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Eyewitness Misidentification: A Comparative Analysis Between the United States and England

Christina Begakis*

“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹

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

Abstract:

Eyewitness misidentification is one of the leading causes of wrongful convictions, although eyewitness identification remains one of the most widely used investigatory methods for law enforcement in both the United States and England. This article begins by describing the science behind human memory and the various factors that can influence memory. Next, this article compares the eyewitness identification procedures used in the United States and England and describes how the scientific variables can affect the procedures used by law enforcement. Finally, this article compares the tests used by courts in the United States and England to address the reliability of eyewitness identification and analyzes the potential problems in each of the tests. Although eyewitness misidentification is a widely recognized problem in both the United States and England, both countries must implement the necessary reforms to both the procedures used by law enforcement and the tests used by the courts to improve the reliability of eyewitness identifications.

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I. INTRODUCTION

The credibility and reliability of eyewitness identification provides challenges to jurisdictions worldwide. An eyewitness is “a person who actually sees some act, occurrence, or thing and can give a firsthand account of it.”² The criminal justice system of the United States relies heavily on eyewitness identifications as a critical piece of evidence in the “apprehension and prosecution of criminals.”³ With a similar adversarial system, the English criminal justice system also relies on police investigations and eyewitness identification to obtain criminal convictions.⁴ Although eyewitness identifications that implicate a defendant are highly compelling evidence to jurors at trial,⁵ the human memory is inherently unreliable and current eyewitness identification procedures may unfairly influence the witness’s memory of the crime.⁶

In the United States, eyewitness misidentification was the leading cause of wrongful convictions in 72% of the first 318 wrongful convictions that were overturned by DNA evidence.⁷ Currently, there have been 1,728 exonerations in the United States nationwide.⁸ Mistaken eyewitness identification has played a role in 32%, or 552, of 1,728 wrongful conviction cases, and is the third highest contributing factor to wrongful convictions after official misconduct and perjury/false accusations.⁹ The high rate of error within eyewitness identification may lead to a dilemma for prosecutors and the criminal justice system as a whole because “it is frequently the only or primary evidence available in a criminal case.”¹⁰

In England, concerns about wrongful convictions based on eyewitness misidentification led Lord Devlin, a renowned British lawyer and judge, to serve as chairman of the committee ordered by the House of Commons to investigate the reliability of eyewitness identification.¹¹ The resulting “Devlin Report” recognized the problems with eyewitness identifications as a cause of wrongful convictions

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2. *Eyewitness*, DICTIONARY.COM, <http://dictionary.reference.com/browse/eyewitness> (last visited Jan. 12, 2016).
 3. THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW 2 (2007), available at https://public.psych.iastate.edu/glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf.
 4. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1244 (2001).
 5. *Eyewitness Identification Reform: Mistaken Identifications are the Leading Factor in Wrongful Convictions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/factsheets/eyewitness-identification-reform> (last visited June 10, 2016).
 6. See Griffin, *supra* note 4, at 4.
 7. *National Academy of Sciences Releases Landmark Report on Memory and Eyewitness Identification, Urges Reform of Police Identification Procedures*, INNOCENCE PROJECT (Oct. 2, 2014), <http://www.innocenceproject.org/national-academy-of-sciences-releases-landmark-report-on-memory-and-eyewitness-identification-urges-reform-of-police-identification-procedures/> (last visited Jan. 1, 2017).
 8. *Percent Exonerations by Contributing Factor*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Jan. 5, 2016).
 9. *Id.*
 10. Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 442 (2009).
 11. LORD P. DEVLIN, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT ON THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES 1 (1976).

and listed several statistics detailing the scope of the problem.¹² One statistic shows that there have been 38 cases of verified mistaken identity in cases where convictions have been overturned, or a pardon was awarded, in England and Wales since 1945.¹³ Because this statistic only looks to cases that were successfully overturned, the number of instances of mistaken identity is largely underestimated.¹⁴ The report recommended guidelines to improve eyewitness identification procedures.¹⁵ Following the report, the English Court of Appeals implemented safeguards in eyewitness identification trials through the *Regina v. Turnbull* decision.¹⁶

With the Innocence Network¹⁷ receiving high volumes of cases involving wrongful convictions due to eyewitness misidentification in the United States,¹⁸ this comment will address the current identification procedures used in the United States and England,¹⁹ the widely accepted inherent problems with human memory,²⁰ and the current unreliable test used by the United States Supreme Court compared to the test used by criminal courts in England to assess the reliability of the eyewitness identification.²¹

Part II of this comment will highlight the number of differences between the eyewitness identification procedures used in the United States and England. Related and divergent results of scientific studies on those systems expose the frailties of human memory in general.²²

Finally, parts III and IV of this comment will provide an overview of the current laws as applied to eyewitness identification. The current laws in place in both the United States and England illustrate the strengths and weaknesses between each system's use of eyewitness identification in criminal prosecutions. One significant difference in the standards used to determine reliability is the use of "science." In the United States, the Supreme Court uses a set of factors, many of which can be influenced by law enforcement suggestive procedures, in order to determine if the identification is reliable.²³ Unfortunately, there is a possibility that unreliable identifications may be admitted as evidence of guilt as a result of the current test.²⁴ In England, judges use factors that take into account the variables that may affect a witness's memory of events (the "science").²⁵

12. *Id.* at 186.

13. *Id.*

14. Graham Davies & Laurence Griffiths, *Eyewitness Identification and the English Courts: A Century of Trial and Error*, 15 PSYCHIATRY, PSYCHOL. AND L. 435, 438 (2008).

15. *Id.* at 439.

16. *Id.*

17. THE INNOCENCE NETWORK, <http://innocencenetwork.org/> (last visited Jan. 1, 2017) (offering pro bono legal services to convicted individuals seeking to prove their innocence).

18. *Eyewitness Identification Reform*, *supra* note 5.

19. *Id.*

20. *See infra* note 38.

21. *See generally* *Manson v. Brathwaite*, 432 U.S. 98 (1977); *see generally* *Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

22. *See infra* Part II.

23. *See infra* Part III.

24. *See* Jared T. Dotson, *The Linchpin Of Identification Evidence: The Unreliability Of Eyewitnesses And The Need For Reform In West Virginia*, 117 W. VA. L. REV. 775 (2014).

25. *Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

While the English reliability factors have a greater potential to minimize the effect of eyewitness misidentification, both the United States and England must continue to recognize the problems with eyewitness misidentification and implement significant reforms.

II. OVERVIEW OF THE EYEWITNESS IDENTIFICATION

Eyewitness identification plays a major role in the criminal justice system in two ways. Eyewitness identifications shape police investigations and typically provide good cause to begin, charge, and prosecute criminal cases.²⁶ Once in trial, eyewitness testimony that directly implicates a defendant is compelling evidence of guilt.²⁷ Jurors may not realize, however, that confident and trustworthy witnesses may be mistaken.²⁸

The United States Court of Appeals for the Second Circuit addressed the issue of the impact of eyewitness testimony in *Kampshoff v. Smith*.²⁹ The Second Circuit recognized that a juror's "doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, '[T]hat's the man!'"³⁰

In England, Lord Devlin reported similar concerns, noting that eyewitness identification evidence is "exceptionally difficult to assess" because "the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken."³¹ Eyewitness testimony, although compelling, may be flawed simply because of the "normal and natural memory processes that occur whenever human beings acquire, retain, and attempt to retrieve information," which may be particularly susceptible to outside influences.³² Unfortunately, despite the known flaws with eyewitness identification, the testimony of a single eyewitness may be enough evidence for a jury to convict an innocent person.³³

Both the Second Circuit's and Lord Devlin's concerns are rooted in flawed eyewitness identification procedures. Eyewitness identification procedures are inherently unreliable for two reasons. First, there are widely accepted problems with human perception and memory that may affect the witness's capability of identifying the proper suspect.³⁴ Second, the procedures typically

26. *Eyewitness Identification Reform*, *supra* note 5.

27. Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 514 (2002).

28. *Eyewitness Identification Reform*, *supra* note 5.

29. *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1983).

30. *Id.*

31. LORD P. DEVLIN, *supra* note 11

32. *Eyewitness Identification Reform*, *supra* note 5.

33. See Maurice Possley, *Maurice Caldwell: Other California Cases with Mistaken Witness Identifications*, THE NATIONAL REGISTRY OF EXONERATIONS (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3792> (last visited Jan. 1, 2017) (telling the story of exoneree Maurice Caldwell who was convicted of murder and sentenced to life in prison on the basis of a single eyewitness).

34. See generally NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 108 (2014) (hereinafter IDENTIFYING THE CULPRIT) (concluding that "memory

used by American law enforcement allow for the potential of police influence on the identification of a suspect.³⁵ Although the identification procedures used in England are considered more reliable than the procedures in the United States, inconsistent application may continue to affect the reliability of eyewitness identification.³⁶

A. *Problems with Human Memory and Perception*

Eyewitness identifications are subject to error because “human perception is selective in the details it ‘records,’ and human memory reconstructs and fills in the missing detail of the images stored in the mind.”³⁷ There are three stages of human memory.³⁸ The first stage of memory is “acquisition,” or “the perception of the original event.”³⁹ The second stage of memory is “retention,” or “the period of time that passes between the event and the eventual recollection of a particular piece of information.”⁴⁰ Finally, the third stage of memory involves “retrieval,” or the “stage during which a person recalls stored information.”⁴¹ Unfortunately, at each stage of human perception and memory there is a chance that “the information ultimately offered as ‘memory’ can be distorted, contaminated and even falsely imagined.”⁴² There are two categories of variables that have been identified as likely to contribute to the likelihood of error in human perception and memory.⁴³ The first category involves estimator variables.⁴⁴ Estimator variables are “factors relating to the attributes of the eyewitness that cannot be controlled by the legal system.”⁴⁵ The second category involves system variables.⁴⁶ System variables are factors that can be controlled by the legal system.⁴⁷ The combination of estimator and system variables can “affect and dilute memory and lead to misidentifications.”⁴⁸

is often far from a faithful record of what was perceived, ... its contents can be forgotten or contaminated at multiple stages, it can be biased by the very practices designed to elicit recall, and it is heavily swayed by emotional states”).

35. See Sussman, *supra* note 27, at 3.

36. Davies & Griffiths, *supra* note 14, at 440.

37. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1498 (2008).

38. State v. Henderson, 208 N.J. 208, 245 (2011) (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (2d ed.1996)).

39. *Id.* (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (2d ed.1996)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 247.

44. *Id.*

45. Thompson, *supra* note 37, at 1499.

46. Henderson, 208 N.J. at 247.

47. *Id.*

48. *Id.* at 218.

1. ***Estimator Variables***

Estimator variables are factors related to “the incident, the witness, or the perpetrator,” and may affect a witness’s ability to acquire or retrieve the memory of an event.⁴⁹ Examples of estimator variables include stress, the presence of a weapon, cross-racial identifications, as well as other factors such as distance from the event and lighting. Such variables are unavoidable and beyond the control of the legal system.⁵⁰ Estimator variables are important to consider because: “(1) they are central to the understanding of why and when eyewitnesses are more likely to make mistakes; and (2) understanding system variables’ importance is dependent on first understanding estimator variables.”⁵¹

a. Stress and the Presence of a Weapon

A person under high levels of psychological stress at the time of a crime is less likely to make an accurate identification of the perpetrator than a person experiencing moderate levels of stress.⁵² Typically, moderate levels of stress increase the performance of human memory.⁵³ Once stress levels reach “high,” however, performance capability decreases.⁵⁴ One experiment illustrative of the effects of high levels of stress and memory involved the study of 500 military personnel.⁵⁵ The military personnel were either exposed to high stress interrogations or low stress interrogations.⁵⁶ The following day, the military personnel were asked to identify their respective interrogators from a live lineup.⁵⁷ Among those who were exposed to high stress interrogations, seventy percent failed to identify the correct interrogator.⁵⁸ Thus, the study concluded, eyewitnesses exposed to similar levels of high stress will likely experience a similar rate of error during identifications.⁵⁹

One situation that may trigger high levels of stress is the presence of a weapon at the crime scene.⁶⁰ When a weapon is visible to the witness at a crime scene, the witness may be distracted away from the identity of the culprit and instead focused solely on the weapon itself.⁶¹ According to scientific research done by the National Academy of Sciences, “the presence of a weapon at the scene of a crime captures the visual attention of the witness and impedes the ability of the witness to

49. *Id.* at 262.

50. Dotson, *supra* note 24, at 803.

51. *Id.* (citing Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45, 55 (2006)).

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

53. ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY: WITH A NEW PREFACE* 1, 35 (1996).

54. *Id.*

55. See generally Charles Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265 (2004).

56. *Id.*

57. *Id.*

58. *Id.* at 272.

59. *Id.*

60. See LOFTUS, *supra* note 53, at 80.

61. *Henderson*, 208 N.J. at 263.

attend to other important features of the visual scene, such as the face of the perpetrator.”⁶² This phenomenon is known as “weapon focus,”⁶³ and may “impair recognition of a perpetrator in a subsequent lineup.”⁶⁴ Although recent studies of weapon focus have found inconsistent effects on the accuracy of eyewitness identification, a larger effect was found in high stress, threatening situations in which a weapon was present.⁶⁵

b. Cross-Racial Identifications

The race and ethnicities of the witness and perpetrator are an important estimator variable for eyewitness identification analysis.⁶⁶ The National Academy of Sciences has identified a phenomenon known as “own-race bias” that “describes the phenomenon in which faces of people of races different from that of the eyewitness are harder to discriminate (and thus harder to identify accurately) than are faces of people of the same race as the eyewitness.”⁶⁷ One explanation suggests that when a witness views a person of a different race, the witness tends to focus on distinctive features of the race (such as skin color) in general rather than traits specific to the perpetrator.⁶⁸ Although it is unclear what causes the unreliability of cross-racial identifications, one study revealed that cross-racial misidentification was present in forty-two percent of mistaken eyewitness identification.⁶⁹

c. Other Factors

Some additional estimator variables that may affect witness perception of the crime include lighting, distance, weather, and duration of the opportunity to view the perpetrator.⁷⁰ Poor lighting and time of day may hinder a person’s ability to see and make a reliable identification.⁷¹ Additionally, the greater the distance between the witness and the perpetrator, the less likely the witness will be able to make a reliable identification.⁷² Along with the distance between the witness and the perpetrator, the duration of time the witness is able to observe the perpetrator plays a major role in the accuracy of the identification.⁷³ Although there is no exact measure of time needed to be able to make a reliable identification, a “brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.”⁷⁴

62. See IDENTIFYING THE CULPRIT, *supra* note 34, at 93.

63. Henderson, 208 N.J. at 263.

64. See IDENTIFYING THE CULPRIT, *supra* note 34, at 93.

65. *Id.*

66. *Id.* at 96.

67. *Id.*

68. See LOFTUS *supra* note 53, at 21, 139.

69. See IDENTIFYING THE CULPRIT, *supra* note 34, at 96.

70. *The Science Behind Eyewitness Identification Reform*, INNOCENCE PROJECT, available at <http://www.innocenceproject.org/science-behind-eyewitness-identification-reform/> (last visited Jan. 1. 2017).

71. Henderson, 208 N.J. at 264.

72. *Id.*

73. *Id.*

74. *Id.* (citing Colin G. Tredoux et al., *Eyewitness Identification*, in 1 *Encyclopedia of Applied Psychology* 875, 877 (Charles Spielberger ed., 2004)).

The presence of estimator variables and the effect they have on eyewitness misidentification cannot be attributed to the criminal justice system.⁷⁵ Law enforcement is essentially powerless against the inevitable effects of estimator variables and can do nothing to improve a witness's "innate perception and memory failings."⁷⁶

2. System Variables

The potential for law enforcement influence on a witness's identification comes from "system variables" that may affect the witness's memory of the crime and the perpetrator.⁷⁷ System variables are "factors affecting witness accuracy that the legal system can control to some extent,"⁷⁸ and may include the training of 911 dispatchers, crime scene control, and identification procedures. System variables make it possible, whether consciously or unconsciously, for police to influence a witness to choose the suspect that was already arrested by the police.⁷⁹ System variables that substantially impact the accuracy of identifications include the type of lineup used, the selection of "fillers," instructions to the witness before the identification, and communication with the witness after the identification occurs.⁸⁰

B. Eyewitness Identification Procedures in the United States

Some examples of the traditional eyewitness identification procedures used by law enforcement in the United States include the show up identification, "six-pack" photo lineups, and live lineups.⁸¹

1. Show-Up Identification

A Show-up identification typically occurs immediately after a crime has occurred and police officers believe they have found a person matching the description given by the witness.⁸² Police officers then bring the witness to the location where the potential suspect has been apprehended and ask the witness to identify the suspect.⁸³ A Show-up is essentially a "single person lineup."⁸⁴ According to the California Innocence Project, the Show-up identification is "quite possibly the worst eyewitness identification procedure of all."⁸⁵ When police officers bring a witness to do a Show-up identification, witnesses will often see the potential suspect handcuffed and surrounded by police

75. Thompson, *supra* note 37, at 1503.

76. *Id.*

77. *Id.* at 1504.

78. *Id.*

79. *Id.*

80. *Eyewitness Identification Reform*, *supra* note 5.

81. *Eyewitness Identification*, CALIFORNIA INNOCENCE PROJECT, <http://californiainnocenceproject.org/issues-we-face/eyewitness-identification/> (last visited Jan. 1, 2017).

82. See IDENTIFYING THE CULPRIT, *supra* note 34, at 27-28.

83. *Id.*

84. *Henderson*, 208 N.J. at 259.

85. *Eyewitness Identification*, *supra* note 81.

officers or in the back of a police car.⁸⁶ This incriminating scene may convince the witness that police have additional reasons to suspect this person.⁸⁷ The witness then assumes the suspect must be the person that committed the crime regardless of whether the witness actually remembers seeing that person commit the crime or not.⁸⁸ Additional system variables involved in the Show-up identification can create problems with multiple witnesses communicating at the scene, police opining that the criminal has been found, and police bringing witnesses to the arrest of the potential suspect and essentially asking “is this the guy?”⁸⁹

2. Photo and Live Lineups

In a six-pack photo identification, the witness is shown a page containing a group of six photographs that include one potential suspect and five fillers.⁹⁰ Live-lineups occur once the suspect is in custody. The suspect is displayed along with fillers and shown to the witness.⁹¹ The training that police typically receive for administering photo and live lineups involves some procedures to reduce the possibility of a bad identification such as: “(1) including only one suspect per lineup; (2) selecting five fillers that have features similar to the suspect, including such as hair length, weight, height, and clothing type; and (3) ensuring that all six photographs have similar backgrounds, lighting, and distance from the camera to the suspect.”⁹² Despite the procedures currently in place, eyewitness identification continues to be unreliable.⁹³ Although law enforcement currently receives training for conducting lineup identification procedures, there is still potential for unintentional influence on the eyewitness.

Six-pack photo and live-lineups are relatively more reliable than Show-up identification, but still involve problems with police influence on the witnesses.⁹⁴

a. *Administration*

One major problem occurs because the police officer administering the identification lineup typically knows which person in the lineup is the suspect and may, purposefully or accidentally, provide the witness with hints of which person to choose from the lineup.⁹⁵ Additionally, the police officer administering the lineup may create a lineup with improper fillers despite the procedures in

86. Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 388 (2010).

87. *Id.* at 389.

88. *Id.*

89. DANIEL REISBERG, *THE SCIENCE OF PERCEPTION AND MEMORY: A PRAGMATIC GUIDE FOR THE JUSTICE SYSTEM* 1, 120 (2014).

90. *Lineups and Showups*, ALEMEDA COUNTY DISTRICT ATTORNEY’S OFFICE, (Fall 2011), available at http://le.alcoda.org/publications/point_of_view/files/LINEUPS.pdf.

91. *Id.*

92. *Eyewitness Identification*, *supra* note 81.

93. IDENTIFYING THE CULPRIT, *supra* note 34, at 30.

94. *Eyewitness Identification*, *supra* note 81.

95. *Eyewitness Identification Reform*, *supra* note 5.

place.⁹⁶ When fillers in the lineup do not match the description of the suspect given by the witness, the suspect may stand out to the witness based on the composition of the lineup.⁹⁷

b. Relative Judgment

A witness typically uses “relative judgment” when identifying a suspect from a lineup.⁹⁸ Relative judgment is a problem for eyewitness identification because witnesses will identify a person in a lineup that most closely resembles the witness’s memory of the perpetrator, rather than the lineup member that most closely resembles the actual perpetrator.⁹⁹ Relative judgment typically occurs because witnesses assume law enforcement only conducts a lineup when there is a likely suspect to be identified.¹⁰⁰ If witnesses assume that the suspect has already been identified by law enforcement for a lineup, witness may feel pressured to make an identification even if the witness does not recognize anyone in the lineup.¹⁰¹

c. Positive Feedback

Another issue with lineups involves the positive feedback that is given by police officers following the witness’s selection of the suspect that the police believes was involved with a crime.¹⁰² When a witness is given positive feedback following the identification, their confidence level increases enormously even if they were not confident about the identification initially.¹⁰³ By the time the case is brought to trial, the witness exudes confidence to the jury that will likely lead to a conviction despite the witness’s initial hesitance during the identification procedure.¹⁰⁴

3. Suggested Best Practices

Currently, eleven states in the U.S. have acknowledged the problems with traditional eyewitness identifications and have implemented statutes or guidelines that implement “best practices” for eliminating the potential for misidentification.¹⁰⁵ Best practices for eyewitness identification procedures include double blind administration, pre-identification instructions, proper composition of the lineup, confidence statements, and recording the procedure.¹⁰⁶

96. *Id.*

97. *Id.*

98. Richard A. Wise et al., *A Tripartite Solution To Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 852 (2007).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Eyewitness Identification Reform*, *supra* note 5.

103. *Id.*

104. *Id.*

105. *Eyewitness Identification Reform*, *supra* note 5.

106. *Id.*

a. Double Blind Administration

Double blind administration eliminates the problems that occur when the police officer administering the lineup knows the suspect and unintentionally provides hints to the eyewitness.¹⁰⁷ Under double blind administration, the officer conducting the lineup is unaware of which person in the lineup is the suspect and thus cannot provide unintentional clues to the eyewitness.¹⁰⁸

b. Pre-Identification Instructions

Pre-identification instructions involve statements such as “the suspect may or may not be present in the lineup,” to prevent the eyewitness from feeling compelled to make a selection from the lineup.¹⁰⁹ This helps reduce the tendency by witnesses to use “relative judgment” when viewing a lineup.

c. Sequential Viewing of Lineups

The sequential method of presenting a lineup involves presenting “an unknown number of lineup participants, viewed one at a time, and requires the witness to make a decision on each lineup participant before moving on to the next person.”¹¹⁰ Sequential lineups would replace the current method of simultaneous lineups in which witnesses view all the potential suspects at once.¹¹¹ Sequential lineups reduce the potential for misidentification because the witness will be unable to use relative judgment and compare the members of the lineup in order to choose one that most closely matches the witness’s memory.¹¹² Although many scientists and law enforcement officials remain skeptical about the benefits of the sequential method of viewing lineups,¹¹³ some states have implemented sequential lineups among the “best practices” for eyewitness identification procedures.¹¹⁴

d. Composition of the Lineup

Proper composition of the lineup, although already considered during police training, must involve fillers that are selected based on their resemblance to the witness’s description of the perpetrator, as opposed to the resemblance to the police suspect. This is meant to ensure that the police’s suspect does not stand out among the other fillers.¹¹⁵

107. *Id.*

108. *Id.*

109. *Id.*

110. Dotson, *supra* note 24, at 800.

111. *Id.*

112. *Id.*

113. *Id.* at 801.

114. *How is Your State Doing?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/policy> (last visited Jan. 1, 2017).

115. *Eyewitness Identification Reform*, *supra* note 5.

e. Confidence Statements

Immediately following the identification procedure, the witness should give a “confidence statement” articulating their initial level of confidence to prevent inflated confidence levels as evidence at trial.¹¹⁶

f. Recording the Procedure

By recording the eyewitness identification procedure, reliability is improved by allowing the jury to view the identification procedure.¹¹⁷ If the jury has the opportunity to view the procedure, then jurors can account for visible system variables when assessing the reliability of the identification.

Based on the issues with the current eyewitness identification procedures that are listed above, there is no logical way to confirm the accuracy or reliability of the eyewitness identification evidence that prosecutors use at trial in the absence of other extrinsic evidence linking the suspect to the crime. The Supreme Court, however, created a two-part test in *Manson v. Brathwaite* to analyze the reliability of eyewitness identification.¹¹⁸ First, the Court looks to whether the procedures used by law enforcement to obtain identification were “impermissibly” or “unnecessarily” suggestive in nature.¹¹⁹ If the procedure is not suggestive in nature, the identification is admitted as evidence.¹²⁰ If the procedure is deemed to be suggestive, the Court looks to a set of factors, many of which can be influenced by law enforcement suggestive procedures, in order to determine if the identification is reliable.¹²¹ Unfortunately, there remains a possibility that unreliable identifications may be admitted as evidence of guilt as a result of the current test.¹²²

C. Eyewitness Identification Procedures in England

Identification Procedures in England and Wales are codified in the Police and Criminal Evidence Act of 1984 (“PACE”).¹²³ Code D of PACE is used by police officers to determine which identification procedure should be used.¹²⁴ There are four main types of identification procedures: (1) video identification, (2) identification parades, and (3) group identification, and (4) confrontation.

116. *Id.*

117. *Id.*

118. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

119. *Id.* at 108.

120. *Id.* at 108-109.

121. *Id.* at 114.

122. Dotson, *supra* note 24, at 802.

123. Police and Criminal Evidence Act 1984, Codes of Practice, Code D 3 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf.

124. *Id.*

1. ***Video Identification***

Video identification is the preferred method of eyewitness identification and involves “showing a witness moving images of a suspect, together with images of others who resemble the suspect.”¹²⁵ The images typically involved in the videos include a head and shoulders shot, and the video involves front, right, and left turning profiles.¹²⁶ The video must include at least eight “foils,” or filler suspects, that resemble the suspect in age, height, and general appearance.¹²⁷ Any facial scars or tattoos may be digitally added to the videos to increase the similarities between the suspects and the other foils.¹²⁸ The video will also involve showing the suspects and eight foils carrying out the same sequence of movements.¹²⁹ Prior to the identification, the suspect is entitled to see the video and object to any unreasonable features in the video.¹³⁰ Once the video is ready for the witness to view, only one witness may view the video at a time.¹³¹ The suspect will not be present at the viewing of the video and the identification.¹³² Witnesses are shown all nine foils consecutively and may view the videos at their own pace with the capability of pausing and replaying the videos numerous times. During the second viewing of the videos, the witness indicates whether the perpetrator of the crime is in the lineup and, if so, indicates which video portrayed the suspect.¹³³

Unlike many of the current identification procedures used in the United States, the video identification does not require the witness to come “face to face” with the suspect. When an eyewitness comes “face to face,” through one-way mirror glass, with a person that may have committed the crime, the eyewitness may re-live the stress of the initial crime during the identification procedure. Instead of direct confrontation, witnesses are accompanied by a police officer into a normal office to view the videos and make an identification.¹³⁴ This form of identification leads to decreased levels of stress among witnesses, and therefore, higher accuracy.¹³⁵ One study shows that anxiety at the stage of memory retrieval has a significant effect on “facial recognition performance.”¹³⁶ Additionally, unlike traditional photo lineups that also decrease stress levels, video identifications offer higher likelihood that the foils used closely resemble the suspect through digital alterations.

¹²⁵ *Id.*

¹²⁶ Davies & Griffiths, *supra* note 14.

¹²⁷ Police and Criminal Evidence Act 1984, Codes of Practice, Code D 3, 47 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf; Davies & Griffiths, *supra* note 14.

¹²⁸ Police and Criminal Evidence Act 1984, Codes of Practice, Code D 3, 47 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf.

¹²⁹ *Id.*

¹³⁰ *Id.* at 48.

¹³¹ *Id.* at 49.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Nicola A. Brace et al., *Eye-Witness Identification Procedures and Stress: A Comparison of Live and Video Identification Parades*, 11 INT’L J. OF POLICE SCI. & MGMT. 183, 185 (2008).

¹³⁵ *Id.*

¹³⁶ *Id.*

Although video identification is typically seen as the most reliable form of identification, it is still limited. First, the videos only allow the witness to view a head and shoulders shot of potential suspects. This view of the suspects removes the possibility for a witness to recall a suspect based on height and build along with general appearance. Second, video identification requires English law enforcement to continuously maintain a thorough library of foil videos. Third, unless the officers exercise blind administration, there is still a chance that law enforcement provides unintentional clues to the witness.

2. Identification Parade

An identification parade is similar to a live lineup in the United States. The identification parade involves a suspect lined up with at least eight other people that closely resemble the suspect in age, height, and general appearance.¹³⁷ Unlike the video identifications, which police can create without the suspect's consent, the police may not compel a suspect to participate in an identification parade.¹³⁸ Prior to the lineup, the code requires police to take steps to prevent witnesses from speaking with each other and may not remind the suspect of any physical features of the suspect.¹³⁹ The code also requires that witnesses are instructed that the suspect "may or may not" be present in the lineup and if the witness is unable to identify the suspect they must say so.¹⁴⁰ Additionally, witnesses are advised and encouraged not to make a decision until each person in the lineup is viewed at least twice.¹⁴¹

Despite the addition of the best practice pre-identification instructions, identification parades face similar problems as live lineups. One of the major problems with identification parades is the "selection of suitable foils."¹⁴² The Police Research Group conducted a survey of witnesses that participated in the identification parades. The survey concluded, "70 per cent of witnesses stated that less than half the parade members resembled the person who committed the crime and 50 per cent said that less than half the parade members looked similar to each other."¹⁴³ Unlike video identification, where digital alterations may be used to ensure similarity between the suspect and the foils, identification parades face a higher possibility that the suspect may stand out to the witness and encourage unreliable identifications.

137. Police and Criminal Evidence Act 1984, Codes of Practice, Code D 52 (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Brace et al., *supra* note 132.

143. *Id.*

3. **Group Identification**

Group identifications are an informal identification procedure where the suspect is identified in an informal group of people.¹⁴⁴ The identification typically takes place where there are people walking around or passing by so the witness is able to view the suspect amongst a crowd. Unlike video identifications and identification parades, group identification does not require close resemblance between the suspect and the group of people. The only requirement is that the surrounding people should be “broadly similar” to the suspect. The witness views the group “for the period which the person conducting the procedure reasonably believes is necessary in the circumstances for them to be able to make comparisons between the suspect and other individuals of broadly similar appearance to the suspect.”¹⁴⁵

The “informal” aspect of group identifications makes it one of the most unreliable eyewitness identification procedures. Group identifications only require a “close resemblance” of the suspect with the group of people in the surrounding area. This creates a higher likelihood that the suspect will stand out among the crowd in group identifications compared to parades or video identifications that have specific guidelines for foils.

4. **Confrontation**

Confrontation identification is very rare among identification procedures. In confrontation identifications, a witness is brought face to face with the suspect at the police station.¹⁴⁶ Prior to the confrontation however, witnesses are instructed that the person they saw commit the crime “may, or may not, be the person they are to confront and that if they are not that person, then the witness should say so.”¹⁴⁷ When the suspect is confronted, the witness is asked, “Is this the person?”¹⁴⁸ If the witness confirms the identification, they will be asked “how sure they are that the person is the one they saw on the earlier occasion.”¹⁴⁹

The confrontation identification is similar to the “show up” identification used in the United States and similarly unreliable. By simply asking “Is this the person,” the witness may assume the suspect must be the person that committed the crime regardless of whether the witness actually remembers seeing that person commit the crime or not.¹⁵⁰ Despite the addition of the “best practice” confidence statement following a confrontation identification, this method of identification is unreliable and only used when absolutely necessary.¹⁵¹

144. Police and Criminal Evidence Act 1984, Codes of Practice, Code D 13 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Cicchini & Easton, *supra* note 86, at 389.

151. Police and Criminal Evidence Act 1984, Codes of Practice, Code D 61 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253831/pace-code-d-2011.pdf.

Although Code D of PACE includes important instructions for law enforcement to conduct reliable identification procedures, criminal courts in England follow the *Turnbull* guidelines to assess the weight and reliability of eyewitness identifications. The *Turnbull* guidelines are used to distinguish between “good” and “poor” quality identifications. Unlike the test used in the United States, the *Turnbull* guidelines require judges to consider additional factors when ruling on the reliability of eyewitness identification. These factors take into account the estimator and system variables that may affect a witness’s memory of events. Further, the *Turnbull* guidelines require judges to instruct the jurors on the potential weakness of eyewitness identification and the factors that apply to determine reliability.

III. OVERVIEW OF THE LAWS IN PLACE

A. Case Law in the United States: *Manson v. Brathwaite*

Manson v. Brathwaite was decided on June 16, 1977,¹⁵² and remains the governing case in the United States for admissibility of eyewitness identification. With a seven Justice majority, Justice Blackmun wrote the majority opinion addressing the question of whether the use of an identification that was obtained through suggestive and unnecessary procedures violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.¹⁵³

1. The Test

Although the Supreme Court of the United States explicitly recognized the problems with eyewitness identification,¹⁵⁴ the Court nevertheless determined in *Manson v. Brathwaite* that identifications from unnecessarily suggestive identification procedures are still admissible if the identification remained reliable.¹⁵⁵ The Court created a two-part test for admissibility of eyewitness identifications.¹⁵⁶

The first part of the test looks to whether the police used an “unnecessarily suggestive” procedure to suggest the defendant is the perpetrator of the crime.¹⁵⁷ The “unnecessarily suggestive” standard is determined subjectively by judges in individual cases. If the procedure was not suggestive, the identification evidence is allowed into evidence because no due process obstacle is present.¹⁵⁸

If the procedure was in fact suggestive, the Court looks to the second part of the test to determine if the identification is nonetheless reliable.¹⁵⁹ Reliability is determined using a “totality of the circumstances” standard and the Court lists five factors for determining reliability: (1) the

152. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

153. *Id.* at 106.

154. *See* *United States v. Wade*, 388 U.S. 218, 228 (1967).

155. *See generally Brathwaite*, 432 U.S.

156. Ruth Yacona, *Manson v. Brathwaite: The Supreme Court’s Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 546 (2006).

157. *Id.* at 547.

158. *Id.*

159. *Id.*

eyewitness's opportunity to view the perpetrator during the crime, (2) the length of time between the crime and the initial identification, (3) the level of certainty by the witness at the time of the initial identification, (4) the accuracy of the witness's prior description of the criminal, and (5) the eyewitness's degree of attention during the crime.¹⁶⁰ The Court ultimately held that the Due Process Clause does not compel exclusion of the identification evidence, despite any suggestive or unnecessary procedures, so long as the identification is reliable.¹⁶¹

2. *The Problem*

The *Manson* test is flawed and likely to admit unreliable eyewitness identifications into evidence. The test "evaluates the 'reliability' of eyewitness identifications using factors derived from prior [court] rulings and not from empirically validated sources."¹⁶² The scientific studies discussed above show the effects of several factors on a witness's identification and confidence, which invalidate the *Manson* test.¹⁶³ The first part of the *Manson* test is flawed because it allows the judge complete discretion to determine what procedures may or may not be "suggestive" for purposes of admitting the evidence. If the procedures used in the identification are not determined to be unnecessarily suggestive, then the first prong of the *Manson* test is satisfied and the identification is admissible evidence.¹⁶⁴ If the procedures are deemed unnecessarily or impermissibly suggestive, the evidence may still be admitted if the identification meets the second part of the *Manson* test.¹⁶⁵ The five-factor, second prong of the test is unreliable because: (1) two factors require a subjective analysis by the witness that may be affected by estimator variables, and (2) three out of five factors may be heavily influenced by law enforcement and system variables. With the courts underestimating the power of suggestive identification procedures, there may be violations of the Due Process Clause where the identifications are used for evidence.¹⁶⁶ Thus, the *Manson* test may actually be contributing to the number of wrongful convictions by admitting unreliable eyewitness identifications rather than working to reduce the likelihood of eyewitness misidentification.

B. *Case Law in England: Regina v. Turnbull*

In 1976, the Court of Appeal to the Criminal Division of the English Legal System decided *Regina v. Turnbull*.¹⁶⁷ *Turnbull* set out specific rules and guidelines in assessing the weight that should be given to the eyewitness identification evidence. These guidelines attempt to distinguish between "good" and "poor" quality identifications.¹⁶⁸

160. *Brathwaite*, 432 U.S. at 114 (citing *Neil v. Biggers* 409 U.S. 188, 199-200 (1972)).

161. *Id.*

162. IDENTIFYING THE CULPRIT, *supra* note 34, at 44.

163. *Id.*

164. Yacona, *supra* note 154, at 547.

165. *Id.*

166. *Id.* at 548.

167. *Regina v. Turnbull and Another* (1976) 63 Cr App R 132.

168. *Id.*

1. ***The Guidelines***

When a suspect challenges the identification evidence, the prosecution bears the burden of showing the identification is of “good” quality, and the judge will decide what weight should be given to the identification evidence.¹⁶⁹ Factors English judges will use to determine the reliability of the identification include: (1) the distance the eyewitness was from the criminal activity; (2) the time of day the crime occurred; (3) the length of time the witness was able to view the perpetrator; (4) the general conditions that may have affected the sighting; (5) whether the witness already knew the defendant; and (6) how close the description given by the witness at the time immediately following the crime matches the description of the defendant.¹⁷⁰ In addition to the judge determining what weight will be given to the identification evidence, the judge will instruct and caution the jury of convicting the defendant in reliance on the identification.¹⁷¹ The guidelines suggest the judge instruct the jury regarding the rationale behind their warning and “make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.”¹⁷² If the judge views any part of the identification as weak, the judge should remind the jury of such weaknesses.

2. ***The Problem***

The *Turnbull* guidelines are criticized for their reliance on the presiding judge’s personal assessment of reliable identification evidence and the extent to which the guidelines are actually applicable.¹⁷³ The *Turnbull* guidelines only provide examples of “good” and “poor” quality identifications, and judges may exercise personal judgment when deciding which of the two extremes apply in each case.¹⁷⁴ As a result, the *Turnbull* guidelines are inconsistently applied by judges.¹⁷⁵ Similarly, the *Turnbull* jury instructions are only provided if the prosecution’s case depends wholly or substantially on the eyewitness identification.¹⁷⁶ This allows unreliable identifications to be used in many other cases so long as the prosecution does not substantially rely on the identification.

IV. ANALYSIS

A. ***The Manson Test***

169. *Identification, THE CROWN PROSECUTION SERVICE, available at* http://www.cps.gov.uk/legal/h_to_k/identification_of_suspects/.

170. *Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

171. *Id.*

172. *Id.*

173. *Davies & Griffiths, supra* note 14.

174. *Id.*

175. *Id.*

176. *See Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

Although the Court in *Manson* determined that “a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest,”¹⁷⁷ the admission of compelling unreliable evidence is fundamentally unfair and in violation of the Due Process Clause of the United States Constitution. The Due Process Clause of the Fifth Amendment states that no one shall be “deprived of life, liberty, or property without due process of law.”¹⁷⁸ In a criminal context, Due Process ensures that a trial will result in a “reliable determination of guilt or innocence.”¹⁷⁹ Eyewitness identification plays a major role in criminal trials. When courts rely on the *Manson* test and “neglect to prevent the admission of unreliable and prejudicial evidence,”¹⁸⁰ the system fails to guarantee the fair trial required by the Constitution.

The first prong of the *Manson* two-part test requires the court to determine whether the police used an “impermissibly suggestive” procedure to suggest to the witness that the defendant is the perpetrator.¹⁸¹ Although the *Manson* opinion first uses the words “impermissibly suggestive,” the Court later uses “unnecessarily suggestive” to define improper and the procedures that would make the evidence inadmissible.¹⁸² One problem with the first prong of the *Manson* test deals with clarity of the terms. “Impermissibly” is derived from “impermissible,” which means “not allowed or permitted.”¹⁸³ “Unnecessarily,” however is defined as “not by necessity.”¹⁸⁴ With these two terms used to precede “suggestive,” it seems as though each term will lead to a different outcome. “Impermissible” implies that suggestive procedures are not allowed under any circumstances, while “unnecessarily” permits suggestive procedures when police determine the procedures are necessary to obtain an identification. Without a unified test to determine “suggestive procedures,” judges are left to decide whether “impermissibly” or “unnecessarily” should precede “suggestive.”

The second prong of the *Manson* test is triggered when the court finds the police procedure to be suggestive, and requires the court to balance five factors to determine the reliability of the identification.¹⁸⁵ As stated above, the five factors include: (1) opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.¹⁸⁶ There are two issues with the second prong of the *Manson* test. First, two of the factors require the witness’s “subjective assessment.”¹⁸⁷ Witnesses provide their subjective assessment as to their opportunity to view the suspect and their degree of

177. *Manson v. Brathwaite*, 432 U.S. 98, 113 n. 13 (1977).

178. U.S. CONST. amend. V.

179. *People v. Adams*, 53 N.Y.2d 241, 251 (1981).

180. *Yacona*, *supra* note 154, at 549.

181. *Brathwaite*, 432 U.S. at 108.

182. *Id.* at 108-112.

183. *Impermissible*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/impermissible> (last visited Jan. 12, 2016).

184. *Unnecessarily*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/unnecessarily> (last visited Jan. 12, 2016).

185. *Brathwaite*, 432 U.S. at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

186. *Id.*

187. *Yacona*, *supra* note 154, at 548.

attention at the time of the crime. The only way for the court to determine the opportunity of the witness to view the criminal at the time of the crime and the witness's degree of attention is to ask the witness.¹⁸⁸ In relying on these two factors to determine reliability, courts fail to recognize the estimator variables that may affect the witness's opportunity to view the suspect and the witness's degree of attention. Estimator variables such as duration, light, weather, and distance from the perpetrator each play a major role in the opportunity of the witness to view the perpetrator, while stress and the presence of a weapon may greatly affect the witness's degree of attention.¹⁸⁹ Additionally, "self-reported" evidence can be "inflated by the suggestive procedure itself."¹⁹⁰ Because these two factors of the second prong can only be met with subjective assessments and there is no objective test to ensure reliability, these factors are "inaccurate determinants of the reliability of eyewitness identification."¹⁹¹

Second, the three remaining factors of the second prong, including the accuracy of the prior description, level of certainty, and time passed, can be affected by the suggestive police procedures that these factors seek to overcome. The witness's accuracy of the description and level of certainty can be influenced by law enforcement through the system variables described above such as unintentional cues given to the witness during a lineup as well as positive feedback once the witness identifies a suspect.¹⁹² When law enforcement offers subtle suggestion to a witness, officers may not realize that "their words or suggestions permanently destroyed the identification evidence due to the malleability of [the witness's] memory."¹⁹³ Therefore, subtle suggestions by law enforcement may alter a witness's description of the perpetrator to more closely match the suspect. Further, once a witness identifies the suspect, law enforcement may offer the witness positive feedback by saying "great job."¹⁹⁴ Once a witness hears this positive feedback, their level of certainty rises immensely immediately following the identification.¹⁹⁵ Finally, the time between the crime and the identification can also be controlled by law enforcement. Although show-up identification seems like the best identification procedure because it typically occurs *immediately after* the crime has occurred, and the witness's memory should be the sharpest, show-up identifications are highly prejudicial.¹⁹⁶ Further, if the police wait too long to take a witness statement and perform identification procedures, then the witness's memory is faded and the witness will likely look for cues from the law enforcement officer administering the lineup. Because law enforcement is capable of influencing the remaining three factors of the second prong, these factors are not indicative of the reliability of the eyewitness's identification.

188. *Id.*

189. *See supra* Part II.A.1.

190. *State v. Lawson*, 352 Or. 724, 748 (2012).

191. Yacona, *supra* note 154, at 548.

192. *Eyewitness Identification Reform*, *supra* note 5.

193. Yacona, *supra* note 154, at 552.

194. *See Eyewitness Identification Reform supra* note 5.

195. *Id.*

196. Cicchini & Easton, *supra* note 86, at 388.

B. The Turnbull Guidelines

Unlike the *Manson* test, the *Turnbull* guidelines were developed with Lord Devlin's criticisms of eyewitness identification procedures in mind. As such, the *Turnbull* guidelines offer a more reliable method for determining the reliability and weight of identifications by accounting for estimator variables and cautioning the jury of identification evidence's weaknesses.

The factors used in the *Turnbull* guidelines account for estimator variables that are typically known to affect a witness's memory. The factors used in the second prong of the *Manson* test do not account for estimator variables, and instead use factors that are highly susceptible to the effects of estimator variables. Again, the factors used in *Turnbull* include: (1) the distance the eyewitness was from the criminal activity, (2) the time of day the crime occurred, (3) the length of time the witness was able to view the perpetrator, (4) the general conditions that may have affected the sighting, (5) whether the witness already knew the defendant, and (6) how close the description given by the witness at the time immediately following the crime matches the description of the defendant.¹⁹⁷ The first four factors directly address common estimator variables that affect the way a witness is able to perceive an event. Although law enforcement cannot control the presence of estimator variables, they must be taken into account when addressing eyewitness identifications. By accounting for distance, lighting, and duration, English judges and jurors can make a more accurate determination regarding the reliability of the identification.

In addition to account for flawed procedures, the *Turnbull* guidelines also require judges to caution jurors on relying on the identification to convict the defendant. The guidelines go so far as to require the judge to instruct the jurors on any weaknesses with the identification. If jurors are aware that confident witnesses may be mistaken, they may be less likely to convict a defendant based solely on an identification. This will require the prosecution to obtain additional evidence or evidence that supports the accuracy of the identification. Conversely, the *Manson* test does not require any jury instructions, but instead relies solely on the judge to decide which factors are relevant to the reliability of the identification. Because the *Turnbull* guidelines address estimator variables and require jury instructions to caution the jury about the dangers of relying heavily on eyewitness identification, defendants in England have a smaller chance of being convicted based solely on mistaken eyewitness identification.

Despite the benefits of the *Turnbull* guidelines, there continues to be inconsistency in applying the guidelines due to an undefined spectrum of "good" and "poor" quality and the limited applicability determined by the prosecution's reliance on the evidence.

Much like the *Manson* test, there is an issue with vagueness of terms. By simply distinguishing "good" identifications from "poor" identifications, judges are required to determine where the identifications fall on the spectrum from good to poor based on only a few given examples. The example used to identify "good" quality identification stemmed from a case in which the witness had

197. See *Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

“a prolonged opportunity to view the suspect.”¹⁹⁸ The case involved a kidnapping where the witness/victim was able to view the defendant for a prolonged period of time and the defendant was not wearing a mask or disguise.¹⁹⁹ A “poor” quality identification example included the scenario of a handbag snatching where the witness was only able to view the perpetrator for a “fleeting glimpse” of time.²⁰⁰ The two categories of identifications are at polar opposite ends of the spectrum with no defining characteristic to determine reliability beyond the length of time the witness was able to observe the perpetrator. Inconsistent application by judges is inevitable without more specificity in the guidelines.

Also problematic is that English defendants may only benefit from the *Turnbull* guidelines if the prosecution’s case depends *wholly* or *substantially* on the eyewitness identification.²⁰¹ This limitation raises an issue where the prosecution does not substantially rely upon the identification as evidence of guilt, but the identification is unreliable. Eyewitness identification testimony is extremely compelling evidence for jurors and may be the most convincing piece of evidence even if the prosecution does not “substantially” rely on the identification. The *Turnbull* guidelines should be available in all cases in which eyewitness identifications are admitted as evidence.

Finally, both the *Manson* test and the *Turnbull* guidelines require the defendant to challenge the reliability of the identification before their benefits may be realized. Once the prosecution introduces the eyewitness identification, the defendant bears the difficult burden of proving “a very substantial likelihood of irreparable misidentification.”²⁰² However, if the prosecution held the burden of showing that the eyewitness identification was in fact reliable at a higher standard, perhaps the prosecution—as well as law enforcement—would feel the pressure to obtain reliable identifications, reducing improper convictions.

V. CONCLUSION

Although both the *Manson* test and the *Turnbull* guidelines have several flaws, the *Turnbull* guidelines provide a superior method for determining the reliability of eyewitness identification because the Devlin Report forced the English Courts to address the science behind eyewitness identification. In order to decrease the number of wrongful convictions due to eyewitness misidentification, American courts should discontinue the use of the *Manson* test and seek to implement a new test for courts to determine the admissibility of reliable eyewitness identifications. Specifically, the new test should recognize the science behind eyewitness identification and include factors similar to those used in the *Turnbull* guidelines.

It is a terrible tragedy to society when an innocent person is convicted and sentenced to spend any amount of time in prison for a crime he did not commit. The criminal justice systems of both the

198. Davies & Griffiths, *supra* note 14, at 435, 440.

199. *Id.*

200. *Id.*

201. See *Regina v. Turnbull and Another* (1976) QB 224 (Eng.).

202. *Brathwaite*, 432 U.S. at 116.

United States and England should seek to avoid the possibility of wrongful convictions. This can be accomplished by addressing the problems with eyewitness identification procedures and continuously looking to implement necessary reforms. Positive reforms to eyewitness identification procedures will ultimately improve both the procedures used by law enforcement, as well as the tests used by courts to determine the reliability of the identifications.