UCLA
UCLA Criminal Justice Law Review

Title
Raising the Standard of Evidence for Initiating an Identification Procedure

Permalink
https://escholarship.org/uc/item/5gj837r0

Journal
UCLA Criminal Justice Law Review, 5(1)

Authors
McCoy, Candace
Katzman, Jacqueline

Publication Date
2021

DOI
10.5070/CJ85154810

Copyright Information
Copyright 2021 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at https://escholarship.org/terms

eScholarship.org Powered by the California Digital Library
University of California

RAISING THE STANDARD OF EVIDENCE FOR INITIATING AN IDENTIFICATION PROCEDURE

Candace McCoy[*] & Jacqueline Katzman[†]

Abstract

How do police select suspects for witnesses to identify? There is currently no standard for the quantity of evidence required before investigators can order an identification procedure. Because eyewitness misidentification continues to be the leading cause of wrongful convictions, law and policy should guide police discretion at this investigatory stage by requiring detectives to show an evidentiary basis for placing suspects in lineups, showups, or photo arrays. The American Law Institute has proposed an addition to the Model Penal Code requiring

---

[*] Candace McCoy is Professor of Criminal Justice at the City University of New York, Graduate Center and John Jay College, where she teaches doctoral seminars on criminal justice policy, criminology and the law, police, and sentencing. She publishes widely in law and criminal justice journals, most recently on reforming sentencing laws for burglary (in Journal of Legislation, with Philip Kopp, 2020). From 2016–2018, McCoy served as Director of Policy Analysis for the Inspector General for the New York City Police Department. She has served on several policy advisory boards, most recently on the Plea Bargaining Review Task Force of the New York City Bar Association. McCoy holds a B.A. from Hiram College (Political Science and Spanish), a J.D. from the University of Cincinnati, and a Ph.D. in Jurisprudence and Social Policy from the University of California, Berkeley. She is a member of the Ohio bar.

[†] Jacqueline Katzman is a doctoral student at the City University of New York, Graduate Center and John Jay College, where she is dual specializing in the Psychology and Law and Basic and Applied Social Psychology Programs. She researches the way in which social psychological principles—such as attributions, impression formation, attitudes, and heuristics—affect eyewitness identification and juror decisionmaking. She has presented at conferences nationwide and received the American Psychology-Law Society's Outstanding Student Presentation Award in Spring 2020. Katzman's work has been published by traditional outlets such as Oxford University Press as well as digital media outlets such as Business Insider. Katzman received her B.A. from Cornell University in 2018 with majors in both Government and Psychology. The authors thank Brandon Garrett for his thoughtful review of a previous draft of this Article and the editors of the *UCLA Criminal Justice Law Review* for their hard work and collaboration in refining the revised version for publication.

© 2021 Candace McCoy & Jacqueline Katzman. All rights reserved.

police to have a *strong basis* in factual evidence before conducting identification procedures. The American Psychology-Law Society called for an *evidence-based suspicion* standard. Current law provides Fifth Amendment due process challenges to the suggestiveness of such procedures post hoc but does not address the reasons police may apply them to subjects ab initio, which is a Fourth Amendment concern. Reviewing *Terry v. Ohio* (1968), Justice Brennan's dicta in *Davis v. Mississippi* (1969), and *Maryland v. Buie* (1990), this Article outlines Fourth Amendment-based arguments for developing a standard of evidence for initiating identification procedures, concluding that the *reasonable suspicion* standard of *Terry* is insufficient, and an *articulable facts* standard should be implemented.

Table of Contents

Introduction 130
I. Empirical Findings and Constitutional Options 134
II. A Continuum of Recommended Standards 147
III. Articulating the Facts in Police Procedures 149
Conclusion 150

Introduction

Recent deaths of Black Americans at the hands of police have led to renewed and continuing petitions to change police procedures, specifically those which have high potential to lead to disparate outcomes for racial minority groups.[1] One such procedure is the mechanism guiding how police select suspects to be identified by witnesses—for instance, in lineups. Currently, there is no consistent standard either in law or policy

1. The absence of a standard of evidence specifying when police may subject a suspect to an identification procedure is likely highly racialized. Though there is scant empirical or archival evidence to this specific point, the disproportionately high percentage of Black people misidentified in a lineup and later convicted for crimes they did not commit provides strong support for the hypothesis that broad police discretion over such procedures correlates with the high proportion of racial minorities falsely identified. *DNA Exonerations in the United States*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states [https://perma.cc/LT2T-LWYP]. Data on numbers of people wrongfully convicted and later exonerated show that the most common reason for the false conviction is mistaken eyewitness identification. In his study of 250 exonerees whose cases began in the 1980s, Garrett showed that among those in which faulty eyewitness identifications were introduced at trial (190 of the 250 total, or 76 percent), 93 involved crossracial identifications. "Social scientists have long found an 'other-race effect,'" he notes, "in which the likelihood of misidentification is higher when an identification is cross-racial." Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 72 (2011).

on the quantity of evidence an officer must have against a suspect before ordering a lineup or showup.[2]

At issue is the scope of police discretion in investigating crimes. When there is no rule of law to guide decisionmaking, there is more opportunity for bias to operate on the part of both officers and witnesses. This is not to say that police or witnesses consciously set out to misidentify and wrongfully convict racial minorities, though this could happen.[3] Perhaps, in the majority of cases, implicit biases are at play,[4] or perhaps rushed arrangements lead to mistakes based on careless assumptions. No matter the subjective intent of the officials or members of the public, policies designed to guide official actions are more effective in reducing biased outcomes than are measures designed first to eliminate officers' biases in the hope that their actions might then become more equitable.[5]

---

2. Police arrange lineups when a crime has been witnessed by one or more people. A lineup consists of a person who the police believe committed the crime (the suspect) and some number of people who are known to be innocent of the crime (fillers). Investigators show witnesses the lineup to test whether they can identify the suspect as the person who committed the crime. If so, a witness is said to have made a positive suspect identification, which is often perceived as sufficient evidence that the suspect is the perpetrator and along with other evidence will be used to constitute probable cause to arrest. When this Article refers to lineups, the term covers both live lineups and photo arrays. Live lineups involve showing witnesses in person, whereas lineups conducted by showing witnesses a photo of a suspect and some number of fillers are known as photo arrays. By contrast, a showup is a procedure in which police show a witness a single person, usually someone that they have managed to detain a short time after a crime has been committed and in the general vicinity of the crime. This Article analyzes evidentiary problems in initiating lineups and photo arrays, although showups share some of the same weaknesses. *See infra* note 22. As to lack of evidentiary standards for initiating these procedures, *see generally* Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Hum. Behav. 3 (2020) (official recommendations of the American Psychology-Law Society).
3. The state of mind of a police officer who pushes for eyewitness identification of a particular suspect, psychologists agree, is usually characterized as searching for confirmation of what the officer already believes to be the guilty person, with "confirmation bias" and "tunnel vision" leading to erroneous outcomes. Anthony Batts et al., Policing and Wrongful Convictions 5–7 (2014). Instances in which an officer intentionally railroads a suspect—knowing that the person is factually innocent—are rarely uncovered in eyewitness identification circumstances, though they are more common in wrongful convictions based on police perjury. Russell Covey states that such "[w]rongful convictions resulting from occasional police misconduct involving only a single officer, or a relatively small group of corrupt police officers, scattered throughout the nation's police departments, would be almost impossible to detect. And yet, the aggregate effect of such misconduct could easily generate a very large number of wrongful convictions. It is also possible that such cases may truly be rare. We simply do not have any way to know." Russell Covey, *Police Misconduct as a Cause of Wrongful Conviction*, 90 Wash. U. L. Rev. 1133, 1145 (2013).
4. *See* Jennifer L. Eberhardt, *Imaging Race*, 60 Am. Psychologist 181, 185–186 (2005).
5. Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System:*

Ultimately, it is far easier to rein in police direction by articulating and enforcing evidentiary standards than it is to change human biases in the hope that eventually police will make less prejudiced choices. In the short run, adherence to the policy creates better outcomes no matter the officer's preferences. In the long run, police internalize the rationale for careful procedural guidelines as they continue to follow them, and this, along with other initiatives aimed at reducing biases, can eventually produce more equitable outcomes.

Moreover, a good argument for setting out explicit guidelines is that any procedure that is completely standardless cannot be reviewed post hoc. There is currently no legal framework for prevailing on appeal with a claim that a detective for no articulable reason subjected a subject to a lineup, because there is no law on the matter. Complete discretion in conducting identification procedures operates at the quotidian levels of criminal investigation, and the conditions under which detectives decide to put a suspect in a lineup or to contact witnesses (or not) for more information are reviewable only by the detective's departmental superiors.[6]

Although research regarding how officers choose suspects for lineups is at its early stages, preliminary findings raise concerns. In a survey of law enforcement officers in 2011, 47 percent reported that they would place a person in a lineup with no articulable evidence of guilt beyond a "hunch".[7] Another study found that, in 47 percent of lineups conducted by the Sacramento Police Department, there was no evidence against the suspects at all when officers decided to put them in lineups.[8] Currently, the legal basis for placing an individual in a lineup can be so low because there is no standard governing the issue[9] unless a state has chosen to legislate on the matter or a police department applies a policy of requiring a higher standard on its own. In the 2013 Police Executive Research Forum survey of police departments in cities with populations over 100,000, some had adopted policies for improving the accuracy of eyewitness identifications, but none had a policy about the amount of pre-identification evidence necessary for initiating such procedures.[10]

Prevalence, Causes, and a Search for Solutions, 1 J. Soc. Issues 1139, 1157 (2019).

6. Gary L. Wells et al., *Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect Equivalency Curves, and Reasonable Suspicion*, 39 Law & Hum. Behav. 99, 116 (2015).

7. Richard A. Wise et al., *What U.S. Law Enforcement Officers Know and Believe about Eyewitness Factors, Eyewitness Interviews, and Identification Procedures*, 25 Applied Cogn. Psychol. 488, 497 (2011).

8. Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 Law & Hum. Behav. 279, 283, 289 (2005) (suspects categorized as having "no extrinsic evidence" made up 164 of 348 total suspects in study).

9. *See generally* Wells et al., *supra* note 2.

10. *See generally* Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies (2013), http://www.policeforum.org/assets/docs/Free_Online_Documents/Eyewitness_Identification/a national survey of eyewitness identification procedures in law

Considering PERF's findings that few urban police departments adopted National Institute of Justice recommendations[11] to adopt and apply policies for improving the accuracy of line-up identifications once initiated, unless pressed by the courts or legislation it is unlikely any police departments will go further and adopt policies about when to initiate such eyewitness procedures at all.

Recognizing all this, two highly regarded professional organizations very recently highlighted the problem. In reviews of current practice culminating in recommendations for changes in law and policy, both the American Law Institute (ALI) and the American Psychology-Law Society (AP-LS) explored the dimensions of the problem and recommended that an evidentiary standard be met before a person is subjected to an identification procedure.[12]

The ALI's studies and recommendations overall aim to "clarify, modernize, or otherwise improve the law"; "ALI's more than 4,500 members come from the bench, bar and academy and are selected on the basis of outstanding achievement in the profession."[13] Recommended "Principles of the Law, Policing" have been provisionally approved, subject to a final vote by the ALI membership that is expected in 2022. The ALI report sets out the arguments for constraining police discretion, stating that lineups are often conducted without any reference to provable facts and recommending a "threshold for conducting eyewitness identifications":

> Policing agencies should not conduct eyewitness identifications unless they have a *strong basis* to believe that the suspect committed the crime and should therefore be presented to the eyewitness . . . .[14]

By contrast, the AP-LS recommended that identification procedures may proceed only with "evidence-based suspicion."[15] Its scientific review paper on eyewitness identification procedures was authored by senior scholars appointed by the AP-LS Executive Committee. This was one of only five new recommendations proposed to the Society since 1998.[16] Published in February 2020, this report relied heavily on research findings the Society had compiled and published in 1998, which had formed the basis for numerous legal seminars, workshops, and decisions in state and federal courts.[17] The inclusion of a recommendation

---

enforcement agencies 2013.pdf [https://perma.cc/C5FS-VHMC].

11. The U.S. Department of Justice National Institute of Justice provided model policies and recommended their adoption; the PERF survey set out to determine how many had actually done so. *See* Nat. Inst. Just., Eyewitness Evidence: A Guide for Law Enforcement (1999).
12. Principles of the Law, Policing § 10.03 (Am. Law Inst., Tentative Draft No. 2, 2019); Wells et al., *supra* note 2 at 12–13.
13. *Frequently Asked Questions*, Am. Law Inst., www.ali.org/about-ali/faq [https://perma.cc/JCX9-G8JQ].
14. Principles of the Law, Policing § 10.03 (emphasis added).
15. Wells et al., *supra* note 2 at 8.
16. *Id.*
17. *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603 (1998); State v.

for evidence-based suspicion in the 2020 review is noteworthy, as it represents the official position of psychology experts on this issue and powerfully presents the problem to the legal community.

The differing recommendations might seem easy to reconcile, but they highlight the fact that even the most careful expert opinions can vary somewhat, perhaps attributable to the fact that the issue has not been deeply explored before. Police discretion at the beginning of the prosecutorial process is crucial: investigation, specifically using eyewitness evidence, leads to probable cause which in turn leads to search, seizure of any more incriminating evidence, and eventually arrest. The very earliest investigative move—obtaining a positive identification—sets this process into motion. Yet very little law regulates it.

What is the evidentiary standard that should be used as the basis for subjecting an individual to an identification procedure at all? This question differs from previous law and psychological research about identification evidence because it does not focus on the ideal way to conduct a lineup (such as the use of double-blind procedures and an appropriate selection of lineup fillers, which in turn raise Fifth Amendment due process challenges) but rather the likelihood that the suspect in the lineup is actually the culprit.

Today, with our increased forensic knowledge and hindsight as to the significant number of wrongful convictions that originate with mistaken identifications from lineups, it is clear that interdisciplinary expert opinion is converging to push for change. All agree that a standard should be articulated; the issue is, which one? *Strong basis*, proposed by the ALI, is the most stringent; *evidence-based*, proposed by the AP-LS, a bit less so; and *reasonable suspicion* is the least exacting, though any of the three would be an improvement over the current nonstandard of *nothing legally required at all*.

This Article analyzes these three differing recommended evidentiary standards, placing them in context of the current state of law and policy on the subject. We argue that, although the ALI recommendation requiring police to have a factually *strong basis* to conduct a lineup is compelling as the highest bar for police to meet and thus affords the greatest protection to suspects, and although practical considerations of implementation may point to the existing but low Fourth Amendment standard of *reasonable suspicion*, the middle ground of the AP-LS *evidence-based suspicion* standard provides both a clear test and one that can be rooted in existing caselaw.

I. Empirical Findings and Constitutional Options

Since 1992, the Innocence Project and its affiliates around the nation have facilitated the exoneration of over 375 innocent people

Henderson, 208 N.J. 208, 916–917 (2011); State v. Lawson, 291 P.3d 673, 695 (Or. 2012); Young v. Conway, 715 F.3d 79, 81 (2d Cir. 2013).

wrongly convicted, primarily of homicides and rapes.[18] The leading cause of wrongful convictions is faulty eyewitness reports, which played a role in 69 percent.[19] There is no reason to imagine that the rate of wrongful convictions based on faulty identification is lower in less serious felonies; in fact, it is likely higher in those cases because most conclude in guilty pleas which are generally not reviewable.[20] Consequently, researchers have spent decades proposing methodologies to make identification procedures less suggestive as a way to lower the rate at which innocent people are imprisoned.[21]

Given the volume of psychological research demonstrating the fallibility of memory under a wide variety of circumstances,[22] the clear scientific consensus is that witness identification is highly unreliable. And, although much psychologically based knowledge about how police can improve identification procedures has accumulated, the best and most commonsensical safeguard for innocent suspects is to refrain from subjecting them to a lineup procedure ab initio. A corrective would be to require police detectives to have some modicum of evidence raising particularized suspicion before they can order a lineup.[23]

---

18. *Eyewitness Identification Reform*, INNOCENCE PROJECT (last visited May 29, 2021), https://www.innocenceproject.org/eyewitness-identification-reform [https://perma.cc/4UCT-XS4A] [hereinafter *Innocence Project Data*]. A recent study of wrongful convictions in England and Wales found 263 cases from 1970 to 2016, of which 41 percent were attributed to "unreliable witness testimony." Rebecca K. Helm, *The Anatomy of "Factual Error": Miscarriages of Justice in England and Wales: A Fifty Year Review*, 5 CRIM. L. REV. 351, 354 (2021). Although that percentage is remarkably similar to that of the United States, this category of "unreliable witness testimony" included all witness testimony, not only testimony based on mistaken identifications. Only 35 cases involved eyewitness identifications there—7.5 percent of the total number of wrongful convictions. *Id.* at 360. The author notes that the Code of Practice, Police and Criminal Evidence Act of 1984, as updated in 2017, regulates eyewitness identification procedures. *Id.* at 360 n.48.
19. *Innocence Project Data*, *supra* note 18.
20. Brandon L. Garrett explains that in felony cases of medium severity (rather than cases of rape or homicide), a defendant who pleads guilty and receives a typical prison sentence of three years, for example, will be released from prison before habeas petitions have run their course. Thus, wrongful convictions in cases in which defendants pled guilty to avoid steeply more severe punishment should a jury convict (such as to avoid the trial penalty) will never come to light and thus are not counted in estimates of the prevalence of wrongful convictions. GARRETT, *supra* note 1 at 151–152. The result is deep underestimation of the number of innocent people convicted due to faulty witness identifications.
21. Gary L. Wells & Rod C. L. Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 PSYCHOL. BULLETIN 776, 783–784 (1980).
22. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 288 (2003).
23. The AP-LS recommendations also covered showups, stating that they should be avoided as inherently suggestive. Recommendation 9 states: "*Showups should be avoided whenever it is possible to conduct a lineup (e.g., if probable cause exists to arrest the person then a showup should not be conducted.). Cases in which it is necessary to conduct a showup should use the procedural safeguards that are*

In moving from an emphasis on reducing the suggestibility of identification procedures to inquiring as to the evidentiary basis for conducting them at all, constitutional challenges to the procedures would shift from Fifth Amendment due process concerns to the Fourth Amendment's requirement that "no warrants shall issue but upon probable cause . . . particularly describing . . . the persons . . . to be seized."[24] Of course, a lineup is not an arrest and therefore does not require probable cause, but in well-established caselaw the U.S. Supreme Court has held that investigatory procedures which may lead to arrest, such as police officers' stopping, questioning, and perhaps frisking (patting down) people they deem to be suspicious and potentially dangerous, fall under Fourth Amendment protections.[25] The use of these practices is not entirely within officers' discretion; questioning people is permitted only if officers have *reasonable suspicion* that a crime has occurred or is about to occur, and frisks may be conducted only if police perceive danger to themselves or other people nearby.[26] Some scholars have suggested that *reasonable suspicion* should also be the standard as to the amount of evidence necessary to justify subjecting a person to eyewitness procedures, since *Terry* stops and lineups both occur at the earliest stages of crime investigation.[27]

The Court's wording in *Terry* describing the reasonable suspicion required for stopping and questioning a suspect at first glance appears to apply well to other very early investigative actions. "Due weight must be given, not to [an officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts," the *Terry* Court said.[28] Considering that detectives

---

recommended for lineups, including the elimination of suggestive cues, a warning that the detained person might not be the culprit, video-recording the procedure, and securing a confidence statement." Wells et al., *supra* note 2 at 26. However, the Supreme Court has consistently supported their admissibility. *See* Neil v. Biggers, 409 U.S. 188, 381–382 (1972); Manson v. Braithwaite, 437 U.S. 98, 107 (1977). Because the issue there is the inherent suggestibility of a one-on-one showup between suspect and witness and not the issue of how much evidence is necessary before an identification procedure can be conducted, that caselaw is not squarely on point here. However, arguably the minimal evidentiary standard is met in showups because of the suspect's proximity in space and time to the alleged crime. Should courts establish an evidentiary standard applicable to the initiation of lineups and photo arrays, the question of whether such proximity would be sufficient to meet such a standard in the case of showups would arise.

24. U.S. Const. amend. IV.
25. Terry v. Ohio, 392 U.S. 1, 8–9 (1968).
26. *Id.* at 30–31.
27. Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 Duke J. Const. L. & Pub. Pol'y 49, 79 (2008); Barbara D. Gonzo, *Fourth Amendment Implications of Compelling an Individual to Appear in a Lineup Without Probable Cause to Arrest*, 45 Fordham L. Rev. 124, 129–30 (1976).
28. *Terry*, 392 U.S. at 27. The New York Court of Appeals described the *Terry* standard for reasonable suspicion as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe

today may place a person in a lineup without reference even to so much as a hunch, it would seem that applying *Terry* to that investigative procedure would tighten police discretion in such instances. But in some ways *Terry*'s reasonable suspicion standard is not perfectly apt. It was intended to give officers *greater* flexibility in dangerous and time-sensitive situations than the warrant requirement does,[29] while at the same time retaining a Fourth Amendment boundary on police activity. Applying it to identification procedures, by contrast, would allow less flexibility in a process currently unbounded. Nevertheless, courts could reasonably determine that the Fourth Amendment requires, at a minimum, that the standard for conducting an investigative lineup should be consistent with the standard for conducting an investigative questioning, if *Terry* means what it says.[30] Of more concern is the fact that the *Terry* standard has not aged well. Perhaps importing it wholesale into another investigatory stage would simply replicate deep fissures in constitutional implementation that have become quite apparent in the decades since the Court approved the practice of stop-question-frisk. The power to engage in this procedure has proven to be quite wide—virtually unbounded in practice—because the facts upon which police claim to base their reasonable suspicions are so broad that they often do not apply to the particular person but instead to the neighborhood the person is in, or with whom the person associates. In a hard-hitting article published in 1998,[31] David A. Harris discerned a troubling trend in lower court cases towards interpreting *Terry*'s *articulable facts* as only broad categories of crime-prone situations, "when there is, in fact, little or nothing to indicate that crime is afoot."[32] The predictable outcome, he opined, is that eventually the standard designed first to give police flexibility in responding to fast-moving events while, second, requiring individualized suspicion for searching particular suspicious persons, will lose its power to control police discretion.[33] The Court gave permission to expand police activities by permitting investigatory stops and frisks, but that practice then overtook the boundaries the case had also required, i.e., that reasonable suspicion be based on a suspect's actions, not circumstances. The predicable result, Harris and others pointed out, is that widespread use of *Terry* stops and

---

criminal activity is at hand." People v. Cantor, 36 N.Y.2d 106, 112–13 (1975).

29. *Terry*, 392 U.S. at 16, n.12.

30. Police must "point to specific and articulable facts .... This demand for specificity . . . is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21 n.18.

31. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 St. John's L. Rev. 975 (1998).

32. *Id.* at 1015. *See also* George C. Thomas, Terry v. Ohio *in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 St. John's L. Rev. 1025, 1027 (1998).

33. Harris, *supra* note 31 at 1020–1021.

frisks will produce "[d]isproportionate [d]istribution of [its] [e]ffects," that is they will be applied mostly against people of color.[34]

Fifteen years later, these predictions were visibly confirmed in *Floyd v. City of New York*,[35] perhaps the most widely known recent challenge to *Terry*'s reasonable suspicion standard as a too-broad categorization of situations, not suspects. In providing injunctive relief requiring that the New York Police Department (NYPD) end its aggressive stop-and-frisk program, the trial court clearly stated that the problem was not in *Terry*'s standard per se, but in the way the NYPD applied it.[36] New York City's policy of blanketing high-crime neighborhoods with officers working under frisk quotas was widely criticized not only for disregarding *Terry*'s requirements but also for its disparate racial impact. Neighborhood activists claimed that in the majority of on-street questioning, the police did not really have any reasonable suspicion of individual people and instead manufactured it post hoc, often after escalating from questioning to frisking.[37] In an analysis of the reports these officers filed whenever they questioned and frisked suspects, the Attorney General of the State of New York found that the stop-and-frisk program led to approximately 2.4 million stops and 150,000 arrests between 2009 and 2012.[38] In other words, a mere 6.2 percent of the stops produced enough evidence to amount to probable cause to arrest—much less, convict—raising the question of whether the officers typically had even a reasonable suspicion

34. *Id.* at 1017. *See also* Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 St. John's L. Rev. 1271 (1998); Tracey L. Meares, Terry *and the Relevance of Politics*, 72 St. John's L. Rev. 1343 (1998).

35. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

36. In an Executive Summary of the case, Judge Sheindlin stated at the outset that "[t]his case is not primarily about the nineteen individual stops . . . but about whether the City has a policy or custom of violating the Constitution by making unlawful stops and conducting unlawful frisks." *Id.* at 556. That policy would violate the Fourteenth Amendment's equal protection clause. As to the 19 individual cases of stops that lead plaintiffs brought to the court, five were upheld under *Terry* analysis. *Id.* at 562.

37. Plaintiffs presented these activists' claims in *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001). Later, the *Floyd* court agreed with plaintiffs that the voices of people and their communities most directly affected by the harmful stop-question-frisk practices should be considered in determining whether further remedies should be ordered. The *Floyd* order established a Joint Remedial Process by which a wide variety of people from many neighborhoods and professional backgrounds, including police themselves, were consulted. Hundreds of respondents participated in town halls and focus groups, resulting in more reform recommendations sent to the court. *See generally* Hon. Ariel E. Belen et al., Final Report and Recommendations: New York City Joint Remedial Process on NYPD's Stop and Frisk and Trespass Enforcement Policies (2015) (documenting the decades-long history of the controversy and sets out the community input process, findings, and recommendations).

38. N.Y. State Office of the Attorney General, A Report on Arrests Arising from the New York City Police Department's Stop and Frisk Practices 2 (2013), https://ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf.

that a crime had been or was about to be committed at the time of the stop. Following this report, the Center for Constitutional Rights filed *Floyd* and its companion cases.[39] The court held that NYPD officers had not actually based most of the stops on reasonable suspicion—though they claimed on preprinted forms that they had—resulting in a massive number of Fourth Amendment violations.[40] The first problem with New York's stop-and-frisk program was that the NYPD's official policy rationalized *Terry*'s reasonable suspicion standard into situational categories that might raise suspicion in general, not necessarily as to the particular person stopped.[41] Equally damning, the *Floyd* court also identified a Fourteenth Amendment violation because the baseless stops-and-frisks were concentrated in neighborhoods populated mostly by racial minorities.[42] It is unfortunately not surprising that this illegal practice was applied disproportionately.[43] By contrast, when stops are made upon reasonable suspicion of particular crimes, individually articulated in each instance and reviewable by officers' supervisors and in court, there are much better outcomes from both law enforcement and fairness perspectives.[44]

---

39. *See* Belen et al., *supra* note 37 at 55.
40. *Floyd*, 959 F.Supp. at 540 (holding illegal "the NYPD's practice of making stops that lack individualized reasonable suspicion . . . ."); *see also* Shira A. Scheindlin, *A Chance to Reflect: Thoughts from the Author of* Floyd v. City of New York, 15 Ohio St. J. Crim. L. 35, 37 (2017).
41. Jeffrey A. Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. Chi. L. Rev. 51 (2015). The authors served as expert witnesses in the *Floyd* litigation. They obtained all the forms that officers were required to fill out every time they made a street stop, which had boxes listing situations that would raise "reasonable suspicion." Officers would checkmark the form to fit the case. Fagan and Geller's analysis showed "patterns of articulated suspicion" which "evolve over time and become clearer and more refined across a wide range of police stops, and "that refinement seems to follow the capacious interpretative room created by Fourth Amendment jurisprudence." *Id.* at 51.
42. *Floyd*, 959 F. Supp. 2d at 621–24.
43. Although criminologists agree that neighborhoods of concentrated disadvantage are criminogenic, the Fourth Amendment protects individual people and thus requires individualized facts that may arouse suspicion of danger to officers or the public, not a general reference to the likelihood that a crime will occur in a high-crime place. The problem has been clearly recognized for decades. *See, e.g.*, Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 Ohio St. L.J. 99, 137 (1999).
44. After the *Floyd* court ordered the NYPD to stop its aggressive stop-question-frisk practices, the Department required its officers to conduct frisks only upon individualized suspicion and to record the reasons for the stops. The total number of stops drastically decreased, while the percentage of stops that produced incriminating evidence drastically increased. "Reported stops went from 685,000 in 2011 to 11,238 in 2018." Peter L. Zimroth et al., NYPD Monitor, Tenth Report of the Independent Monitor 3 (corrected 2020), http://nypdmonitor.org/wp-content/uploads/2020/01/Monitors-Corrected-Tenth-Report.pdf.

Applying the lessons of *Floyd* to the present context, the dangers of leaving eyewitness identification procedures unregulated are apparent. In stop-question-frisk situations, in which a reasonable suspicion standard clearly applies, the largest police department in the nation nevertheless evaded it in over a million cases. Imagine a scenario in which the *Floyd* plaintiffs would have had no grounds even to challenge the procedure because even a minimal *reasonable suspicion* standard simply did not exist. That is the current situation for eyewitness identification procedures. Given that the ramifications of being misidentified following a lineup are just as consequential as being stopped and questioned, and that unregulated police discretion at the earliest stages of criminal investigation invites inequitable application of the criminal law, it is clear that there is a great need—and legal basis—to revisit the issue of unregulated lineups.

If the existing *Terry* holding covering evidence necessary to conduct questioning is inadequate for improving identification procedures, a new standard should be devised and applied. Which constitutional provision would support it? In his classic article on Fourth Amendment protections from police overreach, Anthony G. Amsterdam said, "[a]part from the warrant requirement, the requirement of probable cause for arrest . . . and the pint-sized version of probable cause required for stop-and-frisk, the Supreme Court has never found—nor, so far as I can tell, has it ever been asked to find—any legal mechanisms for controlling police activities."[45] Perhaps this is one reason that criminal defense attorneys, knowing that the Court has eroded the requirement of probable cause by allowing so many exceptions to it,[46] and knowing that there is no evidentiary standard at all for arranging procedures for eyewitness identifications, settled on the Fifth and Sixth Amendments' Due Process Clauses to challenge the types and conditions of eyewitness identification rather than relying on the Fourth Amendment to regulate when a person may be ordered into a lineup ab initio. The argument that suggestive lineups violate the Fifth Amendment first prevailed in 1967,[47] and

45. Anthony G. Amsterdam, *Reflections on the Fourth Amendment*, 58 Minn. L. Rev. 349, 414 (1974). In Fourth Amendment jurisprudence, Amsterdam's conclusion still holds today. However, since then, the Supreme Court has approved one other mechanism for controlling police department policies and thus affecting officer behavior—the private constitutional tort lawsuit brought under 42 U.S.C. § 1983. *See generally* Candace McCoy, *How Civil Rights Lawsuits Improve American Policing*, *in* Holding Police Accountable 111 (Candace McCoy ed., 2010).

46. "There are currently seven exceptions to the warrant requirement," John M.A. DiPippa wrote in 1984, and since then they have been amplified to apply in a variety of analogous situations. John M.A. DiPippa, *Searching for the Fourth Amendment*, 7 U. Ark. Little Rock L. Rev. 587, 589 n.10 (1984). The exceptions he identified were: (1) searches incident to arrest, (2) automobile searches, (3) exigent circumstances, (4) station-house inventories, (5) plain view, (6) consent, and (7) investigative frisks. *Id.*

47. Stovall v. Denno, 338 U.S. 293, 302 (1967).

was strengthened with the Court's decision that not providing counsel at lineups is a violation of the Sixth Amendment's Due Process Clause.[48] These cases were decided just before the Court took up the *Terry* case. However, subsequent decisions stopped any further regulation of lineups and eventually eroded the prohibition of suggestiveness. In *Neil v. Biggers*, the Court decided that the results of a suggestive lineup could be admitted into evidence as long as it is deemed "reliable."[49] In order to determine reliability, in *Manson v. Braithwaite* the Court gave the trial court the authority to decide that lineups are reliable if the resulting identification is probative, even if the lineup itself was suggestive.[50] History now shows that the *Manson* ruling is problematic, as eyewitness testimony resulting from highly suggestive identifications continues to be introduced at trial and results in a great number of false positives.[51] It is clear that due process analysis based on Fifth or Sixth Amendment principles alone is not an adequate safeguard for innocent suspects today.

Is it time to return to a Fourth Amendment foundation for constraining police discretion at early investigative stages of criminal procedure? Although challenges to lineup procedures have mostly been based on due process rationales, the Supreme Court has suggested as a general principle that the reliability of a police investigatory procedure can be relevant in terms of the Fourth Amendment.[52] Since almost all identification procedures of suspects happen pre-arrest, they function as a tool to develop investigative evidence when probable cause has not yet been established. Under Fourth Amendment analysis, it would be permissible to detain a suspect for the purpose of conducting a lineup on some amount of evidence less than probable cause,[53] but the issue now is whether the investigator must have some justifiable reason to focus on the person under investigation and thus arrange an identification procedure—in other words, sufficient evidence linking the suspect to the crime so as to render the seizure of the person for purposes of a lineup reasonable. A lineup conducted under reasonable suspicion is squarely within

48. United States v. Wade, 338 U.S. 218, 229 (1967). In *Wade*, the Court discussed the suggestibility issue in tandem with the Sixth Amendment's right to counsel. If a lineup is suggestive but the suspect does not have counsel present to object to it, the denial of right to counsel is the due process violation that underlies any others. If counsel had been present, the attorney would have objected to a suggestive lineup and prevented it, or if not prevented would have preserved it for challenge at trial. *Id.* at 228–335.

49. Neil v. Biggers, 409 U.S. 188, 199 (1972).

50. Manson v. Braithwaite, 432 U.S. 98, 112–114 (1977).

51. *See Innocence Project Data*, *supra* note 18.

52. Davis v. Mississippi, 394 U.S. 721, 726 (1969).

53. *See* Morris v. Crumlish, 239 F. Supp. 498, 499, 502 (E.D. Pa. 1965). Morris complained that without probable cause to arrest, the government should not be permitted to take him into custody for the purpose of placing him in a lineup. Ruling against him, the court said he failed to establish that the defendants (the District Attorney and the Police Commissioner of Philadelphia) denied him equal protection or due process.

a *Terry* rubric, in that a police investigator has obtained particularized facts which give rise to a reasonable suspicion that this person has committed a crime, so further inquiry is permitted. The issue is whether *all* lineups should be conducted *only* when reasonable suspicion—or some other higher evidentiary standard—based on *non*-eyewitness evidence has been met.

The Supreme Court has grappled with the question of how much evidence warrants investigatory action in situations other than street encounters. *Davis v. Mississippi* held that it was illegal to detain a suspect overnight without probable cause for the purpose of gaining physical evidence such as fingerprints.[54] In that case, twenty-four suspects were first briefly detained without probable cause when the police were conducting an investigation of a rape case. The suspects all matched the very general description the victim provided—that she had been raped by "a Negro youth"[55]—and police relied on it to justify fingerprinting them at the police station. Subsequently, police focused on petitioner Shawn Davis and took him ninety miles away to a jail in Jackson, Mississippi and detained him overnight, after which he took a lie detector test and signed an incriminating statement. He was fingerprinted a second time and these prints were found to match those from the scene and, relying partly on this second set of fingerprints, he was tried and convicted.[56] He argued on appeal that the police acted illegally in violation of the Fourth Amendment in detaining and fingerprinting him without probable cause to arrest.

The Court ruled that "detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment" than are investigatory stops under *Terry* v. *Ohio*,[57] but Davis's prolonged detention eleven days after the first fingerprinting session was the basis for overturning his conviction. Because the trial court used the second set of fingerprints that had been obtained when Davis was arrested without probable cause, transported ninety miles away and detained overnight, then subjected to a lie detector test and interrogation, evidence taken during this illegal detention (which included the fingerprints) was excluded from evidence.[58]

Writing for the majority, Justice Brennan offered dicta that police might be able to compel the taking of fingerprints in the absence of probable cause, as fingerprinting is minimally intrusive compared to full-blown searches,[59] but citing *Terry* he was careful to show that some

54. *Davis*, 394 U.S. at 727.
55. *Id*. at 722.
56. *Id.* at 723.
57. *Id.* at 727 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)). In *Terry*, which it had decided only the year before, the Court likened a brief detention in a police station for the purpose of obtaining fingerprints to a stop-and-question on the street, stating that the Fourth Amendment applies to them both. *Id.*
58. *Id.* at 725.
59. *Id.* at 727.

Fourth Amendment protection still applies. He stated that fingerprinting "is not subject to such abuses as the improper line-up"[60] but, since this case turned on the illegality of the detention, the Court did not need to explore the issue in depth.

Yet this unobtrusive procedure had been undertaken only because a very general description from an eyewitness first started the investigation. The analogous question of whether a mere description of a suspect—or even no description at all, merely a hunch—is sufficient evidence to initiate an identification procedure, which as Brennan noted is more intrusive than fingerprinting, has not found its way to the Court.

Parenthetically, note that even fingerprinting has consequences. Had any of the other twenty-three people who were required to give their fingerprints been able to challenge this, the issue of whether at least reasonable suspicion is necessary before gathering such evidence would have emerged in *Davis*. Those on whom no match was found would leave the police station angry and disaffected—a situation closely analogous to the 94 percent of New Yorkers stopped and frisked in the *Floyd* case and on whom no incriminating evidence was found,[61] and who were racial minorities (as were all the people subjected to fingerprinting in *Davis*). If the fingerprints of one of the twenty-three had been found to match those of a suspect in a crime unrelated to the one being investigated, and that person were prosecuted, the question of how much evidence is necessary before a person can be subjected to identification procedures would have been litigated. Matching fingerprints or DNA obtained from a government database to those found at a crime scene is a common investigatory practice. But fingerprints and DNA are considerably more reliable identifiers than eyewitness descriptions are. Matching an eyewitness description to a broad sample of individuals whose physical appearance roughly approximates it and then digging into databases to find some indication of criminality is a nightmarish outcome of leaving this stage of investigatory procedure unregulated.

Davis may be fact-specific; that is, since fingerprints are generally a more reliable indicator of a suspect's involvement in a crime than eyewitness identification is, the case has stood on its own and has not been applied outside the fingerprinting context.[62] Police assume that no standard of evidence applies in either situation, but *Davis* has not been explicitly extended to other investigatory procedures.[63] Justice Brennan

---

60. *Id.*
61. Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).
62. Yet the Court has indicated, again in dicta, that the Fourth Amendment would require that police point to a reasonable suspicion that the suspect has committed a crime before they can demand fingerprints. *See* Hayes v. Florida, 470 U.S. 811, 816 (1985).
63. In *State v. Hall*, the Supreme Court of New Jersey held that an individual could be compelled to participate in a lineup on less than probable cause. State v. Hall, 461 A.2d 1155, 1161 (N.J. 1983). However, citing *Davis*, the *Hall* court insisted that these procedures can be conducted on less than probable cause only

raised the issue in *dicta*, arguing that since eyewitness identifications are a less reliable form of evidence than fingerprinting, the Fourth Amendment would apply to them. The appropriate evidentiary standard for temporarily detaining suspects for the purpose of appearing in lineups should be more stringent than that of obtaining suspects' fingerprints, he implied.[64] Brennan's desire for less police discretion, in this case concerning identification evidence, could provide the basis for creating an evidentiary standard in the eyewitness identification context.[65]

In a comprehensive review of this issue, Sarah Anne Mourer explained that in recent decades, long after *Davis* was decided, the scientific community made significant progress in understanding human memory function.[66] With advancing scientific knowledge about how suggestion can influence memory inaccurately, she contends that Brennan's argument is newly relevant.[67] *Davis* stands for the proposition that the evidentiary standard of probable cause does not apply at the earliest stages of investigation, but consideration of exactly what other standard might apply is still inchoate.

A *reasonable suspicion* standard would essentially import *Terry* into eyewitness identification procedures. By contrast, the AP-LS recommendation that identification procedures be conducted only upon *evidence-based suspicion* seems to call for more particularized explanation of why the suspicion is reasonable, and thus is a more stringent standard. However, given that *Terry* is recently being tightened to require evidence of individual suspects' dangerous or threatening actions, it may now amount to the same thing. Alternatively, a more stringent test would be the ALI's recommendation that such procedures be allowed only when police have a *strong basis* to believe the suspect committed the crime. There is some caselaw more recent than *Davi*s (1964) which struggles to enunciate a less-than-probable-cause-but-more-than-mere-hunch standard of evidence at the investigatory stage of criminal procedure. In *Maryland v. Buie* (1990), the Court settled on an *articulable facts* standard.[68] There, an officer saw an item of clothing in plain view that a particular suspect had previously been wearing, and based on this evidence, the officer decided to conduct a warrantless "sweep" of the room. The suspect was found hiding there.[69] The Court held that the plain view

when they are comparable in reliability to fingerprinting, where the likelihood of the evidence being probative is generally higher than in eyewitness accounts. *Id.* The court failed to outline how police agencies can assure that lineups are as reliable as fingerprinting, but psychological research in subsequent decades has convincingly shown that lineups are very often suggestive—in other words, that it is almost impossible to make lineup procedures to obtain eyewitness identification of suspects as reliable as fingerprints are.

64. *See id*.
65. Gonzo, *supra* note 27, at 137–138; Mourer, *supra* note 27, at 77–78.
66. Mourer, *supra* note 27, at 54–58.
67. *Id.*
68. Maryland v. Buie, 494 U.S. 325, 327 (1990).
69. *Id*. at 328.

exception to the warrant requirement permitted seizure of the clothing, but not a search for the person because there was not yet sufficient evidence for probable cause to arrest. The sweep was justified based on a standard of evidence less than probable cause to search: "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[70] An *articulable facts* requirement applied to identification procedures might similarly raise the bar higher than *no evidence at all* but lower than full *probable cause*, and of the three standards set out here, seems the best fit to AP-LS's *evidence-based suspicion* recommendation.

One argument for requiring a more stringent standard than *Terry*'s *reasonable suspicion* is that the *Terry* bar was set low because it applies only to on-street situations potentially dangerous to officers or the public. Though police may need broad discretion when operating in unpredictable environments such as on the street or in apartment buildings, investigatory detention to stage a lineup occurs in secure police stationhouses. The police control this environment and they also have time to follow the procedure correctly. Therefore, some scholars have called for lineups to be conducted only upon probable cause, arguing that applying a balancing-of-interests test to investigatory lineups results in a decision that the individual's need for protection and liberty outweighs the government's interest in the collection of identification evidence.[71] Others have agreed that the Fourth Amendment applies to investigatory procedures such as lineups, but state that the *reasonable suspicion* standard, rather than the more stringent *probable cause* requirement, is sufficient for achieving government and suspect interest balancing. In 1976, Barbara D. Gonzo argued that it is impractical to require law enforcement officials to have probable cause to arrest in order to compel a suspect to appear in a lineup when the evidence which would constitute such probable cause is merely a witness's statement—too scant for obtaining a warrant.[72] Analogizing to *Terry*, the *reasonable suspicion* standard assists officers when they have some evidence against a suspect and need authority to place an individual in investigatory detention (and ultimately a lineup), absent probable cause. The *reasonable suspicion* standard protects the suspect more than does detention based on no evidence at all, but considering that identification procedures are conducted in secure environments and on officers' timetables, requiring police to point to some specific particularized evidence before conducting them would provide even better protection of Fourth Amendment rights.

70. *Id.* at 327 (quoting Michigan v. Long, 463 U.S. 1032, 1049 (1983)).
71. *See, e.g.*, Peter S. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 Cal. L. Rev. 1011, 1041 (1973).
72. Gonzo, *supra* note 27, at 132–133.

Mourer also echoes other scholars in arguing that lineups inherently raise a Fourth Amendment issue and should trigger its protections, while also acknowledging that the appropriate standard for ordering a lineup may nevertheless be less than probable cause.[73] Mourer explains that most caselaw on the matter was decided in regards to when police could compel appearance of an individual in a live lineup.[74] Now, improved photographic technologies have prompted detectives to utilize photo arrays much more often. Due to the cheaper cost, time saved, and the rapid proliferation of facial recognition technologies, approximately 95 percent of all identification procedures now use photos instead of live lineups.[75] Does an individual maintain the same civil liberties in a photo array as in a live lineup? Applying the logic employed in *Kyllo v. United States*, it seems that they do.[76] In *Kyllo*, the Supreme Court concluded that individuals need not be aware that they are being searched to raise Fourth Amendment protections, but the right to privacy extends to investigative procedures even if the suspects are not physically present.[77] Given the power of new technologies that can scan massive numbers of photographs and other digital identifiers, the risk that law enforcement will fish for incriminating evidence against disfavored people, dredging it up and labeling it probable cause, is heightened. Requiring that officers first state specifically the evidentiary basis for requesting such information at the beginning of an investigation can prevent privacy violations, and such a requirement seems to approximate the AP-LS *evidence-based suspicion* recommendation.

Photographic technology is tremendously more advanced today than it was when *Davis* was decided in 1969. Realistically, today a detective who decides to put a person in a lineup is more likely to have available some photographic evidence that may raise reasonable suspicion, considering the wide proliferation of closed-circuit television (CCTV) constantly recording in stores, homes, and public streets, and considering that police departments are rapidly adopting body-worn cameras to record all encounters with the public. Identification via photographic recordings and facial recognition software are the contemporary equivalent of the old-fashioned photo array.

Had the *Davis* Court been presented with the problem of photo arrays and in-person lineups rather than fingerprinting as the investigative techniques that should require some modicum of extrinsic evidence before proceeding, and if the case were being decided now rather than 1969, Justice Brennan's reasoning might have prevailed. In dicta, Brennan suggested that the degree of intrusiveness a pretrial procedure requires affects the degree of Fourth Amendment protection it might be afforded,

73. Mourer, *supra* note 27, at 79–80.
74. *Id.* at 86.
75. Police Executive Research Forum, *supra* note 10, at viii.
76. *See* Mourer, *supra* note 27, at 86; Kylo v. United States, 533 U.S. 27 (2001).
77. *Kylo*, 533 U.S. at 40.

stating that because the fingerprinting process "may constitute a much less serious intrusion upon personal security than other types of police searches and detentions,"[78] it is possible that "the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no cause to arrest."[79] A photo array or facial recognition analysis of recordings would seem to present about the same degree of intrusiveness as fingerprinting, thus calling for some "narrowly circumscribed procedures." As for witness identifications, they are "subject to such abuses as the improper line-up,"[80] Brennan said, implying that police would therefore be required to have even more extrinsic evidence to initiate a line-up than fingerprinting or photo identification. Similarly, the Court's balancing of interests in *Camara v. Municipal Court*, with its concern for the great difficulty government may have in enforcing some regulations,[81] today tips more towards the suspect's privacy rights at early investigative stages because detectives can now very easily gather photographic evidence in pinpointing a person to be placed in a lineup.

II. A Continuum of Recommended Standards

Given the vibrant discussion surrounding unregulated identification procedures, legal scholars and psychologists alike have proposed policy recommendations intended to narrow police discretion to conduct such proceedings by setting a standard of evidence for initiating them. Proposed standards fall somewhere between the lowest line of reasonable suspicion (such as would be required for an investigatory stop) and full probable cause.[82] In between, the AP-LS *evidence-based suspicion* is more stringent than *reasonable suspicion*, but less stringent than the ALI's *strong basis* requirement for initiating an investigation procedure.

The AP-LS scientific review paper on eyewitness identification procedures highlighted empirical studies showing that conducting lineups on the sole basis of a hunch generates a low base rate of true positive identifications for culprit-present lineups, and this is why Gary Wells and colleagues outlined a need for evidence-based suspicion. Their review states: "There should be evidence-based grounds to suspect that an individual is guilty of the specific crime being investigated before including that individual in an identification procedure and that evidence should

78. Davis v. Mississippi, 394 U.S. 721, 727 (1969).
79. *Id*. at 728.
80. *Id*. at 727.
81. Camara v. Municipal Court, 387 U.S. 523 (1967).
82. Currently, because there are no evidentiary requirements precedent to police placing a person in an identification procedure, if a lineup or photo array is initiated despite lacking any evidence and the witness makes a faulty identification, the police can use the faulty identification to establish probable cause to arrest. In this way, police can manufacture probable cause even if initially there was no evidence at all tying the suspect to the crime.

be documented in writing prior to the lineup."[83] This evidence-based standard proposed from the scientific community appears analogous to *Maryland v. Buie*'s "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing" that further investigation is warranted.[84] If so, like *reasonable suspicion*, this standard has the advantage of already having been articulated in caselaw (in *Maryland v. Buie*), and thus is road-ready right now. Should trial judges prefer a phrase already extant in applicable caselaw, the words "articulable facts" would substitute for the AP-LS wording of "evidence-based," or they could be combined into a requirement of *evidence-based, articulable facts*.

Unlike *evidence-based suspicion* based on *articulable facts*, however, importing *Terry*'s *reasonable suspicion* standard into the eyewitness identification phase of investigation is not advisable since it has a history of being interpreted loosely[85] and is wedded to the situation of field interrogations of stop-question-frisk that pose danger to officers or the public, unlike eyewitness identification situations. Applying it to other early stages of criminal investigation would be inapt, since the circumstances of investigations on the street are different from those in the station house where exigency is not at issue.

Finally, the most stringent standard short of probable cause is the ALI's "strong basis to believe that the suspect committed the crime."[86] Without existing caselaw to explain what that strong basis would look like, the standard seems almost indistinguishable from probable cause itself. Furthermore, from an implementation standpoint, police and courts may find it more difficult to define how much evidence is required before it amounts to *strong* rather than simply requiring detectives to document *articulable facts* and then leaving it to courts to determine whether the facts were substantial enough to justify an identification procedure.

For these reasons, the *evidence-based, articulable facts* standard, based on the AP-LS report and rooted in *Maryland v. Buie*, is likely the best option for reforming the current state of eyewitness investigatory procedures requiring no evidence at all.

83. Wells et al., *supra* note 2, at 11.
84. Maryland v. Buie, 494 U.S. 325, 334 (1990).
85. The loose interpretation of the reasonable suspicion standard occurs among police executives and officers, as in the *Floyd* case discussed above, but is also mobilized by the Supreme Court itself. For example, citing *Terry*, the Supreme Court has upheld seizing property when there was only reasonable suspicion that contraband was inside, searches upon reasonable suspicion of weapons being present, and a full search of a probationer's home without probable cause. *See* U.S. v. Van Leeuwen, 397 U.S. 249, 253 (1970); Michigan v. Long, 463 U.S. 1032, 1051–1054 (1983); United States v. Knights, 534 U.S. 112, 121 (2001).
86. Principles of the Law, Policing § 10.03 (Am. Law Inst., Tentative Draft No. 2, 2019).

III. Articulating the Facts in Police Procedures

Unlike almost all previous policy recommenders, Wells and colleagues outline ways in which this policy could be implemented by police departments internally. They write that an *evidence-based suspicion* standard could be enforced by requiring detectives to present a request for conducting a lineup to a superior, with the request including a statement of the evidence, so that police supervisors and courts alike can review it. If the detective fails to articulate relevant facts that would lead to the particular suspect, the supervisor could suggest extending the investigation in order to gain more confidence that the suspect is actually the culprit.[87] Furthermore, prosecutors and defenders can review the factual statement for sufficiency to determine whether Fourth Amendment requirements have been met.

Without this policy, police detectives are unlikely to pay attention to evidentiary sufficiency for conducting lineups or photo arrays. In recent laboratory research, Jacqueline Katzman and Margaret Bull Kovera examined whether police officers were sensitive to variations in the strength of evidence affecting the likelihood of whether a suspect is guilty, and whether such sensitivity could be improved with an instruction that explained to officers the heightened risk for misidentification when there is little prior extrinsic evidence of the suspect's guilt.[88] The officers were indeed aware that eyewitness identifications are better if based on extrinsic evidence, but an instruction explaining the relationship between the base rate of guilt among suspects and the probability that witnesses would make correct identifications failed to affect their indications that they would nevertheless proceed to conduct identification procedures on very scant bases—58 percent still said they would be willing to order identification procedures with no prior evidence of guilt at all.[89] This finding confirms the prediction that education on this issue is likely inadequate—real change starts only with policy. A satisfactory recommendation must not only provide specific guidance as to how officers could be held to a stricter standard within their departments, but also be grounded in a legal framework that is interpretable and enforceable in the courtroom.

To provide guidance as to how this recommendation could be implemented on a departmental level, a proposed police department standard operating procedure could state:

> *All eyewitness identification procedures shall be conducted only after articulating a specific, concrete fact or facts (more than a hunch), based on prior investigation, that explicitly links the suspect to the crime. Prior to initiating an identification procedure, officers shall*

---

87. Wells et al., *supra* note 2 at 13.
88. Jacqueline Katzman & Margaret Bull Kovera, *Evidence-Based Suspicion: Evidence Strength Affects Police Officers' Decisions to Place a Suspect in a Lineup* (March 2021 unpublished manuscript) (on file with authors).
89. *Id.*

> *be required to state this fact or facts in writing to a supervisor who will determine if the investigator's reasoning meets this standard. This written statement shall be included in the case file if an identification procedure is conducted and the case proceeds. Identification procedures include, but are not limited to, eyewitness identifications arranged at the scene or at the police station, and photo arrays.*

Conclusion

The standard of evidence for requiring an individual to appear in a lineup has not been clearly stated in constitutional law beyond statements that probable cause, and thus a warrant, are not necessary at this investigatory stage of criminal procedure. Recent events have shown that police discretion needs guidance so as to avoid arbitrary or discriminatory actions. Because the downstream implications of being misidentified in a lineup or photo array are just as severe if not *more* severe than the consequences of other investigatory practices to which an evidentiary standard of reasonable suspicion applies, and because lineups and showups are conducted at the police station where exigencies of on-street investigation do not exist, the level of suspicion that an officer must show prior to conducting an eyewitness identification procedure should be even higher, preferably demonstrating *evidence-based, articulable facts*.

Perhaps the core of this issue was most accurately described by policing scholar Egon Bittner when he wrote that "[t]he Patrolman conceives of himself as a man able to make on-the-spot decisions about guilt or innocence."[90] Now that it is clear that the patrolman often falls short in this regard, it is time to protect suspects from the unreliability of identification procedures in the most direct and clear way possible: by not placing people there in the first place, unless police can articulate a reason for doing so.

90. Peter K. Manning, *The Police Mandate, Strategies and Appearances*, *in* POLICING: A VIEW FROM THE STREET 24 (Peter K. Manning & John van Maanen eds., 1978).