Boston College Law Review

Volume 54 | Issue 3 Article 20

5-23-2013

The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness

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THE DANGERS OF EYEWITNESS IDENTIFICATION: A CALL FOR GREATER STATE INVOLVEMENT TO ENSURE FUNDAMENTAL FAIRNESS

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Abstract: In 2012, the U.S. Supreme Court decided *Perry v. New Hampshire*, the Court's first case on the admissibility of eyewitness identifications in thirty-five years. The Court held that the Due Process Clause does not require a preliminary judicial assessment of the reliability of an eyewitness identification that was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement. The Court retained factors for assessing reliability when police misconduct is involved that were adopted in the 1970s, despite the emergence of new data highlighting the inherent unreliability of eyewitness identification. This Note argues that the Supreme Court did not go far enough in *Perry* to ensure fundamental fairness, and that state courts should interpret their own constitutions to provide greater protections for defendants. New Jersey adopted a comprehensive model in 2011 that more adequately accounts for the unreliability of eyewitness identification. Other states should follow New Jersey's lead and adopt a similar approach.

INTRODUCTION

In 1985, a prosecutor posed the question, "Jennifer, are you absolutely sure that Ronald Junior Cotton is the man?"[1] Jennifer Thompson, a rape victim, answered yes with confidence.[2] Because of this identification, Ronald Cotton spent more than ten years in prison for a crime that he did not commit.[3] Jennifer Thompson identified a man who she believed was her rapist.[4] She identified Mr. Cotton in a photo

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[1] JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 64 (2009).

[2] *See id.*

[3] *Id.* at 284.

[4] *Id.* at 64. Jennifer Thompson described her experience working with a sketch artist, trying to recall the shape of her rapist's brows, his eyes, and his smile, which were "seared in [her] memory." *Id.* at 23.

array, a lineup, and at trial; she was mistaken all three times.[5] Later, when she saw her actual rapist sitting in a courtroom, she did not recognize him.[6] The judge presiding over Mr. Cotton's trial followed procedures that the Supreme Court has outlined to evaluate the reliability of eyewitness identification testimony and its admissibility.[7]

Jennifer Thompson and Ronald Cotton's story is not unique.[8] Eyewitness misidentifications plague the American criminal justice system.[9] In 2012, the U.S. Supreme Court decided *Perry v. New Hampshire*, its first case on eyewitness identification since 1977, and held that the Due Process Clause does not require a preliminary judicial assessment of the reliability of an identification unless the identification was procured under unnecessarily suggestive circumstances orchestrated by law enforcement.[10] Since the Court decided *United States v. Wade* in 1967, the scientific community has thoroughly researched the reliability of eyewitness identification and highlighted the dangers of misidentification.[11] A number of studies indicate that eyewitness identifications are often unreliable.[12] Experts have called for police and judicial reform to counter the frailties inherent in eyewitness identification and ensure fairness at criminal proceedings.[13] Under the Due Process Clause of

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[5] *See* David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 Or. L. Rev. 263, 264 (2010) (describing how Ms. Thompson claimed to be absolutely certain that Mr. Cotton was her attacker during each identification).

[6] *See* Thompson-Cannino, Cotton & Torneo, *supra* note 1, at 134.

[7] *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (articulating the due process standard for challenging eyewitness identifications); United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that there is a Sixth Amendment right to have counsel present during a post-indictment, pretrial lineup); *infra* notes 90–147 and accompanying text.

[8] *See* Brandon L. Garrett, Convicting the Innocent 45, 50, 55, 56, 58 (2011) (recounting cases of convictions that were based upon eyewitness misidentifications).

[9] *Understand the Causes: Eyewitness Misidentification*, Innocence Project, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited May 8, 2013) (discussing the Innocence Project's ongoing work to raise awareness about the dangers of eyewitness identification and to overturn erroneous convictions).

[10] 132 S. Ct. 716, 721 (2012).

[11] *See Wade*, 388 U.S. at 233–35 (describing some of the dangers of eyewitness identification); Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal 10–11 (1997); *infra* notes 48–89 and accompanying text.

[12] *See* Charles A. Morgan et al., *Accuracy of Eyewitness Identification Is Significantly Associated with Performance on a Standardized Test of Face Recognition*, 30 Int'l J.L. & Psychiatry 213, 220–23 (2007); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765, 765–66 (1995).

[13] *See* Garrett, *supra* note 8, at 80–83 (calling for reforms to eyewitness identification procedures); Gary L. Wells, *Perry vs. New Hampshire*: Reflections on Oral Arguments of Nov. 2, 2011, at 3 (Nov. 3, 2011), http://www.psychology.iastate.edu/~glwells/Wells_articles_pdf/Perry_vs_New_Hampshire_-_Gary_Wells.pdf (expressing hope that the Supreme Court

the Fourteenth Amendment, defendants have a right to a fundamentally fair proceeding.[14] Unreliable eyewitness identifications undermine this judicial safeguard.[15]

This Note argues that to ensure fundamental fairness and to protect a defendant's due process rights, additional safeguards must be implemented regarding the admissibility of eyewitness identifications.[16] The Supreme Court's decision in *Perry* eliminated due process claims when the police do not suggestively orchestrate an identification procedure.[17] Moreover, the Court failed to confront the scientific data highlighting the unreliability of eyewitness identification.[18] In light of *Perry* and the Supreme Court's unwillingness to revisit its eyewitness identification jurisprudence, this Note argues that states should grant greater protections under their own constitutions to exclude unreliable identifications.[19] The New Jersey Supreme Court did this in 2011, and other state courts should adopt New Jersey's approach.[20]

Part I of this Note outlines the concept of fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment, its impact on the admissibility of eyewitness identifications, scientific research on eyewitness identification, and past and current trends in state and federal eyewitness identification jurisprudence.[21] Part II analyzes the relationship between scientific data, reliability, and eyewitness identification, and identifies two problems with the Supreme Court's

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would not wait another thirty-four years to confront the problems of eyewitness identification).

[14] *See* U.S. Const. amend. XIV, § 1; Rivera v. Illinois, 556 U.S. 148, 158 (2009); *infra* notes 30–47 and accompanying text.

[15] *See Perry*, 132 S. Ct. at 735, 738 (Sotomayor, J., dissenting) (advocating for additional safeguards to prevent the admission of unreliable identifications); Stovall v. Denno, 388 U.S. 293, 301–02 (1967), *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314 (1987).

[16] *See Manson*, 432 U.S. at 113; *Wade*, 388 U.S. at 235; State v. Henderson, 27 A.3d 872, 919 (N.J. 2011); *infra* notes 266–333 and accompanying text.

[17] *See Perry*, 132 S. Ct. at 721.

[18] *See id.*

[19] *See Henderson*, 27 A.3d at 919; State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (calling on states to grant greater individual protections when the federal Constitution and the Supreme Court fall short); *infra* notes 266–295 and accompanying text.

[20] *See Henderson*, 27 A.3d at 919; *see also* Commonwealth v. Walker, 953 N.E.2d 195, 209–10 (Mass. 2011) (demonstrating the Massachusetts Supreme Judicial Court's willingness to revisit its eyewitness identification jurisprudence); *infra* notes 296–333 and accompanying text.

[21] *See infra* notes 25–174 and accompanying text.

approach in *Perry*.[22] Part III then argues that in light of *Perry*, state courts should interpret their constitutions more liberally than the Fourteenth Amendment to exclude unreliable identifications and implement a test that takes science into account.[23] Part III calls for states to adopt the New Jersey Supreme Court's approach, articulated in *Henderson*, as the best way to ensure fundamental fairness at trial.[24]

I. The Constitution and Eyewitness Identification

This Part discusses the history surrounding the constitutionality of eyewitness identification testimony.[25] Section A describes the concept of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.[26] Section B describes scientific studies conducted since 1977 that emphasize the unreliability of eyewitness identification through exoneration data and psychological research.[27] Section C discusses U.S. Supreme Court case law regarding eyewitness identification, beginning with the *Wade* trilogy of cases decided in 1967 and concluding with its decision in *Perry*.[28] Finally, Section D outlines the approaches that some state courts have adopted for eyewitness identification.[29]

A. *Due Process and Fundamental Fairness*

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires fundamental fairness in criminal and civil proceedings.[30] This protection extends to criminal trials involving eyewitness identification.[31] Fundamental fairness is not explicitly delineated in the Fourteenth Amendment, but the Supreme Court has nonetheless interpreted the Fourteenth Amendment to include a right to fun-

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[22] *See infra* notes 175–265 and accompanying text.
[23] *See infra* notes 275–295 and accompanying text.
[24] *See infra* notes 296–333 and accompanying text.
[25] *See infra* notes 30–174 and accompanying text.
[26] *See infra* notes 30–47 and accompanying text.
[27] *See infra* notes 48–89 and accompanying text.
[28] *See infra* notes 90–147 and accompanying text.
[29] *See infra* notes 148–174 and accompanying text.
[30] *See* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (discussing fundamental fairness in the context of the Sixth Amendment right to counsel in a custody proceeding).
[31] *See Manson*, 432 U.S. at 113; *Stovall*, 388 U.S. at 302.

damental fairness.[32] Despite its importance, defining fundamental fairness has not been straightforward.[33]

The Court's concerns about fundamental fairness are relevant in the context of eyewitness identification because a defendant's rights can be compromised by a misidentification admitted at trial.[34] In the 1920s, the Court began interpreting the Due Process Clause to invalidate criminal proceedings that were fundamentally unfair.[35] In 1952, the Court concluded that due process of law "precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"[36] Since then, the Court has tried to define what exactly offends one's sense of justice.[37]

To determine the methods that offend our sense of justice, the Court has looked at whether a civil[38] or criminal proceeding was fundamentally fair.[39] A criminal defendant is entitled to rights that, in the

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[32] *See* Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Brennan, J., dissenting) ("But due process derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily . . . ."); *Lassiter*, 452 U.S. at 26 (explaining that the Fourteenth Amendment's fundamental fairness provision at least guarantees the right to counsel when one's liberty is at stake); *see also* Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 51 (1991) ("[F]or a very long time the Supreme Court has interpreted [the Due Process] clause to require at least *some* substantive protection as well as protection for fair procedure.").

[33] *See Lassiter*, 452 U.S. at 24 (describing the requirement of fundamental fairness as "a requirement whose meaning can be as opaque as its importance is lofty").

[34] *Stovall*, 388 U.S. 176 at 302.

[35] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that a judge with a personal and pecuniary interest in deciding a case violated the Due Process Clause); *see also* Powell v. Alabama, 287 U.S. 45, 71 (1932) (concluding that a trial court's failure to give the defendants reasonable time and opportunity to secure counsel in light of, among other things, the defendants' youth, ignorance, and illiteracy, to be a denial of due process). In *Brown v. Mississippi*, decided in 1936, the Court held that a confession procured through torture violated the Due Process Clause because such methods offended principles of justice that Americans deem fundamental. *See* 297 U.S. 278, 285, 287 (1936) (deciding that coerced confessions offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))). In 1952, the Court in *Rochin v. California* held that forcibly removing the contents of the defendant's stomach violated his due process rights. 342 U.S. 165, 172 (1952).

[36] *Rochin*, 342 U.S. at 173 (quoting *Brown*, 297 U.S. at 286).

[37] S*ee Lassiter*, 452 U.S. at 24–25.

[38] *Id.* at 33 (holding that due process did not require the appointment of counsel during a custody hearing because this practice was not fundamentally unfair).

[39] *See Rivera*, 556 U.S. at 158 ("The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but 'fundamental elements of fairness in a criminal trial.'" (quoting Spencer v. Texas, 385 U.S. 554, 563–64 (1967))).

context of American legal history, have been deemed fundamental to a fair proceeding.[40] For example, due process precludes the government from using evidence it knows to be false.[41] Furthermore, the Court has recognized that due process may constrain the admission of evidence at trial that "is so extremely unfair that its admission violates fundamental conceptions of justice."[42]

In defining what comports with due process, the Court has been unwilling to find fundamental unfairness in the absence of police misconduct.[43] In *Colorado v. Connelly*, decided in 1986, the Court held that a mentally impaired defendant's confession did not violate his due process rights because the police did not act coercively to obtain the confession.[44] Even though the defendant was unable to confess freely, the Court held that exclusion of the confession would be justified only if the police used coercion to secure the confession.[45]

In his dissent in *Connelly*, Justice William J. Brennan expressed concerns over the relationship between reliability, fundamental fairness, and the Due Process Clause because of the impaired mental state of the confessor.[46] Although the Court determined that state action was necessary for a confession to be deemed involuntary, Justice Brennan's concerns over reliability and fundamental fairness are relevant in other criminal proceeding contexts, including the admissibility of eyewitness identifications.[47]

B. *Problems and Risks Associated with Eyewitness Identification*

Since the 1970s, numerous studies have emerged that suggest eyewitness identifications can be very unreliable.[48] As early as the 1980s, experts observed that mistaken identifications were the cause of wrong-

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[40] *See id.*; *see also* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 Ohio St. J. Crim. L. 105, 111 (2005) ("[T]he Court made clear that it regarded public perceptions of fairness of proceedings as serving a critical function in establishing the constitutional standards for due process in criminal trials.").

[41] *See Perry*, 132 S. Ct. at 723 (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).

[42] *See id.* (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[43] *Connelly*, 479 U.S. at 167.

[44] *Id.* at 162, 167.

[45] *Id.* at 167. In *Perry*, the Court's 2012 decision on eyewitness identification, the Court affirmed the focus on police misconduct in the debate over fundamental fairness. 132 S. Ct. at 726 (citing *Connelly*, 479 U.S. at 167); *infra* notes 122–147 and accompanying text.

[46] *See Connelly*, 479 U.S. at 176 (Brennan, J., dissenting). Justice Brennan emphasized the unfairness in admitting an unreliable confession. *See id.*

[47] *See id.* at 181 ("A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial rather than inquisitorial practices.").

[48] *See* Garrett, *supra* note 8, at 48.

ful convictions.[49] Research continues to undermine the reliability of eyewitness identifications, with a number of courts using this science to determine admissibility.[50]

With the advent of DNA as a tool for conviction and exoneration, the prevalence of misidentifications leading to wrongful convictions has become more apparent.[51] As of 2011, out of 250 cases studied by the Innocence Project, 190 of those cases involved eyewitness misidentifications.[52] In many wrongful conviction cases, multiple eyewitnesses identify the wrong person.[53] Furthermore, in 2011 the American Psychological Association observed that controlled experiments and studies show that the rate of incorrect identifications is approximately thirty-three percent.[54]

Critics contend that studies on eyewitness identification fail to duplicate reality.[55] Studies often only use college students as witnesses instead of a more realistic cross section of society.[56] Additionally, stress is often not incorporated into the tests.[57] Critics argue that experimental witnesses know that a misidentification does not have severe consequences, and the data is therefore less accurate.[58]

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[49] *See* Gary L. Wells, *Eyewitness Identifications: Systemic Reforms*, 2006 Wis. L. Rev. 615, 615–16 (noting that even in the 1970s psychologists had begun isolating variables that lead to unreliable identifications and observing that misidentifications are particularly common under certain situations).

[50] *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (citing recent studies on the unreliability of eyewitness identification); *Henderson*, 27 A.3d at 885–86 (citing the Innocence Project's work on exonerations in cases where a witness misidentified the defendant and other studies questioning the reliability of eyewitness identification).

[51] *See Henderson*, 27 A.3d at 885 (observing that misidentifications are the greatest cause of wrongful convictions in the United States (citing State v. Delgado, 902 A.2d 888, 895 (N.J. 2006))); Garrett, *supra* note 8, at 48.

[52] *See* Garrett, *supra* note 8, at 48 (noting that eyewitnesses misidentified the exonerees in seventy-six percent of the cases where DNA exonerated a wrongfully convicted person).

[53] Brian L. Cutler & Margaret Bull Kovera, Evaluating Eyewitness Identification 5 (2010) ("Laboratory, field, and archival research on eyewitness memory also suggests that eyewitnesses are capable of making mistakes and that mistaken identifications are very common.").

[54] Brief for American Psychological Association as Amicus Curiae Supporting Petitioner at 14–15, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3488994, at *15 [hereinafter APA Amicus Brief].

[55] *See* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 6 (2009).

[56] *See id.*

[57] *See id.*

[58] *See id.*

Nonetheless, the bulk of scientific opinion defends the studies demonstrating the unreliability of eyewitness identifications.[59] The Innocence Project's data supports these studies.[60] There is general consensus among the scientific community about the research undermining the accuracy of eyewitness identifications.[61] Two major problems plague eyewitness identifications: suggestive identification procedures (System Variables) and the inherent unreliability of eyewitness identifications (Estimator Variables).[62]

1. Suggestive Identification Procedures: System Variables

System variables are variables that can be controlled by the criminal justice system, and include the way law enforcement officers conduct identification procedures.[63] Human memory is malleable and susceptible to police suggestion.[64] A showup is an example of a suggestive technique that may lead to a misidentification.[65] During a showup, a witness confronts a single suspect directly or in a photograph and then makes

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[59] *See id.*

[60] *See* Garrett, *supra* note 8, at 48; Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification 4 (2009), *available at* http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

[61] *See Henderson*, 27 A.3d at 911 ("The Special Master found broad consensus within the scientific community . . . ."); Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychol. 405, 405 (2001).

[62] *See Henderson*, 27 A.3d at 920–21; Garrett, *supra* note 8, at 48.

[63] *See Henderson*, 27 A.3d at 920–21. System variables include blind administration, preidentification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actor involvement, and other identifications made by the eyewitness, including whether the witness initially did not identify anyone or identified someone else. *Id.*

[64] *See Manson*, 432 U.S. at 108 (finding that the exhibition of a single photograph of the suspect was extremely suggestive); Garrett, *supra* note 8, at 49 (describing the police engaging in suggestive behavior in many cases where defendants were later exonerated, including indicating to the eyewitness who he should select during a lineup, using showups where only one person is presented to the witness, and using lineups where the suspect stands out).

[65] *See* Sonenshein & Nilon, *supra* note 5, at 270. A showup is an example of a system variable because it is a suggestive technique controlled by law enforcement. *See Henderson*, 27 A.3d at 920–21.

an identification.[66] When a witness sees only one person, the witness is more likely to identify the suspect as the perpetrator.[67]

Other examples of suggestive procedures or system variables are simultaneous lineups and photo arrays.[68] Research shows that a witness viewing people or photos simultaneously generally compares one photo or person to another and then decides who most closely resembles the offender.[69] A sequential lineup, however, merely requires the witness to respond yes or no to each new person.[70] Sequential lineup procedures produce fewer misidentifications than simultaneous procedures.[71]

It is also more difficult to make an accurate identification if lineup participants do not match the suspect's description.[72] A lineup where the witness is shown a color photograph of the suspect, but black-and-white mug shots of other people, is suggestive.[73] Police remarks, such as telling the witness which suspect to pick or reinforcing a witness's identification, may also taint an identification.[74] Police officers also preju-

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[66] *See Stovall*, 388 U.S. at 302 (demonstrating an example of a showup where the witness saw the suspect one-on-one in the hospital and the Court acknowledged that the procedure was suggestive); GARRETT, *supra* note 8, at 55–57; Charles A. Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1104 (1974) (defining a showup).

[67] *See* GARRETT, *supra* note 8, at 55 (describing showups as one of the most suggestive identification procedures because they tell the witness who the suspect is and noting that their use has been "widely condemned"); *see also* Wells & Quinlivan, *supra* note 55, at 7 (arguing that showups are suggestive in a different way from lineups because they suggest to the eyewitness which person to choose during an investigation, whereas a lineup offers a variety of suspects from which to choose).

[68] *See* Wells, *supra* note 49, at 625–26.

[69] *See id.*

[70] *See id.* (advocating for the use of sequential lineup procedures because they set a higher bar for a positive identification than simultaneous lineups and increase the odds of the witness making an accurate identification).

[71] *See id.* Some research suggests that under certain conditions (e.g., multiple perpetrators or children witnesses) sequential lineups might not lead to more accurate results than simultaneous lineups. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 471 (2001). Nonetheless, the research indicates that overall, sequential lineups lead to more accurate results. *Id.*; *Fix the System: Eyewitness Identification*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited May 8. 2013) (calling for the implementation of sequential, instead of simultaneous, lineups).

[72] *See* GARRETT, *supra* note 8, at 57.

[73] *See id.* at 58 (discussing the case of Marvin Anderson, who was exonerated of a 1982 rape by DNA evidence). Moreover, a lineup where only the suspect has facial hair or distinctive facial bumps is suggestive. *See id.* at 58–59 (discussing the cases of Ronnie Bullock and Lonnie Erby, who were identified during suggestive lineups, convicted, and subsequently exonerated because of DNA evidence).

[74] *See id.* at 59–61 (discussing cases involving police officers acting suggestively during an identification).

dice witnesses by informing them that the suspect is present in a lineup or by not informing them that the suspect might not be in the lineup at all.[75] If a witness assumes the perpetrator is present, the witness will be more likely to identify someone, rather than inform the police that the suspect is not in the lineup.[76]

2. The Frailties of Human Memory: Estimator Variables

A second problem with eyewitness identifications is their unreliability, regardless of the suggestiveness of the identification procedure.[77] The factors associated with the inherent unreliability of identifications are referred to as estimator variables—including factors related to the witness, the perpetrator, or the event—which cannot be controlled by the criminal justice system.[78]

Research indicates that human frailties jeopardize the reliability of eyewitness identifications.[79] Human memory is extremely complex.[80] Significantly, critics contend that a witness's certainty in identifying a suspect is not necessarily related to accuracy.[81] Witnesses can develop a false sense of confidence once they make an identification.[82] Additionally, stress can also play a large role in making a misidentification.[83] Although a moderate amount of stress may increase attention to detail,

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[75] *See id.* at 60; Gary L. Wells et. al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 629–30 (1998).

[76] *See* GARRETT, *supra* note 8, at 60.

[77] APA Amicus Brief, *supra* note 54, at 12–13.

[78] *See Henderson*, 27 A.3d at 921–22. Estimator variables include environmental or personal factors such as stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of the perpetrator, memory decay, racial bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of the prior description of the criminal, level of certainty demonstrated at the confrontation, and the time elapsed between the crime and the confrontation. *Id.* The *Biggers* factors used to determine reliability, discussed in greater detail below, are criticized for being "deeply flawed" and not giving judges the adequate tools with which to evaluate reliability because they do not include all salient estimator variables. *See* GARRETT, *supra* note 8, at 63 (describing the *Biggers* test as "so flexible as to be toothless"); *infra* notes 110–121 and accompanying text.

[79] *See* Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, *in* 11 HANDBOOK OF PSYCHOLOGY 149, 157 (Irving B. Weiner ed., 2003).

[80] *See Henderson*, 27 A.3d at 894 (noting that human memory is not like a tape recording that can be replayed to remember what happened).

[81] *See* Wells, *supra* note 49, at 620 ("Controlled experiments . . . show that eyewitnesses can be both highly confident (even 'positive') and yet totally mistaken in an eyewitness identification.").

[82] *See id.* This false sense of confidence can cause a witness to become entrenched and seem even more convincing at trial even though the identification was actually erroneous. *See id.*

[83] *See* CUTLER & KOVERA, *supra* note 53, at 40.

high levels of stress can lead to misidentifications.[84] The infirmities of cross-racial identification can also heighten the unreliability of eyewitness identifications.[85] Empirical research shows that witnesses more accurately identify suspects of their own race than suspects of a different race.[86]

Research on eyewitness identification indicates that jurors give great weight to eyewitness testimony, and are often unable to separate reliable from unreliable testimony, making the admissibility of such evidence very important to criminal defendants.[87] Justice Brennan recognized this problem when he wrote in his dissent in *Watkins v. Sowders*, decided by the U.S. Supreme Court in 1981, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[88] Thus, eyewitness testimony disproportionally impacts jurors' evaluation of a case and may lead to unjust outcomes.[89]

C. *The Supreme Court and Eyewitness Identification*

Courts today evaluate the admissibility and reliability of eyewitness identifications using a test the Supreme Court articulated during the 1960s and 1970s.[90] The Supreme Court has held that a defendant's right to fundamental fairness extends to the admissibility of eyewitness

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[84] *See id.*

[85] *See id.* at 37–38. A cross-racial identification is an identification of a person of one race by a person of a different race. *See id.*

[86] *See* APA Amicus Brief, *supra* note 54, at 12 (citing a 2001 meta-analysis that encompassed thirty-nine research articles and nearly 5,000 participant witnesses, which "concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications").

[87] *See Henderson*, 27 A.3d at 888–89; *see also* Loftus & Doyle, *supra* note 11, at 2 (describing a study in which a juror's guilty verdict rose from eighteen percent to seventy-two percent when an eyewitness account was added to the evidence); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 Ohio St. J. Crim. L. 603, 620 (2010) ("The scientific literature shows clearly that jurors (not to mention judges and lawyers) are not generally equipped to distinguish between reliable and unreliable identification evidence.").

[88] 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

[89] *See Perry*, 132 S. Ct. at 737 (Sotomayor, J., dissenting); Loftus & Doyle, *supra* note 11, at 5 (recounting a case where Connecticut jurors believed an eyewitness identification over testimony of an FBI director who testified that DNA evidence conclusively exonerated the particular defendant); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990) (discussing the great weight jurors place on eyewitness identification testimony).

[90] *See Manson*, 432 U.S. at 114; Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (formulating a five factor test to determine reliability of an identification); *infra* notes 97–109 and accompanying text.

identifications.[91] The Court, aware of the dangers associated with eyewitness identification, has closely analyzed their use in criminal proceedings and implemented constitutional safeguards to ensure fundamentally fair trials.[92]

Eyewitness identifications have been a critical component of criminal trials for centuries, and the Court has been mindful of the need to continue their use in criminal proceedings.[93] Despite their prevalence, eyewitness identification has been controversial for decades.[94] In 1927, then-Professor Felix Frankfurter wrote, "The identification of strangers is proverbially untrustworthy."[95] Frankfurter described the hazards involved with introducing eyewitness identification testimony at trial in both American and English courts.[96] The Court recognized these dangers and analyzed the admissibility of eyewitness identifications under the Sixth Amendment right to counsel and the Due Process Clause of the Fourteenth Amendment.[97]

1. The *Wade* Trilogy

In 1967, the Supreme Court addressed the constitutionality of admitting eyewitness identification testimony at trial in a series of three cases, and concluded that eyewitness identifications warranted special

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[91] *See Manson*, 432 U.S. at 113. In a concurring opinion in *Perry*, Justice Clarence Thomas noted his disagreement with the reasoning of the Court's due process analysis with regard to eyewitness identification. 132 S. Ct. at 730 (Thomas, J., concurring). Justice Thomas found that the *Stovall* line of cases were wrongly decided because they were premised on a "substantive due process" right to fundamental fairness. *Id.*

[92] *See Stovall*, 388 U.S. at 302; Gilbert v. California, 388 U.S. 263, 272 (1967); *Wade*, 388 U.S. at 235.

[93] *See Stovall*, 388 U.S. at 302; *Gilbert*, 388 U.S. at 272; *Wade*, 388 U.S. at 235; Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 383 (2006) ("Eyewitness identification may be the oldest way of solving a case."); Siegfried L. Sporer et al., *Introduction: 200 Years of Mistaken Identification*, *in* Psychological Issues in Eyewitness Identification 1, 3 (Siegfried L. Sporer et al. eds., 1996) (describing the case of Sergeant Lesurques, who was identified and later executed for committing a robbery that occurred in 1796 in France even though he had an alibi and thirteen other suspects were also identified as committing the same crime). Despite acknowledging the dangers of eyewitness identification, the Court recognized that eyewitness identifications are an important prosecutorial tool. *See Wade*, 388 U.S. at 237.

[94] Felix Frankfurter, *The Case of Sacco and Vanzetti*, Atlantic Monthly, Mar. 1927, http://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/6625/.

[95] *Id.*

[96] *See id.*

[97] *See Manson*, 432 U.S. at 114; *Wade*, 388 U.S. at 235.

protections under the Sixth[98] and Fourteenth Amendments.[99] The standards and framework for evaluating the admissibility of eyewitness identification testimony stem from these cases.[100]

Criminal defendants can argue that the admission of an identification violates the Due Process Clause of the Fourteenth Amendment.[101] In *Stovall v. Denno*, decided in 1967, the Court held that a claim seeking relief for denial of due process was a recognized attack on a conviction, independent of any Sixth Amendment claims.[102] To prove that a defendant's due process rights have been violated, the identification must have been "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[103] If the court determines that an identification meets this test, the defendant is entitled to have the pretrial identification excluded at trial.[104] Whether an identification was unnecessarily suggestive depends

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[98] The Court held that under the Sixth Amendment, a defendant is entitled to have counsel present during a pretrial lineup, where a witness is asked to identify a defendant as the perpetrator of a crime. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *Wade*, 388 U.S. at 236–37. The defendant in *Wade* was indicted for conspiring to rob a bank, and without notice to his lawyer, was observed in a lineup by two bank employees. 388 U.S. at 220. The Court deemed the pretrial lineup to be a "critical stage" of the proceeding, and held that the Sixth Amendment required counsel's presence. *See id.* at 236–37; *see also* Brewer v. Williams, 430 U.S. 387, 398 (1977) (holding that the Sixth Amendment right to counsel attaches once judicial proceedings have been instigated against a defendant). The Court acknowledged the dangers of eyewitness misidentification and the potential for police officers or prosecutors to act suggestively in eliciting identifications from witnesses. *Wade*, 388 U.S. at 228 ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). An attorney's presence during a pretrial lineup may make the cross-examination of the witness at trial more meaningful because the defense attorney can ask pointed and specific questions about the identification. *See id.* at 230. According to the Court, having an attorney present during a pretrial lineup also potentially reduces the likelihood of police misconduct or suggestiveness. *See id.*

[99] *Stovall*, 388 U.S. at 302 (analyzing admissibility under the Due Process Clause of the Fourteenth Amendment); *Gilbert*, 388 U.S. at 272 (using the Sixth Amendment rationale discussed in *Wade* to analyze admissibility); *Wade*, 388 U.S. at 237 (analyzing admissibility under the Sixth Amendment).

[100] *See Perry*, 132 S. Ct. at 724, 726–27 (discussing *Manson* and *Wade*); *Manson*, 432 U.S. at 113 (analyzing admissibility under the Due Process Clause of the Fourteenth Amendment and citing the *Wade* trilogy in its analysis).

[101] *Stovall*, 388 U.S. at 302.

[102] *Id.* at 299 (holding that a defendant may allege and prove a confrontation "resulted in such unfairness that it infringed his right to due process"). The defendant in *Stovall* was convicted after a witness made an in-court identification of the defendant after she had previously identified him during a showup in her hospital room. *Id.* at 295.

[103] *See id.* at 301–02.

[104] *See id.*

upon the totality of the circumstances surrounding the identification.[105] Suggestive procedures include showups, stacked lineups, and suggestive remarks said in front of or to the eyewitness.[106]

Courts must also determine whether an identification procedure was *unnecessarily* suggestive.[107] A suggestive identification might be admissible if those circumstances were the only way a witness could make the identification, as was the case in *Stovall*.[108] The Court's analysis in *Stovall* laid the groundwork for the Court's future due process analysis of eyewitness identification.[109]

2. A Focus on Reliability

Recognizing that certain identification procedures implicate the Due Process Clause, the Court articulated a test to determine when identifications are admissible.[110] The Court's test analyzes whether the identification procedure was so impermissibly suggestive that it creates a substantial likelihood of misidentification in light of the totality of the circumstances.[111] In addition to looking at the suggestiveness of the identification, in 1972 in *Neil v. Biggers* the Court added reliability as a factor in the admissibility analysis.[112]

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[105] *Id.* at 302.

[106] *See* GARRETT, *supra* note 8, at 55–62; *supra* notes 63–76 and accompanying text.

[107] *Stovall*, 388 U.S. at 301–02.

[108] *See id.* at 302 (finding that a showup in the victim's hospital room was the only way the police could have obtained an identification of the attacker, and consequently concluding that the defendant was not entitled to relief).

[109] *See, e.g.*, *Perry*, 132 S. Ct. at 720 (acknowledging that a defendant could bring a due process claim challenging the admissibility of an eyewitness identification so long as there was some sort of police suggestiveness involved); *Manson*, 432 U.S. at 113 (analyzing the admissibility of an eyewitness identification under the Due Process Clause of the Fourteenth Amendment); Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir. 1998) (using due process analysis to evaluate eyewitness identification in any suggestive circumstances), *abrogated by Perry*, 132 S. Ct. at 716; State v. Addison, 8 A.3d 118, 125 (N.H. 2010) (using federal due process jurisprudence as guidance for evaluating an eyewitness identification made under suggestive circumstances).

[110] *See Biggers*, 409 U.S. at 199–200; Simmons v. United States, 390 U.S. 377, 383 (1968).

[111] *See Biggers*, 409 U.S. at 199; *Simmons*, 390 U.S. at 383. In *Simmons v. United States*, decided by the U.S. Supreme Court in 1968, the police showed photos of the accused to five bank employees who had witnessed the robbery to obtain an identification of the accused. 390 U.S. at 380. At trial, the five witnesses identified Simmons as one of the robbers. *Id.* at 381. On appeal, Simmons claimed the identification was so prejudicial that it tainted his conviction. *Id.* The Court used the test articulated in *Stovall* and rejected the defendant's due process claim on the grounds that the police suggestion was necessary and there was little chance that the police procedure had led to a misidentification. *Id.* at 384–85.

[112] *See Biggers*, 409 U.S. at 199.

According to the Court, the relevant factors to determine reliability include (1) the opportunity the witness had to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of certainty at the time of the identification, and (5) the length of time between the crime and the identification ("*Biggers* factors").[113] If the defense shows that the identification was so unnecessarily suggestive that it might have led to a misidentification, then the trial judge weighs the five *Biggers* factors in a preliminary *Wade* hearing to determine whether the identification is reliable enough to be admitted.[114]

In 1977, in *Manson v. Brathwaite*, the Court further emphasized its focus on the reliability of the identification as an important part of its due process analysis.[115] The Court held that due process *does not require* the exclusion of a pretrial identification that was unnecessarily suggestive.[116] The Court concluded, "[R]eliability is the linchpin in determining the admissibility of identification testimony."[117] Despite being unnecessarily suggestive, an identification is admissible if a judge determines that under the totality of the circumstances it is reliable.[118]

The *Manson* Court declined to adopt a rule strictly excluding suggestive identifications because the Court determined that a jury should hear evidence that is both reliable and relevant.[119] The Court affirmed that the requirement for the admissibility of eyewitness identifications under the Due Process Clause is fairness, determined by the totality of the circumstances, and focused on the reliability of the identification

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[113] *Id.* at 199–200. Using these factors, the Court found that there was not a substantial likelihood of misidentification and the evidence was therefore properly admitted. *Id.* at 201.

[114] *Manson*, 432 U.S. at 106 (observing that the factors elucidated in *Biggers* are the relevant factors for determining reliability); Brisco v. Ercole, 565 F.3d 80, 89 (2d Cir. 2009) (using the *Biggers* factors to determine whether a showup identification was independently reliable); *see also* Wells & Quinlivan, *supra* note 55, at 3 (discussing the usage of the *Biggers* factors in *Manson*).

[115] *See Manson*, 432 U.S. at 114.

[116] *See id.* In *Manson*, a police officer eyewitness identified the accused by a photograph that was left on his desk by another officer—a procedure deemed by the Court to be unnecessarily suggestive. *Id.* at 101, 104.

[117] *Id.* at 114.

[118] *Id.* at 117 (finding the police officer's identification was reliable based upon the totality of the circumstances). The *Wade* trilogy of cases is still good law, but the Court in *Manson* added reliability as a crucial component of the admissibility analysis. *See infra* notes 119–147 and accompanying text.

[119] *Manson*, 432 U.S. at 111–12.

based upon the five *Biggers* factors.[120] Since 1977, courts have evaluated an identification's suggestiveness and reliability to determine whether its admission comports with due process.[121]

The Court's most recent decision regarding the admissibility of eyewitness identification is *Perry v. New Hampshire*, decided in 2012.[122] The Court, in an eight-to-one opinion written by Justice Ruth Bader Ginsburg, held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when law enforcement did not arrange suggestive circumstances in procuring the identification.[123] Thus, it is up to the jury, not the judge, to weigh the reliability of eyewitness evidence in a criminal proceeding.[124]

In *Perry*, the defendant was charged in New Hampshire Superior Court with theft by unauthorized taking and criminal mischief after being identified at the scene of a crime.[125] The witness said she saw Perry stealing items from a car as she looked out of her apartment window.[126] It was nighttime.[127] The witness, when asked by a police officer for a description of the suspect, pointed out her window and identified Perry.[128] At the time of the identification, Perry was standing next to another officer.[129] Later, the witness was unable to identify Perry in a photographic array.[130] Nonetheless, the police officer and the eyewitness testified at

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[120] *Manson*, 432 U.S. at 114. In his dissent, Justice Thurgood Marshall criticized the majority for attacking the protections that the Court implemented a decade before in the *Wade* trilogy. *Id.* at 118 (Marshall, J., dissenting). Justice Marshall wrote that the "Due Process Clause requires adherence to the same high standard of fundamental fairness in dealing with every criminal defendant," and concluded that the majority's totality test would "allow seriously unreliable and misleading evidence to be put before juries." *Id.* at 128. Justice Marshall concluded that the adoption of a per se exclusionary rule would enhance the "effective administration of justice." *Id.*

[121] *See, e.g.*, United States v. De León-Quiñones, 588 F.3d 748, 753 (1st Cir. 2009) (using a two-step inquiry involving suggestiveness and reliability to determine the admissibility of an identification); *Ercole*, 565 F.3d at 88 (using the totality of the circumstances test described in *Stovall* to evaluate identification testimony); United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989) (discussing the Supreme Court's reliability analysis in *Manson*), *abrogated by Perry*, 132 S. Ct. at 716; Ford v. Sec'y, Dep't of Corr., No. 8:08-cv-1975-T-23EAJ, 2011 WL 5572618, at *5 (M.D. Fla. Nov. 16, 2011).

[122] *Perry*, 132 S. Ct. at 721.

[123] *Id.*

[124] *Id.* at 728.

[125] *Id.* at 722.

[126] *Id.*

[127] *Id.* at 721.

[128] *Perry*, 132 S. Ct. at 722.

[129] *Id.*

[130] *Id.*

trial that the witness had identified Perry as the thief on the night that the crime had occurred.[131] A jury found Perry guilty of theft.[132]

Before trial, Mr. Perry moved to suppress the identification on due process grounds.[133] The New Hampshire Superior Court denied the motion and the New Hampshire Supreme Court affirmed the conviction.[134] The U.S. Supreme Court granted certiorari to resolve the question whether due process requires a preliminary hearing to determine the reliability of an identification made under suggestive circumstances not orchestrated by law enforcement.[135] The Court, relying on precedent and unwilling to tamper with a widely used evidentiary tool, answered this question in the negative.[136]

The Court highlighted the importance of deterring police misconduct through suppressing evidence.[137] If deterrence is the main goal, the Court reasoned that requiring judicial inquiry into eyewitness identifications where no police suggestiveness is involved would be futile.[138] Moreover, the Court emphasized its concern that requiring preliminary inquiries by the court would take the reliability determination away from the jury.[139] The Court cited other safeguards, such as the Sixth Amendment right to have counsel present during a post-indictment pretrial lineup and evidentiary rules, as sufficient to ensure that criminal trials are fundamentally fair.[140]

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[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Perry*, 132 S. Ct. at 722–23.

[135] *Id.* at 723. Although the circumstances surrounding the identification were suggestive—there was only one suspect, and he was standing next to a police officer—the police officer did not *arrange* the suggestive circumstances because the witness spontaneously pointed at Perry. *See id.* at 722.

[136] *Id.* at 721.

[137] *Id.* at 726.

[138] *Id.* This rationale is similar to that proposed by the Court in its analysis of the exclusionary rule in cases involving the Fourth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961); *see also* Herring v. United States, 555 U.S. 135, 147–48 (2009) (holding that negligent police conduct is not sufficient to trigger the exclusionary rule because the deterrent effect of suppression on police misconduct is the primary rationale for excluding evidence); United States v. Leon, 468 U.S. 897, 916 (1984) (creating a good faith exception to the exclusionary rule in situations where a magistrate erred and highlighting that the exclusionary rule is "designed to deter police misconduct rather than to punish the error of judges and magistrates").

[139] *Perry*, 132 S. Ct. at 728.

[140] *Id.*; *see also* FED. R. EVID. 403 ("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."); N.H. R. EVID. 403 (same).

The Court concluded that when there is no improper police conduct involved in an identification, there is no need for a pretrial determination of reliability.[141] Thus, because law enforcement did not arrange the suggestive circumstances in *Perry*, and because other constitutional and evidentiary safeguards were present during Perry's proceeding, the introduction of eyewitness testimony without a preliminary reliability determination did not violate Perry's right to a fundamentally fair proceeding.[142]

Perry eliminated federal due process claims where no police orchestration is involved in procuring a suggestive identification.[143] In the future, courts will conduct a threshold inquiry when a defendant challenges the admissibility of an identification on due process grounds.[144] First, the defense will have to prove that police suggestiveness was involved.[145] Only if the defense succeeds in showing police suggestiveness will a court apply the *Biggers* factors to evaluate whether the identification was so unnecessarily suggestive that it would lead to a misidentification.[146] Yet, states are free to interpret their own constitutions in such a way to grant greater individual rights than the U.S. Constitution.[147]

D. *State Approaches to Eyewitness Identification*

Despite the risks associated with eyewitness identification, most police units do not have standardized approaches for conducting lineups or photo arrays.[148] In *Perry*, the Supreme Court limited due process

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[141] *Perry*, 132 S. Ct. at 730. The Court did not apply the *Biggers* factors in *Perry* because the reliability analysis is performed only if unnecessarily suggestive circumstances surround the identification. *See id.*

[142] *Id.* Justice Sonia Sotomayor, the sole dissenter, disagreed with the majority's holding that due process is implicated only when police suggestiveness procures an identification. *Id.* at 731 (Sotomayor, J., dissenting); *see infra* notes 203–206 and accompanying text.

[143] 132 S. Ct. at 721.

[144] *See id.*

[145] *See id.*

[146] *See id.* at 726; United States v. Shavers, 693 F.3d 363, 382 (3d Cir. 2012) ("Recently, in *Perry v. New Hampshire*, the United States Supreme Court directed that courts should not reach the reliability inquiry unless the identification resulted from a situation created by improper police conduct."); *supra* note 113 and accompanying text (laying out the *Biggers* factors).

[147] *See* Connecticut v. Barrett, 479 U.S. 523, 536 (1987) (Stevens, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); Brennan, *supra* note 19, at 491.

[148] *See* Garrett, *supra* note 8, at 53 (describing a case of misidentification in which an officer admitted at a preliminary hearing that "he had never been trained on how to create a photo array"); *Fix the System: Eyewitness Identification*, *supra* note 71 ("Most law en-

claims involving eyewitness identifications to identifications involving police suggestiveness (i.e., system variables).[149] Some state courts, however, have begun interpreting their own constitutions in a way that more fully incorporates the scientific data.[150]

For example, some state courts have attempted to reduce the danger of a persuasive erroneous identification by using testimony of eyewitness identification experts to educate jurors and by providing enhanced jury instructions.[151] These measures, however, have been criticized for not adequately alerting jurors to the dangers of eyewitness misidentifications.[152] Testimony from experts can be effective in warning jurors, but courts are not always willing to allow this testimony.[153] Jury instructions may reinforce faulty assumptions or they may be long, complicated, and confusing.[154] Furthermore, some states have not

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forcement agencies use the same methods they have used for decades—live and photo lineups, usually conducted without a blind administrator or proper instructions.").

[149] 132 S. Ct. at 721.

[150] *See, e.g.*, *Walker*, 953 N.E.2d at 209–10 (indicating a willingness to revisit jurisprudence regarding eyewitness identification in light of updated science but refusing to do so here); *Henderson*, 27 A.3d at 919 (concluding a modified framework incorporating the last thirty years of scientific developments on eyewitness identification should be incorporated into New Jersey law).

[151] *See* Sonenshein & Nilon, *supra* note 5, at 289–90.

[152] *See id.* (describing the ineffectiveness of limiting juror instructions); *see also* Harmon M. Hosch et al., *Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts?*, *in* Expert Testimony on the Psychology of Eyewitness Identification 143, 159 (Brian L. Cutler ed., 2009) (citing a study where the average juror had insufficient knowledge of factors influencing an eyewitness identification); Thompson, *supra* note 87, at 630 (noting that cross-examination is not an effective way of "making jurors aware of some of the counterintuitive facts relating to eyewitness identification accuracy").

[153] *See* David S. Caudill & Lewis H. LaRue, *Why Judges Applying the* Daubert *Trilogy Need to Know About the Social, Institutional, and Rhetorical—And Not Just the Methodological—Aspects of Science*, 45 B.C. L. Rev. 1, 29–30 (2003) (discussing a case where the appellate court confirmed that psychological studies on the limitations of perception and memory in eyewitness identifications are an appropriate subject of expert testimony); *see also* Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, *in* Expert Testimony on the Psychology of Eyewitness Identification, *supra* note 152, at 15, 21–22 (discussing the value of experts as "educators" to the jury and the widespread agreement in the scientific community about the findings of eyewitness identification researchers).

[154] *See* Elizabeth F. Loftus, Eyewitness Testimony 190 (1979) (discussing some of the problems associated with cautionary jury instructions, including the fact that judges are not experts in the field and that jury instructions tend to be long and tedious); Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651, 679–80 (2011) (describing the advantages and shortcomings of jury instructions on eyewitness identification testimony).

adopted any of these reforms, and the results are mixed among federal courts.[155]

Some states have declined to follow the Supreme Court's jurisprudence regarding eyewitness identification and have established new standards to evaluate reliability.[156] In 1986, in *State v. Long*, the Utah Supreme Court criticized the inadequacies of the five *Biggers* factors for failing to encompass "well-respected and essentially unchallenged empirical studies," and came up with its own test to assess reliability.[157] The Utah court adopted three additional factors to promote greater accuracy, namely, (1) the witness's capacity to observe the event, (2) whether the identification was made spontaneously and remained consistent, and (3) the nature of the event being observed.[158] The *Long* court also held that trial courts are required to issue cautionary jury instructions whenever an eyewitness identification is central to a case and defense counsel requests the instruction.[159]

The Wisconsin Supreme Court also recognized that it can interpret Wisconsin's due process clause differently from the U.S. Constitution.[160] The Wisconsin Supreme Court implemented more stringent standards to determine the admissibility of showups.[161]

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[155] *See, e.g.*, Wallace v. State, 701 S.E.2d 554, 557 (Ga. Ct. App. 2010) (declining to find an abuse of discretion where a trial judge refused to give a more specific jury instruction on reliability and cross-racial identifications); *see also* Sonenshein & Nilon, *supra* note 5, at 294–97 (discussing the three-way split among federal courts regarding the admissibility of testimony by eyewitness identification experts, including a complete bar to expert testimony, a case-by-case approach, and courts finding expert testimony admissible); Thompson, *supra* note 87, at 628 ("As a general rule, courts have denied requests for jury instructions or expert witnesses to assist jurors in evaluating the reliability of eyewitness identification evidence.").

[156] *See, e.g.*, *Henderson*, 27 A.3d at 920–21 (New Jersey); People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981) (New York); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (Utah); *Dubose*, 699 N.W.2d at 592–93 (Wisconsin).

[157] 721 P.2d 483, 491 (Utah 1986). The *Biggers* factors include the opportunity the witness had to view the perpetrator, the witness's degree of attention, the accuracy of the witness's prior description, the witness's level of certainty at the time of the identification, and the lapse of time between the crime and the identification. *See supra* note 113 and accompanying text.

[158] *Long*, 721 P.2d at 493; *see also Ramirez*, 817 P.2d at 781 (affirming the Utah Supreme Court's reasoning in *Long* and utilizing *Long*'s altered test to determine reliability); Thompson, *supra* note 87, at 625–26 (describing the court's reasoning in *Ramirez*).

[159] 721 P.2d at 492.

[160] *Dubose*, 699 N.W.2d at 597 ("[W]e retain the right to interpret our constitution to provide greater protections than its federal counterpart.").

[161] *Id.* at 593–94 (concluding that a showup would not be necessary unless the police lacked probable cause to arrest a suspect or because exigent circumstances prevented the police from conducting a photo array or lineup).

In 1981, the New York Court of Appeals noted the importance that identifications can play in determining guilt or innocence.[162] The court held that a pretrial identification procured using unnecessarily suggestive procedures would be excluded at trial under the New York Constitution.[163] The court concluded that a showup conducted in front of two victims together was unnecessarily suggestive, but the error was harmless because there was a valid in-court identification.[164]

Recently, the New Jersey Supreme Court has addressed reliability concerns by implementing safeguards under the New Jersey Constitution to ensure that jurors do not hear unreliable identification testimony.[165] In 2011, in *State v. Henderson*, the court proposed a revised framework for resolving some of the problems associated with eyewitness identification.[166] The court directed New Jersey's lower courts to consider a nonexhaustive list of system variables, including lineup construction, feedback, recording confidence, multiple viewings, showups, and private actor involvement.[167]

Furthermore, to evaluate the overall reliability of an identification, New Jersey courts will now consider a non-exhaustive list of estimator variables including stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of the perpetrator, memory decay, racial bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of the prior description of the criminal, level of certainty demonstrated at the confrontation, and the time elapsed between the crime and the confrontation.[168] Some of these factors overlap with the five *Biggers* factors.[169] The court concluded that if a

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[162] *Adams*, 423 N.E.2d at 383–84.

[163] *See* N.Y. Const. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); *Adams*, 423 N.E.2d at 383.

[164] *Adams*, 423 N.E.2d at 384.

[165] *See* N.J. Const. art. I, ¶ 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."); State v. Chen, 27 A.3d 930, 943 (N.J. 2011); *Henderson*, 27 A.3d at 920–21.

[166] *See* 27 A.3d at 920–21; Benjamin Weiser, *In New Jersey, Sweeping Shift on Witness IDs*, N.Y. Times, Aug. 25, 2011, at A1 (discussing New Jersey's new procedures regarding eyewitness identifications that broadened the factors to consider when assessing reliability and their significance).

[167] *See Henderson*, 27 A.3d at 920–21; *supra* notes 63–76 and accompanying text (explaining system variables).

[168] *Henderson*, 27 A.3d at 921–22; *supra* notes 77–89 and accompanying text (explaining estimator variables).

[169] *Henderson*, 27 A.3d at 921–22; *see supra* note 113 and accompanying text (outlining the *Biggers* factors).

defendant presents some evidence of suggestiveness, the judge would then evaluate both the system and estimator variables to determine reliability at a pretrial hearing.[170]

By adopting this framework, the court sought to incorporate modern science to "promote fair trials and ensure the integrity of the judicial process."[171] Contrary to the U.S. Supreme Court's holding in *Perry*, New Jersey had already extended the *Henderson* analysis to include any type of suggestiveness by a public or private actor.[172] The New Jersey court concluded that the *Manson* test for reliability, which uses the five *Biggers* factors, does not adequately measure reliability or deter police misconduct, and that it "overstates the jury's innate ability to evaluate eyewitness testimony."[173] Consequently, the court came up with its own framework incorporating all relevant system and estimator variables, and directed courts to use enhanced jury charges to help jurors adequately evaluate eyewitness identification testimony.[174]

II. The Dangers and the Constitutionality of Eyewitness Identification

Criminal defendants have the right to due process of law under the U.S. Constitution.[175] This right includes barring the admission of identifications that are so unnecessarily suggestive that they would lead to a misidentification.[176] This Part argues that the interplay between due process, reliability, and Supreme Court precedent suggests that a defendant's right to a fundamentally fair proceeding is undermined by the admission of unreliable eyewitness identifications.[177] Section A highlights the importance of due process concerns in the context of eyewitness identification.[178] Section B outlines the problems and limitations of

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[170] *Henderson*, 27 A.3d at 920–22.

[171] *See id.* at 928.

[172] *Compare Perry*, 132 S. Ct. at 721 (holding that due process claims for pretrial judicial hearings to exclude eyewitness identifications are only available when there has been some police suggestiveness), *with Chen*, 27 A.3d at 943 (allowing for pretrial hearings on the admissibility of eyewitness identifications when there was any suggestiveness in procuring the identification).

[173] *Henderson*, 27 A.3d at 918.

[174] *Id.* at 919.

[175] U.S. Const. amend. V, amend. XIV, § 1.

[176] *See* Colorado v. Connelly, 479 U.S. 157, 181 (1986) (Brennan, J., dissenting); Manson v. Brathwaite, 432 U.S. 98, 113 (1977); Stovall v. Denno, 388 U.S. 293, 301–02 (1967), *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314 (1987).

[177] *See infra* notes 181–265 and accompanying text.

[178] *See infra* notes 181–193 and accompanying text.

the Court's analysis in *Perry v. New Hampshire*.[179] Section C analyzes the future of eyewitness identification in post-*Perry* criminal proceedings.[180]

A. *The Importance of Due Process in the Context of Eyewitness Identification*

Due process plays an essential role in eyewitness identification analysis because the dangers of a misidentification can undermine a defendant's right to a fundamentally fair proceeding.[181] To combat the risk of misidentification, the Supreme Court held that criminal defendants could raise due process claims if an identification was so unnecessarily suggestive that it would lead to a misidentification.[182]

Due process, in any context, is not a stagnant concept.[183] Woodrow Wilson wrote in 1908, "[T]he Constitution of the United States is not a mere lawyer's document: it is a vehicle of life, and its spirit is always the spirit of the age."[184] This is especially relevant in the context of eyewitness identification because recent scientific discoveries show that fundamental fairness can mean something different in 2013 than it meant thirty-five years ago.[185] If the Constitution is the spirit of the age, then it is necessary to incorporate new scientific research and norms into traditional conceptions of fundamental fairness.[186] This means revisiting and revising the five *Biggers* factors and eyewitness identification jurisprudence to reflect modern science.[187]

The right to due process must include an established framework to ensure fundamental fairness.[188] The rules should create a system where only evidence that comports with due process is admitted at trial.[189] The great unreliability of eyewitness identifications, in addition to their great influence on a criminal proceeding, suggest that a defendant's right to a fundamentally fair proceeding is violated by the admission of unreliable

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[179] *See infra* notes 194–244 and accompanying text.

[180] *See infra* notes 245–265 and accompanying text.

[181] *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 720 (2012); *Manson*, 432 U.S. at 113; *Stovall*, 388 U.S. at 302; United States v. Wade, 388 U.S. 218, 228 (1967).

[182] *Stovall*, 388 U.S. at 301–02.

[183] *See* Woodrow Wilson, Constitutional Government in the United States 69 (1908).

[184] *Id.*

[185] *See supra* notes 30–89 and accompanying text.

[186] *See* Wilson, *supra* note 183, at 69; *supra* notes 30–47 and accompanying text.

[187] *See* State v. Henderson, 27 A.3d 872, 928 (N.J. 2011); *supra* notes 48–89 and accompanying text.

[188] *See* People v. Adams, 423 N.E.2d 379, 383 (N.Y. 1981) ("A defendant's right to due process would be only theoretical if it did not encompass the need to establish rules to accomplish that end.").

[189] *See id.*

eyewitness testimony at trial.[190] Accurate eyewitness identifications are, however, beneficial crime-fighting and prosecutorial tools.[191] By focusing on reliability, the Court has attempted to find a balance between admitting identifications and preserving due process rights.[192] If reliability is the linchpin of the analysis, then only reliable identifications should be admissible.[193]

B. *Problems with Eyewitness Identification Jurisprudence and the Limitations of the Supreme Court's Analysis in* Perry

The problems with eyewitness identifications that have the potential to undermine due process rights and fundamental fairness focus on (1) the type of suggestiveness involved with the identification, and (2) how to determine reliability.[194] These two concepts are directly correlated; the more suggestive an identification procedure, the more susceptible it is to being unreliable.[195] Yet, the solutions for both can be distinct.[196] Courts can eliminate the first problem simply by adopting a more robust test for determining reliability.[197]

In *Perry*, the Court dealt with the first problem—determining the type of suggestiveness that is required to support a due process claim.[198] The Court held that police suggestiveness must be present to bring a due process claim.[199] In cases where police suggestiveness is in-

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[190] *See* Garrett, *supra* note 8, at 48–49; *supra* notes 30–89 and accompanying text. Admitting inaccurate eyewitness identification testimony, like admitting a coerced confession, can be damning for a criminal defendant. *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936) (excluding a confession procured through coercion).

[191] *See Manson*, 432 U.S. at 112, 117 (holding that the police officer's identification, though suggestive, was reliable); Wells, *supra* note 49, at 631–32 (advocating for procedural reforms rather than complete exclusion of eyewitness identifications).

[192] *See Manson*, 432 U.S. at 112.

[193] *See id.*; *supra* note 117 and accompanying text.

[194] *See Manson*, 432 U.S. at 114.

[195] *See id.* at 112 ("The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police."); *supra* notes 63–76 and accompanying text.

[196] *See Manson*, 432 U.S. at 114; *supra* notes 48–147 and accompanying text; *infra* notes 296–333 and accompanying text.

[197] *See infra* notes 296–333 and accompanying text (discussing New Jersey's robust test).

[198] 132 S. Ct. at 721.

[199] *See id.* This was not surprising given the Court's holding in 1986 in *Colorado v. Connelly*, where the Court required state action to exclude a coerced confession on due process grounds. *See* 479 U.S. at 167. Accordingly, a defendant cannot assert a due process claim if a private actor acted suggestively while a witness made an identification. *See Perry*, 132 S. Ct. at 721.

volved, defendants can still assert that admitting an unreliable identification violated their due process rights.[200]

The *Perry* majority, however, failed to consider several salient claims.[201] The majority emphasized the deterrence rationale for excluding eyewitness identifications when police suggestiveness is involved to support its conclusion that courts only need to engage in a reliability determination if the police orchestrated a suggestive identification.[202] Yet, as Justice Sonia Sotomayor correctly noted in her dissent, if reliability were truly the linchpin of the analysis, then *any* type of suggestiveness should implicate due process.[203]

Justice Sotomayor aptly noted that the Court's concerns with the reliability of eyewitness identification articulated in *Stovall v. Denno* and *Manson v. Brathwaite* only involved the jury hearing unreliable eyewitness testimony.[204] Consequently, she correctly attacked the majority for including the mens rea of police officers conducting an eyewitness identification procedure in the Court's due process analysis because it creates a "murky distinction" between suggestive confrontations orchestrated by the police and situations inadvertently caused by police actions.[205] This confusion ignores the dangers of allowing the jury to hear a witness give an unreliable identification at trial.[206]

The Court in *Perry* also emphasized the importance of maintaining the jury as the primary arbiter of reliability.[207] Although this is a worthy goal, the Court unconvincingly compared unreliable identification testimony with the testimony of government informants.[208] A jailhouse snitch is markedly different from a sympathetic rape victim or a neutral bystander.[209] A jury would likely have an easier time acknowledging motives and bias behind an informant's testimony than it would ac-

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[200] *See Perry*, 132 S. Ct. at 721.

[201] *See id.*; *supra* notes 122–147 and accompanying text.

[202] *See Perry*, 132 S. Ct. at 726.

[203] *See id.* at 731 (Sotomayor, J., dissenting) (noting that due process concerns stem from the adverse effects that any type of suggestiveness has on the reliability of an identification, not the act of suggestion itself).

[204] *Id.*

[205] *Id.* at 734.

[206] *Id.* at 735.

[207] *See id.* at 728 (majority opinion).

[208] *See Perry*, 132 S. Ct. at 728. The Court noted that in other contexts, including evidence of government informants, potential unreliability alone does not render a trial fundamentally unfair. *Id.*

[209] *See id.* at 737 (Sotomayor, J., dissenting).

knowledging the frailties of human memory and perception that are involved when an eyewitness makes an identification.[210]

The Court had legitimate reasons for limiting the scope of due process claims and for issuing a narrow holding in *Perry*.[211] The jury is an integral part of the criminal process.[212] Jurors are the fact-finders of a criminal case and it is their responsibility to evaluate credibility.[213] Shifting this responsibility from jurors to a judge would be a dramatic and potentially unfair shift.[214] Precedent also indicates that the admission of unreliable evidence does not necessarily lead to a fundamentally unfair proceeding.[215]

The Court's reasoning, however, ignores the uniqueness of eyewitness identification.[216] In its 1967 decision in *United States v. Wade*, and in subsequent eyewitness identification cases, the U.S. Supreme Court recognized that eyewitness identifications pose *specific* dangers.[217] It was this concern that prompted the Court to hold that the Sixth Amendment right to counsel attaches during a post-indictment, pretrial lineup.[218] Furthermore, the majority barely addressed the scientific data highlighting the risks involved with eyewitness identification.[219] This empirical data demonstrates the dangers of eyewitness identification and the need for evaluating suggestiveness broadly.[220]

Judges may be as ill-equipped as jurors to distinguish between reliable and unreliable identifications.[221] If this is true, it suggests that judges would be ineffective gatekeepers.[222] Nonetheless, the judge would *only* act as the gatekeeper, and a jury would still determine guilt.[223] Indeed, the dangers of letting the jury hear an unreliable iden-

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[210] *See id.*

[211] *See id.* at 728 (majority opinion).

[212] *See id.*

[213] *See id.*

[214] *See Perry*, 132 S. Ct. at 728.

[215] *See, e.g.*, Kansas v. Ventris, 556 U.S. 586, 594 (2009) (holding that an informant's testimony, elicited in violation of the Sixth Amendment, was admissible at trial to challenge inconsistent testimony).

[216] *See Wade*, 388 U.S. at 228.

[217] *See id.*; *supra* notes 90–147 and accompanying text.

[218] *See Wade*, 388 U.S. at 230, 237 (noting that an identification may be more susceptible to police suggestion without the watchful eye of a defense attorney overseeing the procedure); *supra* note 98 (explaining the Sixth Amendment implications of eyewitness identification).

[219] *Perry*, 132 S. Ct. at 738 (Sotomayor, J., dissenting).

[220] *See id.*

[221] *See* Thompson, *supra* note 87, at 620.

[222] *See id.*

[223] *See* Hosch et al., *supra* note 152, at 158–59.

tification outweigh concerns about traditional roles.[224] Studies show that eyewitness testimony has a significant and lasting impact on juries, who then decide guilt or innocence based upon potentially inaccurate and unreliable evidence.[225]

In addition to the problem of the suggestiveness and the limitations of *Perry*, there remains a second problem: how to evaluate the reliability of an identification.[226] Since the 1970s, courts have used the five *Biggers* factors to evaluate reliability.[227] Yet, studies suggest there is an inherent unreliability in eyewitness identification that the *Biggers* factors do not satisfactorily take into account.[228] The solution to ensuring due process at trial may be to reformulate the *Biggers* factors to take into account the new data, at least in situations involving police suggestiveness.[229] This is possible within the framework set by *Perry*, which merely limits the due process analysis to situations involving police suggestiveness.[230] New Jersey's new multi-factor test contains helpful suggestions to amend the *Biggers* factors.[231]

Substantial amounts of research indicate that eyewitness identifications have serious flaws.[232] In 1995, a judge on the Massachusetts Supreme Judicial Court wrote that scientific studies conducted since 1977 have confirmed that eyewitness identifications are often "hopelessly unreliable."[233] The malleability and vulnerability of human memory highlight the dangers involved with eyewitness identification.[234] Because of these risks, identifications should be scrutinized closely to avoid miscarriages of justice.[235] The Court in *Perry*, however, largely ignored the data

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[224] *See* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

[225] *See* Loftus & Doyle, *supra* note 11, at 2; *supra* notes 48–89 and accompanying text.

[226] *See Henderson*, 27 A.3d at 920–21; Loftus & Doyle, *supra* note 11, at 2.

[227] *See, e.g.*, Brisco v. Ercole, 565 F.3d 80, 89 (2d Cir. 2009); State v. Addison, 8 A.3d 118, 124 (N.H. 2010).

[228] *See* Loftus & Doyle, *supra* note 11, at 10–11; *supra* notes 48–89 and accompanying text.

[229] *See* Thompson, *supra* note 87, at 608–09.

[230] *See Perry*, 132 S. Ct. at 721.

[231] *See Henderson*, 27 A.3d at 920–21; *supra* notes 165–174 and accompanying text.

[232] *See* Garrett, *supra* note 8, at 48; *supra* notes 48–89 and accompanying text.

[233] Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995). The Massachusetts Supreme Judicial Court rejected the reliability test articulated in *Manson* and adopted a per se exclusion rule when defendants demonstrate by a preponderance of the evidence that an identification was unnecessarily suggestive and offensive to due process. *Id.* at 1265.

[234] *See id.* at 1261.

[235] *See id.*; APA Amicus Brief, *supra* note 54, at 6; Brief for The Innocence Network as Amicus Curiae Supporting Petitioner at 5–6, *Perry*, 132 S. Ct. 716 (No. 10-8974), 2011 WL 3439922, at *15.

by barely addressing it and by maintaining the *Biggers* factors.[236] Such a result seems incompatible under jurisprudence that deems due process a fundamental right.[237]

Human memory is not a video recording.[238] A witness under stress, in the presence of a weapon, or making a cross-racial identification has a greater likelihood of misidentifying a suspect.[239] The five *Biggers* factors may be inadequate to safeguard against unreliable testimony at trial because they do not take these important factors into account.[240] Notably, the fourth *Biggers* factor, the witness's level of certainty at the time of the identification, is particularly misleading.[241] Despite these scientific findings, many judges are reluctant to suppress eyewitness identifications.[242] This is not surprising, especially in situations where there may be no other evidence.[243] The Supreme Court, however, failed to address the inadequacy of the *Biggers* factors in *Perry*.[244]

C. *Life After* Perry: *The Future of Eyewitness Identification*

Perry limited defendants' right to challenge identifications on due process grounds to situations where law enforcement orchestrated suggestive identification procedures.[245] Nevertheless, the battle against the admission of unreliable evidence at criminal trials is not over.[246] Defendants can still raise evidentiary arguments, citing either the Federal Rules of Evidence or state evidence rules that allow judges to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.[247] The Court in *Perry* specifically cited this evidentiary op-

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[236] *See Perry*, 132 S. Ct. at 738 (Sotomayor, J., dissenting).

[237] *See id.*

[238] *See* Douglas J. Narby et al., *The Effects of Witness, Target, and Situational Factors on Eyewitness Identifications*, *in* Psychological Issues in Eyewitness Identification, *supra* note 93, at 23, 25 (listing a variety of factors that influence memory).

[239] *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 280 (2003) (describing types of witnesses).

[240] *See supra* notes 77–89, 110–114 and accompanying text.

[241] *See* Garrett, *supra* note 8, at 63–64.

[242] *See id.* at 77.

[243] *See id.* Jennifer Thompson's rape case demonstrates both the importance of an eyewitness identification in a rape case and its dangers. *See supra* notes 1–7 and accompanying text.

[244] *See* 132 S. Ct. at 721.

[245] *Id.*; *see supra* notes 122–147 and accompanying text.

[246] *Perry*, 132 S. Ct. at 721; *see infra* notes 247–265 and accompanying text.

[247] *See Perry*, 132 S. Ct. at 729.

tion as a curative measure if a preliminary hearing is not required.[248] Yet these options are not satisfactory alternatives.[249]

Based upon the scientific data suggesting that jurors put an inordinate amount of weight on eyewitness testimony, one could imagine a situation where a judge excludes an identification that would confuse the jury so much that the probative value is substantially outweighed by its prejudicial effect.[250] But it is not obvious that this would be the norm.[251] In a climate where some judges are hesitant to give jury instructions on the frailties of eyewitness identifications or to allow expert testimony, it seems unlikely that judges will use traditional evidentiary rules in a new way to exclude evidence.[252] Because Federal Rule of Evidence 403 is weighted toward admissibility, a defendant will bear a heavy burden to show that the admission of the testimony is unduly prejudicial.[253]

Nonetheless, in 2012, the Oregon Supreme Court used evidentiary rules, including Oregon's version of Federal Rule of Evidence 403, Oregon Evidence Code Rule 602's personal knowledge requirement, and Oregon Evidence Code Rule 701's regarding the requirements of lay opinion testimony, to go even further than the New Jersey Supreme Court in recognizing the fallibility of eyewitness identification evidence.[254] The court concluded that the scientific discoveries of the last thirty-five years indicate that the methodology that Oregon courts had been using to test the reliability of eyewitness identifications (similar to the federal *Manson* test), was inadequate.[255] To increase reliability, the court shifted the burden to the government to "establish all preliminary facts necessary to establish admissibility of the eyewitness evidence."[256] The decision requires trial courts to consider all relevant estimator and system variables to determine reliability.[257] Oregon's approach represents a positive step by a state court to cure some of the problems associated with eyewitness identification.[258] Nevertheless,

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[248] *Id.*

[249] *See id.* at 739 (Sotomayor, J., dissenting).

[250] *See* FED. R. EVID. 403.

[251] *See* GARRETT, *supra* note 8, at 80 (describing how many judges do not explain to the jury relevant social science research on the potential effects of police suggestion).

[252] *See id.* at 77.

[253] *See* FED. R. EVID. 403. The Rule calls for admission unless the probative value is substantially outweighed by a prejudicial effect. *See id.*

[254] State v. Lawson, 291 P.3d 673, 692–94, 697 (Or. 2012).

[255] *Id.* at 690.

[256] *Id.* at 696–97.

[257] *Id.* at 685–88.

[258] *See id.* at 697.

from an academic and analytical standpoint, New Jersey's approach seems to capture more accurately the importance of a defendant's right to a fundamentally fair proceeding by deciding the admissibility of identification testimony on due process grounds.[259]

In addition to the evidentiary option, the Supreme Court has left defendants with the tools of jury instructions, expert testimony explaining the dangers of eyewitness identification,[260] and rigorous cross-examination.[261] Enhanced use of these options may contribute to fairer proceedings, but they are not enough to battle the inherent dangers of eyewitness identification.[262]

Defendants should challenge the validity of the *Biggers* factors in state courts as a fundamentally unfair way of assessing reliability when police suggestiveness is involved.[263] Defendants can point to the vast amount of social science and to the New Jersey Supreme Court's recent decision as a more fair methodology for evaluating reliability.[264] To ensure that a defendant has access to fundamentally fair proceedings, state courts should adopt more robust measures that would prevent misidentifications from appearing in court.[265]

III. A Call for State Court Action to Address the Dangers of Eyewitness Identification

In light of the Supreme Court's decision in 2012 in *Perry v. New Hampshire* and the severe dangers of admitting unreliable eyewitness identification testimony, state courts should interpret their constitutions

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[259] *See Henderson*, 27 A.3d at 928; *supra* notes 181–193 and accompanying text; *infra* notes 296–333 and accompanying text.

[260] *See* Malpass et al., *supra* note 153, at 21–22. Experts on eyewitness identification are helpful in explaining to jurors that eyewitness identifications are less accurate than they think. *See* Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, *in* Expert Testimony on the Psychology of Eyewitness Identification, *supra* note 152, at 169, 175 (discussing the value of expert testimony in explaining to jurors the intricacies involved with eyewitness identifications). Expert testimony can also educate jurors about the nature of eyewitness memory. *See id.* This leaves the reliability question with the jury, but allows jurors to make a more informed decision about how much weight to attribute to a witness's identification. *See Perry*, 132 S. Ct. at 728 (explaining the Court's unwillingness to remove from the jury its traditional role of determining the reliability of evidence).

[261] *See Perry*, 132 S. Ct. at 721.

[262] *See Henderson*, 27 A.3d at 925–26; State v. Cromedy, 727 A.2d 457, 467–68 (N.J. 1999) (requiring New Jersey courts to issue jury instructions for cross-racial identifications twelve years before *Henderson*), *abrogated by Henderson*, 27 A.3d 872.

[263] *See Henderson*, 27 A.3d at 919; State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005).

[264] *See Henderson*, 27 A.3d at 928.

[265] *See infra* notes 273–333 and accompanying text.

to grant greater protections than the U.S. Constitution.[266] Prior to *Perry*, the New Jersey Supreme Court took action.[267] It has long been acknowledged that states may interpret their own constitutions to grant greater rights than those granted under the U.S. Constitution.[268] In addition to interpreting their own constitutions more liberally, state courts could also use their supervisory powers to make procedural rules to ensure that defendants have access to fundamentally fair trials.[269]

This Part argues that state courts should grant greater protections under their own constitutions in the field of eyewitness identification.[270] Section A argues that state courts are the appropriate courts for granting these protections, that they have done this in other contexts, and that they should grant greater protections in the context of eyewitness identification.[271] Section B advocates using the New Jersey Supreme Court's recent approach as a model for evaluating the admissibility of eyewitness identifications.[272]

A. *State Courts Can and Should Reform Eyewitness Identification*

In 1977, Justice William J. Brennan wrote, "State constitutions, too, are a font of individual liberties."[273] Although the U.S. Supreme Court has recognized limited due process protections for eyewitness identification under the U.S. Constitution, state courts and legislatures should do more to ensure that fundamental fairness is protected by excluding unreliable eyewitness identifications.[274] In light of the Supreme Court's decision in *Perry*, where the Court was unwilling to reformulate its eyewitness identification jurisprudence to account for new scientific data and thus called into question the reliability of eyewitness identifications

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[266] *See* Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012); State v. Henderson, 27 A.3d 872, 928 (N.J. 2011).

[267] *See Henderson*, 27 A.3d at 928.

[268] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (recognizing that the "authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" is not limited); Brennan, *supra* note 19, at 491.

[269] *See, e.g.*, Commonwealth v. Rosario, 661 N.E.2d 71, 76 (Mass. 1996); *infra* notes 276–278 and accompanying text.

[270] *See infra* notes 273–333 and accompanying text.

[271] *See infra* notes 273–295 and accompanying text.

[272] *See infra* notes 296–333 and accompanying text.

[273] Brennan, *supra* note 19, at 491.

[274] *See id.*

and the continued use of the five *Biggers* factors, it is necessary for the states to take action.[275]

State (and federal) courts can create procedural and evidentiary standards through their supervisory powers.[276] Although the use of supervisory powers has been somewhat limited on the federal level, it can still be a powerful tool for state courts to ensure that judicial integrity is preserved, especially in criminal proceedings.[277] Indeed, some state supreme courts have already exercised their supervisory powers in the criminal sphere.[278]

States are in a good position to grant protections regarding eyewitness identifications because the majority of criminal trials are state court proceedings, and therefore states have the power to affect the

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[275] *See Perry*, 132 S. Ct. at 721; *supra* notes 48–89, 194–244 and accompanying text. By focusing only on police misconduct, the *Perry* majority failed to eliminate the danger of the inherent unreliability of eyewitness identifications caused by estimator variables. *See Perry*, 132 S. Ct. at 721.

[276] *See* McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."), *superseded by statute*, 18 U.S.C. § 3501 (2006), *as recognized in* Corley v. United States, 556 U.S. 303, 306 (2009); *Rosario*, 661 N.E.2d at 76; *see also* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 Colum. L. Rev. 324, 325 (2006) (describing the Supreme Court's supervisory power as "authorizing a federal court to regulate its *own* proceedings").

[277] *See* United States v. Payner, 447 U.S. 727, 735 (1980) (eroding the federal supervisory power by holding that the supervisory power does not authorize suppression of otherwise admissible evidence if it was seized unlawfully from a third party); State v. Ledbetter, 881 A.2d 290, 318 (Conn. 2005) ("We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy.").

[278] *See, e.g.*, State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (discussing the Minnesota Supreme Court's exercise of its supervisory authority by holding that custodial interrogations will only be admissible at trial if recorded); State v. Cook, 847 A.2d 530, 547 (N.J. 2004) (discussing the New Jersey Supreme Court's exercise of its supervisory authority regarding the electronic recording of confessions as a prerequisite to admissibility); State v. Bennett, 165 P.3d 1241, 1249 (Wash. 2007) (exercising its supervisory power to instruct lower Washington courts to refrain from using a particular jury instruction). Justice Benjamin Cardozo, during his tenure as Chief Judge of the New York Court of Appeals, discussed the role of supervisory jurisdiction in New York courts, but was reluctant to extend its scope beyond "particular exigencies" in concrete situations. People *ex rel.* Lemon v. Supreme Court of N.Y., 156 N.E. 84, 86 (N.Y. 1927). Using their supervisory powers, states can create rules that are easy to implement at trial. *See, e.g.*, *Ledbetter*, 881 A.2d at 318 (directing trial courts to implement jury instructions incorporating warnings about the dangers inherent in eyewitness identification); State v. Obeta, 796 N.W.2d 282, 287 (Minn. 2011) ("[W]e have the inherent judicial authority to regulate and supervise the rules that govern the admission of evidence in the lower courts.").

most cases where eyewitness identification will be used at trial.[279] Additionally, states are free to experiment with different approaches to determine what leads to the greatest degree of reliability.[280] For example, if state courts apply a more rigid rule suppressing identifications procured in a suggestive manner, or adopt a more expansive test to determine reliability, law enforcement officials may adopt techniques that reduce suggestiveness, thereby increasing reliability.[281] It might also spur state legislatures to enact statutes regulating police practices.[282]

If state courts are clear that they are interpreting their own constitutions to grant greater due process rights regarding the ability of defendants to challenge eyewitness identification testimony, the Supreme Court cannot review the decision.[283] Moreover, the fact that states have granted greater protections under state constitutions than the Supreme Court in other areas of criminal procedure legitimates this practice in the context of eyewitness identification.[284]

States have granted greater individual protections under their own constitutions in other areas of criminal procedure where the U.S. Supreme Court has interpreted the U.S. Constitution restrictively.[285] For

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[279] *See* Brennan, *supra* note 19, at 491; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[280] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (explaining that it is "one of the happy incidents of the federal system that a single state may . . . serve as a laboratory" and try novel experiments without affecting the rest of the country).

[281] *See Henderson*, 27 A.3d at 912. If the identification had been suppressed in *Perry*, police officers in the future might have been more careful about the circumstances surrounding identifications (including the lighting and the proximity of the suspect to another police officer). *See Perry*, 132 S. Ct. at 721–22. The current state of the law merely deters police officers from actively arranging suggestive procedures; it does not encourage them to adopt best practices that ensure reliable identifications. *See id.*

[282] *See Henderson*, 27 A.3d at 912.

[283] *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (discussing the adequate and independent state ground standard for determining whether there is a federal question and concluding that if the state court makes a plain statement indicating it is relying on state law, this standard will be met); *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 625 (1981) (arguing that state courts will always play a role in adjudicating constitutional claims).

[284] Robert M. Bloom & Hillary Massey, *Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents*, 79 U. COLO. L. REV. 381, 389 (2008) (citing Brigham City v. Stuart, 547 U.S. 398, 408–09 (2006) (Stevens, J., concurring)) (describing "new federalism" and noting that in some states criminal defendants enjoy greater protections than those granted under federal law).

[285] *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27–28 (1989)

example, state courts have granted greater protections than the Supreme Court in declining to extend exceptions to the exclusionary rule,[286] in interpreting unreasonable searches and seizures,[287] and in formulating the correct test for determining the adequacy of warrant requirements.[288] In addition, states have declined to adopt the Supreme Court's lax standard regarding consent searches.[289] Instead, some state courts have interpreted their constitutions to require that the police inform people that they have the right to refuse to consent to a search.[290]

Thus, because states have granted greater rights in other areas of criminal procedure where the Supreme Court has interpreted constitutional protections narrowly, it is reasonable that states can, and *should*, implement similarly protective measures to exclude unreliable identifications.[291] If contraband found during an unlawful search incident to

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(observing a "marked increase" in state courts interpreting their constitutions independently).

[286] *See, e.g.*, State v. Novembrino, 519 A.2d 820, 856–57 (N.J. 1987) (rejecting the Supreme Court's application of a good-faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897, 926 (1984), and concluding that the New Jersey constitution does not contain a good-faith exception); State v. Oakes, 598 A.2d 119, 126–27 (Vt. 1991) (declining to extend *Leon*'s good-faith exception under the Vermont constitution).

[287] *See, e.g.*, State v. Kaluna, 520 P.2d 51, 58–60 (Haw. 1974) (rejecting the Supreme Court's analysis on a lawful search incident to arrest in *United States v. Robinson*, 414 U.S. 218, 235 (1973), and concluding that the Hawaii constitution requires that governmental intrusion must not be "greater in intensity than absolutely necessary under the circumstances"); State v. Hardaway, 36 P.3d 900, 914 (Mont. 2001) (rejecting *Robinson* and establishing a more stringent privacy standard under the Montana constitution than the U.S. Constitution); *see also* State v. McAllister, 875 A.2d 866, 875 (N.J. 2005) (concluding that the New Jersey constitution grants a reasonable expectation of privacy in personal bank records, contrary to *United States v. Miller*, 425 U.S. 435, 440 (1976), and *Payner*, 447 U.S. at 732).

[288] *See, e.g.*, People v. Griminger, 524 N.E.2d 409, 411 (N.Y. 1988) (rejecting the Supreme Court's totality of the circumstances test for determining adequate warrant requirements articulated in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and concluding that the more protective, two-prong *Aguilar-Spinelli* test is required by the New York constitution); State v. Jackson, 688 P.2d 136, 143 (Wash. 1984) (same).

[289] *See, e.g.*, State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (interpreting the New Jersey constitution as requiring that police inform people of their right to refuse a search for consent to be valid); State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998) (same).

[290] *Compare Johnson*, 346 A.2d at 68 (holding that the police must inform persons to be searched about their right to refuse consent), *with* Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973) (holding that a valid consent to a search does not require proving knowledge of the right to refusal).

[291] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1265 (Mass. 1995) (rejecting the Supreme Court's analysis in its 1977 decision, *Manson v. Brathwaite*, and affirming the interpretation of the Massachusetts constitution as requiring per se exclusion of unnecessarily suggestive showups); *Henderson*, 27 A.3d at 928.

arrest is excluded under a state constitution, it seems natural that state courts should also exclude an identification that, if admitted, would undermine due process.[292]

It is important that state courts recognize the dangers of eyewitness misidentifications, and implement measures to ensure their judicial systems comport with due process.[293] Although it might be difficult to prescribe a blanket rule excluding unreliable identifications, courts could set standards that more carefully evaluate identifications made under suggestive circumstances, thereby eliminating some of the confusion surrounding the five-factor *Biggers* test and creating a clearer rule of admissibility.[294] One clear way to improve the accuracy and reliability of eyewitness identification testimony is for states to adopt a test similar to what New Jersey began implementing in 2011.[295]

B. *New Jersey as a Model*

The New Jersey Supreme Court embraced the scientific research highlighting the dangers of eyewitness identification in its 2011 decision in *State v. Henderson*, and has adopted a seemingly workable and balanced approach to eyewitness identification.[296] The *Henderson* court resolved the two problems left after *Perry* by eliminating the police orchestration requirement to raise a due process claim, and by replacing the *Biggers* factors with a more suitable, multi-factor test for reliability.[297]

The *Henderson* court solved the first problem by holding that the New Jersey Constitution requires New Jersey courts to hold preliminary judicial hearings (similar to *Wade* hearings) when a defendant presents some evidence of suggestiveness, state or otherwise involved in procuring an identification.[298] The *Henderson* court solved the second problem by rejecting the *Manson/Biggers* test, which focuses on whether an identification was impermissibly suggestive to lead to a misidentifica-

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[292] *See Kaluna*, 520 P2d at 58–59; *Hardaway*, 36 P.3d at 914.

[293] *See* Wells & Quinlivan, *supra* note 55, at 9 (calling for a reevaluation of the Supreme Court's analysis in the eyewitness identification context).

[294] *See Henderson*, 27 A.3d at 928; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 80–81 (2008) (criticizing the *Biggers/Manson* test as an inadequate tool for excluding unreliable eyewitness identifications). For example, state courts could exclude identifications made through showups or identifications made during biased lineups. *See* GARRETT, *supra* note 8, at 55–59 (describing the dangers of showups and stacked lineups).

[295] *See infra* notes 296–333 and accompanying text.

[296] *See Henderson*, 27 A.3d at 928.

[297] *See id.*; *supra* notes 194–244 and accompanying text.

[298] *See* State v. Chen, 27 A.3d 930, 942 (N.J. 2011); *Henderson*, 27 A.3d at 919 n.10, 928.

tion, and by rejecting the five *Biggers* factors as measures of reliability.[299] In their place, the court adopted a multi-factor test that utilizes system and estimator variables to determine reliability.[300]

The New Jersey Supreme Court appointed a Special Master to conduct an investigation to determine the best test to evaluate reliability, who concluded that three of the five *Biggers* reliability factors *are themselves unreliable* because they rely on self-reporting, which can be influenced by suggestive procedures.[301] Although having preliminary judicial hearings may seem cumbersome in criminal proceedings, this burden is outweighed by the benefit of avoiding wrongful convictions.[302]

The court was conscious of the state's interest in protecting public safety, and thus did not adopt a per se rule of exclusion.[303] The court recognized that an identification would likely not be found inadmissible at a pretrial hearing based solely on estimator variables (i.e., variables not influenced by the criminal justice system).[304] The court's acknowledgment that both system and estimator variables should play a significant role in the admissibility analysis strikes a good balance between ensuring justice and maintaining the use of eyewitness identification as an important prosecutorial tool.[305]

Therefore, other states should adopt New Jersey's framework because it goes further than the U.S. Supreme Court by taking into account any type of suggestiveness.[306] The framework also does a good job translating modern scientific developments highlighting the unreliability of eyewitness identifications into a set of factors that courts can apply.[307] New Jersey's standard includes estimator variables such as racial bias, stress, and the presence of a weapon, and system variables, including sequential versus simultaneous lineups, showups, and lineup procedures.[308] Judges then weigh these factors during a pretrial hear-

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[299] *See Henderson*, 27 A.3d at 918; *supra* notes 226–244 and accompanying text.

[300] *See Henderson*, 27 A.3d at 920–22.

[301] *See id.* at 918 (finding that the level of certainty of the witness at the time of the identification and the witness's self-reports of the witness's degree of attention and opportunity to view the suspect at the time of the crime have been proven to be inaccurate measures of reliability).

[302] *See id.* at 928.

[303] *See id.* at 922.

[304] *See id.* at 923.

[305] *See id.* at 928.

[306] *See Henderson*, 27 A.3d at 928.

[307] *See id.*

[308] *See id.* at 920–21. The system variables that New Jersey courts will now use are blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, and other identifications made. *Id.*

ing.[309] Although judges retain a significant amount of discretion in weighing the factors, these factors are straightforward and easy to apply.[310] And the defendant still bears the burden of proving a substantial likelihood of irreparable misidentification, ensuring that not all identifications will be excluded under the New Jersey model.[311]

Had *Perry* been decided in New Jersey, the outcome may have been different.[312] The trial court would have looked at the suggestiveness of the identification despite the lack of overt police-orchestrated suggestiveness.[313] The trial court, once suggestiveness was adequately alleged, would then weigh the estimator and system variables.[314] In *Perry*, the time of day (three o'clock in the morning) and the vantage point of the witness (a window on the fourth floor of an apartment building) would be included in the court's analysis of reliability.[315] The darkness and the witness's distance from the suspect cast doubt on the reliability of this identification.[316] In addition, the court could take into account the subsequent failure of the witness to identify the defendant in a photo array.[317] In weighing all of the relevant factors, a judge might still have decided that the identification was reliable and therefore admissible.[318] Whatever the end result, utilizing the multi-factor approach will help to ensure a just outcome.[319]

It may be too soon to know if New Jersey's procedures will cure all of the inherent problems associated with eyewitness identification.[320]

The estimator variables that the court incorporated into its test are stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of the perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of the prior description of the criminal, level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.* at 920–22.

[309] *See id.* at 920. Although there are many factors to weigh, all of the factors will not be present in every challenged identification. *See id.* at 922. Moreover, judges often perform balancing tests. *See id.* at 920. The alternative is not including a potentially determinative factor in the test, which threatens the fairness of the proceeding. *See id.*

[310] *Id.* at 920–21. This is especially true of some of the estimator variables, such as light, distance, and cross-racial identifications. *See id.*; *supra* notes 315–316 and accompanying text.

[311] *See Henderson*, 27 A.3d at 920.

[312] *See Perry*, 132 S. Ct. at 721; *Henderson*, 27 A.3d at 928.

[313] *See Chen*, 27 A.3d at 942.

[314] *See Henderson*, 27 A.3d at 920.

[315] *See Perry*, 132 S. Ct. at 721.

[316] *See Henderson*, 27 A.3d at 921.

[317] *See Perry*, 132 S. Ct. at 722; *Henderson*, 27 A.3d at 921–22.

[318] *See Henderson*, 27 A.3d at 920–22.

[319] *See id.*

[320] *See id.*

Nevertheless, for now the New Jersey approach seems to be the best option for state courts to implement because it appears to be both workable and fair.[321] Moreover, state courts can experiment with this model or adopt their own standards that at least take some of the scientific data into account.[322]

Other options states can adopt include a hybrid *Henderson/Perry* formula, the current *Perry* framework, or a mix of the *Henderson* factors and other measures.[323] For instance, a hybrid *Henderson/Perry* formula would keep intact *Perry*'s holding that the court will not conduct a reliability hearing if there is no police misconduct leading to suggestiveness, but it would eliminate the *Biggers* factors and instead adopt *Henderson*'s system and estimator variables to determine reliability when police suggestiveness is involved.[324] This would lead to greater reliability when police misconduct is involved, but would still not account for suggestive identifications without police misconduct.[325]

A second option is for states to maintain the *Perry* framework and wait for the Supreme Court to revisit its jurisprudence.[326] In the meantime, courts would only make reliability determinations when police misconduct was involved and courts would continue to use the antiquated *Biggers* factors.[327] This approach would effectively maintain the status quo, which has resulted in an unacceptable number of wrongful convictions.[328]

A third option would be to combine either some or all of the *Henderson* analysis with improved jury instructions that fully explain the dangers associated with eyewitness identification and/or more expansive use of expert testimony outlining the dangers of eyewitness identification.[329] This combination of using estimator and system variables to determine reliability (in all cases where there is any type of suggestiveness), and instituting innovative trial tools would likely lead to greater reliability and fewer wrongful convictions.[330]

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[321] *See id.*

[322] *See id.*; People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981) (experimenting with the admissibility of showups); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (experimenting with changing the *Biggers* factors).

[323] *See Perry*, 132 S. Ct. at 721; *Henderson*, 27 A.3d at 928.

[324] *See Perry*, 132 S. Ct. at 721; *Henderson*, 27 A.3d at 928.

[325] *See Perry*, 132 S. Ct. at 721; *Henderson*, 27 A.3d at 928.

[326] *See Perry*, 132 S. Ct. at 721. A reconsideration of *Perry*, however, seems unlikely in the near future given the near unanimity of the opinion. *See id.*

[327] *See id.*

[328] *See supra* note 52 and accompanying text.

[329] *See Henderson*, 27 A.3d at 920–22; *supra* notes 151–155 and accompanying text.

[330] *See Henderson*, 27 A.3d at 920–22.

If state courts choose experimentation over idleness and stagnation, criminal proceedings will be fairer and states can try different approaches.[331] The *Henderson* model is comprehensive and ready to be implemented.[332] Because the *Henderson* model encompasses modern research, establishes concrete factors that judges can use to determine reliability, and considers suggestiveness even when not the result of police misconduct, states should adopt this model to ensure fundamental fairness in criminal proceedings.[333]

Conclusion

Eyewitness identifications are an important law enforcement tool that can lead to just convictions that promote public safety. In some situations, they may be the *only* way to make a case against a perpetrator. Nonetheless, eyewitness identifications often have proved to be unreliable. Human memory is malleable; we are often unable to remember a face, or we can easily misremember a face. This is not to say that eyewitness identification should never be used. The Supreme Court's current jurisprudence, however, fails to adequately take these factors into account.

Although the Supreme Court limited the scope of due process in *Perry v. New Hampshire*, state courts can and should revise the factors they use to determine whether a due process violation occurred. State courts, where the majority of criminal trials are heard, should grant greater protections to ensure that defendants have adequate access to due process of law, a fundamental safeguard in the American legal system. With years of research and scientific data indicating that human memory is not as reliable as we would like it to be, there does not seem to be another alternative to wrongful convictions. Ronald Cotton spent over 4000 days in prison for a crime he did not commit. State courts need to set up systems to ensure that no one in the future suffers such injustice.

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[331] *See id.* at 928 ("At the core of our system of criminal justice is the 'twofold aim . . . that guilt shall not escape or innocence suffer.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

[332] *See id.* at 920–22.

[333] *See id.*