." *Muller*, 208 U.S. at 420 n.1. For an examination of *Muller* from a feminist perspective, see Sybil Lipschultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 YALE J.L. & FEMINISM 131, 134–39 (1989).

109 *See* Fradella, *supra* note 106, at 107 ("Largely as a result of the changes that occurred as a function of the New Deal, '[b]y the 1930's, classifying social science as fact was deeply ingrained in the thinking of the Court,' and the amicus brief became the mechanism for receiving social fact into judicial decision-making." (quoting John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 481 (1986))).

110 347 U.S. 483 (1954).

111 Fradella, *supra* note 106, at 107.

112 *Id.* at 108 (citation omitted) (internal quotation marks omitted).

Most recently, the Court has relied on social science evidence to develop the restrictions the Eighth Amendment[113] places on the punishment of juvenile criminal offenders. In *Roper v. Simmons*, the Supreme Court held that it was impermissible under the Eighth Amendment to execute a juvenile offender who was older than fifteen but younger than eighteen when he committed a capital crime.[114] According to the Court, in construing the prohibition against cruel and unusual punishments, the Court must "refer[] to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[115]

The Court relied on social science evidence in order to determine that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[116] First, the Court determined that juveniles are unusually reckless.[117] Next, it noted that juveniles are "more vulnerable . . . to negative influences and outside pressures" because they "have less control, or less experience with control, over their own environment."[118] Finally, the Court observed that "[t]he personality traits of juveniles are more transitory, less fixed."[119]

According to the Court, the differences between juveniles and adults, illuminated by social science, "render[ed] suspect any conclusion that a juvenile falls among the worst offenders."[120] The Court, noting a rule "forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder," held that "[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."[121]

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113 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

114 543 U.S. 551, 573–74 (2005).

115 *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

116 *Id.* at 569.

117 *Id.* (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

118 *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

119 *Id.* at 570 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

120 *Id.*

121 *Id.* at 573.

The Court extended *Roper* to hold that a juvenile could not be sentenced to life in prison without parole for a nonhomicide crime in *Graham v. Florida*.[122] The Court reaffirmed the validity of the social science evidence that supported *Roper*.[123] In *Miller v. Alabama*, the Court held that juveniles could not be subject to a mandatory sentencing scheme that "mandates life in prison without possibility of parole for juvenile offenders."[124] Again, the Court referenced the social science findings in *Roper*.[125]

Despite this rise in the use of social science, some have argued that the Court's reliance on social science data is waning. After conducting an empirical study of Supreme Court decisions, Henry F. Fradella concluded, "[I]t appears as if the heyday of social science as persuasive evidence in courts of law is firmly in the past. Moreover, it seems unlikely that the courts will re-embrace the social sciences in the near future."[126] Amy Rublin concludes that, in the area of gay rights, "a growing national consensus is likely to be more persuasive to the Court than social science findings."[127] However, she maintains that "there is little doubt that social science will continue to influence" decisions about gay rights and other areas.[128]

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122 130 S. Ct. 2011, 2034 (2010).

123 *Id.* at 2026 ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

124 132 S. Ct. 2455, 2469 (2012).

125 *Id.* at 2464 (citing *Roper*, 543 U.S. at 569).

126 Fradella, *supra* note 106, at 170.

127 Rublin, *supra* note 102, at 220; *see also* Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263–64 (arguing that the Supreme Court's jurisprudence tracks public opinion, but proposing that the Justices do not directly respond to public opinion, but instead that their views are shaped by the same forces that shape public opinion).

128 Rublin, *supra* note 102, at 222; *see also* Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Promoting the Well–Being of Children Whose Parents Are Gay or Lesbian*, 131 PEDIATRICS 827, 827 (2013) (supporting marriage equality as a matter of policy in light of "extensive scientific literature" indicating that "children's well-being is affected much more by their relationships with their parents, their parents' sense of competence and security, and the presence of social and economic support for the family than by the gender or the sexual orientation of their parents." (citation omitted) (internal citations omitted)), *available at* http://pediatrics.aappublications.org/content/early/2013/03/18/peds.2013-0376.full.pdf+html.

B. A Framework for the Use of Social Science Data in Constitutional Decision-Making

Normative principles demand that the Supreme Court consider social science evidence in some situations when interpreting the Constitution. David L. Faigman has developed a model for analyzing when such evidence is an appropriate source of constitutional interpretation.[129] According to Faigman, "The role of social science in the legal process remains confused . . . due to the lack of a standard by which to measure its relevance."[130] Faigman's basic framework is quite simple. He argues that the standard by which the general legal relevance of social science research can be judged "should depend on [its] scientific strength, that is, on the ability of social scientists to answer validly the questions posed to them."[131]

Faigman, however, has a more specific view of when social science research is an appropriate source for *constitutional* interpretation. He identifies a number of sources of constitutional interpretation including "the text, original intent, precedent, constitutional scholarship, and contemporary values."[132] Faigman emphasizes, however, that in interpreting the Constitution, the Court must engage in fact-finding. It is in this fact-finding process that empirical research is relevant to constitutional interpretation.[133]

Faigman bases his analysis of "constitutional fact-finding" on the scholarship of Kenneth Culp Davis.[134] Davis distinguished between two kinds of facts: legislative and adjudicative. Legislative facts are those that "inform legislative judgment," that is, those facts that are relevant to questions of "law or policy."[135] These facts are to be contrasted with "adjudicative facts." According to Davis, "[F]acts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were— . . . may conconveniently be called adjudicative facts."[136]

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129 *See generally* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989).

130 Faigman, *To Have and Have Not*, *supra* note 129, at 1009.

131 *Id.* at 1009–10 (footnote omitted).

132 Faigman, "*Normative Constitutional Fact-Finding*," *supra* note 129, at 548.

133 *Id.* at 551.

134 *Id.* at 552 (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942)).

135 Davis, *supra* note 134, at 402.

136 *Id.*

Professor Faigman has built on this distinction. He refines the category of legislative facts into categories of legislative facts particularly relevant for constitutional interpretation. According to Faigman, "*Constitutional doctrinal facts* are advanced to substantiate a particular interpretation of the Constitution."[137] These facts go to the meaning of the Constitution itself and include the text, original intent, constitutional structure, precedent, scholarship, and contemporary values.[138] Faigman then identifies "*constitutional reviewable facts*." These facts are examined "under the pertinent constitutional rule or standard to determine the constitutionality of some state or federal action. Reviewable facts transcend particular disputes and thus can recur."[139] Finally, "*constitutional case-specific facts*" are those that "are relevant to the application of constitutional rules in particular cases."[140] Where the Court needs to answer empirical questions in order to engage in constitutional fact-finding, it is appropriate for the Court to consider social science evidence.

Professor Faigman argues that constitutional fact-finding is particularly appropriate in cases where there is "difficulty in choosing which constitutional principle to rely upon."[141] Therefore, where there are overlapping constitutional principles, social science evidence may be particularly appropriate to constitutional interpretation. Faigman cites *Brown* as a primary example of this sort of case. According to Faigman, "[No] traditional principle[] of constitutional adjudication . . . squarely supports the decision and several indicate a contrary result."[142] In this context, constitutional fact-finding filled the void created by the law and provided a basis for the Court's decision.

IV. SOCIAL SCIENCE IS PARTICULARLY RELEVANT IN RESOLVING THE APPROPRIATE DUE PROCESS TEST FOR THE ADMISSION OF EYEWITNESS EVIDENCE

A. The Social Science Supporting a Change in the Manson *Test Is Reliable and Well-Established*

As discussed supra, it is essential for Faigman that the social science that provides support for constitutional fact-finding must be re-

137 FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 129, at 46.
138 *Id.* at 47.
139 *Id.*
140 *Id.* at 48.
141 Faigman, *"Normative Constitutional Fact-Finding," supra* note 129, at 567.
142 *Id.*

liable. Contrary to the assertions of respondent's amici in *Perry*,[143] the reliability of the social science evidence with respect to eyewitness identifications is unassailable. According to psychologist Gary Wells, "[H]undreds of eyewitness experiments have been published in peer-reviewed journals, many of which bear on issues in *Manson*."[144] These studies are based on "the experimental model that psychology long ago borrowed from other sciences, such as biology and physics."[145] The generalizability of eyewitness evidence across age groups has been confirmed by empirical research.[146] The reliability of research concerning eyewitness evidence has also been recognized by numerous courts.[147] Professor Faigman described the "proliferation of studies on eyewitness identification."[148] And, "[U]nlike the study of complex legal and psychological issues, such as the coercive impact of religiously inspired prayer at graduation ceremonies, eyewitness perception requires little legal sophistication and is relatively easy to research."[149] The scientific and legal consensus clearly demonstrates that scientific research regarding eyewitness identification is sufficiently reliable to serve as the basis of a finding of constitutional fact.

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143 *See supra* note 14.

144 Wells & Quinlivan, *supra* note 8, at 1.

145 *Id.* at 5.

146 Steven Penrod & Brian H. Bornstein, *Generalizing Eyewitness Reliability* Research, *in* 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 529, 538 (Rod C.L. Lindsay et al. eds., 2007); Thomas E. O'Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 LAW & HUM. BEHAV. 385, 392 (1989).

147 *See* United States v. Bartlett, 567 F.3d 901, 906 (7th Cir. 2009) (examining confidence-accuracy relationship and effects of memory decay), *cert. denied*, 130 S. Ct. 1137 (2010); United States v. Brownlee, 454 F.3d 131, 142–44 (3d Cir. 2006) (noting the "inherent unreliability" of eyewitness identifications and the accuracy-confidence relationship); United States v. Smith, 621 F.Supp. 2d 1207, 1215–17 (M.D. Ala. 2009) (discussing cross-racial identifications, impact of high stress, and feedback); State v. Chapple, 660 P.2d 1208, 1220–22 (Ariz. 1983) (discussing memory decay, stress, feedback, and confidence-accuracy); People v. McDonald, 690 P.2d 709, 718 (Cal. 1984) ("The consistency of the results of [eyewitness identification] studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice."), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000); Benn v. United States, 978 A.2d 1257, 1265–68 (D.C. 2009) (citing expert consensus regarding system and estimator variables); State v. Henderson, 27 A.3d 872, 916 (N.J. 2011) ("We find that the scientific evidence presented is both reliable and useful."); People v. LeGrand, 867 N.E.2d 374, 380 (N.Y. 2007) (discussing the confidence-accuracy relationship, feedback, and confidence malleability); State v. Copeland, 226 S.W.3d 287, 299–300, 302 (Tenn. 2007) (discussing weapons effect, stress, cross-racial identification, age, and opportunity to view); State v. Clopten, 223 P.3d 1103, 1113 n.22 (Utah 2009) (citing with approval research on multiple system and estimator variables).

148 FAIGMAN, CONSTITUTIONAL FICTIONS, *supra* note 129, at 28.

149 *Id.* at 29 (footnote omitted).

B. Criminal Due Process Is Sufficiently Open-Ended to Make Reliance on Constitutional Facts Desirable

As was true with the equal protection analysis in *Brown* and the Eighth Amendment analysis in *Roper*, constitutional interpretation surrounding criminal due process does not have a firm doctrinal grounding. Niki Kuckes has examined the Supreme Court's criminal due process precedent.[150] According to Kuckes, "While the Court's civil and administrative precedents express a clear due process approach, . . . no single doctrinal approach to procedural due process emerges from the Court's criminal decisions."[151] Kuckes goes on to say, "[T]o the extent a dominant approach is reflected in the Court's recent criminal cases, it suggests that the process due in criminal cases should be heavily influenced by historic tradition, but this doctrine has neither the clarity nor the consistency of the civil due process test."[152]

This doctrinal confusion is reflected in the Court's eyewitness identification decisions. In *Stovall*, the Court described the petitioner's challenge to the lineup on the grounds that it was so unnecessarily suggestive as to violate due process as a "recognized ground of attack upon a conviction independent of any right to counsel claim."[153] The only authority that the Court cited for this proposition was *Palmer v. Peyton*,[154] a Fourth Circuit case from the previous year.[155] The Court provided no rationale outside of this "recognized ground of attack" that the Due Process Clause could require the exclusion of evidence obtained from a suggestive eyewitness procedure.

The Court's eyewitness identification due process jurisprudence is part and parcel of its muddled approach to criminal due process more generally. In this context, the traditional sources of authority that inform the Court of constitutional doctrinal facts are unavailable. The Court has not said why, as a formal matter, a matter of precedent, or a matter of original intent the Due Process Clause *means* that unreliable evidence obtained through suggestive procedures should be excluded. If the Court had relied on one of these more traditional sources of constitutional interpretation in establish-

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150 Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006).

151 *Id.* at 14.

152 *Id.* at 15–16 (footnote omitted).

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

154 359 F.2d 199 (4th Cir. 1966).

155 *Palmer*, remarkably, cited no authority for the proposition that suggestive police procedures conducive to mistaken identifications could be violative of the Due Process Clause.

ing the *Manson* test, modern courts might look to it assessing the continuing validity of the test.

In the absence of such a rationale, however, constitutional reviewable facts are the only ones available to resolve disputes over the meaning of the Due Process Clause in this area. Since social science evidence provides facts of this kind and the social science evidence in the realm of eyewitness identification is reliable, it would be appropriate for the Court to consider it in refining the *Manson* test.

C. The Test Established by the Supreme Court Presents an Empirical Question That Should Be Resolved by Social Science

Not only is the criminal due process jurisprudence vague enough that social science evidence should be used to resolve the doctrine, the test that the Supreme Court established for excluding eyewitness evidence under the Due Process Clause creates empirical questions that can best be resolved by reference to social science facts. According to *Manson*, there are two questions that need to be addressed in order to decide whether the admission of eyewitness evidence will violate the Due Process Clause. First, the Court must decide whether the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[156] Second, the Court must decide whether the identification was sufficiently reliable that its admission would not violate due process.[157]

The first question can only be resolved with reference to constitutional reviewable facts. Courts must decide which procedures are so suggestive that they give rise to a substantial likelihood of misidentification. The Constitution itself has nothing to say on this topic. At this point, there may be sufficient precedent to guide lower courts in determining which procedures are suggestive enough to satisfy the test. However, the question is really an empirical one: what sorts of identification procedures will lead to a risk that witnesses will make false identifications?

This answer can be and has been answered by social scientists. They have proved that undergoing multiple identification procedures,[158] seeing a mugshot before undergoing the procedure,[159] failing

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156 Manson v. Brathwaite, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)) (internal quotation marks omitted).

157 *Id.* at 106 (majority opinion).

158 Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value*, 34 LAW & HUM. BEHAV. 241, 256 (2010).

159 Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287,

to engage in "double blind" lineup procedures,[160] failing to provide unbiased pre-identification instructions,[161] the construction of the lineup, administrator feedback,[162] having the witness compose a composite,[163] and presenting the witness with a "show-up"[164] can affect the likelihood that the witness will misidentify the suspect. These studies go directly to answering an empirical question that is at the heart of the constitutional analysis of what procedures violate due process. As such, the Court should make use of them in analyzing this constitutional question.

Much the same can be said for the second part of the *Manson* inquiry. Lower courts are directed to decide "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."[165] According to the Court, "reliability is the linchpin" of this analysis.[166] The factors identified by the Court are intended to provide a guide to lower courts as to what constitutional, case-specific facts they should adduce in order to determine whether due process has been violated in a particular case. However, the question of what factors, as part of a totality of the circumstances, contribute to the reliability of a given identification is empirical. It must be answered with reference to constitutional reviewable facts.

As in the first *Manson* prong, these facts about what makes a given identification reliable have been established by reliable social science research. Psychologists have identified weapons focus,[167] presence of a disguise,[168] cross-racial identification,[169] and stress[170] as factors that

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299 (2006); Charles A. Goodsell et al., *Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults*, 23 APPLIED COGNITIVE PSYCHOL. 788, 789 (2009).

160 Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 71 (2009).

161 Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 285–86, 294 (1997).

162 Wells & Bradfield, *supra* note 84, at 360.

163 Gary L. Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 6, 6–7 (2007).

164 A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996).

165 Manson v. Brathwaite, 432 U.S. 98, 106 (1977) (quoting Neil v. Biggers, 409 U.S. 188, 199 (1972)) (internal quotation marks omitted).

166 *Id.* at 114.

167 Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 413 (1992).

168 BRIAN L. CUTLER & MARGARET BULL KOVERA, EVALUATING EYEWITNESS IDENTIFICATION 43 (2010); Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 240, 244–45 (1987).

affect the reliability of eyewitness identification. Moreover, social science research has revealed that one of the *Biggers* factors, certainty, is *not* correlated with reliability.[171] This reliable evidence has given clear answers to the empirical question that the *Manson* test requires courts to resolve. As such, these findings are relevant and should be relied upon in judicial interpretation of the Due Process Clause.

The Court should look to social science research in interpreting when the Due Process clause proscribes the admission of eyewitness evidence. In general, criminal due process is not governed by clear principles. More specifically, the Court did not cite traditional sources of constitutional interpretation in establishing the *Manson* test. As such, it is appropriate for the Court to engage in constitutional fact-finding to determine the meaning of the Due Process Clause in the context of criminal due process. More specifically, the Court's precedent asks courts to make inquiries that can be illuminated by social science research. It is appropriate and normatively desirable for the Court to use social science evidence in determining the meaning of the Due Process Clause as it relates to eyewitness evidence.

V. POTENTIAL OBJECTIONS TO USING SCIENTIFIC EVIDENCE IN THE CONTEXT OF EYEWITNESS IDENTIFICATION

A. Tying Constitutional Analysis to Scientific Findings Will Create an Unstable Standard

Some have objected that tying constitutional principles to social science findings creates a moving target that will render the law perpetually unsettled and will fail to provide guidance to lower courts and law enforcement.[172] According to Professor Faigman, this criti-

169 Tara Anthony et al., *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 296, 299 (1992); Robert K. Bothwell et al., *Cross-Racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19, 19, 23 (1989); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 14 (2007).

170 Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 687, 699 (2004).

171 Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL.: APPLIED 11, 11 (2006); Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?*, 85 J. APPLIED PSYCHOL. 542, 548 (2000).

172 The Criminal Justice Legal Foundation made this very objection in its amicus brief in support of the respondent in *Perry*. Brief of Amicus Curiae of The Criminal Justice Legal Foundation in Support of Respondent at 24, Perry v. New Hampshire, 132 S. Ct. 716

cism was leveled at Justice Harry Blackmun's majority opinion in *Roe v. Wade*.[173] Faigman observes, "Critics complain that attaching constitutional meaning to scientific opinion, even when scientists are in consensus, condemns the Constitution to fluctuations in meaning as scientific knowledge changes."[174]

In *Roe*, the Court found that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[175] The Court then held that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."[176] Thus, a state could place limitations on abortion rights after the first trimester.[177] Justice Blackmun based his decision on scientific facts. He "immersed himself in research at the huge Mayo Clinic medical library" before writing his opinion.[178] Blackmun's reliance on scientific principles was widely criticized. In her dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*, Justice Sandra Day O'Connor argued that, due to the developing nature of medical science, "[t]he *Roe* framework . . . is clearly on a collision course with itself."[179]

Professor Faigman, however, has convincingly argued that "Blackmun's error in *Roe* does not come from attaching the fundamental right of choice to empirical fact, but rather from failing to sufficiently articulate the constitutional principles underlying that right."[180] As such, the constitutional standard itself was subject to fluctuation with any change in the empirical fact. Since there was no clear constitutional principal, the *only* guidance lower courts had was viability.

(2012) (No. 10-8974) ("The research and theories are not solid enough on which to rest a constitutional standard.").

173 Roe v. Wade, 410 U.S. 113, 163 (1973).

174 Faigman, *"Normative Constitutional Fact-Finding," supra* note 129, at 573.

175 *Roe*, 410 U.S. at 154.

176 *Id.* at 163.

177 *Id.*

178 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 229 (1979); *see also* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 90 (2005) ("Blackmun visited the Mayo Clinic library, where the staff had set aside a place for him to work and compiled a stack of books and articles on the history and practice of abortion. In long-hand on a lined pad, he took careful notes, numbering each factual assertion and marking the citation for each.").

179 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

180 Faigman, *"Normative Constitutional Factfinding," supra* n. 129 at 574.

This is not a problem in the realm of eyewitness identification. The Supreme Court has, in the case of the due process standard for eyewitness identification, identified the principles that provide the contours of the right at stake. Defendants have the right not to be subject to suggestive procedures to the extent that they are likely to produce unreliable identifications. Here, the empirical evidence will not change the constitutional standard. Rather, as the Supreme Court of New Jersey noted in *Henderson*, "The factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve."[181] As the *Henderson* court recognized, the *Manson* framework can accommodate changing social science discoveries without threat to the framework itself.

Moreover, courts are well equipped to stay abreast of this new evidence. As demonstrated by the Supreme Court's opinion in *Graham*, the Supreme Court is fully capable of assessing the developments of relevant social science.[182] Since the science in this area is well settled and changes to it will not affect the constitutional test itself, using social science to define suggestiveness and reliability will not create an unduly unpredictable standard.

B. Judicial Activism

One may also argue that judges lack the institutional competence to weigh and assess social science evidence; this is a task best left to the legislature. The specter of judicial activism encompasses two concerns. First, one might worry that judges are not competent to assess scientific facts. Second, one may worry that unelected judges are not democratically accountable and, as such, are not the proper governmental actors to be assessing legislative facts and creating policy around them.

The courts are entirely competent to make an assessment of the social science evidence relevant to eyewitness identifications. Here, courts are not being asked to make a policy judgment better suited to a legislature. Rather, they are trying to adduce whether identifications in particular cases are reliable. Trial courts routinely assess the validity of scientific evidence in the context of certifying expert witnesses. The *Daubert* standard requires courts to assess "whether the [proffered] expert is proposing to testify to (1) scientific knowledge

181 State v. Henderson, 27 A.3d 872, 878 (N.J. 2011).

182 *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

that (2) will assist the trier of fact."[183] In making this assessment, the court must examine "whether the reasoning or methodology underlying the testimony is scientifically valid."[184] Courts have engaged in this evaluation of scientific evidence for almost ten years.

The anti-democratic concern is also not compelling in the case of eyewitness identifications. In his book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Alexander Bickel argued that "judicial review is a counter-majoritarian force in our system."[185] He argued that judicial review was undemocratic, since, by allowing unelected judges to overturn legislation duly passed by a democratically elected Congress, it "constitute[s] control by an unrepresentative minority of an elected majority."[186] In light of this worry, one might argue that even if judges are competent to analyze social science evidence, they should not do so; rather, limitations on eyewitness evidence should be made by the people through the legislature.

This argument is unconvincing because the interests of those who are protected by due process protections, people accused of committing crimes, are a minority and cannot adequately represent their interests in the legislative process. According to Erwin Chemerinsky, "Constitutional law should begin with the idea that society should have an institution, the Court, that is not popularly elected or directly electorally accountable identify and protect values that are sufficiently important to be constitutionalized and safeguarded from political majorities."[187]

The people whose rights are at stake in determining the proper scope of criminal due process protections are criminal defendants. They are precisely those people that a counter-majoritarian institu-

183 Daubert v. Merrel Dow Pharm., Inc., 509 U.S. 579, 592 (1993).

184 *Id.* at 592–93.

185 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

186 *Id.*

187 Erwin Chemerinsky, *The Supreme Court, 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 102 (1989). This view is reflected in the famous footnote four of *United States v. Carolene Prods. Co.*, which called for greater judicial scrutiny of statutes that target "discrete and insular minorities." 304 U.S. 144, 153 n.4 (1938). John Ferejohn and Pasquale Pasquino identify another benefit to counter-majoritarian Supreme Court rulings. According to them, "the countermajoritarian nature of judicial review is not a 'difficulty,' but an 'opportunity.' A countermajoritarian court can make it possible for a democracy to become more deliberative." John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 360 (2010). On this view, a counter-majoritarian ruling in favor of the rights of the accused would have the advantage of encouraging public deliberation on this issue.

tion is best suited to protect.[188] As such, this is an area where judicial activism on the part of the Court is necessary, since the legislature will be unable, due to its majoritarian commitments, to adequately protect the rights of criminal defendants.

CONCLUSION

It is entirely appropriate and normatively desirable for the Supreme Court to use social science evidence to amend the *Manson* test. The Supreme Court's precedents in this area do not adequately protect criminal defendants and have led to erroneous convictions. Criminal due process is an area of constitutional interpretation that is ideal for considering social science facts. Since the standards of criminal due process do not have firm grounding in traditional sources of constitutional interpretation, social science can provide a powerful tool in constitutional interpretation in this area.

Moreover, the Court has defined the test in such a way that empirical questions must be resolved in order to apply it. In doing so, the Court has opened the door to social science research. Which procedures are suggestive and what factors contribute to the reliability of an identification are empirical facts. These facts are necessary to interpreting the Constitution in the Court's framework. In doing so, the Court should not ignore a robust and reliable source for those facts. Relying on social science in this area will not constitute a radical departure from the Court's past practice. If there is an area where social science has something to add to constitutional interpretation, this is it.

The Court is not at risk of creating an unstable standard, since adoption of social science evidence will not necessarily call the standard itself into question. Finally, the Court has a duty to make use of such facts in this area due to its counter-majoritarian obligations.

Other scholars have argued forcefully that the *Manson* test is deficient. The Court should not put on blinders and ignore the vast body of knowledge developed by scholars in non-legal fields. In order to determine the contours of due process with regards to eyewitness evidence, the Supreme Court must look to social science.

188 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 142–43 (2010) (describing the "collateral consequences" of criminal convictions, including the loss of the right to vote).