Notes

Convicting with Our Eyes Open: Regulation of Eyewitness Identification in the United States and England and Wales

*Columbia Journal of Transnational Law* Writing Prize in Comparative and International Law, Outstanding Note Award

*This Note considers whether the U.S. Supreme Court’s current standard for regulating eyewitness identification evidence is satisfactory. Many years of research have shown that this type of evidence can be dangerous to our criminal justice system by contributing to mistaken convictions. Yet, because eyewitness evidence can be probative and is readily available, we tolerate its continued use so long as safeguards are in place to minimize risk of error. This Note looks at what these safeguards entail, and argues that what we presently have is grossly inadequate.*

*Part I compares the U.S. Supreme Court’s approach to evaluating eyewitness evidence with that of England and Wales, and finds that the former is significantly less protective of criminal defendants. Part II examines how states have responded to the federal standard, discovering that a growing number have departed, some more subtly than others, from the federal benchmark. Even among those states that have devotedly followed U.S. Supreme Court precedent, a handful have expressed deep concern with the federal standard. Part III suggests that the U.S. Supreme Court should, in light of the English experience, post-*
Manson case law, and psychological research, revise the federal standard. The Court should replace its current standard with a new standard, taking the form of a penalty default, that asks two independent and equally weighty questions: (1) do conditions surrounding the observation make the observation of the identification unreliable?; and (2) were suggestive procedures used in the identification process? If the answer to either question is “yes,” then the resultant evidence should be excluded.

INTRODUCTION ................................................................................. 250
I. A COMPARATIVE ANALYSIS: UNITED STATES AND ENGLAND AND WALES ......................................................... 252
   A. U.S. Supreme Court: From Suggestiveness to Reliability ........................................................................ 252
      1. Fleeting Glance/Difficult Conditions (in U.S. Terms, Reliability) ......................................................... 261
      2. Breach of Code D (in U.S. Terms, Suggestiveness) ........................................................................ 265
II. STATE COURTS: LEAVING BIGGERS AND MANSON BEHIND.....269
   A. Excluding Evidence Where the Police Use Suggestive Procedures ............................................................. 270
   B. Modifying the Biggers/Manson Test Factors ......................... 272
   C. Modifying Jury Instruction Procedures .............................. 275
   D. Social Science-Based Approaches to Admissibility ...... 276
   E. Growing Dissatisfaction with Biggers and Manson ..... 279
III. A NEW APPROACH: SUGGESTIVENESS AND RELIABILITY ......284
   A. Drawing from the English Experience: Suggestiveness and Reliability ......................................................... 284
   B. Application in the U.S. Context ................................................. 289
   C. A Return to Stovall? ............................................................... 292
CONCLUSION .................................................................................... 294
INTRODUCTION

The dangers inherent in using inculpatory eyewitness identification evidence against criminal defendants are widely recognized.\(^1\) Criminal courts continue to rely on this evidence, however, because of its potential probative value\(^2\) and ready availability.\(^3\) The question is not whether to continue using it, but how to best regulate it to maximize truth-finding and minimize erroneous results.\(^4\) This Note argues that the current federal standard for regulating identification evidence provides insufficient protection to criminal defendants. It examines the experiences of England and Wales\(^5\) and a number of

---


2. See, e.g., Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (“There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says, ‘That’s the one!’”).

3. See Michael Zander & Paul Henderson, *Crown Court Study*, § 3.3.1 (Royal Commission on Criminal Justice, Research Study No. 19, 1993) (observing that eyewitness identification is very or fairly important in around twenty-five percent of cases tried in the Crown court); Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC’Y 71, 73 (1989) (calculating that nearly 80,000 suspects are targeted each year based on eyewitness reports); Daniel Goleman, *Studies Point to Flaws in Lineups of Suspects*, N.Y. TIMES, Jan. 17, 1995, at C1 (arguing that, since eyewitness evidence is often the sole or primary evidence in a criminal case, the legal system must enhance the ability of judges, other legal personnel, and jurors to check its accuracy).


5. The scope of this Note is limited to the law of the United States and that of England and Wales. In particular, it does not focus on the law of Scotland or that of Northern Ireland. The positions taken by the law of Scotland or that of Northern Ireland on legal issues may diverge from those taken by English law. See, e.g., Michael Bromby et al., *An Examination of Criminal Jury Directions in Relation to Eyewitness Identification in Commonwealth Jurisdictions*, 36 COMMON L. WORLD REV. 303, 323–25 (2007) (observing that, unlike England and Wales, “jury direction with regard to eyewitness identification [in Scotland] is largely left to the discretion of the trial judge”).
states in the United States, and argues that the U.S. Supreme Court should replace its current test with a penalty default—a threat to impose an inflexible rule unless states come up with their own locally tailored and equally effective solution. Such a penalty default should contain two separate and independent tests based on the conditions under which the observation was made and the suggestiveness of the identification procedures employed.

Part I compares the U.S. Supreme Court’s approach to evaluating identification evidence with that of England and Wales. Whereas the United States has moved from a test based on suggestiveness to a test based on reliability, English law has adopted both tests. In the United States, a defendant can only exclude evidence if both suggestiveness and unreliability are shown. By contrast, under English law, the defendant can exclude evidence if either suggestiveness or unreliability is shown. It follows that the U.S. Supreme Court’s current approach to regulating identification evidence, from a defendant’s perspective, is comparatively less stringent. Part II considers how state courts have responded to the federal standard. It shows that a number of states have grown dissatisfied with and have departed from the federal standard in a number of ways. Moreover, even among those states that have continued to follow the U.S. Supreme Court’s holding faithfully, there are dicta suggesting that change is on the way. With this understanding, Part III suggests that the U.S. Supreme Court should learn from the English experience in light of attitude changes among state courts. The U.S. Supreme Court should replace its current standard with one that asks two independent and equally weighty questions: (1) whether conditions surrounding the observation make the identification unreliable; and (2) whether suggestive procedures were employed in the identification process. If the answer to either question is “yes,” then the resultant evidence should be excluded. This new standard should take the form of a penalty default. A penalty default would encourage states to brainstorm collectively about alternative approaches to regulating identification evidence.

6. See infra Part III(B).

7. See infra notes 10–11 and accompanying text.
I. A COMPARATIVE ANALYSIS: UNITED STATES AND ENGLAND AND WALES

A. U.S. Supreme Court: From Suggestiveness to Reliability

The earliest major case on eyewitness identification evidence in the United States is Stovall v. Denno. In that case, the U.S. Supreme Court articulated the applicable standard for excluding evidence to be whether, under the totality of the circumstances, the identification procedures were so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law. From a psychological perspective, a procedure is suggestive if it places pressure on, or fails to remove pressure from, eyewitnesses to make a lineup selection. It is also suggestive if it indicates to witnesses which person is the suspect or whether their identification response is accurate. In Stovall, the victim of a stabbing identified the defendant as her assailant when the defendant was brought to the hospital room. The police asked the defendant, who was the only African-American person in the hospital room and who was handcuffed to one of five police officers present, to speak a few words for voice identification purposes. The victim then assented to the officer’s question concerning the identity of the man. The Court observed that the procedures used in this case were condemnable. Nonetheless, because the victim was in medical peril and was the only person who could exonerate the defendant, the Court found

9. Id. at 302.
10. See Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 LAW & HUM. BEHAV. 1, 6 (2009).
11. Id.
13. Id.
14. Id.
15. Id. at 302 (“The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.”).
16. Id. (“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..."
that using a “show-up”—a procedure in which the eyewitness is only shown one person without any fillers—was necessary.

The focus on suggestiveness was followed in *Simmons v. United States*, in which the defendant was convicted of armed robbery based on a positive identification in court by witnesses who were shown photographs of the defendant before trial. Justice Harlan, writing for the majority, confirmed that the standard was whether the identification procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” As in *Stovall*, the Court justified the police’s use of a suggestive procedure by reasoning that such a procedure was necessary. In doing so, however, the U.S. Supreme Court implied that the ultimate issue was reliability and not suggestiveness. Because the robbery occurred in a well-lit bank, the robbers were not masked, five employees were able to see the appellant for periods ranging up to five minutes, and these witnesses were shown photographs only a day after the incident, the Court determined that the evidence did not need to be excluded.

The U.S. Supreme Court first explicitly departed from *Stovall’s* suggestiveness test in *Neil v. Biggers*. There, the police

---


18. *Stovall*, 388 U.S. at 302 (“[T]he record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative.”).


20. *Id.* at 380.

21. *Id.* at 384.

22. *Id.* at 384–85 (“It is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the ‘one-man lineup’ in *Stovall v. Denno.*”).

23. *Id.* at 385–86 (emphasizing that the “circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal”).

24. *Id.* at 385.

conducted an identification procedure that consisted of two detectives walking the defendant past the victim at the police station.\textsuperscript{26} At the victim’s request, the police instructed the defendant to say, “shut up or I’ll kill you,” after which and again at trial the victim identified the defendant.\textsuperscript{27} The Court concluded that, on its own, a suggestive identification does not require exclusion of the evidence.\textsuperscript{28} Exclusion is required only if, after considering a number of factors, a court finds the evidence unreliable under the totality of the circumstances (“the suggestiveness-then-reliability test” or “the Biggers/Manson test”):\textsuperscript{29}

\[T\]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ 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.\textsuperscript{30}

Applying the Biggers/Manson test means that a court’s conclusion that procedures were suggestive is only the first of a two-step inquiry. Despite being suggestive, the Biggers Court found that the evidence was reliable because the victim spent up to half an hour with her assailant, was with him under adequate artificial light in her house and a full moon outdoors, and faced him directly and intimately at least twice.\textsuperscript{31} The Court also observed that her description of his approximate age, height, weight, complexion, skin texture, build, and voice was “more than ordinarily thorough” and that she had “no doubt” that she had the right defendant.\textsuperscript{32}

The canonical case on regulation of eyewitness identification evidence is Manson v. Brathwaite,\textsuperscript{33} in which a police officer made a positive out-of-court photo identification of the defendant as the man from whom he made an undercover purchase of drugs two days earlier.\textsuperscript{34} The majority expressed three concerns with the Stovall suggestiveness test. It found that relying only on suggestiveness to deter-

\begin{itemize}
  \item \textsuperscript{26} Id. at 195.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id. at 198.
  \item \textsuperscript{29} Id. at 199.
  \item \textsuperscript{30} Id. at 199–200.
  \item \textsuperscript{31} Id. at 200.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Manson v. Brathwaite, 432 U.S. 98 (1977).
  \item \textsuperscript{34} Id. at 101.
\end{itemize}
mine whether evidence should be excluded: (1) would be over-inclusive and keep out reliable evidence; (2) was not required for deterrence purposes; and (3) would significantly impair the administration of justice. Justice Marshall, dissenting, argued that a rule excluding evidence obtained through suggestive procedures was necessary because of the dangers of unreliable identification evidence. In response to the majority’s concerns that a suggestiveness approach would exclude reliable evidence and hinder administration of justice, he argued that suppressed identification evidence was not forever lost because a prosecutor could easily arrange another lineup if the original identification procedure was unfair. Applying the Neil v. Biggers factors—(1) opportunity to view, (2) attention, (3) accuracy of prior description, (4) certainty, and (5) length of time between observation and identification—the majority concluded that the identification was reliable. The witness, the majority noted, (1) was within two feet of the seller and testified that the confrontation occurred over a “couple of minutes” in natural light; (2) was a trained

35. Id. at 112 (“The per se rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.”).

36. Id. (“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.”).

37. Id. at 112–13 (“Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the per se approach but not under the totality approach cases in which the identification is reliable despite an unnecessarily suggestive identification procedure reversal is a Draconian sanction.”).

38. Id. at 125 (Marshall, J., dissenting) (observing that “such a rule would make it unquestionably clear to the police they must never use a suggestive procedure when a fairer alternative is available,” which is important because “[t]he dangers of mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive identifications”).

39. Id. at 126 (Marshall, J., dissenting) (“Identification evidence, however, can by its very nature be readily and effectively reproduced.”).

40. Id. at 126–27 (Marshall, J., dissenting). But see Wells & Quinlivan, supra note 10, at 14–15 (criticizing Justice Marshall’s claim as “implausible” because “a mistaken identification taints the witness’ memory toward the identified person” and arguing that holding a second procedure does not cancel out the suggestiveness of the first one).

41. Manson, 432 U.S. at 114–15.

42. Id. at 117.

43. Id. at 108, 114.
police officer who realized his duty to arrest the suspect\textsuperscript{44}; (3) gave a detailed description of the suspect, which an officer used to pick out a photograph, and which led to a positive identification of the suspect\textsuperscript{45}; (4) had “no doubt” that he identified the right defendant\textsuperscript{46}; and (5) made the identification only two days after the crime occurred.\textsuperscript{47} Applying the same factors, Justice Marshall reached the opposite conclusion. He observed that (1) the entire face-to-face transaction could have taken as little as fifteen to twenty seconds\textsuperscript{48}; (2) the witness was distracted by a variety of interruptions, including the door, the window in the room behind the door, the woman standing behind the man, and the details of the transaction\textsuperscript{49}; (3) the witness’ description “was actually no more than a general summary of the seller’s appearance,” failing to describe the seller’s high cheekbones, other facial features, age, or West Indies native origin\textsuperscript{50}; (4) his certainty was “worthless as an indicator that he is correct”\textsuperscript{51}; and (5) two days was a long time because significant memory loss takes place within hours after the event.\textsuperscript{52}

To its credit, the Biggers/Manson test is consistent with the findings of a number of psychological studies assessing the accuracy of eyewitness identifications under different circumstances. As those studies find, it assumes that greater probative weight is due to the identification of a witness who had a clear and extended opportunity to view the perpetrator,\textsuperscript{53} had prior knowledge of the perpetrator’s identity,\textsuperscript{54} was certain about her selection at the time of identification,\textsuperscript{55} and made the identification promptly after the crime and under

\begin{itemize}
\item \textsuperscript{44} Id. at 115.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 108, 115.
\item \textsuperscript{47} Id. at 115–16.
\item \textsuperscript{48} Id. at 129 (Marshall, J., dissenting).
\item \textsuperscript{49} Id. at 129–30.
\item \textsuperscript{50} Id. at 131–32.
\item \textsuperscript{51} Id. at 130.
\item \textsuperscript{52} Id. at 131.
\item \textsuperscript{53} See Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 101 (1995) (finding that length of observation is an important cue of accuracy); see also infra note 295.
\item \textsuperscript{54} See Amina Memon et al., A Field Evaluation of the VIPER System: A New Technique for Eliciting Eyewitness Identification Evidence, 17 Psychol. Crime & L. 711, 717 (2011) (observing that “suspect identification rates dropped from 92.5% where the witness knows the suspect to 43.6% in the identification of unknown persons”).
\item \textsuperscript{55} See Tim Valentine et al., Do Strict Rules and Moving Images Increase the Reliability of Sequential Identification Procedures?, 21 Applied Cognitive Psychol. 933,
circumstances which prompted a high degree of attention. Moreover, as a matter of principle, if the court is certain that evidence is reliable and the defendant is raising a technical procedural objection to escape the law’s reach, it is arguable that the court should include the evidence.

One problem is that in practice, the suggestiveness-then-reliability test has allowed lower courts so much flexibility that they have found due process violations only in “outrageous” situations, effectively diluting a defendant’s due process rights. This is because many courts have interpreted “reliability” in a relaxed manner, even when an identification is clearly suggestive. They can do this because more disagreement exists amongst psychological researchers on the question of when an observation is “reliable” than on the question of when an observation is “suggestive.” The result is a parade of horribles infecting the U.S. criminal justice system: (1) law enforcement departments have minimal standing policies or procedures for conducting lineups; (2) police officers receive haphazard and nonuniform training; (3) police officers use biasing instructions to...
assure witnesses of their selection63; (4) innocent defendants are mistakenly identified because they are the only target matching the witness’ description or because they otherwise stick out64; (5) innocent defendants are mistakenly identified after witnesses give dramatically different initial descriptions of their assailants65; and (6) witnesses are given multiple chances to make an identification or, worse yet, to make the correct identification after having chosen a filler at a previous procedure.66 All of this throws into question whether there is sufficient deterrence to discourage the police from holding suggestive procedures.68 By contrast, a test that excludes on the basis of suggestiveness alone would leave lower courts much less flexibility because they must exclude evidence if procedures are problematic, without regard to reliability.

The Biggers/Manson test is also open to challenge as a matter of theory. Psychological research has shown that suggestive procedures influence a witness’ evaluation of her opportunity to view, how much attention she paid to, and how certain she is in her identification of the defendant.69 Believing, as a result of the suggestive procedure, that they picked out the correct defendant, witnesses become unduly confident about their selection.70 At trial, witnesses subjected to suggestive influences are more likely to testify that their observation was made for a prolonged period of time,71 that they paid significant attention to the suspect during the observation,72 and that they are certain about their selection.73 Under the Biggers/Manson test, the court would view this as an indicator of reliability even though it is in reality an “indicator of the power of the suggestive procedure.”74

63. Id. at 78.
64. Id. at 77–78.
65. Id. at 78–79.
66. Id. at 79–80.
67. Id. at 80.
69. Wells & Quinlivan, supra note 10, at 9–12.
70. Id.
74. Wells & Quinlivan, supra note 10, at 17.
In other words, the more suggestive an identification procedure is, the more likely it is that the witness will come across as reliable. Once the police recognize that suggestive procedures increase the likelihood that identifications will be considered reliable, they may be incentivized to make greater use of them.75

The foregoing shows that the U.S. Supreme Court has steered away from pure suggestiveness in Stovall and towards a focus on reliability. At the same time, the Court has made clear, in Perry v. New Hampshire,76 that suggestiveness remains an essential element of a defendant’s constitutional claim. There, a police officer instructed the theft defendant to stay in the parking lot with another officer while she went to speak with the witness, who lived on the fourth floor of the apartment building.77 During the conversation with the witness, the witness described the person she saw as a tall, African-American man.78 When asked for a more specific description, she pointed to her kitchen window and said that the person she had seen breaking into the victim’s car was standing in the parking lot beside the officer.79 A month later, the witness was unable to identify the defendant in a photographic array.80 Rejecting Perry’s challenge based solely on reliability, the majority held that Perry could only succeed if he demonstrated both suggestiveness and unreliability.81 Justice Ginsburg, writing for the majority, reasoned that “[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.”82 Since the police did not engage in any improper conduct in Perry, the Court rejected Perry’s challenge.83 Justice Sotomayor filed a dissent,

75. Id.
77. Id. at 721.
78. Id.
79. Id. at 722.
80. Id.
81. Id. at 725–26 (“[T]he Bratwaite Court’s reference to reliability appears in a portion of the opinion concerning the appropriate remedy when the police use an unnecessarily suggestive identification procedure . . . . The due process check for reliability, Bratwaite made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct.”).
82. Id. at 726.
83. The majority was also concerned that agreeing with Perry’s position would “entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.” Id. at 727.
emphasizing identification evidence’s “unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process.” 84 Unlike the majority, she interpreted the Court’s precedent as being concerned with the reliability of identification evidence, which was “the ‘driving force’ of [the Court’s] doctrine,” deterrence being only a “subsidiary concern.” 85

In summary, under the Biggers/Manson test, which remains good law today, identification evidence is permitted if suggestive procedures are not used. But even if suggestive procedures are used, this does not mean that the court will automatically exclude the evidence. It will only exclude the evidence if, under all the circumstances, the court finds that it is also unreliable.


This section discusses how English law regulates identification evidence. At first glance, the English and U.S. approaches appear to be worlds apart because of differences in terminology. Upon closer examination, it becomes clear that like the United States, English law considers both reliability of observation and suggestiveness of procedure in determining whether evidence is admissible. Unlike the United States, however, unreliability and suggestiveness under English law are two distinct reasons to exclude evidence. This section turns first to English law’s treatment of unreliability before considering its chosen response to suggestiveness.

84. Id. at 730 (Sotomayor, J., dissenting). Although the majority accepted “the importance [and] fallibility of eyewitness identifications,” it concluded that that is not enough to warrant a due process rule, due to its recognition that “the jury, not the judge, traditionally determines the reliability of evidence.” Id. at 728 (majority opinion). The majority also observed that other safeguards existed “to caution juries against placing undue weight on eyewitness testimony of questionable validity . . . includ[ing] the defendant’s Sixth Amendment right to confront the eyewitness[,] . . . the defendant’s right to the effective assistance of an attorney[,] . . . [e]yewitness-specific jury instructions[,] . . . [t]he constitutional requirement that the government prove the defendant’s guilt beyond a reasonable doubt[,] . . . [and] exclusion of relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury.” Id. at 728–29.

85. Id. at 736 (Sotomayor, J., dissenting). Justice Thomas also filed a concurrence, remarking that substantive due process is not a “right to ‘fundamental fairness’” but rather is premised on the deprivation of life, liberty, or property. Id. at 730 (Thomas, J., concurring).
1. Fleeting Glance/Difficult Conditions (in U.S. Terms, Reliability)

The English equivalent of Manson is R v. Turnbull,\(^86\) which consolidated a number of appeals from convictions for conspiracy to burgle, robbery, and unlawful wounding.\(^87\) Recognizing that eyewitness identification evidence “can bring about miscarriages of justice and has done so,”\(^88\) Lord Chief Justice Widgery elucidated a number of guidelines for trial judges to follow. In a case that relies wholly or substantially on challenged identification evidence, a trial judge “should warn the jury of the special need for caution” before reaching a guilty verdict.\(^89\) She should instruct them that a mistaken witness may be convincing and that a number of witnesses may all be mistaken in their identification.\(^90\) Even in cases where the witness is familiar with the accused, it is still possible that the witness may have made a mistake.\(^91\) In addition to pointing out specific strengths and weaknesses in the identification evidence,\(^92\) the judge should direct the jury to closely examine the circumstances surrounding the observation. The following questions are pertinent:

How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?\(^93\)

Most relevantly for the purposes of this Note, Turnbull directs judges to withdraw cases from the jury where a weak identification—“as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions”—is the main evi-

\(^{87}\) Id. at 137.
\(^{88}\) Id.
\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) Id.
\(^{93}\) Id.
idence against the defendant. In determining what “fleeting glance” and “difficult conditions” mean, judges must scrutinize the circumstances under which the witness made the observation.

In *R v. Ley*, the Court of Appeal of England and Wales found an observation to be fleeting even though the witness knew the defendant for four years prior to the incident. The court explained its result by observing that the witness only had a “quick fleeting glimpse of [the defendant’s] face,” the time that elapsed was “virtually nil,” the witness was ten to twelve feet away, did not recognize the defendant’s facial features, mixed up the names of the four similar looking brothers, and misestimated the appellant’s height by five inches and the appellant’s age by ten years. Conversely, the Court of Appeal of England and Wales (Criminal Division) in *R v. Waterfield* found that the identification was not based on a fleeting glance. Although the victim admitted that she was avoiding eye contact with her attacker and the crime occurred in dimly lit conditions, the incident lasted ten minutes and the victim testified that she looked at him during that period. The Court of Appeal of England and Wales (Criminal Division) reached the same result in *R v. Reilly*. Although the witness’ description of the assailant’s hair color did not match that of the defendant and the witness waited seven months before participating in an identification procedure, the court found the identification to be more than fleeting. This is because the witness testified that she paid special attention to the appellant from the moment he entered the premises and that she closely

94. *Id.* at 138 (“The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.”).


96. *Id.* at [31].

97. *Id.* at [29].


99. *Id.* at [15].

100. *Id.* (While the victim accepted that she “was avoiding eye contact as much as possible,” she recalled that she “looked at him and then looked away. You can look at someone without looking at them in the eye.”).


102. *Id.* at [13].

103. *Id.* at [21].

104. *Id.* at [9] (“She was working behind the bar on the evening this all happened. She gave evidence as to how a group came in. She then said that she understood one to be Denise Minott’s partner as Denise had pointed him out. She had paid attention to him for that reason.”).
observed him for a considerable period of time. Likewise, in *R v. Davidson*, the Court of Appeal of England and Wales (Criminal Division) refused to classify two witnesses’ identifications as fleeting glances, despite the first victim’s failure to recognize the defendant’s photograph taken hours after the crime, and the second victim’s admission that she only saw the defendant’s eyes. This is because, unlike *Ley*, *Davidson* was not a case between people who did not know each other, the defendants were inside the premises for three minutes, and the victim accurately recalled the defendant’s age, build, and height. A survey of England and Wales’ case law indicates that courts have not been overeager to characterize an identification as a fleeting glance or one made in difficult conditions. *Ley* shows that courts will, nevertheless, do so where the factual circumstances justify such a characterization.

This is not to say that the “fleeting glance” approach is infallible, however; trial judges have taken strained interpretations of “fleeting glance” to avoid excluding identification evidence. A recent example of this is *R v. Dossett*, which involved two seriously injured victims of a robbery. In concluding that the identification evidence was “good enough to justify leaving the case to the jury as it stood,” the Court of Appeal of England and Wales (Criminal Division) focused on testimony that the victim had a clear view of the defendant when the street lights were shining on his face. To reach this result, the court discounted the significance of flaws in the victim’s identification that, in prior cases, were viewed as important and even determinative. The court found that neither the short period of time of observation (“a few minutes”), the failure to mention the

105. *Id.* at [12].
107. *Id.* at [32].
108. *Id.* at [18].
109. *Id.* at [19].
110. *Id.* at [32] (“Laura Bowers gave evidence that she knew the appellant as a fellow member of this small community and had grown up in the area with him, and, indeed, that he had been a guest in her home.”).
111. *Id.* at [28].
112. *Id.* at [29].
114. *Id.* at [2].
115. *Id.* at [16].
116. *Id.* at [13].
117. *Id.* at [14] (“Although the whole incident lasted only a few minutes . . . experience
defendant’s neck tattoos when describing the attacker to the police, nor the height discrepancy between the defendant and the witness’ description were fatal to the reliability of the identification.\textsuperscript{118} I have suggested elsewhere that the Dossett court’s narrow interpretation of “fleeting glance” has left the law in an unclear and unsatisfactory state, virtually destroying the descriptive power of the “fleeting glance” test.\textsuperscript{119} This is part of the broader problem of judges “continu[ing] to put too much faith in juries . . . letting juries convict on eyewitness evidence alone in too wide a range of cases.”\textsuperscript{120}

Nonetheless, there are two reasons to be somewhat more sanguine about the state of the law in England and Wales as compared to that in the United States. First, English courts recently confirmed that judges may exclude weak identification evidence even if the observation is not a “fleeting glance,” so long as it falls into the “longer observation made in difficult conditions” category.\textsuperscript{121} In R v. Oakes,\textsuperscript{122} two men robbed the victim of a cash card and £70 cash.\textsuperscript{123} Although the incident lasted three to four minutes and the victim testified that one of the defendants, who repeatedly punched her, was only “‘in her face’ for a minute or so,”\textsuperscript{124} the trial judge found that this was not a fleeting glance case and admitted the evidence.\textsuperscript{125} This is because the victim was able to give “clear evidence as to the lighting conditions, the close range of the observation, her specific memory and her observation of the man’s face over a minute or two.”\textsuperscript{126} The Court of Appeal of England and Wales (Criminal Divi-

\textsuperscript{118}. Id. (“It is true that neither witness mentions seeing any tattoos, though whether they were clearly visible under the prevailing conditions is uncertain.”).

\textsuperscript{119}. Id. (“There is also the discrepancy between Mr. Ryan’s assessment of the attacker’s height and the height of the appellant, but there is a real distinction between the instinctive process of taking in a person’s facial features and the conscious mental process involved in assessing a person’s height in feet and inches.”).


\textsuperscript{123}. R v. Oakes [2014] EWCA (Crim) 449.

\textsuperscript{124}. Id. at [4].

\textsuperscript{125}. Id.

\textsuperscript{126}. Id. at [15].

\textsuperscript{127}. Id.
sion), however, reversed Oakes’ conviction, holding that the case should have been withdrawn from the jury. It observed that the victim was awoken during the night, was immediately subjected to a continuous attack of her head and face, and did not previously know her assailant. In addition, the defendants were hooded and in the house for a short period of time. Furthermore, there were discrepancies between the victim’s description of her attacker and Oakes. The victim described her attacker as a thin man who was between five foot ten and six foot, whereas Oakes had a forty-two inch chest and a thirty-six to thirty-eight inch waist, and was six foot one inches. Importantly, the court excluded the evidence even though it agreed with the trial judge that the observation was “more than a fleeting glance” because the observation was made under “undoubtedly difficult conditions.” In short, a fleeting glance is the starting point but not always the ending point of the reliability inquiry.

A second reason to be more sanguine is that defendants may argue for exclusion based solely on the suggestiveness of the identification procedure instead. Unreliability and suggestiveness in the English system are two independent bases for arguing that evidence should be excluded. A U.S. defendant, by contrast, must demonstrate both suggestiveness of procedure and unreliability in observation in order to succeed in excluding evidence. 

2. Breach of Code D (in U.S. Terms, Suggestiveness)

England and Wales’ Code of Practice (Code D) under the Police and Criminal Evidence Act (PACE) offers the police detailed guidance for good practice in handling identification evidence. According to Code D, if a witness is available to identify the perpe-

---

128. Id. at [21].
129. Id. at [19].
130. Id.
131. Id. at [7], [12].
132. Id. at [19] (“This was more than a fleeting glance, but in our judgment putting all those factors together the conclusion is inescapable that the identification evidence was poor because this was a short-lived observation made in undoubtedly difficult conditions. Given the lack of supporting evidence, we are of the view that this case should have been withdrawn from the jury: the difficulties were such that it falls within the category identified in Turnbull in which the dangers of mistaken identification are too great.”).
133. See supra Part I(A).
erator of a crime, an identification procedure should be held, organized by an identification officer who is not involved with the relevant investigation. Videotaped procedures should be used unless they would serve no useful purpose. Where the identity of the perpetrator is not clearly established, the police should not direct the witness’ attention to any individual unless “taking into account all the circumstances, this cannot be avoided.” In any case, the police should record what happens and ask the witness to provide a description of the perpetrator before she attempts any identification.

PACE’s exclusionary provision gives Code D teeth. Section 78 of PACE empowers courts to discretionarily exclude evidence if the police did not follow the good practices set out in Code D:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This provision enables courts to respond to the problems associated with using suggestive procedures. In practice, courts have

---

136. Id. § 3.11.
137. Id. § 3.12(ii); see, e.g., Marsh v. DPP [2006] EWHC (Admin) 1525 [9] (finding that “no purpose would have been served by having an identification parade” because the witness made the observation from afar—the window of his flat—and so was only able to identify the defendant by reference to a “general description of his height and age and . . . that [the defendant] was wearing a denim jacket”).
138. Cf. R v. S C [2001] EWCA (Crim) 885 [40]–[44] (concluding that Code D did not apply because the identities of the perpetrators were established, and that the dispute was instead about what particular role each co-defendant played).
139. Police and Criminal Evidence Act Code D 2011, § 3.2(b). Code D does not provide examples of unavoidable situations, but observes that:

[T]his does not prevent a witness being asked to look carefully at the people around at the time or to look towards a group or in a particular direction, if this appears necessary to make sure that the witness does not overlook a possible suspect simply because the witness is looking in the opposite direction and also to enable the witness to make comparisons between any suspect and others who are in the area.

Id.
140. Id. §§ 3.1(a), 3.2(a).
141. Police and Criminal Evidence Act 1984, c. 60, § 78 (Eng. & Wales).
142. See supra notes 69–75 and accompanying text.
determined whether to exercise this discretion by taking into account factors such as whether the police acted in bad faith and whether the defendant was disadvantaged by the breach. Where, however, proceedings would not be rendered unfair due to a breach of Code D, courts have admitted the evidence. This does not mean that the defendant has no remedy at all. In such cases, the judge must give a jury instruction in accordance with the guidelines in *R v. Forbes*.

But if the breach is a failure to hold an identification parade when required by Code D, paragraph 2.3, the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eyewitness’s identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair.

An example of the exclusionary rule’s operation is *K v. Director of Public Prosecutions*. In that case, the appellant was convicted of robbery after allegedly taking the victim’s wallet and mobile telephone. The victim identified the appellant as his attacker after the police walked the appellant to the police car in which the victim sat, and held him at the car window. Observing that the appellant protested his innocence before the police directed him to walk to the police car and that there was enough evidence to arrest the appellant, Mr. Justice Henriques concluded that the officer should have proceeded by organizing an identification procedure pursuant to paragraph 2.3 of Code D. Finding that the District Judge should have excluded the identification evidence under Section 78 of PACE, the court quashed the conviction.

---

144. *See, e.g., R v. Kingdom [2009] EWCA (Crim) 2935 [9]–[15] (finding that the trial judge was entitled to decide that the suggestive parade identification is admissible, and that the breach of Code D did not render proceedings unfair because the defense was permitted to make the point that the parade identification was tainted by an accidental identification three months before that).
146. *Id. at 488.*
148. *Id. at [4].
149. *Id. at [6]–[9].
150. *Id. at [45].
151. *Id. at [47].
to ensure that the police observed statutory and Code D safeguards.\textsuperscript{152} The \textit{K} court did not proceed to consider whether the observation was reliable because suggestiveness was sufficient to support exclusion.\textsuperscript{153} By contrast, the \textit{Biggers/Manson} test would require a U.S. court hearing a similar case to take a second step and consider whether, despite procedures being suggestive, the observation was nonetheless reliable. Taking that approach may have led to the opposite outcome because in \textit{K}, “the victim [saw his assailants] for some time in good light and he heard the demands for his phone.”\textsuperscript{154}

Like the “fleeting glance” and “difficult conditions” doctrines, Code D is imperfect and open to criticism. First, judges are not given much guidance on how to exercise their discretion to exclude evidence obtained in violation of Code D.\textsuperscript{155} Second, where judges do not exclude such evidence and a \textit{Forbes} warning is given to the jury, juries are not given any guidance on what to do with the information that there has been a breach of Code D.\textsuperscript{156} Finally, it is unclear whether a \textit{Forbes} warning constitutes effective protection for a defendant at trial and whether it sufficiently deters police misconduct.\textsuperscript{157}

While these ambiguities need to be addressed, it does not call for the rejection of an exclusionary rule based on suggestiveness. A test based on suggestiveness would encourage the police to engage in desirable practices,\textsuperscript{158} thereby increasing the assurance that only guilty defendants are convicted.\textsuperscript{159} The \textit{Forbes} warning provision

\begin{itemize}
\item \textsuperscript{152} Id. at [38].
\item \textsuperscript{153} Id. at [47].
\item \textsuperscript{154} Id. at [5].
\item \textsuperscript{155} Judges are only instructed that they “may refuse to allow evidence . . . to be given if it appears . . . [that] the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” Police and Criminal Evidence Act 1984, c. 60, § 78 (Eng. & Wales) (emphasis added).
\item \textsuperscript{156} Juries are told to “take account of” the fact that there has been a breach of Code D “in its assessment of the whole case, giving it such weight as it thinks fair,” without explaining how the breach relates to their verdict. R v. Forbes [2001] 1 AC 473 (HL) at 488 (appeal taken from Eng.).
\item \textsuperscript{157} See \textit{Ashworth & Redmayne, supra} note 121, at 137 (arguing that such a warning is a “rather ineffectual response” and recommending instead that the identification evidence be excluded).
\item \textsuperscript{158} See \textit{supra} notes 135–40 and accompanying text.
\item \textsuperscript{159} See \textit{In re Winship}, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).
\end{itemize}
may also be desirable as a form of compromise to ensure that defendants who have been identified under clearly reliable circumstances do not escape the law’s reach. A jury instruction would prevent automatic exclusion in such cases and provide some form of redress to defendants.\textsuperscript{160} The police would also be deterred from deviating from good practice if they are aware that the jury would obtain information of police misconduct.\textsuperscript{161}

To summarize, English law takes a more stringent approach in regulating identification evidence because there are two separate bases under which the defendant may seek to exclude it—where the observation is a fleeting glance or where it is made under difficult conditions (unreliable but not suggestive) and where the police use suggestive procedures in breach of Code D (suggestive but not unreliable). This does not necessarily mean that the U.S. system should follow English law’s lead and have two separate exclusionary tests, as long as there is consensus among U.S. state and federal courts in favor of a more relaxed approach. The next part shows, however, that a growing number of state courts are discontent with the \textit{Biggers/Manson} test.

\section*{II. State Courts: Leaving \textit{Biggers} and \textit{Manson} Behind}

This part examines the approaches that a number of U.S. state courts have taken since \textit{Biggers} and \textit{Manson} to heighten the standard for regulating identification evidence. Such approaches include: \textit{(A)} excluding evidence where the police use suggestive procedures; \textit{(B)} modifying the \textit{Biggers/Manson} test factors; \textit{(C)} modifying jury instruction procedures; and \textit{(D)} amending pre-trial admissibility procedures to reflect social science realities. This part concludes by ob-
serving that (E) a number of states have continued to follow the Biggers/Manson test, but have hinted that change may be near.

A. Excluding Evidence Where the Police Use Suggestive Procedures

New York and Massachusetts have adopted the first approach—excluding evidence where the police use suggestive procedures. In People v. Adams,162 the defendants were convicted for robbing a stationery store.163 The prosecution relied on an identification at the police station by the shopkeeper and his employee.164 Judge Wachtler, writing for a majority on the New York Court of Appeals, observed that the procedure was suggestive for a number of reasons. A police officer notified the shopkeeper and employee that he thought the police had the robbers.165 Additionally, police officers stood behind and held the defendants while the defendants stood with their hands behind their backs.166 Rejecting the Biggers/Manson test, under which the identification would still be admissible as long as it contained indicators of reliability, the court established a state constitutional rule based on suggestiveness.167 Under this rule, where a witness makes an identification under the influence of a suggestive procedure and there is no independent source that suggests that the defendant is the perpetrator, the court must exclude the evidence. In Adams, the independent source exception applied because two other witnesses who identified the defendants did not participate in the suggestive procedures.169

Over a decade later, the Massachusetts Supreme Judicial Court followed suit in Commonwealth v. Johnson.170 There, the defendant was convicted of larceny after taking the victim’s wallet while armed with a machete.171 The identification on which the prosecution relied took place in the area where the victim saw his as-

163. Id. at 380.
164. Id. at 381.
165. Id. at 382.
166. Id.
167. Id. at 383–84.
168. Id. at 384.
169. Id.
171. Id. at 1258.
sailant on the night of the crime. The police brought the defendant forward from the group, and the defendant wore similar clothing to the perpetrator. The majority rejected the government’s plea to follow the Biggers/Manson test, finding that the suggestiveness-then-reliability test does not offer enough police deterrence and is likely to result in the imprisonment of innocent defendants. Adopting the Adams rule, the court barred the prosecution from introducing an identification where a defendant demonstrates by a preponderance of the evidence that the identification procedure used is unnecessarily suggestive and therefore offensive to due process. The prosecution is limited to introducing only those identifications that have an independent source. The court followed Adams over the dissent of Justice Nolan, who observed that a state does not necessarily violate due process by employing suggestive procedures, and of Justice Greaney, who made the prudential argument that the court should follow the majority of states that have accepted the Biggers/Manson test. The guilty verdict was vacated because no independent source existed.

More recently, the Supreme Court of Wisconsin in State v. Dubose modified its standard for regulating identification evidence. However, it took an approach that differed from those used in Adams and Johnson in two ways. First, the court’s holding was limited to the admissibility of show-ups as opposed to identifications generally. Second, like in Stovall, the Wisconsin approach recognizes that there are some circumstances in which the use of suggestive procedures is necessary and justified. Dubose concerned an armed robbery involving a first show-up with the defendant and the victim in separate squad cars and a second show-up at the police station.

172. Id. at 1258–59.
173. Id. at 1259.
174. Id. at 1262–63 (“The ‘suggestiveness-then-reliability test’ is unacceptable because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions . . . . To the contrary, it appears clear to us that the [suggestiveness-then-reliability test does little or nothing to discourage police from using suggestive identification procedures.”).
175. Id. at 1260.
176. Id.
177. Id. at 1266 (Nolan, J., dissenting).
178. Id. at 1268 (Greaney, J., dissenting).
179. Id. at 1265 (majority opinion).
180. State v. Dubose, 699 N.W.2d 582 (Wis. 2005).
181. Id. at 586.
The defendant contended that the show-up procedures were suggestive. Justice Crooks agreed, holding that the lower court erred in denying the defendant’s motion to suppress that evidence. However, the Supreme Court of Wisconsin rejected both the Biggers/Manson test and Adams approach, finding instead that evidence obtained from a show-up is not admissible unless the show-up is necessary. A show-up is necessary where the police do not have probable cause to make an arrest or where there are exigent circumstances that make a lineup or photo array inappropriate. The court also recommended that show-ups be “conducted in locations . . . that [do not] implicitly convey[] to the witness that the suspect is guilty,” and that the police caution witnesses that the suspect may be absent and the investigation will continue regardless of the result of the procedure. Because the show-ups in Dubose were suggestive and there was no exigency, the Wisconsin Court of Appeals’ decision was reversed and remanded. The court’s departure survived three dissenting justices’ criticisms that such an interpretation ran counter to the state constitution drafters’ intent, that there was nothing inherently unfair or suggestive about the procedure, and that the focus should be reliability for due process purposes.

B. Modifying the Biggers/Manson Test Factors

Utah and Kansas have opted for the second approach—

182. Id.
183. Id. at 599. But see Andrew Roberts et al., Should We Be Concerned About Street Identifications?, 2014 CRIM. L. REV. 633, 649–50 (concluding after a number of experiments not only that “innocent suspects appear no more likely to be mistakenly identified in street identification than in a video identification procedure,” but also that a higher proportion of witnesses made identifications in a lineup procedure than in a show-up). The authors suggest that this may be because in cases involving line-up procedures, witnesses are likely to be aware that a suspect has been arrested and may speculate that police have evidence or information that incriminates him or her. The use of fillers, moreover, mitigates the risk that an innocent suspect will be mistakenly identified.
184. Dubose, 699 N.W.2d at 593–94.
185. Id. at 594.
186. Id.
187. Id. at 594–96.
188. Id. at 601–02 (Wilcox, J., dissenting).
189. Id. at 604 (Prosser, J., dissenting).
190. Id. at 607 (Roggensack, J., dissenting) (criticizing the majority for “overrid[ing] one of the major tenets in the administration of justice: the presentation of reliable, relevant evidence at trial”).
modifying the *Biggers/Manson* test factors. Unlike New York, Massachusetts, and Wisconsin, Utah and Kansas have not changed the state standard for regulating identification evidence. They have, however, refined the *Biggers/Manson* test in light of psychological research. In *State v. Ramirez*, the defendant was convicted of aggravated robbery of a Pizza Hut manager, her husband, and her brother. The three took part in a show-up in which the defendant was handcuffed to a chain link fence and surrounded by police officers. Only the brother identified the defendant as one of the assailants. Justice Zimmerman, observing that Utah courts have “not agree[d] entirely with the *Biggers* listing of the relevant criteria . . . [and] find some of those criteria to be scientifically unsound,” held that the following factors were pertinent:

(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.

There are three important differences between this formulation and the *Biggers/Manson* test. First, level of certainty is not a factor that Utah courts must consider. Second, suggestibility and capacity to observe have been added as factors that Utah courts must

192. *Id.* at 776.
193. *Id.* at 777.
194. *Id.*
195. *Id.* at 780.
196. *Id.* at 781.
197. Compare *Ramirez*, 817 P.2d at 781 (Utah Supreme Court previously “criticized this factor [i.e., level of certainty] and essentially rejected it as an indicator of . . . reliability.”), with *Neil v. Biggers*, 409 U.S. 188, 199 (1972) (“[T]he factors to be considered in evaluating the likelihood of misidentification include . . . the level of certainty demonstrated by the witness at the confrontation . . . .”)

Finally, whereas length of time was a factor in its own right in *Biggers* and *Manson*, length of time only constitutes part of a consideration of the broader circumstances in *Ramirez*. Although this was a “close case,” the court found that the identification was reliable. The witness was ten to thirty feet from the gunman with no obstructions in between them and good lighting, testified to staring at the gunman to get a good description of him, and was not impaired by fatigue, injury, drugs, or alcohol.

Kansas followed Utah’s lead in *State v. Hunt*, a case involving an aggravated robbery of a Coastal Mart convenience store. There, a police officer arrested the defendant within minutes of receiving the description of the robber and his vehicle. Another officer drove the store clerk to the defendant, and the clerk identified the defendant as the burglar. Justice Geron followed the *Ramirez* model and affirmed the conviction. He held that although the procedure was suggestive, the observation was reliable under the circumstances. This is because the store clerk’s ability to view the robber was unimpeded, he was completely focused on the robber, he was not visually impaired and there were no physical obstructions, the armed robbery was far from ordinary for the clerk, and the clerk and defendant were of the same race.

---

198. Compare *Ramirez*, 817 P.2d at 781 (“[T]he pertinent factors by which reliability must be determined [include] the witness’s capacity to observe the event... suggestibility is included in the fourth... factor, with no comparable emphasis given to this element by *Biggers*.”), with *Biggers*, 409 U.S. at 199–200 (no mention of suggestibility and capacity to observe as factors).

199. *Ramirez*, 817 P.2d at 784.

200. *Id.* at 782–83.

201. *Id.* at 783.

202. *Id.*


204. *Id.* at 573.

205. *Id.*

206. *Id.*

207. *Id.* at 576–77.

208. *Id.* at 577.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 578.

213. *Id.* Race is relevant to the reliability of an identification because of the “other-race effect hypothesis,” which recognizes that “[e]yewitnesses are less likely to misidentify
C. Modifying Jury Instruction Procedures

A third way to intensify regulation of identification evidence is through amended jury instruction procedures. This is the approach that Georgia and Connecticut have taken. In *Brodes v. State*, the Supreme Court of Georgia examined the armed robbery conviction of a defendant that was based only on identification evidence. The victims testified that they were “absolutely certain” that the defendant was the person responsible for the crime, and the judge instructed the jury to consider this in reaching a verdict. After surveying case law and literature that denied a correlation between a witness’ certainty in her identification and the accuracy of the identification, Justice Benham held that trial courts must “refrain from informing jurors they may consider a witness’s level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification.” It reversed the lower court’s judgment because the only evidence that linked Brodes to the crimes was the two victims’ identifications. Despite both expressing certainty in their identifications, the first victim was not able to pick Brodes out in a photo array and the second victim was not able to describe his physical characteristics.

The Supreme Court of Connecticut also modified its jury instruction procedures in *State v. Ledbetter*. The defendant in that

---


215. *Id. at 767.*
216. *Id.*
217. *Id. at 770–71.*
218. *Id. at 771.*
219. *Id.*
case was convicted of robbery in the first degree and conspiracy to commit robbery in the first degree after taking one victim’s bag and its contents, and a second victim’s money, at knifepoint. After surveying the experiences of states that have taken the first two approaches and rejecting them, Justice Borden held that trial courts were required to give a jury instruction when the identification procedure administrator failed to give a warning “that the perpetrator may or may not be present in the identification procedure,” unless no significant risk of misidentification existed. Finding that there was legally sufficient evidence to support the convictions in spite of this error, the court affirmed the lower court’s judgment.

D. Social Science-Based Approaches to Admissibility

More recently, the Supreme Court of New Jersey in State v. Henderson introduced a fourth, social science-based approach to improve regulation of identification evidence. In that case, the defendant was convicted of reckless manslaughter, aggravated assault, and three weapons offenses. During the identification, police of-

221. Id. at 295–97.
222. Id. at 318–19 (“In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. That identification was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure. Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not present. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification. This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine whether that evidence is to be believed. You may, however, take into account the results of the psychological studies, as just explained to you, in making that determination.”).
223. Id. at 316.
224. Id.
225. Id. at 300, 319.
226. See Recent Cases, New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications, 125 Harv. L. Rev. 1514, 1518–21 (2012) (praising Henderson’s social-science grounded approach as a “laudable accomplishment” but arguing that it “should have made a firm judgment that a conviction cannot be sustained on unreliable eyewitness identifications”).
228. Id. at 883.
Officers told the witness to focus, calm down, and relax, and assured him that the police would protect him from retaliation, when he admitted to the lineup administrator that he could not make an identification.  Chief Justice Rabner observed that this exchange led the witness to “reasonably infer that there was an identification to be made, and that he would be protected if he made it.” Remanding to the trial court, the Supreme Court of New Jersey announced a new test that enabled the defendant to “probe all relevant system and estimator variables at a pre-trial hearing.” First, to obtain a pre-trial hearing, a defendant has the initial burden of showing some evidence of suggestiveness—evidence tied only to system variables—that could lead to a mistaken identification. If the defendant fails to meet this initial burden, the court may end the pre-trial hearing. Second, the state must then offer evidence tied to system or estimator variables to show that the proffered identification is relia-

229. Id. at 881 (“In an effort to calm Womble, MacNair testified that he ‘just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against [him] would be put to rest by the Police Department.’ Ruiz added, ‘just do what you have to do, and we’ll be out of here.’ In response, according to MacNair, Womble said he ‘could make [an] identification.’”).

230. Id. at 926.

231. System variables are variables that are “like lineup procedures . . . within the control of the criminal justice system” that can dilute a witness’ memory and lead to misidentifications. Id. at 878. Henderson provided a non-exhaustive list of system variables that courts should consider, including: (1) blind administration; (2) pre-identification instructions; (3) lineup construction; (4) feedback; (5) recording confidence; (6) multiple viewings; (7) showups; (8) private actors; and (9) other identifications made. Id. at 920–21.

232. Estimator variables, in contrast to system variables, are variables “like lighting conditions or the presence of a weapon, over which the legal system has no control.” Id. at 878. They “relate to matters outside the control of law enforcement.” Id. at 923. The Henderson court enumerated a non-exhaustive list of estimator variables that courts should consider, including: (1) stress; (2) weapon focus; (3) duration; (4) distance and lighting; (5) witness characteristics; (6) characteristics of perpetrator; (7) memory decay; (8) race-bias; (9) opportunity to view the criminal at the time of the crime; (10) degree of attention; (11) accuracy of prior description of the criminal; (12) level of certainty demonstrated at the confrontation; and (13) the time between the crime and the confrontation. Id. at 921–22.

233. Id. at 926.

234. Id. at 920, 922–23.

235. Id. at 921 (“If, however, at any time during the [pre-trial] hearing the trial court concludes from the testimony that defendant’s claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant to require the State to elicit more evidence about estimator variables; that evidence would be reserved for the jury.”).
ble. Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification by cross-examining witnesses and police officials, and presenting witnesses and other evidence tied to system or estimator variables. Fourth, 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. If, on the other hand, the court determines that the defendant has not met her burden of demonstrating a very substantial likelihood of irreparable misidentification, the court should admit the evidence and provide appropriate, tailored instructions. Since the trial judge did not take into account the witness’ drug and alcohol use immediately before the confrontation, weapon focus, and lighting, a new trial was required.

The Supreme Court of Oregon adopted a similar social science-based approach to its pre-trial admissibility procedures, offering criminal defendants greater protection than did Henderson, in State v. Lawson. There, the defendant was convicted of murdering a man and shooting his wife while they were camping. The wife, who was “critically wounded but conscious,” referred to the shooter as “they,” accused the pilot of the helicopter who flew her to a hospital to be the shooter, and stated that she did not know who the perpetrator was and had not seen “their” face or faces. She was unable to identify the defendant in a photo lineup the second day after the shooting, said she did not know who the shooter was in a police interview two weeks after the shooting, and again failed to identify the defendant in a photo lineup in a police interview one month after the

236. Id. at 920.
237. Id.
238. Id.
239. Id. at 920, 924–26.
240. Id. at 926.
243. Id. at 678.
244. Id. at 678–79.
EYEWITNESS IDENTIFICATION IN U.S. & ENG. & WALES

shooting. She ultimately identified the defendant two years after the shooting, after the police showed her a photograph of the defendant, took her to the courthouse to observe the defendant during a pre-trial hearing, and then inadvertently showed her one of the earlier photo lineups she had viewed, in which she had failed to identify a suspect from the various photographs. At trial, she testified that she was certain in her identification. The Supreme Court of Oregon, in laying out a revised test for regulating identification evidence, held that first, when a criminal defendant files a pretrial motion to exclude identification evidence, the state must establish all preliminary facts necessary to establish the evidence’s admissibility. Second, if the state meets this burden, the defendant must show that although the identification evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay or needless presentation of cumulative evidence. Third, if the trial court concludes that the defendant has made such a showing, it can either exclude the identification or provide an alternative remedy to cure the unfair prejudice or other dangers involved with using that evidence. Applying this framework, the court reversed and remanded the case to the trial court, observing that a number of estimator and system variables “raise serious questions concerning the reliability of the identification evidence admitted at defendant’s trial.”

E. Growing Dissatisfaction with Biggers and Manson

Although the vast majority of states loyally continue to follow

245. Id. at 679.

246. Id. at 679–80.

247. Id. at 680 (“When asked whether she had any doubt as to her identification, Mrs. Hilde responded: ‘Absolutely not. I’ll never forget his face as long as I live.’ She later added that she ‘always knew it was him.”’).

248. Id. at 696–97. The state must show that the witness has personal knowledge of the matters to which she will testify and that her identification is rationally based on her first-hand perceptions and helpful to the jury. Id. at 697.

249. Id. at 697.

250. Id.

251. Id. at 697–99 (observing that the relevant estimator and system variables should have been considered in Lawson: (1) stress; (2) duration of exposure; (3) environmental viewing conditions; (4) witness characteristics and condition; (5) memory decay; (6) multiple viewings; and (7) suggestive questioning).
the Biggers/Manson test, several states’ intermediate appellate courts have left open the question of whether to follow Biggers and Manson. For instance, the Minnesota Court of Appeals has on three occasions—in State v. Boone, State v. Oestreich, and State v. Sparkman—considered the approaches of states that have rejected the Biggers/Manson test.

In each case, the appellate court affirmed the lower court’s conviction because the identifications were reliable despite being suggestive. In Boone, this is because the witnesses (1) viewed the burglar under lit conditions from a few feet away, (2) were alert and attentive, (3) provided an accurate description of the burglar’s age and clothing, (4) thought that Boone was “definitely” the burglar, and (5) participated in the show-up a few minutes later. The court reached the same result in Oestreich. In that case, (1) the victim had a short conversation with the thief who took his mobile phone; (2) the victim was “coherent, aware, and attentive”; (3) the victim was certain because he immediately identified Oestreich; and (4) only a little more than an hour elapsed between the crime and subsequent identification. Finally, in Sparkman, (1) the victims had a brief conversation with the robbers at close proximity (“inches away from one victim’s face”); (2) the victims “displayed a sufficient degree of attention”; (3) the victims gave accurate de-

256. Id.
257. Id.
258. Id. at *3.
259. Id.
261. Id.
262. Id. at *4.
263. Id.
265. Id.
criptions of the robbers including their relative ages and heights; (4) the victims were confident and “showed no hesitancy” when identifying the robbers; and (5) only half an hour elapsed between the 911 call and subsequent show-up. In all three cases, suggestive identification evidence was admitted against the defendants relying on the second prong of the Biggers/Manson test.

The court did not in any of these cases address the merits of the Biggers- and Manson-repudiating approaches that other states have adopted. Ultimately, it concluded that it could not deviate from the federal standard because of its status as an “error-correcting court” whose role was “not . . . to abolish established judicial precedent.”

Significantly, there were no overlapping judges on these three panels, meaning that nine judges on the court shared this view. Of these nine judges, five still sit on the Minnesota Court of Appeals today, and a sixth judge now sits as an Associate Justice on the Minnesota Supreme Court. The fate of the federal standard in Minnesota is thus far from determined, subject not only to the outcomes of future cases, but also to future changes in the composition of its appellate courts.

Alaska and Iowa are two additional examples of states in which continued faithful adherence to the Biggers/Manson test is uncertain. In Tegoseak v. State, the defendant was convicted of felony driving under the influence and driving with a suspended license. The identification was a photo lineup that occurred one week after the event. The first witness was not able to identify either Tegoseak or the other driver. The second witness was able to

266. Id.

267. Id.

268. Id. at *3.


273. Id. at 346.

274. Id. at 347.

275. Id. at 348.
identify the other driver but identified two fillers when trying to identify Tegoseak. In response, the officer showed more photographs to the second witness and gave him a choice between two photographs—his initial selection and the correct photograph. The Alaska Court of Appeals accepted the defendant’s argument that the identification procedure was suggestive. But after posing the question “[w]hat, if anything, should this [c]ourt do in response to what society has learned in the thirty years since Brathwaite?,” and traversing the psychological literature, it ultimately concluded that the court “[d]id not intend to endorse a particular viewpoint or reach a definitive conclusion at this time.” The court did not need to decide the issue in Tegoseak because, even assuming that the photo lineup procedure was suggestive, any error was “harmless beyond a reasonable doubt.” This is because the prosecution’s evidence established that the car was driven erratically, two men exited the car in a parking lot and switched places before reentering the car and driving off, both men were stopped by the police minutes later, both men admitted to having just driven the car, and the driver explained that they pulled over in the parking lot because Tegoseak was driving very poorly. These facts left the court “no doubt that the jury would have convicted Tegoseak” even if the lower court granted Tegoseak’s motion to suppress the identification evidence. While reserving this question until the issue has been litigated, Judge Bolger, in a concurring opinion, observed that “research cited in the lead opinion suggests that we should consider changes to the test we currently use to determine whether a photo lineup procedure satisfies due process of law.” This dictum suggests a change in the state standard for regulating identification evidence may be near.

More recently, the Iowa Court of Appeals in State v. Williams avoided considering Williams’ claim that his counsel failed to perform an essential duty when his counsel did not move to suppress the show-up identification. The court ruled against Williams because

276. Id.
277. Id. at 348–49.
278. Id. at 361.
279. Id. at 362.
280. Id. at 363.
281. Id.
282. Id.
283. Id.
284. Id. (Bolger, J., concurring).
285. State v. Williams, No. 10–1254, 2011 WL 5394366, at *3 (Iowa Ct. App. Nov. 9,
he did not demonstrate that he was prejudiced by his counsel’s breach. This is because there was independent corroborating evidence apart from the identification that supported his conviction. First, video surveillance showed the robber’s clothing, which matched Williams’ clothing. Second, Williams was found approximately three blocks from the crime scene two minutes after the 911 call was placed. Third, he ignored the police when instructed to stop, fidgeted with something in his pockets, and fell into a snow bank with his hands underneath him, from which the police recovered a knife. Finally, he carried $2.15 in coins, which corroborated a witness’ testimony that he gave the robber “a couple bucks” in change. Like in Tegoseak, these facts did not “show the probability of a different result sufficient to undermine [the court’s] confidence in the outcome of this case.” In reaching this conclusion, however, the court did not address Williams’ plea for Iowa to adopt Wisconsin’s approach in Dubose. Having tactfully sidestepped the issue, the court left the question of whether to continue following the Biggers/Manson test open.

To summarize, a survey of case law in various states demonstrates growing unease with the suggestiveness-then-reliability test in regulating identification evidence. States have deviated from the Biggers/Manson test by changing one of four things: (A) their test for excluding evidence—to strengthen the focus on regulating suggestiveness; (B) the factors considered in their reliability inquiry—to align the Biggers/Manson test more closely with psychological findings; (C) their jury instruction procedures—to ensure that juries are aware that suggestive procedures can generate mistaken identifications; and (D) their pre-trial procedures for determining the admissibility of evidence—to reflect the teachings of social science. While a majority of states remain committed to the Biggers/Manson test, some have (E) expressed discontent with the current approach in light of the dangers of weak identification evidence.

286. Id.
287. Id. at *4.
288. Id.
289. Id.
290. Id.
291. Id.
292. Id.
293. Id. at *3 (stating that the court need not consider whether “we should use our state constitution to adopt the ‘necessity’ standard adopted in Wisconsin”).
III. A NEW APPROACH: SUGGESTIVENESS AND RELIABILITY

Having examined how the U.S. Supreme Court treats identification evidence at the federal level, as well as various approaches that England and Wales and a number of states have adopted, this part considers whether a new federal standard is appropriate. It (A) argues that the U.S. Supreme Court should replace the current two-step suggestiveness-then-reliability test with two separate and independent tests based on suggestiveness and reliability. This would lead to more careful regulation of identification evidence, motivated by a goal and desire to only convict the guilty. To address any federalism concerns, it (B) proposes using a penalty default. Finally, it (C) considers, but ultimately rejects, the merits of using a test based only on suggestiveness.

A. Drawing from the English Experience: Suggestiveness and Reliability

English law’s references to “fleeting glance,” “difficult conditions,” and “breach of Code D” involve terms that are unfamiliar in the U.S. context. However, once these concepts are distilled, it becomes apparent that they are synonymous with “reliability” and “suggestiveness.” Put in terms familiar to the U.S. system, adopting the English approach would mean the adoption of two tests—one based on suggestiveness and the other based on reliability. Employing this regime would enable defendants to seek exclusion of evidence in cases where suggestive procedures are used, even though the circumstances surrounding the observation might be reliable. It would also allow defendants to seek exclusion of evidence in cases where the circumstances are unreliable, even though the police may have conducted procedures without suggestiveness.

This proposed change is defendant-friendly, as defendants would have two avenues for claiming that identification evidence against them should be suppressed. By contrast, under the status quo defendants can only succeed in persuading courts to exclude evidence against them if both the procedure was suggestive and the observation was unreliable. It is therefore prudent to consider whether such a shift in favor of defendants, which heightens the burden of prosecutors across the nation, is justified.

The main benefit of the proposed regime is that it recognizes weak identification evidence is problematic for a number of rea-
First, a witness’ observation at a crime scene may be subpar because of factors such as short observation time, distance, and the presence of a weapon. Second, a witness’ memory retention may be imperfect, such that the witness may have misremembered.

294. See, e.g., State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005) (citing two studies that found eighty-five percent and over two-thirds of wrongful convictions were based significantly on mistaken identifications, and concluding that “eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined”); Wright v. United States, 404 F.2d 1256, 1262 (D.C. Cir. 1968) (Bazelon, C.J., dissenting) (“Since mistaken identifications are probably the greatest cause of erroneous convictions, we must require the fairest identification procedures available under the circumstances. With the stakes so high, due process does not permit second best.”); United States v. Wade, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”).

295. Longer observation time is positively correlated with an identification’s accuracy. See Amina Memon et al., Exposure Duration: Effects on Eyewitness Accuracy and Confidence, 94 BRIT. J. PSYCHOL. 339, 348 (2003); Otto H. Maclin et al., Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition, 7 PSYCHOL. PUB. POL’Y & L., 134, 136 (2001) (summarizing from a number of studies that “in essence, increased exposure time increases recognition accuracy for faces”).

296. Closer distance is positively correlated with an identification’s accuracy. See James Michael Lampinen et al., Effects of Distance on Face Recognition: Implications for Eyewitness Identification, 21 PSYCHONOMIC BULL. & REV. 1489, 1493 (2014) (“[W]e found a significant decrease in hits (.55% per yard), coupled with a significant increase in false alarms (.44% per yard), as the distance between participant witness and target increased.”); R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 LAW & HUM. BEHAV. 526, 533–35 (2008) (observing that although “the reliability of witnesses’ descriptions (at least for height, weight, and age) was virtually unaffected across distances up to 50 m . . . correct identifications decrease[d] with increasing distance in general”); Geoffrey R. Loftus & Erin M. Harley, Why Is It Easier to Identify Someone Close Than Far Away?, 12 PSYCHONOMIC BULL. & REV. 43, 63 (2005).

297. The presence of a weapon is negatively correlated with an identification’s accuracy. See Jonathan M. Fawcett et al., Of Guns and Geese: A Meta-Analytic Review of the ‘Weapon Focus’ Literature, 19 PSYCHOL. CRIM. & L. 35, 56–58 (2013) (“W]eapon presence has consistently demonstrated a negative effect on both feature accuracy and identification accuracy under controlled conditions.”); Nancy Mehrkens Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 LAW & HUM. BEHAV. 413, 420–21 (1992) (same); P.A. Tollestrup et al., Actual Victim and Witnesses to Robbery and Fraud: An Archival Analysis, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 144, 144–60 (1994) (finding that the presence of a weapon had no detrimental effect on the accuracy of a witness’ description of her culprit, but marginally reduced the likelihood of the witness identifying the suspect). But see Tim Valentine et al., Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups, 17 APPLIED COGNITIVE PSYCHOL. 969, 980 (2003) (“The presence of a weapon had no effect on the likelihood of identifying a suspect. This result contrasts with the literature in which the evidence suggests that number of identifications of the culprit is reduced by the presence of a weapon.”).
most of what she observed within days of the event. Third, suggestive procedures may inflate a witness’ confidence in the accuracy of her identification when accusing someone in the lineup as being her perpetrator. Confidence inflation is particularly dangerous because people have an “overinclination to choose.” This means that in a case where a witness does not see her assailant in the lineup, she is more likely to choose the person in the lineup who looks most like her assailant rather than refrain from making a selection. Fourth, the witness’ inflated confidence may carry into the courtroom. Once jurors observe how certain the witness is in her identification when she is testifying on the stand, there is a risk that they will treat her confidence as an indicator of the testimony’s reliability. A final problem is that jurors often give too much weight to identification evidence. This is because they consider this type of “big” evidence to be particularly important, discounting the possibility that it might be unreliable.

In addition, the burdens of the proposed regime should not be exaggerated. The suggestiveness test would only be a slight burden to law enforcement since states are now, with the benefit of decades of psychological research, in a better position to understand what practices minimize the risk of wrongful convictions. To take a few

298. Cutler & Penrod, supra note 53, at 106 (finding that fewer correct identifications—51% compared with 61%—and more false identifications—32% compared with 24%—were associated with longer delays).

299. Bradfield et al., supra note 73, at 117.

300. Simon, supra note 61, at 56–57.

301. Id.

302. Id. at 153–54.

303. Wells & Quinlivan, supra note 10, at 11, 17.

304. See Recent Cases, supra note 226, at 1520; Peter J. Smith, New Legal Fictions, 95 Geo. L.J. 1435, 1452–55 (citing many sources in support of the proposition that “[t]he presumption that jurors can competently assess the reliability of eyewitness testimony . . . is a new legal fiction”); Commonwealth v. Marini, 378 N.E.2d 51, 57 (Mass. 1978) (“The law has not taken the position that a jury can always be relied on to discount the value of an identification by a proper appraisal of the unsatisfactory circumstances in which it may have been made. On the contrary, this court, like others, has read the Constitution to require that where the conditions are shown to have been highly and unnecessarily suggestive, the identification should not be brought to the attention of the jury.”).

305. James S. Liebman et al., The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence, 98 Iowa L. Rev. 577, 636 (2013) (“The more telling distinction, we believe, is between what we have called ‘big’ evidence—including DNA and fingerprints, as well as eyewitness testimony and confessions—and ‘small’ evidence, such as non-exclusionary non-matches.”).
examples, researchers have concluded that flexible sequential\textsuperscript{306} procedures are better than strict simultaneous\textsuperscript{307} procedures,\textsuperscript{308} positive feedback should be avoided,\textsuperscript{309} and witnesses who are older or of a different ethnic appearance than the suspect are less prone to choose correctly.\textsuperscript{310} Consolidation of the scientific literature has prompted recent recommendations of best practices by organizations such as the Innocence Project and the National Academy of Sciences.\textsuperscript{311}

\textsuperscript{306} Sequential procedures present the eyewitness with one lineup member at a time and requires the eyewitness, before being allowed to view the next member, to decide whether or not that person is the perpetrator. Nancy Steblay et al., Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison, 25 LAW & HUM. BEHAV. 459, 460 (2001). By seeing lineup members one at a time, the eyewitness can still decide that the lineup member being viewed currently looks more like the perpetrator than did the previous person, but she cannot be sure that the next (not yet viewed) person does not look even more like the perpetrator. \textit{Id.}; see also R.C.L. Lindsay & Gary L. Wells, Improving Eyewitness Identifications from Lineups: Simultaneous Versus Lineup Presentation, 70 J. APPLIED PSYCH. 556, 559 (1985) (observing that sequential procedures encourage eyewitnesses to “compar[e] . . . each lineup member to one’s recollection on a more ‘absolute’ basis of comparison”).

\textsuperscript{307} Simultaneous procedures, by contrast, present the eyewitness with all lineup members at one time. Steblay et al., supra note 306, at 459. By seeing all lineup members at the same time, the eyewitness can compare lineup members to each other to determine which one most closely resembles the perpetrator. \textit{Id.}; see also Lindsay & Wells, supra note 306, at 559 (reasoning that simultaneous procedures encourage eyewitnesses to make “relative judgments . . . eyewitnesses tend to choose the lineup member who most looks like the perpetrator relative to the other lineup members”).

\textsuperscript{308} See, e.g., Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 WIS. L. REV. 615, 625–28 (arguing that sequential procedures may not be superior to simultaneous procedures and favoring a compromise approach that allows a witness to see a sequence more than once at his or her request); see also Roger C. Park, Hits, Misses, and False Alarms in Simultaneous and Sequential Lineups, 58 HOW. L.J. 459, 472–76 (2015) (outlining the debate about sequential and simultaneous lineups and recommending the use of a sequential lineup with a second lap).

\textsuperscript{309} Wells, supra note 308, at 620–22.

\textsuperscript{310} See, e.g., Jean Searcy et al., Influence of Post-Event Narratives, Line-up Conditions and Individual Differences on False Identification by Young and Older Eyewitnesses, 5 LEGAL & CRIMINOLOGICAL PSYCHOL. 219 (2000) (describing the effects of age in eyewitness identifications); Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces, 7 PSYCHOL. PUB. POL’Y & L. 3 (2001) (examining the impact of race in eyewitness identifications).

\textsuperscript{311} These best practices include: (1) training all law enforcement officers in eyewitness identification; (2) implementing double-blind lineup and photo array procedures; (3) developing and using standardized witness instructions; (4) documenting witness confidence judgments; (5) videotaping the witness identification process; (6) conducting pretrial judicial inquiry; (7) making juries aware of prior identifications in which eyewitnesses participated; (8) using expert testimony; (9) using jury instructions to convey the factors that the jury should consider; (10) establishing a National Research Initiative on
This in turn has led states to take action by adopting administrative guidelines for good police practice. In 2005, Wisconsin issued its Model Policy and Procedure for Eyewitness Identification,\(^\text{312}\) which proposed that police agencies use a double-blind, sequential photo lineup procedure.\(^\text{313}\) The witness is told that the culprit may not be included among the photographs,\(^\text{314}\) is not told in advance how many photographs she will see, and is asked to rate each photograph separately on a "yes," "no," or "unsure" basis.\(^\text{315}\) North Carolina subsequently followed suit, recommending a double-blind and sequential photo lineup approach.\(^\text{316}\) The number of states that have implemented policies with these requirements has since continued to grow.\(^\text{317}\) Because government actors know what needs to be done, the rule only operates to exclude evidence where law enforcement has acted carelessly. However, it seems that police carelessness can be prevented. The police already regularly carry out precise protocols when collecting physical evidence such as blood, hair, and fiber.\(^\text{318}\) They should equally be able to implement non-suggestive protocols with identification evidence.\(^\text{319}\)


\(^s\text{313}\) Id. at 8.

\(^s\text{314}\) Id. at 10 ("The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all photos in the series.").

\(^s\text{315}\) Id. ("After each photo, I will ask you ‘Is this the person you saw [insert description of act here]? Take your time answering the question.’").


\(^s\text{318}\) Wells & Quinlivan, supra note 10, at 21.

\(^s\text{319}\) Id.
In contrast to the suggestiveness test, avoiding the burden of a reliability test is less straightforward because reliability of identification evidence depends on the circumstances of the observation, which the police cannot control. For example, if a witness makes her observation under dimly lit conditions, from far away, and while intoxicated, the identification may be unreliable even if police conduct is blameless. The added burden is justified because of the undue weight that jurors often give to identification evidence. Moreover, the police can increase the chances of the evidence surviving a suppression hearing by collecting detailed statements from witnesses about their viewing conditions and attention, as well as the suspect’s description, early on in the investigation. This evidence can then be used in court to rebut the charge of unreliability.

B. Application in the U.S. Context

Even if it is convincing that the English approach should be followed, there may be practical reasons why direct application is not feasible. In the U.S. context, federalism concerns must be considered. Under the Fourteenth Amendment’s due process clause, states are subject to the same rules as the federal government in the eyewitness identification context. Since any requirement that the U.S. Supreme Court imposes would apply to both state and federal governments, the Court would do well to establish a rule as constitutionally required but leave a degree of flexibility for states to pursue state values. To accomplish this, this Note recommends that the Court adopt a penalty default.

A penalty default is “a threat by the [U.S. Supreme] Court to mandate a single inflexible solution to the problem at hand unless the regulated entities craft their own locally tailored solution and measure its effectiveness.” One benefit of implementing a penalty de-

320. See Miko M. Wilford & Gary L. Wells, Eyewitness System Variables, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 23, 32 (Brian L. Cutler ed., 2013) (“By definition, estimator variables cannot be controlled through policy or in practice.”).
321. See supra notes 304–05 and accompanying text.
322. Wells & Quinlivan, supra note 10, at 20.
323. U.S. CONST. amend. XIV, § 1, cl. 3.
324. See George C. Thomas III, The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence, 3 OHIO ST. J. CRIM. L. 169, 189–92 (2005) (observing that the Court “took the easy road of incorporation” for the regulation of eyewitness identification evidence, as a result of which “innocent defendants have suffered”).
325. See LAFAYE ET AL., supra note 58, at 65–76.
326. James S. Liebman & David Mattern, Correcting Criminal Justice Through
fault is that it enables the United States to adopt the English rule-based approach while leaving room for states to adjust to local needs. 327 If states are unable to come up with a just-as-effective approach, they will be obligated to follow the federal standard as announced by the U.S. Supreme Court. If states are, however, able to think of such an approach, then they are completely free to deviate from the federal standard irrespective of the U.S. Supreme Court’s wishes. The penalty default thus affords states a degree of conditional autonomy—conditional in that states must come up with an equally effective solution before they may exercise their autonomy. Imposing this limit can be justified on the basis that it improves regulation of identification evidence overall.

A second benefit of a penalty default is that it sets the stage for the beginning of a conversation between the U.S. Supreme Court and state entities, so that any rule that the United States uses is predictable and carries democratic legitimacy. 328 The present standard is so relaxed that state entities are comfortable with it and do not feel any need to challenge it. While the growing number of states that departed from the federal standard have opened up a potential discussion, the majority of states have not responded. This is understandable, since adding to the government’s burden by heightening the standard for regulating eyewitness identification evidence is unlikely to be a leading priority for many states. Setting a high penalty default would encourage states to engage in dialogue and generate ideas about other means of regulating evidence that are equally effective but less burdensome. Locally tailored solutions also better recognize differences among, and better respect the autonomy of, states. If the penalty default proves to be too stringent and states are unable to conceive equally effective alternatives, the U.S. Supreme Court


327. See, e.g., Barry Latzer, Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation, 87 J. CRIM. L. & CRIMINOLOGY 63, 64–66 (1996) (observing that while traditionally justified for promoting equality, automatic incorporation is no longer justified because it is costly, inefficient, inappropriate to local circumstances, stifles state uniqueness, independence and freedom to experiment, and state courts are now eager to protect rights); see also William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 502 (1977) (describing that Supreme Court decisions “are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law”).

328. Liebman & Mattern, supra note 326, at 621.
should recognize this and relax the bar in the future. Instead of always excluding unreliable or suggestive evidence, for instance, the Court might consider providing judges with discretion to allow the evidence to come in, accompanied by a jury instruction. By the same token, if the penalty default remains too relaxed, the U.S. Supreme Court should raise the bar even higher. The objective is to reach an optimal standard over time through meaningful and transparent discussion to which federal and state entities have equal opportunity to contribute.

A third benefit of this approach is that it is very similar to what the United States has already been doing. State courts that have deviated from Biggers and Manson have observed that U.S. Supreme Court precedent only sets a benchmark. On this view, the Biggers/Manson test leaves room for state courts to go above and beyond, offering greater constitutional protection if they wish. In penalty default terms, the Biggers and Manson courts effectively set a standard that would be applicable to all states (the suggestiveness-then-reliability test), unless they could craft an equally effective rule on their own. The reason why states have not responded to this call is that they have not felt a need to do so because the standard is so low. This Note therefore does not call for a novel and untested approach to the issue. It merely calls for the U.S. Supreme Court to set the bar higher. Furthermore, now is a good time for the Court to act because the case law demonstrates growing dissatisfaction among a number of states with the existing federal standard. This discontent would make the U.S. Supreme Court’s imposition of a higher standard less controversial and dangerous now than when Biggers and Manson were decided.

330. See, e.g., People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981) (“In the past Federal constitutional guarantees, as interpreted by the Supreme Court, generally satisfied and often exceeded the requirements of comparable provisions of the State Constitution. But there would be no need for an independent State Bill of Rights if that were always the case.”).
331. In fact, the penalty default solution was tried and found successful in the Eighth Amendment context. See Liebman & Mattern, supra note 326, at 620 (“In Furman, the Court overturned every capital-sentencing statute in the nation by reading the Eighth Amendment to forbid wholly discretionary procedures, but it was initially unable to discern the procedures that provision allows. The Court addressed this problem by adopting the penalty default of abolition and challenging States that wanted the death penalty to formulate their own procedures that (1) were consistent with the ‘evolving standards of decency’ on which the Court had previously relied in ‘cruel and unusual’ punishment cases and (2) generated sentences proportional to the killings for which they were imposed.”).
332. See supra Part II.
C. A Return to Stovall?

Even if it is accepted that the U.S. Supreme Court should adopt a more stringent standard, the need to create two tests does not automatically follow. Another option is to revert back to a focus on suggestiveness only, in which case evidence would be excluded if the police used suggestive procedures to obtain identification evidence. Courts would not need to consider whether an observation is reliable because reliability would have no bearing on the admissibility of identification evidence.

There are a number of reasons to favor this standard over creating two independent tests. Practically, Stovall suggestiveness may be less likely to provoke dissension among states for two reasons. First, Stovall was the law in the United States, nationwide, before the U.S. Supreme Court departed from that precedent in Biggers and Manson.\(^333\) By contrast, the English approach has never been part of U.S. law. That the English approach has not been tested in the United States may cause states to be skeptical and nervous. While stepping back from the Biggers/Manson test to Stovall suggestiveness is already defendant-friendly, adopting the English model would go even further.\(^334\) This is because defendants would have an additional ground for seeking exclusion of evidence. Second, a number of states—New York, Massachusetts, and Wisconsin—have, after Biggers and Manson, replaced their suggestiveness-then-reliability tests with a test that focuses heavily on suggestiveness.\(^335\) Conversely, no state so far has followed the English approach by adopting two separate tests. Adopting a test based only on suggestiveness may be more respectful of states’ experience in regulating identification evidence. Stovall suggestiveness may also make more sense if the United States’ goal is to promote desirable police practices.\(^336\) This is because law enforcement is only able to control the suggestiveness of the procedures that it administers.\(^337\) It cannot control through policy or in practice the circumstances under which a witness makes her observation.\(^338\)

On the other hand, the practical implications of creating two independent tests should be viewed as beneficial rather than concern-


\(^334\) See supra Part III(A).

\(^335\) See supra Part II(A).


\(^337\) Wilford & Wells, supra note 320, at 32.

\(^338\) Id.
ing. One problem with the Biggers/Manson test is that most states are not attempting to formulate different tests because the standard is so relaxed that there is no administrative incentive for them to contribute to the conversation. It is therefore necessary to set a standard that is stringent enough to provoke them to engage in a dialogue about how best to regulate this type of evidence. If states feel that the proposed standard is too defendant-friendly, they are free to brainstorm equally effective means of regulating evidence. If they ultimately are not able to come up with anything and remain incensed at the strictness of the new standard, then the U.S. Supreme Court may consider lowering it.

In any case, the practical concern of provoking state dissen- sion is likely overstated. It has been over forty years since Biggers was decided and though it introduced a completely new and untested framework for regulating identification evidence at that time, the vast majority of states loyally followed and continue to follow it. There is no reason to think that introducing the proposed model would generate a nationwide crisis. Moreover, adopting a suggestiveness-only test does not necessarily mean that the U.S. Supreme Court is being more respectful of state precedent. It is not clear why New York, Massachusetts, and Wisconsin chose a suggestiveness-focused test instead of two independent tests based on suggestiveness and reliability. It may be that they were unfamiliar with the English model at the time, that they were familiar with it but felt that it would deviate too significantly from the Biggers/Manson test, or that they were concerned about the unintended consequences of shifting the balance even further in favor of defendants. It does not necessarily mean that they consider a test focused mainly on suggestiveness to be the best approach.

Finally, the theoretical criticism misses an important piece of the puzzle because deterrence of suggestive police practices is only one of the objectives of regulating this type of evidence. Another goal is to prevent mistaken identifications and wrongful convictions. Decades after Biggers and Manson, a large body of research has emerged and shows that a number of factors can affect a witness’

339. See supra Part III(B).
340. Id.
341. Id.
343. See supra note 252 and accompanying text.
observation while a crime is being committed and a witness’ identification of her perpetrator thereafter, and that jurors often give too much weight to this type of evidence. Having a second and independent test based on reliability would substantially enhance the United States’ ability to achieve this goal.

To summarize, this section has argued that the U.S. Supreme Court should replace the Biggers/Manson test with two tests—one based on suggestiveness and one based on reliability. These should be separate and independent in order to afford defendants greater protection when suggestive or unreliable identification evidence is used against them. In light of federalism concerns in the U.S. context, it suggests that a high and adjustable penalty default is preferable. Using a penalty default would give weight to local needs, would generate democratically legitimate outcomes, and is feasible since it is simply a (more stringent) continuation of what the United States has been doing since Biggers and Manson. This model is preferable to a test based solely on suggestiveness because it encourages states to enter into a constructive dialogue about how this type of evidence should be regulated and reduces the risk of convicting innocent defendants.

CONCLUSION

The Stovall Court excluded evidence where suggestive procedures were unnecessarily used. Since then, the U.S. Supreme Court has significantly eroded the protection of defendants in cases involving eyewitness identification evidence. Ever since Biggers and Manson, the Court has required defendants to demonstrate both that suggestive procedures were used and that the witness’ observation was unreliable to exclude evidence. This is in contrast to the English regime, in which defendants can seek exclusion of evidence on the basis of either unreliability (as where a witness’ observation constitutes a “fleeting glance” or where it is made under “difficult conditions”) or suggestiveness (as where the police administers suggestive identification procedures in breach of Code D). While this would be less problematic if the relatively relaxed approach that the U.S. Supreme Court has taken reflects nationwide agreement, a survey of recent case law demonstrates that a number of states are discontent with the Biggers/Manson model. They have repudiated the U.S. Supreme

345. See supra notes 294–97 and accompanying text.
346. See supra notes 298–302 and accompanying text.
347. See supra notes 303–05 and accompanying text.
Court rule in whole or in part by changing their test for excluding evidence, the relevant factors to consider in their reliability inquiry, their jury instruction procedures, or their pre-trial admissibility procedures. Dicta from a number of states that have continued following the Biggers/Manson test suggest that change is lurking around the corner.

The U.S. Supreme Court should establish a penalty default with two separate and independent tests based on suggestiveness and reliability. The revised standard would enable more scrutinizing regulation of this type of potentially dangerous evidence, reducing the number of wrongful convictions. Using a penalty default would give state courts flexibility to craft locally tailored solutions and to measure their effectiveness. However, the U.S. Supreme Court should not expect to reach a state of equilibrium right away. Extensive consultation involving federal and state courts and legislatures is required to determine whether the proposed standard is satisfactory. If research reveals that the standard is widely perceived to be too stringent, then the U.S. Supreme Court should relax it in the future. On the other hand, if the standard remains too lenient, then the U.S. Supreme Court should tighten the reins. Such an incremental approach is clearly more challenging and time-consuming than blindly pronouncing a rule that all states must follow. Nonetheless, this is the way that the Court should go if it is serious about respecting defendants’ due process rights in this area of the law.

Marco Y. Wong*

---

* J.D. Candidate, Columbia Law School, 2016; LL.B., London School of Economics and Political Science, 2015. I am grateful to Professor James Liebman for his supervision during the writing of this Note, and to Professors Brian Cutler, Amy Bradfield Douglass, Conor Gearty, Kent Greenawalt, Bernard Harcourt, Federico Picinali, Mike Redmayne, Dan Simon, Floris de Witte, Velimir Zivkovic, and Judge Debra Livingston for invaluable comments. I also thank Christine Banta, Lucy Cui, Angela Hu, Jerald Khoo, Philippe Kuhn, Arisa Manapawat, Christie Mok, Michael Ng, Myron Phua, and Deborah Tang for helpful suggestions, and the Columbia Journal of Transnational Law for editorial expertise. Above all, for unfailing encouragement, love, and support, I thank my family. I dedicate this Note to the late Professor Mike Redmayne, an intellectual giant in evidence law, skillful teacher, and caring mentor—you are deeply missed.