

Eyewitness identification: expert witnesses are not the only solution

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Expert testimony about factors that can lead to flawed eyewitness identifications may sometimes be helpful to the trier of fact. However, it is expensive, and its utility in cases involving dueling experts has not been demonstrated. Greater emphasis should be placed upon other ways of preventing mistaken identifications, such as improving lineup procedures.

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1. Is inaccuracy of eyewitness identification a problem?

As Professor Stein correctly notes, mistaken identifications have played a significant role in producing a number of wrongful convictions.¹ The DNA exoneration cases have provided some vivid recent examples.² These cases have called public attention to the problem and have led to proposals for systematic improvements, such as changes in lineup procedures.

Professor Stein properly adds a caveat, that the pool from which the DNA exoneration cases are drawn are likely to have a higher proportion of false identification cases than criminal cases generally. I would like to expand briefly on that caution against too much reliance on the DNA exoneration cases. The scientific advance represented by DNA testing was an advance in identifying suspects. Many of the cases of DNA exoneration, for example, have been sexual assault cases in which the victim was assaulted by a stranger.³

¹ See Edward Stein, *The Admissibility of Expert Testimony about Cognitive Science Research on Eyewitness Identification*, *Law, Probability and Risk* (2003) 2, 295–303.

² See Edward Connors, Thomas Lundregan, Neal Miller & Tom McEwan, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, <http://www.ncjrs.org/pdffiles/dnaevid.pdf> (June 1996) (Study of DNA exonerations showed that 24 of the 28 wrongful convictions examined were due largely to eyewitness identification error); Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongfully Convicted* xvi (Doubleday 2000) (Eyewitness error is single most important cause of wrongful imprisonment); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 *Psychol. Pub. Pol. & L.* 765, 787 (1995) (Mistaken identification the single largest factor contributing to false convictions); Edwin M. Borchard & E. Russell Lutz, *Convicting the Innocent: Errors of Criminal Justice* (Yale University Press 1932) (Eyewitness error the single most important factor in wrongful conviction).

³ See Gary L. Wells, *The Scientific Status of Research on Eyewitness Identification*, in *Science and the Law: Social and Behavioral Science Issues* 391, 401 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, West Group 2002) ('Virtually all' of the DNA exoneration cases are sexual assault cases); Edward Connors, Thomas Lundregan, Neal Miller & Tom McEwan, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, <http://www.ncjrs.org/pdffiles/>

Because DNA provided a better way of identifying suspects, one would expect the DNA exoneration cases to contain a large proportion of cases in which the wrongful conviction resulted from a mistaken identification. Had the scientific advance provided a better way of detecting lying in cases of crimes among acquaintances, then the exonerations would have not been mistaken identification cases, but lying witness cases.

I agree that mistaken identification is a major concern, but I prefer not to rely too heavily on the DNA exoneration cases. Those cases do not prove anything more than that misidentification sometimes occurs in important cases. They do not tell us anything about the rate of misidentification, or about the accuracy of witness identification in comparison with other types of evidence, such as evidence of confessions or microscopic hair comparisons. We can, however, get an idea of the dangers of eyewitness identification testimony from controlled experiments showing a high error rate, and I would rely more on those than on the exoneration cases in seeking to demonstrate an unacceptable rate of error. For example, controlled experiments described by Cutler and Penrod found an average false positive error rate of about 36%.⁴ In one of the more realistic studies, a confederate presented a crudely altered money order to a number of bank tellers. All of them refused to cash the money order. They were then asked by an investigator to identify the confederate from a photo array. These subjects had a false positive error rate of 37.5%.⁵

2. Is expert testimony the solution? A consideration of alternatives

a. At trial

The question is not only whether eyewitnesses make errors, not only whether jurors are insensitive to those errors, but whether experts will help. There is some evidence that experts make jurors more sceptical and even some evidence that it may make them more sensitive to the right factors.⁶ But the typical eyewitness situation in practice now is the scenario in which the defence presents an expert witness and the prosecution tries to have the evidence excluded or, if that fails, relies on cross-examination.⁷ Although there a small number of experts who work for the prosecution, most work for the defence.⁸ Free admission of eyewitness expertise offered by the defendant would probably lead to presentation of counter-experts by the prosecution. This would be especially likely to happen if the testimony were effective, i.e. if the testimony changed jurors' minds and led to acquittals. Advocates of free admissibility of expert identification testimony obviously intend that it be effective, so I think they must deal with the likely consequence—that of having experts on both sides. The battle might drive jurors toward using less desirable

dnaevid.pdf (June 1996) (All of the first 28 DNA exoneration cases involved sexual assault, almost all of them perpetrated by strangers).

⁴ Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* 13 (Cambridge University Press 1995).

⁵ *Id.* at 12.

⁶ See Gary L. Wells, *The Scientific Status of Research on Eyewitness Identification*, in *Science and the Law: Social and Behavioral Science Issues* 391, 417–19 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, West Group 2002); Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* 240 (Cambridge University Press 1995) (Expert testimony improved sensitivity without effecting jurors' overall level of scepticism).

⁷ Telephone conversation with Steven D. Penrod, 18 July 2003.

⁸ *Id.*

heuristics than they use now, for example by encouraging them to choose between experts based on demeanour evidence, rather than relying upon their own sensitivity towards factors such as the difficulty of cross-racial identification.

At any rate, expert testimony costs thousands of dollars, and we should be aiming at solutions that are effective for the typical defendant, not only for those who can afford first-class justice. For that reason, I believe that academic experts should study not only the usefulness of expert testimony, but the usefulness of less expensive alternatives. First, it would be worthwhile to know more about the effect of judicial instructions. The effect of bad judicial instructions, such as those based on *United States v. Telfaire*, has been examined in several studies,⁹ but not as much attention has been paid to the effect of good instructions.¹⁰ Instructions that sensitized the jury to factors that the research indicates are more important might work, especially if framed in plain language that appealed to common sense, and they would avoid the expense and side effects of expert battles.

A more daring approach would be juror education material, in the form of a videotaped off-the-rack lecture about eyewitness factors, approved by the state judicial instruction committee. Jurors already receive basic instruction about juror service, and in identification cases they could receive pre-case instruction about factors that affect the accuracy of identification.

These reforms make sense to me, but I admit that it may be difficult to implement them. Researchers therefore might study another possibility, one that fits more easily into the informal trial tradition, in many courtrooms, of allowing counsel to say pretty much what they wish in closing argument. What is the effect of allowing counsel to describe eyewitness research in argument, subject to judicial control to prevent egregious mischaracterizations? As Professor Gary Wells has written, the research on the help offered by experts 'has not clearly confronted the question of whether this same level of 'assistance' could be offered by counsel through arguments pitched to the common sense of the jury.'¹¹

b. Before trial

There have been some hopeful starts in using the eyewitness identification research toward improving systemic obstacles to accuracy. For example, improved lineup procedures have been suggested by the Reno Justice Department Guidelines, the New Jersey Attorney General's Guidelines, and the Illinois guidelines.¹²

⁹ See Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* 257–59 (Cambridge University Press 1995).

¹⁰ See Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* 260–61 (Cambridge University Press 1995) (A study by Green (1988) used, in one of its conditions, a modestly improved version of the Telfaire instructions. These instructions increased juror scepticism of the accuracy of identification but apparently reduced juror sensitivity to witnessing factors, leaving doubts as to whether use of the instructions would improve overall jury decision-making ability.)

¹¹ Gary L. Wells, *The Scientific Status of Research on Eyewitness Identification*, in *Science and the Law: Social and Behavioral Science Issues* 422 (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, West Group 2002).

¹² See U.S. Dept. of Just., *Eyewitness Evidence: A Guide for Law Enforcement*, <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> (October 1999); Office of Atty. Gen. of N.J., *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, <http://www.state.nj.us/LPs/>

I will not attempt a full review of these reforms, preferring merely to refer the reader to sources that can do so. To give a flavour, however, here are some examples of possible reforms:

1. double blind lineups and photo arrays;
2. immediate recording of witness confidence, before it has been bolstered by post-identification reinforcement;
3. improved lineup instructions, for example a warning that the person in question might not be in the lineup and that the person administering the lineup doesn't know whether he is or not;
4. sequential lineups and photo identification;
5. larger lineups;
6. lineups where all foils resemble the identification given by the witness (not necessarily each other, but the pre-lineup description), or if that is not feasible (for example, because of different descriptions by different witnesses), other procedures designed to prevent false identifications by witnesses who pick a person who is the closest in appearance of those presented.

When defendants can afford it, there is money to pay experts who will testify about how witnessing conditions can cause errors in eyewitness identification. Hence there are opinions discussing the admissibility of such evidence, and grist for the law reviews. Defendants do not, however, pay academicians to do studies on how reforms in the justice system might improve witnessing conditions, nor do they pay for the implementation of those reforms. Perhaps defence testimony will indirectly encourage the justice system to repair systemic flaws. But academic experts can make a more direct contribution by writing about the value of systemic reforms and advocating their adoption to criminal justice professionals.

Professor Stein convincingly counters the standard judicial arguments for excluding eyewitness expertise. Were I a judge, I would admit the evidence on a showing of fit and need. But as an academic observer, I hope that scholars will continue to look for other ways to make identifications more trustworthy.

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