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NOTE

EYEWITNESS IDENTIFICATION AND *PERRY V. NEW HAMPSHIRE*: WHERE MAN'S FRAILTY DISAPPOINTS HIS JUSTICE SYSTEM

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I. INTRODUCTION

For the individual defendant, the admission of an eyewitness identification resulting from suggestive circumstances can be devastating. Even if the suggestive circumstances of the identification were accidental, no one wants an unreliable finger pointed at him from across the courtroom. A great deal of empirical research over the last thirty years has substantiated the dangers of admitting eyewitness testimony.[1]

In *Perry v. New Hampshire*,[2] the United States Supreme Court had its first modern opportunity to address the eyewitness identification topic in light of current needs. In this case, Barion Perry ("Perry") was identified by a woman who claims she saw him from her apartment window.[3] Perry asserted that the circumstances surrounding the woman's identification were suggestive of him as the perpetrator because Perry, the only black man outside in the parking lot, was standing next to a police officer at the time the woman identified him.[4] In his appeal to the United States Supreme Court, Perry sought to have his Due Process argument heard even though there was no state action—a prerequisite to a Due Process claim.[5] Consequently, this case was the first of its kind because it involved a

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1. *See infra* part IV.A.

2. Perry v. New Hampshire, 132 S. Ct. 716 (2012).

3. Joint Appendix at 48a, 55a, 61a, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974).

4. *Id.* at 49a.

5. *Id.* at 4228a.

suggestive circumstance that was not the result of any police or state misconduct. Without state action, the Due Process Clause was not implicated; therefore, the Court did not need to create a new standard to resolve the current one.

This Note does not attempt to form a bright-line rule of decision on how to handle suggestive eyewitness testimony. Instead, this Note asserts that the best defense against the negative implications that can result from suggestive eyewitness testimony is skilled attorney advocacy. An informed, well-equipped defense attorney can and must properly attack the fallibilities of eyewitness identification and present that information to the jury. In addition, trial judges making admissibility determinations must be equally informed on the fallibility of eyewitness identifications and make admissibility determinations with that information in mind.

When a new rule is required to solve a problem, in addition to education reform, there are essential, general principles that must be employed to guide the lawmaker in any effort to bring about the law's evolution. Although admitting suggestive eyewitness identification can be "unfair" in one case, a new Due Process standard for all suggestive identifications—as Perry asserted—may not be the best solution. What can be termed, "subjective fairness judgments" undermine the law's very structure.

Although the law must evolve and adapt to current needs, this evolution must be guided by adherence to the integrity of the law, its religious roots and transcendent qualities, efficiency of adjudication, protection of constitutional liberties, accountability, power in numbers, and, especially in the criminal law sense, deterrence. These principles, although not explicitly stated as such, have been the unspoken backbone of historical accomplishments in the law and must guide its development in the modern era as well.

Part II of this Note provides the background of eyewitness identification, including the procedure for eyewitness identifications and the important United States Supreme Court precedents. Part III recounts the facts and procedural history of *Perry v. New Hampshire*. Part IV confronts the problems associated with eyewitness identifications and their susceptibility to error. Finally, Part V proposes a framework for courts to use to resolve disputes involving not only eyewitness identifications but also when a court is presented with an issue that, due to advances in technology or scientific research, requires fresh analysis in light of those changes or advancements.

II. BACKGROUND

A. Eyewitness Identification

Although it has been around for centuries, the topic of eyewitness identification is riddled with misconceptions. At the mention of this fact-finding procedure, one's mind almost invariably runs through scenes from television shows such as Perry Mason or Law & Order. A witness is sitting on the stand; the prosecution asks her if the person she saw commit the crime is in the courtroom; the witness says yes; the prosecution then asks the witness if she will identify the accused; the witness lifts her arm and sternly points to the defendant; a quiet gasp is heard across the courtroom as everyone realizes that a conviction for the defendant is a practical certainty. Despite common presuppositions, however, such in-court identifications have little value and are done only for effect and to meet the "technical requirements of the prosecution's case."[6] By the time a witness makes an in-court identification, counsel for both parties are fully aware that the witness has already identified the defendant during the police investigation.[7]

Before a witness ever takes the stand, one of several pretrial identification methods has already been employed.[8] Most identifications occur in "pretrial confrontation[s]"[9] and fall under one of three categories: mug-shot searches,[10] showups, or lineups.[11] In a pretrial confrontation,[12] known as a

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6. LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION 99 (Stephen R. Saltzburg & Kenneth R. Redden eds., 1982).

7. *Id.*

8. NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS 3 (Dee Pridgen ed., 2d ed. 2011).

9. *Id.* at 4.

10. Although mug-shots will not be discussed in this Note, *see* Hunter A. McAllister, *Mug Books: More Than Just Large Photospreads*, *in* 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 35 (R.C.L. Lindsay et. al. eds., 2007) for a more in-depth look at the interesting issues that surround this identification procedure. A mug-shot search is when a witness looks through a book of mug shots to find a possible suspect. *Id.* This is different from a photo array—where the police already have a suspect and include his picture in the array—because in a mug-shot search the police do not already have a suspect. *Id.*

11. Jennifer E. Dysart & R.C.L. Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?*, *in* 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, *supra* note 10, at 137.

12. In this context, the term confrontation refers to the one-on-one nature of the suspect's contact with the witness. The Confrontation Clause of the Sixth Amendment refers

"showup," a witness may identify a suspect after being presented with only one person or photo.[13] If the identification is in-person, the suspect is brought alone—subject to accompaniment of police officers—to the witness.[14] If an in-person identification is not available or not preferable, a showup occurs when a witness is given one photo of a suspect and is asked if that is the perpetrator.[15] As one could surmise, showups represent the most suggestive identification procedure.[16] The United States Supreme Court stated that it could not conceive of a procedure that more strongly represents the suggestion that the person presented "is believed guilty by the police."[17]

In a "lineup," a witness chooses—or has the opportunity to choose—from several suspects.[18] The lineup can occur at the police station, where the witness can choose from a number of suspects standing on a stage;[19] the lineup can also occur with the use of a photo array.[20] Less controversy surrounds lineups than showups because, in a lineup, the witness is given a

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generally to the trial itself, guaranteeing a criminal defendant's right to confront an accusing witness face-to-face and to cross-examine that witness. U.S. CONST. amend. VI. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (holding that this right may be overridden if the witness is especially vulnerable, as with a child who is an alleged victim of sexual abuse). Additionally, even then, the defendant's attorney must have an opportunity to examine the witness while the defendant observes by means of closed-circuit television or a similar device. *Id.* at 836, 857, 868.

13. Dysart & Lindsay, *supra* note 11.

14. SOBEL, *supra* note 8, at 5.

15. Dysart & Lindsay, *supra* note 11, at 137.

16. TAYLOR, *supra* note 6, at 102–03.

17. United States v. Wade, 388 U.S. 218, 234 (1967); *see also* United States v. Jones, 535 F.3d 886, 891 (8th Cir. 2008) (holding that a showup was suggestive where the defendant was paraded in custody in front of bank windows); Jenkins v. Warrington, 530 F. Supp. 121, 125 (D. Mont. 1982) (referring to showups as a "questionable method of identification"), *aff'd*, 714 F.2d 152 (9th Cir. 1983); Howard v. United States, 954 A.2d 415, 423 (D.C. 2008) (noting that when defendant was handcuffed and illuminated by a police spotlight, "something more egregious than mere custodial status is required to establish impermissible suggestivity . . . ." (internal quotation marks omitted)); Massachusetts v. Phillips, 897 N.E.2d 31, 41 (Mass. 2008) ("One-on-one identifications are generally disfavored because they are viewed as inherently suggestive." Nevertheless, "a one-on-one pretrial identification raises no due process concerns unless it is determined to be *unnecessarily* suggestive." (internal quotation marks omitted)).

18. SOBEL, *supra* note 8, at 4–5.

19. TAYLOR, *supra* note 6, at 101.

20. SOBEL, *supra* note 8, at 5.

choice among a number of suspects.[21] With alternative choices follows a lesser likelihood of suggestiveness and, ultimately, a lesser likelihood of a mistaken identification.[22] As discussed below, these methods of identification all concern procedures employed by the police.[23] Also, Part III of this Note discusses the identification method, or lack thereof, employed in *Perry v. New Hampshire*[24]—the specific case this Note addresses.

All controversy surrounding these identifications involves their admissibility. The key players involved in the criminal justice system—defendants, judges, and lawyers alike—are concerned about admitting potentially false or misleading evidence and presenting it to the jury. The Sixth Amendment[25] right to counsel and the Due Process Clause[26] are constitutional provisions that govern the admissibility of police-arranged identification procedures and in-court identifications.[27] In the context of eyewitness identifications, the Sixth Amendment requires that defendants have a right to the presence of counsel during corporeal[28] identification procedures conducted after the initiation of judicial proceedings.[29] The Due

21. *Id.* at 94.

22. *Id.*

23. TAYLOR, *supra* note 6, at 100.

24. Perry v. New Hampshire, 132 S. Ct. 716 (2012).

25. The Sixth Amendment provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence.*

U.S. CONST. amend. VI (emphasis added).

26. The Due Process Clause of the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

27. Ofer Raban, *On Suggestive and Necessary Identification Procedures*, 37 AM. J. CRIM. L. 53, 53 (2009).

28. "Corporeal" is defined as "having a physical, material existence; tangible." BLACK'S LAW DICTIONARY 368 (9th ed. 2009).

29. Moore v. Illinois, 434 U.S. 220, 231 (1977) (noting that this is independent of any right to counsel issue).

Process Clause forbids the admission of identification testimony that violates principles of fairness.[30]

In determining whether an eyewitness identification should be admitted, a court must consider its suggestiveness. One scholar describes suggestive identification this way:

> A suggestive identification procedure is one that suggests to the identifying witness who is the suspect expected to be identified. Suggestiveness may take many forms: asking the witness to pay particular attention to "number three" in a six-person lineup; having the defendant as the only Hispanic in a photo array; presenting numerous photographs with only the suspect appearing in all of them; or . . . presenting only the suspect to the witness, handcuffed and surrounded by police officers.[31]

Thus, the problems associated with eyewitness identification have more to do with how the witness was asked to identify the suspect than the actual identity of the person she saw.

B. Eyewitness Identification and the Supreme Court: Then and Now

The modern development of the law regarding eyewitness identification began in 1967. On June 12, 1967, the Supreme Court handed down the decisions comprising the "landmark-trilogy"[32] of *Wade-Gilbert-Stovall*.[33] Scholars have noted that this was the first time the Court attempted to establish constitutional safeguards regarding the admissibility of eyewitness identification evidence in United States courts.[34] Prior to these decisions, this area of criminal procedure was largely neglected.[35] Except in the limited circumstance where an identification testimony was the result of an illegal arrest, there was "no solid constitutional basis upon which [to base] an

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30. Stovall v. Denno, 388 U.S. 293, 299 (1967), *abrogated by* Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993). *See id.* at 305 (Black, J., dissenting) ("The concept of due process under which the Court purports to decide this question . . . is . . . to determine in its own judgment whether [the circumstances] comport with the Court's notions of decency, fairness, and fundamental justice.").

31. Raban, *supra* note 27, at 54.

32. SOBEL, *supra* note 8, at 1.

33. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

34. *See* SOBEL, *supra* note 8, at 1.

35. *Id.*

objection to the receipt of eyewitness identification testimony."[36] Different from the situation where a defendant's confession is obtained, "the Fifth Amendment privilege against self-incrimination does not afford a criminal suspect a right of nonparticipation in identification procedures."[37] Before 1967, the rule of admissibility regarding identification was simple: courts asked whether the confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the suspect] was denied due process of law."[38]

As a result of *Wade*, *Gilbert*, and *Stovall*, a type of exclusionary rule was established.[39] In *Gilbert*, the Court held that an identification resulting from a lineup conducted outside the presence of counsel must be excluded.[40] As *Wade* noted, however, if the prosecution could demonstrate, by clear and convincing evidence, that an in-court identification had a source independent of the pretrial identification, such testimony would be admissible.[41] Further, in *Stovall*, the Court held that the standards of *Wade* and *Gilbert* did not apply retroactively to lineups conducted before June 12, 1967, the day the three cases were decided.[42]

Despite *Wade*'s bright-line rule establishing the right to counsel at identification procedures, *Kirby v. Illinois*[43] modified it. In *Kirby*, the Court held that the right to counsel rule explained in *Wade* applies only to lineups taking place after the formal indictment.[44] Later, in *United States v. Ash*,[45] the Court held that the right to counsel rule does not extend to photographic identification procedures.[46] Moreover, the right to counsel rule extends only when the corporeal lineup was held after the defendant was formally charged.[47] Even though *Wade* and *Gilbert* were influential, the *Stovall* segment of the trilogy is the most significant. *Stovall* was the first

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36. WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: INVESTIGATION 343 (West 2009).

37. *Id.*

38. *Stovall*, 388 U.S. at 302.

39. *See* SOBEL, *supra* note 8, at 10.

40. *Id.* at 273.

41. United States v. Wade, 388 U.S. 218, 240 (1967).

42. *Id.* at 300.

43. Kirby v. Illinois, 406 U.S. 682 (1972).

44. *Id.* at 690.

45. United States v. Ash, 413 U.S. 300 (1973).

46. *Id.* at 321.

47. SOBEL, *supra* note 8, at 11.

time the Court held that an unfair identification procedure would result in a violation of due process.[48] *Stovall* set forth a general standard that "a claimed violation of due process of law in the conduct of a confrontation depends on the *totality of the circumstances* surrounding it."[49]

With the totality of the circumstances standard, courts could make independent, factual evaluations to determine whether the facts of a particular case established an unfair identification confrontation. Also, it is important to note that exigency became an additional factor to consider; if the situation is sufficiently urgent, then the totality of the circumstances standard may be somewhat relaxed.[50] A year later, the Court in *Simmons v. United States*[51] held that an identification should be excluded if it "give[s] rise to a very substantial likelihood of irreparable misidentification."[52] Judge Friendly, in *United States ex. rel. Phipps v. Follette*,[53] described the *Simmons* framework this way:

> [T]he required inquiry is two-pronged. The first question is whether the initial identification procedure was "unnecessarily" (Stovall) or "impermissibly" (Simmons) suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been "unnecessarily" or "impermissibly" suggestive was so "conducive to irreparable mistaken identification" (Stovall) . . . that allowing the witness to make an in-court identification would be a denial of due process.
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> . . .
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> The instruction that resolution of this issue "depends on the totality of the circumstances" [*Stovall*], although probably as good a start as could have been made, does not instruct very much. . . . The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is

48. Stovall v. Denno, 388 U.S. 293, 302 (1967); SOBEL, *supra* note 8, at 11.

49. *Stovall*, 388 U.S. at 302 (emphasis added).

50. *Id.* In *Stovall*, the eyewitness was hospitalized and no one knew how long she would live. *Id.* The police followed the only feasible procedure available—bringing the defendant to the hospital so that the eyewitness could identify him. *Id.*

51. Simmons v. United States, 390 U.S. 377 (1968).

52. *Id.* at 384.

53. United States *ex. rel.* Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970).

> able to rely on it at trial without much, if any, assistance from its successor.[54]

Although this explanation is quite useful, no United States Supreme Court case has, thus far, attempted to articulate what the required inquiry should be.

Furthermore, in the seminal case *Neil v. Biggers*,[55] the Court analyzed whether the admission of an out-of-court showup identification would violate a defendant's Due Process rights.[56] The standard applied in *Biggers* more closely aligns with the standard suggested by Judge Friendly. The *Biggers* Court found that it must first look to external factors to analyze whether an identification—though tainted by suggestive identification procedures—is nevertheless "reliable."[57]

In making this decision, the Court outlined the following factors, to be considered when evaluating the likelihood of misidentification:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[58]

In using the *Biggers* factors, the Court seemingly shifted its inquiry to one simply of reliability, rather than asking whether the police identification procedure was "unnecessarily suggestive" and "conducive to irreparable mistaken identification."[59]

The next major Supreme Court case concerning due process and eyewitness identification was *Manson v. Brathwaite*.[60] In *Brathwaite*, the Court was tasked with determining whether due process requires "the exclusion, . . . apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary."[61] The Court applied the *Biggers* analysis, noting that suggestive and unnecessary testimony may be admitted and,

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54. *Id.* at 914–15.

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

56. *Id.* at 190.

57. *Id.* at 199.

58. *Id.* at 199–200.

59. TAYLOR, *supra* note 6, at 164.

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

61. *Id.* at 99.

thus, does not violate due process as long as the identification itself is sufficiently reliable.[62] The *Brathwaite* decision is particularly helpful because it outlines the two post-*Biggers* approaches on the admissibility of suggestive identifications.[63] The Court noted,

> The first, or per se approach, employed by the Second Circuit . . . focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggested confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated fair assurance against the awful risks of misidentification.
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> The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the per se approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.[64]

Ultimately, the Court dispensed with the per se approach because it went too far by automatically keeping from the jury evidence that may be both reliable and relevant.[65] Moreover, the Court concluded that "reliability is the linchpin in determining the admissibility of identification."[66] The Court then analyzed reliability by using the factors outlined in *Biggers* and concluded that the post-*Stovall* identification evidence offered by the prosecution in that case did not violate due process of law.[67]

Although *Brathwaite* is the last major Supreme Court case on eyewitness identification as it relates to due process, more recent cases provide helpful insights into this widely criticized area of American criminal procedure. In

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62. *Id.* at 106.

63. *Id.* at 110 (citations omitted).

64. *Id.* (citations omitted) (internal quotation marks omitted).

65. *Id.* at 112.

66. *Id.* at 114.

67. *Id.* at 116–17.

1986, the Court in *Colorado v. Connelly*[68] held that police misconduct is a prerequisite to a violation of due process.[69] Later, in *Dowling v. United States*,[70] the Court recognized that "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'"[71] The Court further explained that judges "are to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency."[72] The Court also held that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."[73]

III. *PERRY V. NEW HAMPSHIRE*: NO DUE PROCESS VIOLATION ABSENT POLICE MISCONDUCT

A. *Evidence at the Suppression Hearing*

On August 15, 2008, around 2:53 AM, the Nashua, New Hampshire Police received a report that a black male was trying to break into vehicles in the back parking lot of an apartment building at 70 1/2 West Hollis Street.[74] Officer Nicole Clay was sent to the apartment building to investigate.[75] When she arrived at the multi-story apartment building, she parked her marked cruiser out front and walked around the building.[76] Officer Clay noted that there were twelve to fifteen cars in the parking lot, which was "fairly well lit" with lights in the parking lot, lights on the back of the building, and streetlights on Ash Street.[77]

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68. Colorado v. Connelly, 479 U.S. 157 (1986).

69. *Id.* at 164. The Court also noted, "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.* at 166.

70. Dowling v. United States, 493 U.S. 342 (1990).

71. *Id.* at 353 (quoting Rochin v. California, 342 U.S. 165, 170 (1952)).

72. *Id.* (citations omitted) (internal quotation marks omitted).

73. *Id.* at 352.

74. Joint Appendix, *supra* note 3, at 36a–37a.

75. *Id.*

76. *Id.* at 37a–38a, 42a.

77. *Id.* at 56a. Ash Street was the street at the exit to the parking lot. *Id.* at 178a.

Once she arrived at the parking lot, Officer Clay heard a clang, as if a metal bat had hit the ground, and saw the defendant, Barion Perry, a black male, standing between the two vehicles.[78] Perry then walked toward her carrying two audio amplifiers.[79] Officer Clay asked Perry to put the amplifiers down and come speak to her.[80] Perry walked over to Officer Clay and told her he found the amplifiers on the ground and that he was just moving them.[81] When asked where the amplifiers came from, Perry replied that he saw two "kids" leaving the parking lot.[82] Perry said that one of the kids wore a white T-shirt and the other should be on Ash Street.[83]

Following Perry's description, Officer Clay and Perry walked to Ash Street where Perry pointed out a man as one of the kids who left the parking lot.[84] Officer Clay approached the man, Rowley Anzani.[85] Anzani told Officer Clay that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes.[86] While Officer Clay was talking to Anzani, Perry frequently interjected that "he had just found the amplifiers and that other kids had stolen them."[87]

Once Officer Clay and Perry returned to the parking lot, Alex Clavijo came up to them and said that his neighbor witnessed someone breaking into Clavijo's car parked in the parking lot.[88] Clavijo also said that two amplifiers and a large wooden box with two speakers mounted inside had been taken from his car, which matched the description of the items Perry had been carrying.[89] By this time, Officer Robert Dunn, a white male,[90] had arrived at the parking lot.[91] Officer Clay asked Perry to wait in the parking

78. *Id.* at 37a.
79. *Id.*
80. *Id.*
81. *Id.* at 39a.
82. *Id.* at 39a.
83. *Id.* at 40a.
84. *Id.* at 40a–41a
85. *Id.*
86. *Id.* at 41a.
87. *Id.*
88. *Id.* at 42a.
89. *Id.* at 70a–74a.
90. *Id.* at 65a–66a.
91. *Id.* at 43a.

lot with Officer Dunn and then followed Clavijo into the apartment building to speak with Mr. Clavijo's neighbor, Nubia Blandon.[92] While he waited, Perry stood talking to Officer Dunn; he was not handcuffed or otherwise restrained.[93]

Once inside the apartment building, Clavijo escorted Officer Clay to the second or third floor where they spoke in the hallway with Blandon.[94] Blandon stated that, from her apartment window, she had seen a tall, black male carrying a baseball bat, looking inside all the vehicles in the parking lot.[95] According to Blandon, the person circled Clavijo's car, opened the trunk, and removed a large item.[96] When asked for a more specific description of what the man looked like, Blandon said that he was the man that was standing in the parking lot with the police officer.[97] As they spoke, Blandon "pointed towards the window to show [Officer Clay] that she had already looked out the window to see [Perry] and Officer Dunn standing in the parking lot."[98] Although Officer Clay did not ask Blandon how long she had been watching from the window, it would have taken a few minutes for Perry to perform all of the actions that Blandon described.[99] Thus, Blandon must have watched Perry for some time to be able to describe, in detail, all the actions she claimed she saw Perry doing.

Although the record is unclear as to the exact time, Blandon's husband, Joffre Ullon, who had gone out to get coffee some time before Blandon saw anything, returned home;[100] Ullon was the first one to see "the perpetrator" and was the one who called the police to report a man trying to break into cars.[101] In his conversation with Officer Clay, Ullon said "he saw a black

92. *Id.* at 44a.

93. *Id.* at 40a, 43a, 49a, 57a–58a, 65a.

94. *Id.* at 42a–44a, 48a, 66a.

95. *Id.* at 48a, 55a, 61a.

96. *Id.* The large item was a pine box containing audio speakers. *Id.* at 70a.

97. *Id.* at 48a.

98. *Id.* at 49a.

99. *Id.* at 62a–63a. Note that this information—whether Blandon stepped away from the window or if she watched Perry all the way up until the time Officer Clay spoke to him—would have been instrumental in the theft investigation. If Blandon was standing at the window watching the perpetrator in the parking lot and kept watching that person all the time until Officer Clay walked up to him, this author believes that this case would have been settled before trial. Instead, Officer Clay did not ask Blandon any questions about what she was doing as she watched the events in the parking lot or how long she was there.

100. *Id.* at 50a, 54a.

101. *Id.* at 80a–81a, 40a–41a; *see also id.* at 54a.

male walking through the parking lot and lifting up on the [car] door handles."[102] When Officer Clay asked for a description of the man, Ullon said it was the man who was standing in the parking lot with the police officer.[103] After Officer Clay finished speaking with Blandon and Ullon, she went back to the parking lot where she saw Perry and Officer Dunn standing about thirty feet away, at the end of the lot, where it was not as well lit.[104] Officer Clay then found Clavijo's wooden box and speakers in the lot[105] and arrested Perry.[106]

B. Further Evidence at Trial

At trial, Blandon testified that she watched Perry from her kitchen window for about half an hour before Officer Clay arrived.[107] Blandon testified that, when she saw Officer Clay arrive, she left the window and went across the hall to Clavijo's apartment to tell him that he was being robbed.[108] While Blandon watched out the window, Ullon went downstairs, on his way out to get coffee,[109] and as he was driving out of the parking lot he saw Perry walking around the cars parked in the apartment lot.[110] Just as he was driving out of the parking lot, Ullon saw a bicycle near the exit and saw Perry standing nearby in a well-lit area.[111] Ullon, however, could not see Perry's face because it appeared to him that Perry intentionally turned his face away from Ullon.[112] Ullon chose to drive back through the parking lot via the front entrance to get a better look, but Perry crouched behind some cars.[113] After leaving the complex to get coffee, Ullon returned to the lot and, as he was parking his car, he saw Perry standing with Officer Dunn. Then Ullon went up to his and Blandon's apartment and spoke with Officer

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102. *Id.* at 54a.
103. *Id.* at 55a.
104. *Id.* at 57a, 58a.
105. *Id.* at 74a.
106. *Id.* at 84a.
107. *Id.* at 216a–17a.
108. *Id.* at 216a–18a.
109. *Id.* at 54a, 56a, 212a, 228a–29a, 238a–39a.
110. *Id.* at 216, 238a–39a.
111. *Id.* at 238a, 247a.
112. *Id.* at 238a.
113. *Id.* at 238a–39a.

Clay.[114] Over a month later, on September 21, 2008, the Nashua Police interviewed Blandon.[115] The police gave her a photo array, which included a picture of Perry.[116] When asked to point out the man she saw in the parking lot in August, Blandon was unable to make an identification.[117]

C. *Procedural Background of Perry v. New Hampshire*

On February 18, 2009, prior to trial, Perry moved to suppress Blandon's out-of-court identification pursuant to the Due Process Clause of the state and federal constitutions.[118] In his motion to suppress, Perry first argued that the identification procedure was "unnecessarily suggestive" because Blandon identified Perry only after she saw the police car and Perry being arrested and handcuffed.[119] Second, Perry argued that Blandon's identification was unreliable and asked the court to exclude the identification under *Neil v. Biggers*.[120] In the State's objection to Perry's motion to suppress, it argued first that no Due Process analysis was required because Blandon's identification was not the result of police action.[121] Second, the State argued that the circumstances[122] of the identification demonstrate its reliability.[123]

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114. *Id.* at 196a, 241a.

115. *Id.* at 286a.

116. *Id.* at 59a–60a.

117. *Id.*

118. *Id.* at 12a–17a (citing U.S. CONST. amends. V, XIV; N.H. CONST. pt. I, art. 15). This is the identification Blandon made from her apartment, where she told Officer Clay that the man she saw walking around the cars was the same man who was standing next to Officer Dunn in the parking lot. *Id.* At the hearing, Perry's counsel clarified that Perry was not moving to exclude Ullon's identification. *Id.* at 51a–53a.

Before the New Hampshire Supreme Court granted Perry's appeal, his counsel, Melissa A. Kowalewski, filed a motion to withdraw and new counsel was appointed on appeal. *Id.* at 6a. The court granted the motion and Richard Guerriero, a Concord, Connecticut Public Defender, was appointed as new counsel. *Id.* In oral argument at the United States Supreme Court, Justice Ginsberg asked Guerriero to distinguish Blandon's testimony from Ullon's testimony and asked why he did not move to suppress Ullon's testimony. Transcript of Oral Argument at 14–15, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974). Guerriero responded, "Trial counsel simply did not move to suppress that testimony. I don't have a good explanation, and, to be frank, I would have filed the motion to suppress his testimony." *Id.*

119. Joint Appendix, *supra* note 3, at 15a–16a.

120. *Id.* at 12a–16a.

121. *Id.* at 24a.

At the hearing for the motion to suppress, Perry further argued that there was sufficient state action present to warrant a Due Process analysis.[124] In contrast, the State argued that there was no unnecessarily suggestive state action because the police neither knew that Blandon was watching Perry, nor did anything to suggest that they wanted her to identify Perry.[125] The Hillsborough County Superior Court for the Southern Judicial District ruled that because "Blandon's identification of [Perry] was not derived from any suggestive technique employed by the police,"[126] the court did "[not need to] consider whether the identification was otherwise reliable."[127]

At trial, defense counsel said in her opening statement that the case was "about the wrong identification, an inaccurate identification."[128] During her testimony, the defense extensively cross-examined Blandon—counsel asked her about watching a person in the parking lot from a window on the fourth floor, her view being partially blocked by a van,[129] her inability to describe the color of the bicycle the person was riding,[130] her inability to describe the person's clothing or facial features,[131] and her inability to pick the petitioner

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122. The circumstances demonstrating reliability, according to the State were:

> First, Ms. Blandon had an excellent opportunity to view the defendant. . . . Second, Ms. Blandon's degree of attention is evidenced by her description of the events as they occurred, the gender and race of the defendant, the fact that he was carrying a bat which was found at the scene, and that he removed a large object from the victim's car, which proved to be accurate. . . . Third, the pre-identification description of the defendant provided by Ms. Blandon was very accurate. . . . Fourth, Ms. Blandon identified the defendant with certainty, as she immediately identified him as the one in the back of the parking lot standing with the officer. . . . Finally, the identification occurred only a matter of minutes after the occurrence of the crime in question.

Id. at 27a–28a.

123. *Id.* at 27a–29a.

124. *Id.* at 76a–78a.

125. *Id.*

126. *Id.* at 86a.

127. *Id.* at 87a.

128. *Id.* at 113a.

129. *Id.* at 225a–26a.

130. *Id.* at 233a.

131. *Id.* at 233a–34a.

out of a lineup.[132] Despite the defense's attempt to impeach Blandon, the court admitted her out-of-court identification.[133]

Furthermore, the court also admitted Ullon's out-of-court identification without objection from the defense.[134] In her closing argument, defense counsel argued that the defendant was being tried only because there was "an incomplete investigation" and "a wrong ID"[135] and that Ullon and Blandon's out-of-court identifications were unreliable and came about only after the police provided them with "powerful" context clues.[136] After approximately two hours of deliberation, the jury found the defendant guilty of theft by unauthorized taking and not guilty of criminal mischief.[137]

On August 17, 2009, Perry appealed to the New Hampshire Supreme Court.[138] In his brief to the Court, Perry argued for the first time, in his case and in the history of Due Process claims, that no state action was required to trigger a Due Process analysis.[139] The New Hampshire Supreme Court did not address the State's preservation, reliability, and harmless error arguments.[140] Instead, it "decline[d] to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures,'" and held "'that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.'"[141] The court further held that "[b]ecause the evidence support[ed] the trial court's finding that [Perry] failed to carry

132. *Id.* at 234a–35a.

133. *Id.* at 173a–74a. Blandon was not asked to make an in-court identification of Perry. *Id.*

134. *Id.* at 242a–43a, 245a–46a, 285a–87a.

135. *Id.* at 373a–74a.

136. *Id.* at 374a–75a. The context clues that defense counsel was referring to were the facts that Ullon made the identification after he came back to the apartment complex and that Ullon saw Perry talking to police officers while in custody. *Id.* at 374a. "Think about it," she said, "[p]olice officers dressed in uniforms driving cruisers, carrying guns." *Id.* Counsel went on to add, "What's to say that he didn't think to himself at that point, well, that—they're talking to him, it must have been him? What is to say that at that point he didn't make that determination?" *Id.*

137. *Id.* at 408a–09a. The criminal mischief charge was brought as a result of breaking Clavijo's car window.

138. *Id.* at 3a. Note that there is no intermediate appellate court in the State of New Hampshire. Appeals from the trial level are made to the New Hampshire Supreme Court.

139. *Id.* at 428a.

140. *Id.* at 9a–11a.

141. *Id.* at 10a (quoting State v. Addison, 8 A.3d 118, 125 (N.H. 2010), *cert. denied*, 131 S. Ct. 2444 (2011)).

his burden of proof on the first step of the *Biggers* analysis"—improper state action—"[it] need not consider the second step"—reliability.[142] On May 31, 2011, the United States Supreme Court granted Perry's petition for certiorari.[143]

D. Opinion of the United States Supreme Court

On January 11, 2012, the United States Supreme Court, in an opinion written by Justice Ginsburg, evinced both its ability to sift through its own eyewitness identification jurisprudence and its faith in the procedural and constitutional safeguards that exist in the United States justice system. Despite Justice Sotomayor's dissent, the Court held that "[t]he fallibility of eyewitness evidence *does not, without the taint of improper state conduct, warrant a due process rule* requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."[144] The Court denied the chance to "enlarge the domain of due process," recognizing that "the jury, not the judge, traditionally determines the reliability of evidence."[145]

1. Majority Opinion

If the purpose of the introduction of a judicial opinion is to set the tone for the decision, Justice Ginsburg demonstrated a fulfillment of that purpose in the first three sentences of *Perry v. New Hampshire*.[146] From the beginning, the Court noted that not only does our justice system employ a number of procedural and constitutional safeguards against injustice, but this system also has the benefit of up to twelve unbiased additional safeguards—the members of the jury.[147] In addition, the Court recognized that it has placed an additional Due Process check on the admission of eyewitness testimony "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime."[148] Even if an identification is "infected by improper

142. *Id.* at 10a–11a.

143. Perry v. New Hampshire, 131 S. Ct. 2932 (2011) (mem.)

144. Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012) (emphasis added).

145. *Id.*

146. *Id.* at 720.

147. *Id.* ("[T]he reliability of relevant testimony typically falls within the province of the jury to determine.").

148. *Id.*

police influence," it is not per se excluded.[149] It is up to the trial judge to conduct a pretrial screening of the evidence for reliability.[150] Thus, the Court recognized that it has "not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers."[151] The touchstone of the Court's analysis "turn[s] on the presence of state action and aim[s] to deter police from rigging identification procedures."[152]

After analyzing the facts at issue in this case and the events at the state court level, the Court explained that certiorari was granted to resolve a split of opinion among the Circuit Courts of Appeal—whether "the Due Process Clause requires the trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police."[153] With deterrence in mind, the Court went on to explain the Supreme Court's eyewitness identification jurisprudence while at the same time rebutting Perry's contentions regarding the applicability and rationale of certain cases.[154] Carrying the day in the Court's analysis was the fact that, unlike Perry's case, every case in the "*Stovall* line" of cases concerns law enforcement arranging the suggestive circumstances.[155]

Although Perry conceded that his case did not involve police misconduct, he relied on the Court's concern in *Brathwaite* that the Due Process Clause requires a pretrial screening of eyewitness identification.[156] The Court noted that Perry's reliance on the statement in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony" was unfounded in light of the context in which that statement was made.[157] The Court explained that "the *Braithwaite* Court's reference to

149. *Id.*

150. *Id.* The Court noted that "[i]f there is a 'very substantial likelihood of irreparable misidentification,' the judge must disallow presentation of the evidence at trial." *Id.* (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

151. *Id.* at 720–21.

152. *Id.* at 721.

153. *Id.* at 723. *See id.* n.4.

154. *See id.* at 724–28; *see also* pp. 197–205 (discussing the background of this area).

155. *Id.* at 725. The *Stovall* line of cases includes *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968); *Foster v. California*, 394 U.S. 440 (1969); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Neil v. Biggers*, 409 U.S. 188 (1972); and *Manson v. Brathwaite*, 432 U.S. 98 (1977).

156. Joint Appendix, *supra* note 3, at 428a.

157. *Perry*, 132 S. Ct. at 725–26.

reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unnecessarily suggestive identification procedure.*"[158] Because deterrence of police misconduct is the purpose underlying the exclusion of eyewitness evidence, the Court believed that exclusion in Perry's case was "inapposite."[159]

Moreover, because there was no police misconduct in Perry's case, exclusion of Blandon's testimony would not serve a deterrent purpose. To require a particular pretrial assessment of eyewitness testimony would "entail a vast enlargement of the reach of due process as a constraint on the admission of evidence."[160] Although the Court recognized the fallible nature of eyewitness testimony, it explained that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair."[161]

Furthermore, the Court addressed not only procedural and constitutional safeguards in general but specifically outlined the safeguards that were employed in Perry's case.[162] Thus, "[g]iven the safeguards generally applicable in criminal trials, [and the] protections availed of by the defense in Perry's case," the Court held "that the introduction of Blandon's eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair."[163] With no convincing reason to alter precedent, the Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."[164]

2. The Concurrence: Justice Thomas

In a very brief concurring opinion, Justice Thomas expressed his disagreement with the majority's application of the *Stovall* line of cases to

158. *Id.*

159. *Id.* at 726.

160. *Id.* at 727.

161. *Id.* at 728.

162. *Id.* at 728–30. The safeguards employed in Perry's case were these: Perry's counsel cautioned the jury about the vulnerability of Blandon's testimony, counsel constantly reminded the jury of those weaknesses, and the trial court instructed the jury addressing eyewitness testimony and factors it should consider in evaluating it. *Id.* at 729.

163. *Id.* at 730.

164. *Id.*

Perry.[165] According to Justice Thomas, the cases comprising the *Stovall* line were wrongly decided because these cases were based on a substantive due process right to fundamental fairness.[166] Justice Thomas notes,"[T]he Fourteenth Amendment's Due Process Clause is not a 'secret repository of substantive guarantees against unfairness.'"[167] Thus, Justice Thomas would "limit the Court's suggestive eyewitness identification cases to the precise circumstances that they involved."[168] To put it simply, according to Justice Thomas, the Fourteenth Amendment guarantees only *process*—it cannot be used as a means to define the *substance* of life, liberty, or property.

3. The Dissent: Justice Sotomayor

In her dissent, Justice Sotomayor stated that the majority's decision "effectively grafts a *mens rea* inquiry onto [the] rule" that the due process concern should "arise[] not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification."[169] Justice Sotomayor warned that the majority's state action requirement suggests a distinction between intentional and unintentional suggestion.[170] Unintentional suggestion would result in admission; intentional suggestion *could* result in exclusion.[171] Instead, Justice Sotomayor advocated for the following inquiry:

> First, the defendant has the burden of showing that the eyewitness identification was derived through "impermissibly suggestive" means. Second, if the defendant meets that burden, courts consider whether the identification was reliable under the totality of the circumstances. That step entails considering the witness' opportunity to view the perpetrator, degree of attention, accuracy of description, level of certainty, and the time between

165. *Id.* (Thomas, J., concurring).

166. *Id.*

167. *Id.* (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Thomas, J., dissenting)).

168. *Id. See* John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 889 (2007), for more information on Justice Thomas's views regarding substantive due process.

169. *Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting).

170. *Id.*

171. *See id.* at 735.

> the crime and pretrial confrontation, then weighing such factors against the "corrupting effect of the suggestive identification."[172]

According to Justice Sotomayor, this inquiry would provide a "more holistic conception of the dangers of suggestion."[173] The problem with the dissent, however, is that Justice Sotomayor wholly misinterprets the majority's analysis. Justice Sotomayor disagrees with the majority because it created a "novel and significant limitation on our longstanding rule: Eyewitness identifications so impermissibly suggestive that they pose a very substantial likelihood of an unreliable identification will be deemed inadmissible at trial *only* if the suggestive circumstances were 'police-arranged.'"[174] Indeed, the Court used the "suggestive circumstances . . . arranged by law enforcement officers" language, but it made clear that its "decisions . . . turn on the *presence of state action.*"[175]

Contrary to what Justice Sotomayor would argue, the proper inquiry does not question the police officer's *mens rea*—whether or not the officer intentionally suggested to the witness that "this is the guy"—but instead involves determining whether the state arranged for the identification *procedure.* In Perry's case, the police did not arrange for an identification when Blandon identified Perry. While Perry was in the parking lot, away from the witness, the officer simply asked Blandon if she could describe the person she saw trying to break into the cars.[176] In response, Blandon pointed towards the window and said the man she saw was the man standing out in the parking lot next to the other officer.[177] If, however, Officer Clay had asked Blandon to look through the window at the man standing next to Officer Dunn and asked her if the man next to Officer Dunn was the man she saw trying to break into the cars, that would have been a police-arranged identification. Although only suggestive eyewitness identifications are subject to scrutiny, whether the Fourteenth Amendment is implicated at all turns on whether the state *arranged* the identification, not whether the state *intended* to create a *suggestive* identification.

To further express her dismay with the majority's decision, Justice Sotomayor emphasized the inherent problems surrounding eyewitness

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172. *Id.* at 733 (footnote omitted) (citing Manson v. Brathwaite, 432 U.S. 98, 108, 114 (1977); Simmons v. United States, 390 U.S. 377, 384 (1968)).

173. *Id.* at 739–40.

174. *Id.* at 733.

175. *Id.* at 721 (emphasis added).

176. Joint Appendix, *supra* note 3, at 173a.

177. *Id.*

identification and its propensity to generate wrongful convictions.[178] She conceded that the identification in *Perry* most likely did not involve a violation of due process.[179] The reason for her dissent, however, was to express her disappointment that the New Hampshire Supreme Court never made any findings regarding due process "and, under the majority's decision . . . never will."[180]

IV. THE PROBLEMS ASSOCIATED WITH EYEWITNESS IDENTIFICATION

A. Empirical Evidence Surrounding Eyewitness Identification

Although the jury often gives it considerable weight in a criminal trial,[181] eyewitness identifications are surrounded by controversy. Even as far back as 1932, a "survey suggested that among sixty-five cases in which innocent persons were convicted, twenty-nine of the improper verdicts were attributed to improper eyewitness identification."[182] That is more that forty-four percent. Additionally, a more recent study estimates that fifty-two percent of the wrongful conviction cases surveyed involved eyewitness identifications.[183] In a study on exonerations in the United States from 1989 to 2003, it was found that "'[t]he most common cause of wrongful convictions is eyewitness misidentification;' sixty-four percent of the wrongful convictions identified involved an eyewitness misidentification, including ninety percent of the rape cases in which the convicted defendant was subsequently exonerated."[184]

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178. *Perry*, 132 S. Ct. at 738 (Sotomayor, J., dissenting) ("The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'" (quoting State v. Henderson, 208 N.J. 208, 231 (2011))).

179. *Id.* at 739.

180. *Id.*

181. One study showed "that witnesses who make eyewitness identifications are believed by jurors approximately eighty percent of the time, regardless of the accuracy of the identifications." JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 562 (Matthew Bender & Co. ed., 4th ed. 2006) (citing Gary L. Wells, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 278 (1980)).

182. *Id.* at 559 (citing EDWIN M. BORCHARD, CONVICTING THE INNOCENT 3–5 (1932)).

183. *Id.* (citing Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289 (1988)).

184. *Id.* at 560 (citing Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005)).

Most misidentifications occur in one of two scenarios: intentional use of suggestive techniques by police officers[185] or, as is most often the case, the "inherent unreliability of human perception and memory and . . . human susceptibility to unintentional, and often quite subtle, suggestive influences."[186] Studies show that "a person can simultaneously perceive only a limited number of stimuli from his environment, even if his attention level is high."[187]

With the considerable amount of concern surrounding eyewitness identification, much effort has been made to understand the causes of misidentification. A hornbook on criminal procedure explains the causes this way:

> Identification testimony has at least three components. First, witnessing a crime, whether as a victim or a bystander, involves perception of an event actually occurring. Second, the witness must memorize details of the event. Third, the witness must be able to recall and communicate accurately. Dangers of unreliability in eyewitness testimony arise at each of these three stages of the identification process, for whenever people attempt to acquire, retain and retrieve information accurately they are limited by normal human fallibilities and suggestive influences. *Perception* is a highly selective process in which details later shown to be important can be missed, and perceptual inaccuracies are often caused by the brain's inherent limitations, the circumstances of the observation, plus anxiety and fear. *Memory* is constantly undergoing change; some details are forgotten while others are added or altered to resolve the cognitive dissonance that arises when new information differs from the original memory representation. *Recall* is another source of errors, for a narrative description unprompted by questions results in incomplete information retrieval, while

185. *See supra* text accompanying notes 8–24.

186. Frederic D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 970 (1977). For a dramatic example of the problems associated with misidentification, *see* DRESSLER & MICHAELS, *supra* note 181, at 559–60 n.4 (citing Mark Hansen, *Forensic Science: Scoping Out Eyewitness Ids*, 87 A.B.A. J. 39, 39 (2001)).

187. DRESSLER & MICHAELS, *supra* note 181, at 561.

> structured questioning undertaken to achieve completeness causes responses to become more inaccurate.[188]

B. Specific Variables Affecting Identification Accuracy

In a recent, potentially landmark decision, the New Jersey Supreme Court, in *State v. Henderson*,[189] went to extensive lengths to reevaluate the *Manson v. Brathwaite* decision and eyewitness identification in general. In that case, the court appointed a Special Master to "evaluate scientific and other evidence about eyewitness identifications."[190] The Special Master conducted a hearing and heard testimony from seven experts, comprising 2,000 pages of transcript. At the conclusion of the hearing, the Special Master issued a report, which the New Jersey Supreme Court essentially followed in its final opinion.[191] The court found that there are a number of variables that affect memory and can lead to misidentifications.[192]

These variables fit into two categories: system variables[193] and estimator variables.[194] The system variables—variables within the State's control—that the court noted and made recommendations about included: blind administration, pre-identification procedures, lineup construction, avoiding feedback and recording confidence, multiple viewings, simultaneous versus sequential lineups, composites, and showups.[195] Estimator variables

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188. LAFAVE ET AL., *supra* note 36, at 342.

189. State v. Henderson, 208 N.J. 208 (2011). In *Henderson*, the Petitioner was convicted following a photographic array identification alleged to be impermissibly suggestive. *Id.* at 226–27. Initially, the witness could not make an identification. *Id.* at 223. A few minutes later, two officers came into the questioning room and "just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against [him] would be put to rest by the Police Department." Ruiz added, "just do what you have to do, and we'll be out of here." *Id.* at 224. The witness replied that he would make an identification. *Id.* The witness identified the Petitioner seconds later. *Id.*

190. *Henderson*, 208 N.J. at 217.

191. *Id.* at 217.

192. *Id.* at 247.

193. "System variables are factors like lineup procedures which are within the control of the criminal justice system." *Id.* (citing Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1546 (1978)).

194. "Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control." *Id.*

195. *Id.* at 248–59. The system variables, under the control of the state, deal almost exclusively with how the state (the police) should conduct lineup procedures. Although this

included: stress, weapon focus, duration, witness characteristics, characteristics of the perpetrator, memory decay, race-bias, private actors, and speed of identification.[196]

To aid in understanding the many variables associated with eyewitness identification, the following paragraphs will briefly discuss the estimator variables outlined by the New Jersey Supreme Court in *State v. Henderson*. In *Henderson*, the court employed a number of highly qualified and experienced experts and compiled a significant amount of legal research on the topic. Thus, the findings are quite comprehensive. The following paragraphs will follow the order applied by the *Henderson* court in evaluating the estimator variables.

1. Stress

Although high stress levels can increase a person's receptive faculties, high levels of stress nevertheless are more likely to impair an identification than low stress.[197] In one study, researchers found that there was a thirty-two percent decrease in identification accuracy when the witness was subject to high stress at the time of interaction with the perpetrator.[198] Although the court recognized that there is not a precise measure for what constitutes "high" stress, it concluded, "[H]igh levels of stress are likely to affect the reliability of eyewitness identifications."[199]

2. Weapon Focus

Weapon focus occurs when, as one would assume, a witness encounters an individual with a weapon, and the witness is distracted by the weapon.[200] This distraction draws the witness's focus away from the characteristics of the culprit and onto the knife, gun, or other weapon.[201] Although research does not demonstrate that weapon focus has a grave effect on identification accuracy, any number is significant when it concerns a wrongful

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analysis is helpful in understanding the many aspects that play into eyewitness identifications, they are not particularly relevant here because *Perry* did not involve a state-arranged identification.

196. *Id.* at 261–71.

197. *Id.* at 261.

198. *Id.* at 262 (citing Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004)).

199. *Id.* at 262.

200. *Id.*

201. *Id.*

conviction.[202] On average, accuracy decreases about ten percent when the culprit has a weapon.[203] In one experiment, misidentification increased by thirty-one percent when the culprit was holding a syringe in a threatening way towards the witness.[204]

3. Duration

As one would likely assume, the amount of time the witness observes the culprit affects the reliability of the witness's identification.[205] Although there is no magic number that marks the amount of time necessary to increase accuracy, "brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."[206] In addition, witnesses consistently overestimate the amount of time that goes by during an encounter.[207]

4. Distance and Lighting

Although this variable is fairly obvious, distance and lighting can be a major factor in the reliability of an identification.[208] As the court recognized, "[P]oor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification."[209]

5. Witness Characteristics

Two witness characteristics that can have the greatest effect on identification reliability are the witness's age and level of intoxication. Some research indicates that witness accuracy decreases with age.[210] Witnesses from the age of nineteen to twenty-four were more accurate than those

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202. *Id.* at 263.

203. *Id.* (citing Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415–17 (1992)).

204. *Id.* (citing Anne Maass & Gunther Koehnken, *Eyewitness Identification: Simulating the "Weapon Effect,"* 13 LAW & HUM. BEHAV. 397, 401–02 (1989)).

205. *Id.* at 264.

206. *Id.* (citing Colin G. Tredoux et al., *Eyewitness Identification*, *in* 1 ENCYCLOPEDIA OF APPLIED PSYCHOLOGY 875, 877 (Charles Spielberger ed., 2004)).

207. *Id.* (citing Elizabeth F. Loftus et al., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females*, 1 APPLIED COGNITIVE PSYCHOL. 3, 10 (1987)).

208. *Id.* at 264.

209. *Id.*

210. *Id.* at 265.

ranging from sixty-eight to seventy-four years old.[211] Researchers also noticed what is termed, "own-age bias," which occurs when a witness is better at recognizing people of her own age than people of other ages.[212] Due to more nuanced research on this topic, the court could not make a definitive judgment as to whether a jury instruction on the reliability of older eyewitnesses would be appropriate.[213]

6. Characteristics of the Perpetrator

A number of issues come into play concerning the characteristics of a perpetrator. Disguises like hats, sunglasses, masks, and facial hair can all reduce identification accuracy.[214]

7. Memory Decay

Delay in the identification process can significantly affect identification accuracy. As the court noted, "[T]he more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken."[215] One researcher found that there was a significant increase in identification accuracy when identifications occur from two to twenty-four hours after an event.[216]

8. Race-Bias

Race-Bias is demonstrated most identifiably when a cross-racial identification occurs—the eyewitness and the culprit are of different races.[217] One study showed that European subjects were more reliable in recognizing white than African faces, and vice versa.[218] The court in

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211. *Id.* (citing James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults*, *in* 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 317–19 (R.C.L. Lindsay et al., eds. 2007)).

212. *Id.* at 265–66.

213. *Id.* at 266.

214. *Id.* (citing Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 635 (1987)).

215. *Id.* at 267.

216. *Id.* (citing Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58 (1985)).

217. *Id.* (citing State v. Cromedy, 158 N.J. 112, 120 (1999)).

218. SOBEL, *supra* note 8, at 348 (citing Ellis, Davies & Shepherd, *Experimental Studies of Face Identification*, 3 J. CRIM. DEF. 219, 225–26 (1977)).

Henderson noted that a "witness may have more difficulty making a cross-racial identification."[219]

9. Private Actors

This estimator variable refers to non-state actors or factors that can increase the suggestiveness of an identification. Some of the considered factors "includ[e] whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification."[220] Anytime a witness speaks to others about what he or she saw or who he or she identified, the listener's feedback can affect the witness's memory or perceptions of the accused. This post-identification feedback can have significant effects on a witness's confidence and later description at trial. Studies show that this feedback does not have to come from the administrator of the test for it to affect the witness. The court noted that this "feedback and suggestiveness can come from co-witnesses and others not connected to the State."[221]

If witnesses read a newspaper article on the accused or speak to each other about whom they chose, this can "cause a person to form a false memory of details that he or she never actually observed."[222] This interaction can also be significant when co-witnesses are acquainted, are friends, or worse—romantically involved.[223] Identifications of witnesses under these circumstances are "significantly more likely to incorporate information obtained solely from their co-witness into their own accounts."[224]

10. Speed of Identification

Speed of identification relates to how quickly the witness makes an identification after seeing a lineup/showup/photo array. Some researchers

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219. *Henderson*, 208 N.J. at 267 (citing State v. Cromedy, 158 N.J. 112, 120–23 (1999)).

220. *Id.* at 268 (internal quotation marks omitted) (citation omitted).

221. *Id.*

222. *Id.*

223. *Id.* at 270.

224. *Id.* In light of this information, the *Henderson* court recommended that "police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants." *Id.* at 270. Further, the court admonished law enforcement to instruct witnesses not to speak to each other concerning the identification. *Id.* at 271.

have found that identifications are nearly ninety percent accurate when the witness identified the target within ten to twelve seconds of seeing a lineup.[225] Other researchers noted that speedy identifications were really only fifty-nine percent accurate.[226] Because of a lack of consensus, the *Henderson* court declined to make a recommendation concerning this variable.

Therefore, with the inaccuracies inherent in eyewitness identification and the vast number of variables that can affect an identification's accuracy, it is easy to understand why the Supreme Court granted certiorari to hear Perry's seemingly simple case of attempted theft of car speakers. Perry's case presented the Court with an opportunity to squarely address eyewitness identification, especially as it relates to due process. The Court, however, was not up to the task of using the Due Process Clause as a tool for carving out a special protection for especially fallible evidence like eyewitness identification.[227]

V. IS THERE A PROPER STANDARD FOR ADMITTING EYEWITNESS IDENTIFICATIONS?

With all that has been presented about eyewitness identification, it is helpful to set out, on a practical level, what an in-depth analysis of *Perry* and eyewitness identification ultimately reveals. First, eyewitness testimony is inherently unreliable due to the countless variables that can affect an identification. Second, despite limiting instructions and vigorous cross-examination, juries give an incredible amount of weight to eyewitness testimony. Furthermore, misidentifications are one of the leading causes of wrongful convictions—the innocent are going to jail for crimes they are not committing. Now that the fallibilities inherent in eyewitness identification have been fully addressed, an overview of possible solutions is in order.

One option is to exclude eyewitness testimony altogether so as to prevent any chance of further wrongful convictions resulting from misidentifications. A second option is to admit eyewitness testimony—at

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225. *Id.* (citing David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951, 959 (2002)).

226. *Id.* (citing David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule*, 21 APPLIED COGNITIVE PSYCHOL. 677, 688 (2007)). The court noted that this researcher found "twenty-five seconds to be 'time boundary' between accurate and inaccurate identifications." *Id.*

227. Perry v. New Hampshire, 132 S. Ct. 716, 728 (2011).

the judge's discretion—and give the jury detailed, yet understandable, instructions regarding the inherent unreliability of eyewitness testimony. This way, the court can set out exactly what juries should consider in evaluating the eyewitness testimony. Another alternative to consider when admitting eyewitness identification is to also admit expert testimony to attest to the issues surrounding eyewitness identifications.

Another option is go to the root of the problem and reform identification procedures in police departments across the United States. This option would require a considered effort from state legislatures to research and identify the best practices that should be implemented and required. Yet another option is to put more emphasis on equipping defense attorneys to vigorously advocate for their clients. This option would have law schools as its foundation. Organizations like the American Bar Association could require a certain amount of legal education concerning topics of law—like eyewitness identification—that require extra attention.

Last, an option would be to, in a sense, wash one's hands of the potential for misidentifications surrounding eyewitness identification and trust that the procedural and constitutional safeguards already in place will adequately protect the identified defendant. This option invariably requires trust in the trial judges who admit or exclude eyewitness testimony. Judges are left to exercise the discretion granted them in a manner that will serve two important interests of justice: the defendant will get a fair trial and the jury will not be deprived of reliable eyewitness testimony.

Before any attempt to apply these potential solutions can be made, however, it is important to address whether or not the law can or should change when empirical research demonstrates a need for such legal change. Although the Court in *Perry v. New Hampshire* declined to create a bright-line solution to the problems related to eyewitness testimony, the case demonstrates a situation in which a court was presented with a problem and had to either create a solution to that problem or apply solutions used in similar, previous circumstances. In order to properly address any need for a legal rule, a court must first consider the historical principles that have guided lawmakers for hundreds of years.

A. Evolution of the Law Generally

Ever since the giver of life breathed air into the nostrils of Adam in the Garden of Eden, there was law.[228] Adam was given guidelines on what he

228. *Genesis* 2:7 (King James Version) (all subsequent citations to Scripture are to the KJV).

was to do and how he was to conduct himself.[229] Even before Eve's arrival, the Lord admonished Adam not to eat from the tree of life.[230] This law was necessary to help Adam and Eve understand God's authority over them.[231] Since the beginning of mankind, the law has been changing and adapting to fit the needs of those under it. Usages are transformed into custom, and custom is eventually transformed into law.[232]

One legal scholar noted that the transformation of custom into law occurs when restructuring at the top is needed to "control and direct the slowly changing structure in the middle and at the bottom."[233] He goes on to emphasize that law is "custom transformed, and not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top."[234] Law is also a means of enforcing the will of the lawmaker. In terms of natural law, law is an "expression of moral standards as understood by human reason."[235] Finally, law is "an outgrowth of custom, a product of the historically rooted values and norms of the community."[236]

Throughout history, the law surrounding eyewitness testimony has evolved according to the needs and customs of the day. According to Mosaic Law, two witnesses were required for conviction of a capital offense.[237] These witnesses had to be sure enough of their testimony to be willing to cast the first stone.[238] The bystanders then threw the remaining stones necessary to bring the accused to his death.[239] Casting the first stone

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229. Adam was to tend the garden, *Genesis* 2:17, and name every living creature, *Genesis* 2:19.

230. *Genesis* 2:17. The penalty for violation of this law was death. *Id.*

231. Although man was to have dominion over all the Earth, God has ultimate dominion over all. *Genesis* 1:26; *Daniel* 4:34.

232. HAROLD J. BERMAN, LAW AND REVOLUTION 556 (1983).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Deuteronomy* 19:15. The Bible repeatedly emphasizes the importance of having more than one witness. *See Matthew* 18:16; 2 *Corinthians* 13:1; *Hebrews* 10:28.

238. *Deuteronomy* 17:7.

239. *Deuteronomy* 17:6–7 states,

> At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.

created a sense of accountability and responsibility for the witnesses. Additionally, the law specifically forbade a witness from "ris[ing] up against a man for any iniquity, or for any sin."[240] Thus, if a witness falsely accused another man, the witness was brought before the judge, along with the accused, and given whatever punishment he presumed to impose on the accused.[241] At this time in history, priests were the sole triers of fact, and there were no juries.[242]

Further evidence of evolving standards is showcased by the Norman legal system. Through the Assizes of Ariano, issued in 1140, Roger II developed the first modern legal code in Western history.[243] In this code, Roger II introduced professional judges and an "inquisitional procedure" in which the judge interrogated witnesses and examined written evidence.[244] Roger II's successors, in building the Royal Law in Norman Italy, continued Roger II's innovativeness in developing new procedures.[245] This law was considered a continually developing system that grew over time.[246] It is noted, "Roger's successors built on the foundations that he had laid, periodically issuing new laws to meet new circumstances, while maintaining the basic principles of the system as a whole."[247]

This mentality regarding the law has carried throughout history. In English, Henry II came to the throne in 1154 determined to "replace anarchy and violence by law and order but also willing to do so through political and legal institutions and concepts that had only been foreshadowed by his predecessors in England and Normandy."[248] Henry II and his advisors followed the old customs as much as possible in light of new needs and policies.[249]

> The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people. So thou shalt put the evil away from among you.

240. *Deuteronomy* 19:15.

241. *Deuteronomy* 19:15–19.

242. *Deuteronomy* 19:17.

243. BERMAN, *supra* note 232, at 419.

244. *Id.* at 423. These witnesses included witnesses not presented by the parties. *Id.*

245. *Id.* at 424.

246. *Id.*

247. *Id.*

248. *Id.* at 442.

249. *Id.* One of Henry II's major innovations was his formation of permanent central government departments, including the treasury, the high court, and the chancery. *Id.* at 443.

Therefore, it has been a recurrent theme of legal history throughout the world that, as innovations are made and needs arise, the law must move and adapt. Harold Berman summarized the early growth of the Western legal system this way:

> Presupposed in the concept of a body of law was the concept of its growth. Previously, in the periodic legislation of the Germanic rulers, each great "codification" had been conceived as a general recapitulation of customary law, superseding those that preceded it. After the eleventh century, new royal laws presupposed the continued existence of older ones, and indeed built on them. The law appeared to expand and develop, as one king added to the legislation of his predecessors.[250]

Thus, with an obedient eye toward following general principles, the law can and should develop. In the law surrounding eyewitness identification, there has been a great deal of development. As legislatures and courts have become more aware of the dangers involved in eyewitness testimony, the law has developed safeguards to protect against misidentifications. Protections include a unanimous jury verdict requirement, cross-examination, the state's burden of proving guilt beyond a reasonable doubt, Rule 403 of the Federal Rules of Evidence,[251] and the Sixth Amendment right to counsel.

B. Evolution of the Law Governing Eyewitness Identifications

Even before considering constitutional or procedural safeguards against misidentification, the analysis must go further back, to the trial judge's decision on whether or not to admit eyewitness testimony. Essentially, if the courts and the lawmakers guiding them want to ensure that never again will a failed eyewitness identification result in a wrongful conviction, eyewitness testimony must be per se excluded.[252] Absent a per se rule, some

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250. *Id.* at 536.

251. Rule 403 of the Federal Rules of Evidence states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

252. Certainly this would save taxpayers' money in the time spared in litigating the admissibility and, if admitted, unreliability of eyewitness identification. It would also spare defendants the agony of being convicted as a result of the eyewitness testimony and then facing jail time for crimes they did not commit.

misidentifications will occur; nevertheless, these select misapplications of justice do not justify the cost of per se exclusion. The Supreme Court has recognized the dangers surrounding eyewitness identifications but also noted that there is an even greater danger that would result if the jury is deprived of performing its fact-finding function.[253] Certainly the sword is double-edged: per se exclusion can let the innocent go back home to his family, but it can also let the guilty free to offend again.

The judiciary, and presumably the American public, would say that the juice would not be worth the squeeze if eyewitness testimony, no matter how accurate, were to be hidden from the jury. Hence, if we determine that it is too great a sacrifice to exclude eyewitness testimony indefinitely, the trial court has no way of knowing when to let the witness be heard by the jury. Despite its subjectivity, our best defense against essentially "bad" eyewitness testimony is to do two things: (1) advocate for wise, informed judges to be appointed to the bench; and (2) better educate attorneys defending against admitted eyewitness testimony.

The American people grant trial judges the discretion to make admissibility determinations. Such a grant of authority, however, should not be troubling because admitting eyewitness testimony does not mean that a conviction against the defendant is guaranteed. Certainly a thoughtful jury should evaluate the witness's credibility, as well as determine whether the other evidence at trial supports a conviction.[254] Because juries can sometimes fail to make the "right" decision, defendants like Perry would advocate for a special due process inquiry, conducted by the judge, to determine the reliability of eyewitness testimony. If we were honest, however, we would ask whether this special due process inquiry is really any different than what judges are conducting at suppression hearings every day. Under Federal Rule of Evidence 104,[255] trial judges are granted the discretion to determine the admissibility of evidence.[256] That rule specifically states that, in making admissibility determinations, the judge is

253. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 111–12 (1977).

254. Although jurors would not be required to participate (or even be truthful, for that matter), this author proposes that, in criminal trials where eyewitness testimony is admitted and the trial results in a conviction, by way of an anonymous questionnaire, the jury should be asked how much weight each juror gave the eyewitness testimony in making his or her determination of guilt. This way, researchers could gather information on perceived eyewitness credibility without having to wait for a wrongful conviction to turn up.

255. FED. R. EVID. 104(a).

256. *Id.*

"not bound by evidence rules[.]"[257] The judge can draw from whatever he needs to draw from to make this determination.

The second part of the defense against unreliable eyewitness testimony is reforming legal education in such a way as to better equip attorneys to properly rebut eyewitness testimony. This second part will invariably support the first because judges, before being appointed or elected to that position, attend law school and receive the same educational opportunities, if not more, than regular attorneys. An example of seemingly uninformed advocacy is evident in *Perry*. Perry's attorney did not even attempt to exclude Ullon's testimony, even though Ullon saw Perry as he was standing with police officers—just as Blandon saw him.[258] Additionally, the trial transcript is riddled with ambiguity that could have been avoided with clearer questions, leading to clearer responses. For example, three different witnesses, examined by Perry's counsel, testified that Blandon lived on three different floors of the apartment building.[259] This would have been a good point to pin down considering its relation to the distance Blandon would have to look to see Perry.

Moreover, despite the probable benefits of expert testimony, jury instructions, or better police procedures, any real change in this area must start with the attorneys practicing in it. A concerned defense counsel should tirelessly work to inform the judge at the suppression hearing of the unreliability of the proffered testimony. Then, if the evidence is admitted anyway, defense counsel must inform the jury of the testimony's unreliability. In order for attorneys to advocate at a level of excellence—as is required in any circumstance, but especially in dealing with eyewitness testimony—law schools, as well as continuing legal education programs, around the country need to implement curricula to inform students and practitioners of the problems surrounding eyewitness identification and teach these students the tools to properly defend against its pitfalls.

If this issue is not improved through zealous advocacy, reform may come by way of a rule of decision. Although *Perry* did not provide the requisite circumstance ripe for reform, the "right" case could come at any time. If it does, and the Court sees fit to create a more structured rule of decision, this Note proposes a set of guidelines for formulating a rule of decision. Because these guidelines are not the rule, but the framework for a potential rule, they cannot be used to determine the outcome of a dispute. Rather, they should

257. *Id.*

258. *See* Joint Appendix, *supra* note 3, at 48a, 54a–55a.

259. *Id.* at 43a, 49a, 61a, 66a, 225a–26a.

be used as factors for the court to consider, in addition to the problems inherent in eyewitness identifications outlined above, when the court formulates a rule of decision.

Any rule regarding eyewitness identification should adhere to certain basic principles—as was the practice in the evolution of the Western legal system. As identified above, a change in the law should adhere to the concept of legal integrity, "its ongoingness, its religious roots, [and] its transcendent qualities[.]"[260] Further, the court should consider the necessity of deterrence,[261] accountability,[262] power in numbers,[263] protection of constitutional liberties,[264] and adjudicative efficiency.[265] With these principles in mind, a court could formulate a rule that is both useful and faithful to the principles upon which our country was founded.

Nevertheless, until the right case comes along, in light of the fallibility of man and his inability to truly know truth, it is up to students of the law—both practicing and otherwise—to stay informed about eyewitness identification issues. Further, attorneys must develop the skills and knowledge necessary to properly articulate, for either the judge or the jury—the fallibility of eyewitness testimony and its susceptibility to error. Beyond improving practices and techniques—unless eyewitness testimony is excluded altogether—one principle must be kept in mind: the Lord is the ultimate judge, and, where our justice system fails, His will not.[266]

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260. BERMAN, *supra* note 232, at 39.

261. Deterrence not only of police misconduct, but also of criminal activity.

262. This principle is derived from Mosaic law where the witnesses had to cast the first stone to put the accused to death. Although the law may not require witnesses to participate in punishing the convicted, perhaps at least informing the witness of the seriousness of the identification may deter unconsidered identifications.

263. Power in numbers refers to the sensible fact that the more witnesses that saw the event or person, the easier it will be for the jury (or judge) to measure the credibility of the testimony. One interesting thing to note is that in *Perry* there were two eyewitnesses—Ullon and Blandon. *See* Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012).

264. This includes those liberties expressly outlined in the Constitution, not extensions therefrom.

265. Efficient adjudication is essential for courts to adequately protect a defendant's right to a speedy trial.

266. *Isaiah* 33:22 states, "For the LORD is our judge, the LORD is our lawgiver, the LORD is our king; he will save us."

VI. CONCLUSION

If we respect our past, our legal future can be bright. But the lawyers and judges out there practicing must bring about the legal reform. Although a bright-line rule could be helpful, the simple fact remains that, unless eyewitness identification testimony is per se excluded, there will be misidentifications. Thus, it is up to the practitioners working in criminal law, as well as the professors and law schools teaching it, to zealously prepare and be informed about how to protect and defend their clients with excellence.