7. Comparative legal psychology: eyewitness identification

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1. Introduction

We focus in this chapter on one important area of legal psychology: eyewitness identification. Following a brief overview of the broader field of legal psychology and the history of eyewitness identification research, we outline the major contributions that psychological science has made to our understanding of eyewitness identification, and review the procedures used to collect and interpret identification evidence in the United States and England and Wales. We conclude with some thoughts about how one might improve the treatment of identification evidence in legal settings in the future.

1.1. Overview of legal psychology

Legal psychology has shaped thinking and practice in many areas of the criminal justice system, with psychologists (including researchers, and clinical and forensic practitioners) and legal professionals (including lawyers, judges and police officers) contributing actively to this field. Rather than attempt a detailed review of legal psychology in this short chapter, we introduce—as a starting point for readers interested in a broader treatment—a few brief examples of research issues that have attracted programmatic attention from researchers.

Legal psychology research has had much to say about the interpretation of evidence presented in the courtroom. Numerous studies have examined the way that jurors make decisions, both individually and collectively. For example, research suggests that juror-eligible individuals are better able to process and recall relevant information—and, hence, make better judgments—if they receive judicial instructions before, rather than after, hearing complex evidence.¹ In addition, several studies have found evidence of group polarization, with the views held by jurors becoming stronger and even extreme as the jury interacts.²

The large literature on detecting deception is one of the best-known areas of legal psychology and it, too, is relevant to the interpretation of evidence in court. For example,

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numerous laboratory and field studies have demonstrated that lay persons and professionals (such as police officers) are only marginally better than chance at detecting lies in face-to-face interactions; however, through training and the use of innovative interviewing techniques, it is possible to enhance deception detection accuracy substantially. 3

In work spanning the areas of investigative interviewing and false memory, researchers have demonstrated that presenting false incriminating evidence can lead innocent people to not only confess to a crime they did not commit, but also come to believe they are actually guilty. 4 This finding has important ramifications for the interpretation of confessions in police investigations and the courtroom.

Psychology has also shaped understanding of the relationship between mental illness and offending. For example, although we know that people diagnosed with schizophrenia are statistically more likely than non-schizophrenics to commit violent crimes, the risk of an individual with schizophrenia committing a violent crime is still very small (one study has estimated that only 0.02 percent of schizophrenics will be convicted of a serious violent offence in a given year). 5 Psychology has been instrumental in advancing understanding of the development, diagnosis, treatment and management of psychopathy, which has important implications for the legal system in terms of sentencing, predicting violent behavior and evaluating risk of recidivism. 6 More broadly, clinical and forensic psychologists play a critical role in defining and assessing defendants’ fitness to stand trial. 7 Some researchers have estimated that approximately one in 15 defendants in the US undergo such an assessment. 8

These are only a few of many areas of legal psychology, and we encourage interested readers to consult one of the many books that provide a broader coverage. 9

1.2. Eyewitness identification

There is good reason why, of all the different areas of legal psychology, eyewitness identification warrants close examination. Identification evidence has considerable impact on police investigations and the outcome of courtroom trials. It often constitutes a key part of prosecution evidence and is very influential in shaping juror decisions. 10

3 Aldert Vrij, Detecting Lies and Deceit: Pitfalls and Opportunities (Chichester, UK: John Wiley & Sons 2008).
8 Ibid.
9 See the Further Reading section at the end of this chapter.
particularly if the witness is confident in his or her testimony.\footnote{Brian L. Cutler, Steven D. Penrod and Thomas E. Stuve, ‘Jury Decision Making in Eyewitness Identification Cases’, 12 Law & Human Behavior 41-56 (1988).} However, eyewitnesses are often mistaken, as demonstrated numerous times in laboratory research and field studies involving police investigations.\footnote{Brian L. Cutler and Steven D. Penrod, Mistaken Identification (New York: Cambridge University Press 1995); Nancy Steblay, Jennifer Dysart, Solomon Fulero and R. C. L. Lindsay, ‘Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison’, 25 Law and Human Behavior 459-73 (2001).} Because eyewitness evidence is persuasive yet unreliable, it is not surprising that false identification is one of the major precursors of wrongful conviction in the United States and United Kingdom. According to The Innocence Project (a non-profit organization dedicated to overturning wrongful convictions and reforming the legal system), mistaken identification has played a role in more than 75 percent of the 265 cases of proven wrongful convictions in the US.\footnote{The Innocence Project, Eyewitness Misidentification (2011), http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php.} Many of these were for serious crimes; the average sentence of exonerated persons is 13 years and DNA evidence has proven the innocence of 17 persons who were awaiting execution.\footnote{The Innocence Project, Innocence Project Case Profiles (2011), http://www.innocenceproject.org/know.} Refining the way that professionals collect and interpret identification evidence in the legal system has the potential greatly to reduce the number of innocent persons who are wrongly convicted.

Although many might expect identification procedures to be relatively uniform across different locations, this is not the case. One of the aims of this chapter is to give readers an appreciation of the amount of variability that exists in identification procedures not only between countries, but also between different jurisdictions in the US. The other aim is to highlight similarities and differences between the ways that professionals actually collect and interpret identification evidence in different legal settings, and the way that scientific research tells us that it should be collected and interpreted.

2. The science of eyewitness identification

2.1. A brief history of eyewitness research

Eyewitness identification research has its foundations in classic psychological research on memory and social influence. An identification test is essentially a recognition memory test; a witness must decide whether any of the lineup members presented match his or her memory of the culprit in question. Therefore, eyewitness identification research has been able to take guidance from the substantial recognition memory literature. For example, we know that identification performance—like recognition performance—decreases as the amount of time elapsing between viewing the culprit and test increases.\footnote{Kenneth A. Deffenbacher, Brian H. Bornstein, E K. McGorty and Steven D. Penrod, ‘Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation’, 14 Journal of Experimental Psychology: Applied 139-50 (2008); Hermann Ebbinghaus, Memory: A Contribution to Experimental Psychology (New York: Dover 1964, originally published 1895).} However, although eyewitness researchers have been able to
build on basic memory research, they have also had to consider the influence of numerous situational and social factors that might operate in the context of an identification test. For instance, the fact that the police have called in a witness to attempt an identification may lead the witness to assume that the culprit is in the lineup. This assumption may lead the witness simply to pick the person that best matches her memory of the culprit.\footnote{Gary Wells, ‘What Do We Know about Eyewitness Identification?’, 48 American Psychologist 553-71 (1993).}

Many researchers have made substantial contributions in terms of building on basic memory research to advance understanding of eyewitness memory. The early foundations of eyewitness research were laid in the late nineteenth and early twentieth centuries, most notably through the work of Hugo Münsterberg and George Arnold in the US and William Stern in Europe.\footnote{George F. Arnold, Psychology Applied to Legal Evidence and Other Constructions of Law (Calcutta: Thacker, Spink & Co. 1906); Hugo Münsterberg, On the Witness Stand (New York: Doubleday, Page & Co. 1908); L. William Stern (ed.), 1-2 Beiträge zur Psychologie der Aussage [Contributions to the Psychology of Testimony] (Leipzig: J.A. Barth 1903-1906).}

Eyewitness memory research returned to prominence in the 1970s through Elizabeth Loftus’s groundbreaking work on false memories for events,\footnote{Elizabeth F. Loftus, Eyewitness Testimony (Cambridge, MA: Harvard University Press 1979).} Robert Buckhout’s well-publicized demonstrations of mistaken identification\footnote{Robert Buckhout, ‘Eyewitness Testimony’, 231 Scientific American 23-31 (1974).} and Gary Wells’s conceptual distinction between system and estimator variables.\footnote{Gary L. Wells, ‘Applied Eyewitness Testimony Research: System Variables and Estimator Variables’, 36 Journal of Personality and Social Psychology 1546-57 (1978).} System variables are factors within the control of investigators that affect identification accuracy; for instance, the instructions given to witnesses, and the method used to select lineup fillers. Estimator variables are factors outside the control of investigators that affect identification accuracy: for example, the conditions under which persons witnessed the crime, and the characteristics of the witness.

Within the legal profession, there has been a long-standing appreciation of problems associated with eyewitness identification evidence.\footnote{For a review, see Woocher (note 10).} However, it was during the 1990s that eyewitness research really began to receive broader attention from the legal community. This occurred not due to any particular breakthrough in eyewitness research, but because of substantial advances in DNA testing techniques. These advances lead to numerous exonerations,\footnote{Barry Scheck, Peter Neufeld and Jim Dwyer, Actual Innocence (New York: Random House 2000).} some of which received extensive media coverage. A report commissioned by former US Attorney General Janet Reno found that the majority of these wrongful convictions involved mistaken identification.\footnote{Edward Connors, Thomas Lundegran, Neal Miller and Tom McEwan, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (Alexandria, VA: National Institute of Justice 1996); Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero and C. A. E. Brimacombe, ‘Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads’, 22 Law & Human Behavior 1-39 (1998); Gary L. Wells, Amina Memon and Steven D. Penrod, ‘Eyewitness Evidence: Improving Its Probative Value’, 7 Psychological Science in the Public Interest 45-75 (2006).} Nowadays, many members of the law enforcement and judicial communities dedicate substantial time and
effort to improving practices in the collection and treatment of identification evidence (such as Barry Scheck and Peter Neufeld, founders of The Innocence Project).

Eyewitness identification research has flourished in recent decades. There is now an extensive international community of eyewitness researchers, many based in the US and UK. These researchers collaborate across international boarders, publish their findings in a common set of high-quality international journals (for example, Law and Human Behavior or The Journal of Experimental Psychology: Applied), and attend national and international conferences. The journals and conferences are run by various professional organizations such as the American Psychology-Law Society, the European Association of Psychology, and Law and the Society for Applied Research in Memory and Cognition. Eyewitness memory is the subject of numerous journal articles, book chapters, and books and psychology textbooks often examine it. In the next section, we review some of the most important issues that eyewitness researchers have addressed. We discuss several issues that the vast majority of researchers agree on, followed by two issues that eyewitness researchers are still debating.

2.2. Current scientific knowledge

Eyewitness researchers have reached a consensus on two crucial issues regarding the construction of lineups. First, they agree that lineups should contain only one suspect. By allowing all positive identifications to be classified as suspect identifications or known errors, single-suspect lineups (versus all-suspect lineups) greatly reduce the chance that an innocent suspect will be falsely identified.24

Second, researchers agree that lineups must be unbiased or ‘fair’. By this, they mean that the suspect should not stand out relative to other lineup members. The key point here is that lineups should provide a good, but not unreasonably difficult, test of whether the suspect is the culprit. Research suggests that an important first step is to select fillers (the innocent persons who appear in the lineup together with the suspect) that match the physical description of the culprit as given to police investigators by the witness25 (and hence likely to be easily brought to mind by the witness). Using fillers that do not match the culprit’s description (for example, the witness described the culprit as blond, and a blond suspect was placed in a lineup of brunettes) increases the risk that an innocent suspect who resembles the perpetrator will be mistakenly identified. In some cases, it is not feasible or does not make sense to select lineup members who match the description of the culprit (for instance, there is no description, or the suspect does not match the description of the culprit). In these cases, lineup fillers should be similar to the suspect, though precisely what constitutes ‘similar’ remains a subjective judgment. An extreme hypothetical example of high similarity is a lineup of clones, which would represent a task beyond any witness, regardless of the strength of the witness’s memory. Choosing fillers that match the description of the culprit is an effective compromise that yields a better mix of more correct identification rates from culprit-present lineups and

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false identification rates from culprit absent lineups compared to the match to suspect strategy.  

As an aside, although care must be taken in selecting appropriate lineup fillers, the exact number of fillers included in the more typically used lineups (that is, six, eight, ten or 12) appears to be less critical. In fact, some research suggests that, provided there are at least three plausible fillers, the total number of lineup members does not influence witnesses’ propensity to choose from the lineup or the accuracy of their identification decisions.

In terms of the presentation and administration of lineups, many (though by no means all) eyewitness researchers agree on numerous issues regarding the medium of presentation (for instance, live lineups versus photospreads), the use of double-blind lineup administration, the instructions given to witnesses prior to the lineup and procedures for recording information about the witness’s identification decision (for example, witness confidence).

First, there is no meaningful evidence that identification performance differs between live lineups and photospreads. Although this is perhaps surprising given the additional cues (such as build, posture or gait) available to witnesses viewing a live lineup, our current state of knowledge suggests that photospreads are no less valid in conducting identification tests than live lineups.

Second, many researchers strongly argue that lineups should use double-blind administration, meaning that the lineup administrator should not know which lineup member is the suspect and which are fillers. Knowing who the suspect is can alter the way that lineup administrator interacts with a witness, even if the witness and administrator themselves are unaware of this. In turn, this can lead to higher false identification rates compared to double-blind lineups. There are multiple ways of achieving double-blind administration. For example, the administrator can present the images of the lineup members in a randomly determined order on a computer screen that she cannot see, or shuffled in a folder so that the administrator is unaware of the suspect’s position in the lineup until after the witness has made a decision.

Third, prior to viewing the lineup, the administrator should instruct the witness that the lineup may or may not contain the culprit, and that if the witness thinks the culprit is not in the lineup, it is appropriate to indicate so. Such instructions are often termed

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30 Ibid.
‘unbiased instructions’. Relative to unbiased instructions, biased instructions (which omit the above information) increase the propensity of witnesses to choose someone from the lineup. Although biased instructions can increase the rate of correct identifications from target-present lineups, they also produce a disproportionately large increase in false identifications from target-absent lineups. Thus, on balance, the evidence clearly favours the use of unbiased lineup instructions that clearly indicate that the culprit might not be present in the lineup.

Fourth, immediately after the identification test, the lineup officer should make an accurate record of the witness’s response (for instance, if the witness cannot decide between two lineup members then that should be recorded, even if one of the candidates is the police suspect) and the confidence with which that response was made. Recording witness confidence at the time of the identification response is important because there is a wealth of evidence that identification confidence judgments can be influenced by feedback from various sources (such as lineup administrators, other witnesses or attorneys). For example, confirming feedback from a lineup administrator (‘Good! You identified the suspect’) greatly inflates witnesses’ confidence in the accuracy of their decisions. There is debate among researchers about the usefulness of confidence assessed immediately after the identification test for evaluating identification accuracy. However, researchers do agree that confidence judgments influenced by feedback from external sources are not valid indicators of accuracy. (Note that this applies to identification confidence statements made in the courtroom as well.)

Finally, eyewitness researchers recommend that investigators should not have witnesses view a suspect on repeated occasions. This can occur, for example, if investigators ask witnesses to scan a series of mugshots, or to identify a suspect in a show-up (in which the suspect is presented to the witness alone without other persons), prior to viewing a formal lineup. Repeated exposure to a suspect increases the familiarity of that person to the witness, in turn increasing the chances that the witness will identify the repeated suspect regardless of whether the suspect is in fact the culprit.

Not surprisingly, eyewitness researchers are seldom, if ever, unanimous in their recommendations regarding identification testing. While there may be broad agreement on many issues surrounding the collection and interpretation of identification evidence, there are two prominent issues that have divided researchers: the usefulness of witness confidence as an indicator of the likely accuracy of identification decisions, and the method that should be used to present lineup members to witnesses.

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Many eyewitness researchers have argued that the relationship between eyewitness identification confidence and accuracy is, at best, modest. This implies that the confidence expressed by a witness in an identification decision should have little or no bearing on investigators’ assessments of the likely accuracy of that decision. However, a growing body of evidence now contradicts this view. This change has largely been due to two advances in the way that the confidence-accuracy relationship is examined. First, when researchers began to look at the confidence-accuracy relationship separately for different types of identification responses, it emerged that confidence and accuracy were correlated more strongly for positive identifications than lineup rejections (that is, ‘culprit is not present’ responses) and correct identifications were consistently made with greater confidence than incorrect identifications.

Second, whereas earlier work examined primarily the correlation between confidence and accuracy, researchers have now begun to use other statistical techniques to assess different aspects of the confidence-accuracy relationship. For example, calibration reflects the extent to which the subjective probability of accuracy (that is, witness confidence) matches the actual probability of accuracy. If calibration is perfect, then decisions made with ten percent confidence will be ten percent likely to be correct, decisions made with 20 percent confidence will be 20 percent likely to be correct and decisions made with 100 percent confidence will all be correct. Research indicates that confidence and accuracy are well calibrated for positive identifications but not lineup rejections, although positive identifications are typically made with some degree of over-confidence (for instance, decisions made with 90-100 percent confidence are correct approximately 75-90 percent of the time). Note that calibration is a particularly useful approach because it can assist jurors. That is, knowing that positive identifications made with, for example, 90 percent confidence are 80 percent likely to be correct will help jurors evaluate identification evidence, whereas knowing that the confidence-accuracy correlation is 0.4 will not.

Overall, the evidence indicates that the confidence-accuracy relationship is more complex than previously thought. It is not a constant. Witness confidence is a useful indicator of accuracy, provided (1) confidence is measured immediately after the test, without the witness being influenced by feedback from external sources, and (2) the witness makes a positive identification from the lineup. Here, it is important to emphasize one fact that all eyewitness researchers agree about: even an identification made with

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absolute certainty can be wrong. Numerous experiments have demonstrated this under a wide variety of viewing and testing conditions and in high-profile criminal cases serve to illustrate the point.  

The second major topic of debate among eyewitness researchers is the manner in which administrators should present lineups to witnesses. In police investigations, most lineup presentations occur simultaneously, with the witness viewing all lineup members at once either in a live lineup or photospread. However, many researchers advocate sequential presentation, whereby the witness views one lineup member at a time. The witness must decide whether a particular lineup member is the culprit before moving on to the next lineup member. In some versions of sequential presentation, the witness can only view lineup members once and the procedure finishes when the witness positively identifies someone or she has viewed all lineup members. In other versions, the witness views the entire lineup, regardless of whether and when the witness makes a positive identification.

Numerous studies suggest that sequential presentation dramatically reduces the false identification rate without substantially reducing correct identifications, thereby enhancing overall accuracy. However, more recently, some researchers have argued that this effect emerges only under certain conditions, such as when the lineup is biased (that is, where an innocent suspect stands out as the best match to the culprit) and when the suspect appears relatively late in the order of a sequential lineup. Some researchers argue that they have not yet tested sequential presentation under sufficiently varying conditions, and that the evidence in favour of sequential presentation does not yet warrant recommendations to adopt a wide scale procedural change.

Although many journal articles have focused on a comparison of sequential versus simultaneous lineups, perhaps the most critical issue raised in this debate is that neither sequential nor simultaneous lineups produce ideal accuracy rates. Therefore, enhancing identification accuracy through the development of novel methods of lineup presentation should be a top priority for eyewitness researchers.

3. Procedures for collecting eyewitness identification evidence

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38 Ibid; Sporer et al. (note 35).
41 Steblay et al. (note 12).
This part contrasts the ways in which eyewitness identification evidence is collected and admitted to trial in the UK (particularly England and Wales) and the US. These countries differ dramatically in terms of the structuring of their policing and judicial systems although comparatists classify both within the common law tradition. England follows a centralized model, with police powers mandated by the Police and Criminal Evidence (PACE) Act 1984 and accompanying Codes of Practice. The US follows a decentralized model, with thousands of independent law enforcement agencies. Most judicial power is devolved to state courts under the principle of federalism. State constitutions and legislation only bind officials and legal professionals within that state. These organizational differences between England and the US have created stark differences in eyewitness identification procedures. In the following sections, we review these procedures and consider how well they conform to the recommendations of psychologists.

3.1. Procedures in England and Wales

The PACE Act Codes (hereafter ‘the Codes’) govern many aspects of policing in England, including eyewitness identification procedures. Officials review the Codes regularly and they are legally enforceable. The Codes specify several permitted methods for collecting identification evidence, including video and live lineups. Ten years ago, most lineups in England were live. However, live lineups were expensive, inefficient and problematic. These problems led to the development of the video lineup. Digital video clips of thousands of volunteers are stored in large databases, making it fast and easy to select suitable fillers, and cancellation of lineups due to witness non-attendance dropped from 46 to five percent. Field studies conducted in England before and after the widespread adoption of video lineups have shown remarkable consistency in the rates at which witnesses identify suspects. Given the obvious benefits of video lineups, the

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46 See UK Home Office, Police and Criminal Evidence Act 1984 (PACE) and accompanying codes of practice, http://www.homeoffice.gov.uk/police/powers/pace-codes (including Welsh translation). The PACE Act Codes apply to all police forces in England and Wales. Throughout this chapter, we will discuss English procedure though the same arguments apply as well in Wales.


49 The Codes do not permit identification from photospreads.


51 Ibid.


Codes prioritise the use of video lineups over any other identification procedure. Video lineups are now standard procedure across most forces in England.

The Codes provide rules for conducting lineups (whether video or live). Some of these rules conform to current best practices advocated by psychologists. For example, the witness must be cautioned that the culprit may or may not be present in the lineup, the lineup must contain a sufficient number of plausible fillers (specifically, at least eight fillers), and witnesses must not be given any information that could cue them to the identity of the suspect before the lineup (including the decisions of other witnesses). Other rules, however, flout what many researchers would consider best practice recommendations. The Codes do not require double-blind lineup administration, stating only that ‘care must be taken not to direct the witness’s attention to any one individual image or give any indication of the suspect’s identity’.55 The officer who administers the lineup must not have any other involvement with the case and should therefore have no stake in securing a suspect identification. Yet as long as the officer is aware of the identity of the suspect, there remains a risk of unintentional cueing.56 Even if there is no cueing, the use of non-blind administration leaves open the possibility of cueing and therefore threatens the credibility of the procedure.

The Codes also state that administrators must choose fillers to resemble the suspect. However, many psychologists argue that officials should choose fillers, in the first instance, to match the witness’s description of the culprit, rather than just in terms of similarity to the suspect’s appearance.57 In a description-matched strategy, fillers are matched on all features in the witness’s description, but can differ on other features. While this ensures that all lineup members match the witness’s description, research does not provide any clear specifications of precisely how similar to the suspect the fillers should be in order to produce an appropriately discriminating test. Two studies evaluated the fairness of lineups from real cases from England.58 While live lineups were biased towards the suspect, video lineups were found to be fairer despite the use of a suspect-matched strategy.

The Codes do not require the witness to provide a statement of certainty following identification. Given the common finding that information encountered after the identification procedure distorts witness confidence,59 recording confidence immediately is essential if the confidence assessment is to inform any evaluation of the likely reliability of the identification. The Codes state that any comments made by the witness must be recorded, but they do not require officers to ask for a statement of certainty. Anecdotal evidence actually suggests that officers may prevent witnesses making such

56 Greathouse and Kovera (note 29).
57 Luus and Wells (note 25).
59 Semmler et al. (note 32); Wells and Bradfield (note 32).
statements so that the witnesses do not undermine the strength of a suspect identification. There is clearly a need for the Codes to address this shortcoming concerning the assessment of witness confidence, particularly if a witness will be asked later in an investigation—or worse—in court, about the confidence in her identification.

UK police developed the video lineup and it is quite unlike the procedures employed in the laboratory. The process necessitates that each clip is seen individually, one after the other. At first glance, this seems very similar to the sequential lineup developed by psychologists. However, the video lineup procedure used in England requires all witnesses to view the lineup twice and allows unlimited additional passes through the lineup. The sequential lineup procedure was designed to undermine witnesses’ abilities to rely on ‘relative judgments’ (that is, select the person who is the best match to the culprit). Allowing witnesses to return to different faces repeatedly may reinstate that ability, removing any potential benefits of sequential presentation. Analyses of real identifications have shown that witnesses who request additional viewings of the lineup are more likely to choose incorrectly than those who view the lineup only once.

What can we conclude about lineup procedures in England? Video lineups are easier than live lineups to administer. It is easier to create fair lineups with the PACE system than with live lineups due to the large database of available fillers. Clear, legally enforceable guidelines ensure consistency across all police forces in England. However, these rules do not always conform to recommended best practices. Lineups are not required to be double blind, officials need not record witness confidence following the identification and fillers are matched to the appearance of the suspect without necessarily matching the description of the culprit. In a 2007 consultation, the British Psychological Society raised these concerns, yet the revised Codes did not address these issues. Psychologists, therefore, must continue to work with policy makers to improve the quality of eyewitness identification procedures in England.

3.2. Procedures in the United States

In contrast to England, the US has no national, legally enforceable rules on eyewitness identification procedures, leading to huge procedural variation across the country. In a national police survey, most officers reported that they learned about identification procedures from other officers, and the vast majority used only their own

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62 Ibid.
63 Memon et al. (note 54); Horry et al. (note 54).
64 Kemp et al. (note 52); Valentine and Heaton (note 58); Valentine et al. (note 58).
judgment to assess lineup fairness. Photospreads were the most common procedure reported, with some police departments also using live lineups. A statewide survey of law enforcement agencies in Texas found that only 12 percent had written policies on eyewitness identification procedures. Written policies, when in place, often fell short of best practice recommendations, with few requiring double-blind administration.

Various groups have called for procedural reform in the wake of the US DNA exoneration cases, including the American Psychology-Law Society, the National Institute of Justice (NIJ), the Justice Project and the American Bar Association. The recommendations of these groups differ in some minor ways, but together they cover many key components including the use of single-suspect lineups and cautionary instructions that the culprit may not be present. Some groups have advocated sequential lineups while others have remained impartial on that point, given unresolved debates in the psychological literature.

Uptake of these recommendations has been slow. It is more than ten years since the NIJ published its guide, yet few states have reformed their procedures. New Jersey became the first in 2001, when the attorney general mandated the NIJ guidelines statewide. A handful of other states have adopted guidelines or passed legislation, including Illinois, Maryland, New York, North Carolina, Ohio, Vermont, West Virginia and Wisconsin. Others have established advisory groups to review existing procedures, including California and Texas. Some reforms have taken place at local levels, including in Denver, Boston and Dallas. However, most states have resisted change despite the role that mistaken identification plays in US wrongful conviction cases. Why has change been so slow? Law enforcement is decentralized in the US, with no single governing body to ensure consistency. There has also been a ‘historical lack of communication between scientists and law enforcement’. Researchers usually publish their empirical findings in psychological journals and present them at scientific conferences, which are inaccessible to most people in law enforcement. There has also been a lack of leadership from the higher courts and legislatures.

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67 Ibid.
68 Ibid.
70 Ibid.
71 Wells et al. (note 23).
76 Ibid.
77 Ibid.
78 The Justice Project (note 73) 2.
79 Ibid.
In addition, there are further challenges for reform. In 2005, the Illinois legislature commissioned the state police to conduct a pilot study to test the effectiveness of the double-blind sequential lineup in the field. Across three local jurisdictions, the double-blind sequential lineup was compared with the (non-blind) simultaneous lineup. At first glance, the results appeared to suggest that the non-blind simultaneous procedure was, in fact, superior to the double-blind sequential procedure. However, the academic community met this study with a furious backlash, citing methodological flaws so severe as to prohibit any meaningful conclusions being drawn from the data. Field experiments are now underway with the cooperation of law enforcement officials and psychologists, which will avoid the pitfalls of the Illinois pilot program.

Those who resist procedural reform argue that there are already legal safeguards in place to protect innocent suspects, including a constitutional right to legal counsel at a post-indictment live lineup, pre-trial motions to suppress identification evidence obtained using suggestive procedures and cross-examination of witnesses at trial. These safeguards, however, are ‘starkly inadequate’. Most identification procedures involve photospreads rather than live lineups, yet the constitutional right to counsel does not apply to photospreads. Very few pre-trial suppression motions are successful, for reasons that we will explore later. Cross-examination is not useful for revealing inaccuracies in identification evidence, as even honest witnesses who are certain in their memories may be inaccurate. The best protection for the innocent is to use fair identification procedures.

In conclusion, England and the US differ markedly in their eyewitness identification procedures. All police forces in England must conform to one standard set of rules. No such national, legally enforceable rules exist in the US. There are, however, guidelines published by several different bodies, which have begun to influence policy at state and local levels. At present, procedures in both countries fall short of ideal procedures recommended by psychologists.

Differences in law and legal procedures between England and the US and among the US states and jurisdictions understandably result in variation in the procedures used for eyewitness identification. This may be acceptable from a legal perspective, but this state of affairs makes much less sense from a psychological perspective. There is no reason to think that human memory operates differently among British and US citizens and differently among citizens of New York and New Jersey. On the contrary, it is reasonable

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83 The Justice Project (note 73) 2.
84 Wogalter et al. (note 66).
to expect that the factors that influence identification accuracy—including procedures for securing eyewitness identifications—are the same among these groups. Indeed, researchers from various continents collaborate on eyewitness research regularly and operate under the implicit assumption that findings are generalizable across populations. Psychologists would hope that the existence of an internationally accepted body of research on eyewitness science should produce a set of best practices that would be applicable across countries. Perhaps continued international collaboration among scientists will eventually lead to such a positive development.

4. Eyewitness identification evidence in the courts

4.1. Courts in England and Wales

Following two high-profile cases of wrongful conviction in England, Lord Devlin led an inquiry into eyewitness identification evidence. The Devlin Report, published in 1976, recommended that no trial should proceed based on eyewitness identification evidence alone, as the risks of wrongful conviction were too high. The response of the courts to the Devlin Report, however, was slow and conservative. Devlin’s central recommendation, that prosecutors should not try suspects on uncorroborated eyewitness identification, was never affirmed by statute or court rule. Graham Davies, an eminent professor of legal psychology in the UK, lamented that ‘a promising start with Devlin has been muted by the conservatism of the law lords’ and argued that miscarriages of justice will continue to plague the English justice system until this recommendation is carried into law.

Following the Devlin Report, the Court of Appeal attempted to draw a meaningful distinction between good and poor quality identifications. The Court reviewed several cases involving disputed eyewitness identification evidence, and distinguished between poor quality identifications based on a witness’s ‘fleeting glimpse’ and good quality identifications based on longer exposure durations. The Court presented a hypothetical scenario in which a witness was kidnapped and in the presence of the kidnapper over several days. The Court ruled that any identification made by this witness would be high quality, and would be sufficient for a conviction even if uncorroborated. In contrast, a witness who catches a brief glimpse of a handbag thief would provide a poor quality identification. The Court ruled that uncorroborated poor quality identifications should automatically result in the dismissal of the case.

These rulings, known as the Turnbull rulings, provide grounds for exclusion of eyewitness identification evidence if based only on a brief observation of the culprit. However, this only applies to uncorroborated evidence, and evidence from other

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87 Ibid.
witnesses (even of poor quality) is treated as independent corroborating evidence. In a very high profile case, a court convicted Barry George of murdering the television presenter Jill Dando. Nine witnesses described seeing a man of similar appearance to George in the proximity of the crime several hours before the murder. Eight of these witnesses attended live lineups, conducted a year and a half after the incident. Only one witness made an unqualified positive identification of George. Four witnesses made no identification, one identified a volunteer filler, and two made tentative identifications of George. At trial, both of the latter witnesses testified to being sure in their identifications of George, despite their misgivings at the time of the lineup.

George appealed his conviction in 2002 based on the inconsistencies of the eyewitness evidence. Amazingly, the Court concluded that ‘when the identification evidence is looked at as a whole, it provides compelling evidence that the appellant had been at the scene of the crime at the relevant time’. The Court dismissed that appeal, though George launched a successful appeal in 2007 and was acquitted at a re-trial in 2008. This case was an embarrassing failure of the English legal system, which highlights the urgent need for the courts to reconsider the standards by which eyewitness identification evidence is admissible at trial.

Violations of the PACE Act Codes also provide grounds for exclusion. For example, the Codes mandate the use of a video or live lineup whenever a suspect is known and identity is disputed. Identification by any other means, including photographs, can lead to dismissal of a case. Violations of any of the specific rules that govern lineup procedure provide grounds for exclusion and strict enforcement of the Codes by the courts provides strong incentives for police to use fair lineup procedures. However, the courts are inconsistent in their decisions to exclude eyewitness identification evidence.

The prevailing view in the courts is that the Turnbull guidelines are sufficient to overcome the dangers of a suggestive procedure. In Regina v. Williams, for example, the police officers presented the suspect to the witness in handcuffs and surrounded the suspect. The Court of Appeal acknowledged that the procedure was extremely suggestive, yet determined that the identification was of good quality, as the witness had had a prolonged opportunity to observe the culprit. Though the Court initially intended the Turnbull guidelines to improve the way in which eyewitness identification evidence

91 One of these witnesses identified George only after discussing the lineup with another witness, who had positively identified George.
93 Ibid.
94 George v. Regina (2007) EWCA Crim 2722. The appeal raised considerable questions about the sole piece of forensic evidence presented by the prosecution, a single particle of gunshot residue. George was granted a retrial with the forensic evidence excluded, and was acquitted by a jury based on the eyewitness evidence alone.
96 Regina v. Finley, C.L.R. 50 (England and Wales 1993).
97 In Regina v. Kamara (2000) EWCA Crim 37, two suspects stood in separate lineups containing several of the same volunteers. Under the Codes, a witness may not see any lineup member before a lineup, and multiple lineups must contain different volunteers. These violations of PACE led the Court to quash the conviction.
was used in trial courts, they have backfired. The courts place ‘too much faith’ in the trial as a means of determining the reliability of eyewitness evidence. They are not enforcing the use of fair identification procedures, reducing the incentives for police to conform to the Codes.

4.2. Courts in the United States

In *United States v. Wade* (1967), the federal Supreme Court stated that ‘there is grave potential for prejudice, intentional or not, in the pretrial lineup’, and ruled that suspects have a constitutional right to counsel during a live lineup. In 1968, the Supreme Court ruled that identifications obtained using ‘impermissibly suggestive’ procedures might nevertheless be admissible under certain circumstances. In this ruling, the Court showed great insight into some of the risk factors that were later scientifically shown to reduce the reliability of eyewitness identifications, including the use of unfair lineups, prior exposure to mugshots and biased pre-lineup instructions.

However, just a few years later, the Supreme Court issued a ruling that created a precedent regarding the admissibility of identification evidence. In *Neil v. Biggers* (1972), the Court ruled that the use of suggestive identification procedures is a violation of the suspect’s rights only if there is a substantial likelihood of mistaken identification, given the totality of the circumstances. The Court established five criteria (the Biggers criteria) for assessing the reliability of a witness’s evidence: opportunity to view the criminal; attention paid; accuracy of description; certainty of the witness; and delay between the crime and the identification. The Court reaffirmed the use of these criteria in *Manson v. Brraithwaite* (1977), and they continue to be the ‘law of the land’ in the US regarding eyewitness identification evidence.

Gary Wells, a leading eyewitness researcher in the US, has published several papers highlighting serious flaws in the logic of the Biggers ruling. The Court suggested a two-inquiry logic. First, was the identification procedure ‘impermissibly suggestive’? If so, then is the identification nevertheless reliable? The first prong of the test, establishing that an identification procedure is impermissibly suggestive, is attainable by demonstrating in some fashion that the police or prosecutor—directly or indirectly—led the witness to identify the suspect. One reaches the second and more problematic prong when the prosecutor or judge establishes that the first prong exists. When the official deems the identification procedure impermissibly suggestive, the second prong, the

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100 Roberts (note 98).
101 See note 82.
104 ‘Accuracy’ was a strange term for the Court to use, as one can only assess that if he assumes that the defendant is guilty. The Court was presumably referring to the consistency between the witness’s description and the physical appearance of the suspect.
106 Wells and Quinlivan (note 85).
reliability test, is invoked. The Court assumed that one can determine the reliability of a witness independently of the procedures used to obtain the identification by examining the *Biggers* criteria. Yet research shows that this assumption is not valid. Suggestive procedures can distort the memory of a witness, irreparably damaging any chance of obtaining a reliable identification.\(^\text{108}\) Of the five *Biggers* criteria, three (opportunity to view, attention paid, certainty) rely upon self-reports of the witness, and can be artificially bolstered by suggestive procedures.\(^\text{109}\) Wells and Quinlivan argue that using self-report measures to assess reliability ‘seems a bit like assigning a student’s grade based on his or her self-reports of how hard they studied’.\(^\text{110}\)

The *Biggers* criteria were based upon the intuitions of the Supreme Court judges in 1972, and have not been updated to reflect scientific knowledge. Research has shown, for example, that a person’s ability to describe a face is not strongly related to her ability to recognize a face,\(^\text{111}\) and that confidence is extremely malleable and prone to distortion.\(^\text{112}\) The very self-reports that are used to independently evaluate the reliability of the eyewitness identification are prone to distortion by suggestive identification procedures.\(^\text{113}\) Legal scholars have argued that the reluctance of the judicial system to inform its decision-making with the scientific literature violates defendants’ rights to a fair trial.\(^\text{114}\)

The defence has a right to file a motion to suppress eyewitness identification evidence obtained using ‘impermissibly suggestive’ procedures. However, since the *Biggers* ruling, the burden of proof is on the defence to show that the procedure was suggestive and that the risk of misidentification was high. Pre-trial hearings therefore focus on evaluating the reliability of the witness against the *Biggers* criteria and are rarely successful.\(^\text{115}\) The criteria are open to interpretation, as they do not specify absolute values for how long the culprit had to be viewed, how much attention had to be paid and so on, for the witness to be deemed reliable. In *Manson v. Braithwaite* two judges dissented, disagreeing almost completely about the witness’s standing on each of the *Biggers* criteria.\(^\text{116}\) Even in *Biggers*, a substantial delay between the crime and the lineup meant that one could deem the witness ‘reliable’ on only four of the five criteria.\(^\text{117}\) The flexibility of the *Biggers* criteria renders them problematic and does nothing to deter the use of unfair identification procedures.\(^\text{118}\)

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\(^\text{108}\) Wells and Quinlivan (note 85).
\(^\text{109}\) Ibid.
\(^\text{110}\) Ibid. at 9.
\(^\text{112}\) Semmler et al. (note 32).
\(^\text{113}\) Wells and Quinlivan (note 85).
\(^\text{115}\) Wells and Quinlivan (note 85).
\(^\text{116}\) Manson v. Braithwaite (note 105).
\(^\text{117}\) Neil v. Biggers (note 103).
\(^\text{118}\) Wells and Quinlivan (note 85).
Change may be on the way, however. In June 2010, the Supreme Court of New Jersey held a plenary hearing to evaluate the validity of the Biggers criteria in light of scientific research.\textsuperscript{119} Two hundred books and journal articles on eyewitness identification were reviewed, and the Court heard testimony from leading researchers. Its report concluded that the Biggers criteria are not valid, and they do not reflect the full range of factors that influence eyewitness memory. A search through the records of New Jersey’s appeal courts revealed only one case in which a pre-trial hearing to suppress identification evidence was successful.\textsuperscript{120} The recommendations were twofold. First, a judge should hold a mandatory pre-trial hearing in every case involving eyewitness identification. These hearings should focus on the fairness of the identification procedure, and the burden of proof should be shifted to the prosecution to prove that the procedures conformed to the NIJ guidelines.\textsuperscript{121} In effect, the NIJ guidelines would be treated as legally binding, and violations of the guidelines would render evidence inadmissible. Second, the jury should receive instructions educating them about the full range of factors that could have influenced the reliability of a witness in a given case. These instructions should be tailor-made to the specific needs of each case, and should reflect contemporary scientific knowledge.

Scholars await reactions of judiciaries to this development. The report is unprecedented in that a state supreme court has systematically reviewed the scientific literature to evaluate its own policies on eyewitness identification evidence. The recommendations of the report would improve the fairness of lineup procedures used on the front line, and would allow lawyers to present eyewitness evidence to jurors in a careful and unbiased manner. However, American courts might ignore this report just as the English judiciary ignored the Devlin report. Even if New Jersey were to pass a statute on the admissibility of eyewitness evidence, it would only be legally binding within that state. Other states might well follow, but ultimately the US Supreme Court would need to interpret the national constitution to ensure uniformity across the entire country.

4.3. Expert testimony

Another pertinent issue in eyewitness identification is the use of expert witnesses at trial.\textsuperscript{122} Lawyers and judges sometimes ask experts to testify about the reliability of eyewitness memory, the factors that affect an eyewitness’ ability to encode information into memory, the influence of suggestive identification procedures on the risk of false identification, and the relation between eyewitness confidence and accuracy. Eyewitness experts do not give opinions about the accuracy of specific eyewitnesses. There are tight constraints on expert witnesses in English courts. The ‘hearsay rule’, which prevents witnesses from testifying (subject to exceptions) on anything outside of their direct experience, prohibits experts from presenting experimental results at trial.\textsuperscript{123} Courts have ruled that eyewitness reliability is commonsense knowledge within the understanding of

\textsuperscript{119} ‘Report of the Special Master’ (note 75).
\textsuperscript{120} Ibid.
\textsuperscript{121} Technical Working Group for Eyewitness Evidence (note 72).
\textsuperscript{122} For a fuller treatment of this topic, see Brian L. Cutler (ed.), Expert Testimony on the Psychology of Eyewitness Identification (Oxford: Oxford University Press 2009).
\textsuperscript{123} Davies (note 88).
jurors. Instead, the courts rely on instructions given to the jury by the judge. These instructions (known as Turnbull instructions) are tailored to the needs of each case, but must address the following points: mistaken witnesses can be convincing; multiple witnesses can be mistaken; and the circumstances of the initial observation (such as exposure duration, distance, lighting, retention interval, and so on) can influence the accuracy of a witness’s memory. Failure to deliver adequate Turnbull instructions can lead the appellate courts to overturn convictions.

Expert testimony on eyewitness memory is more common in the US than in England, though rules on expert testimony vary between states. Although there are several grounds for judges to deny the admission of expert testimony about eyewitness memory, the single most common reason is that they believe that the content of the testimony is within the common sense of the jury. In other words, there is nothing the expert has to offer that jurors do not already know. Considerable research, however, as discussed in this chapter, has uncovered significant gaps between lay and scientific knowledge about eyewitness memory. If the influence of suggestive identification procedures was wholly a matter of common sense, there would be no need to improve police or judicial procedures. The fact that many jurisdictions have adopted reforms based on eyewitness research is evidence that eyewitness memory is not a matter of common sense. This widespread basis for rejecting proffers of expert testimony is, therefore, highly problematic.

5. Conclusion

In this chapter we have highlighted huge variations in the procedures used to collect eyewitness evidence between the US and England and across jurisdictions within the US. We also identified sizeable gaps between the recommendations of psychologists and the procedures used in the field. Besides the psychological literature, there are key members of the legal community (lawyers, judges, prosecutors and policy makers) who have taken a keen interest in this issue, and who have been working to reform procedures for some time. Indeed, the best hope for achieving procedural reform is to open up new channels of communication between scientists, legal professionals, and law enforcement officials, and to strengthen the ties that are already in place. There is, perhaps, reason to be optimistic. New field studies are underway in the US, involving close collaboration between psychologists and law enforcement personnel. New Jersey’s special report was a product of cooperation between the judiciary and scientists, which may have far-reaching consequences for eyewitness evidence in the US. While satisfactory complete reform may still be some way off, the rate of change is increasing and looks set to continue.

125 Regina v. Turnbull (note 90).
126 Regina v. Kamara (note 97).
128 See, e.g., Woocher (note 10).
129 Report of the Special Master (note 75).
Further reading