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Getting to Truth Before It Falls Into the Hands of the Lawyers: Pursuing Accuracy in Criminal Cases

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SYMPOSIUM ISSUE

Getting to Truth Before It Falls into the Hands of the Lawyers: Pursuing Accuracy in Criminal Cases

James B. Zagel[1]

Societies have always wrestled with the overall question of the reliability of witnesses and, even now, when the legal rules are mostly settled, we still worry about perjury, mistakes, delusions and the integrity of memory. At issue today is the relatively small subset of the witness problem-just that one moment when the witness points to one person and says that is the person whose conduct I have described. For most witnesses to crime, the phrase "That's the man" is shortest part of the story they offer. Concern about its accuracy has been with us for centuries.

If solutions were easily found, this would not be an age old concern. Be wary of those who, with great confidence, offer the miracle cure to a problem we all recognize. The results of the Illinois double-blind eyewitness pilot program offer a vivid example of why what some think obvious is often not so. There is another point here; failure teaches as much or more than does success and we ought not to turn our back on any enterprise that seeks to make our investigations and adjudications better. The great value of tests, like the one we discuss herein, is they keep us from a terrible kind of optimism that, once disappointed, can lead us to abandoning the search for something better.

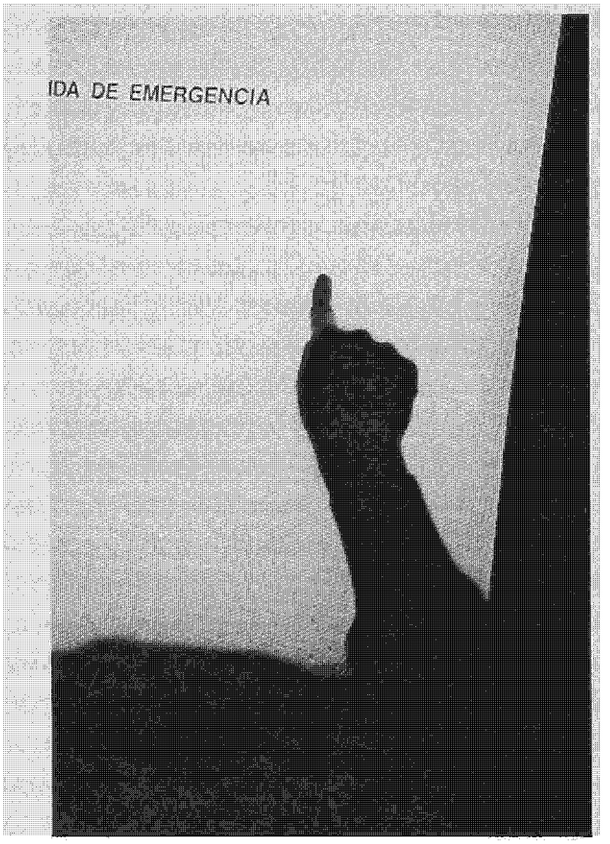
What Is It We Are Trying To Repair and Why?

Our world of arrest, prosecution and defense has changed. The idea that truth arises out of trial in an adversary system is still with us but mostly in theory not practice. Plea bargains are the dominant mode. My colleague, Judge Lynch in New York, has accurately described the process this way:

"[T]he prosecutor ... is the central adjudicator of facts ... arbiter of ... legal issues and of the appropriate sentence to be imposed. Potential defenses are presented by the defendant ... to a prosecutor, who assesses their factual accuracy and then decides the charge of which the defendant should be adjudged guilty..." [2]

This is a far cry from what the Supreme Court envisioned when it began to emphasize 75 years ago that defense counsel at trial was essential to getting at the truth.[3] And the place, they thought, where truth was to be found was trial where it was judge and jury, after hearing prosecution and defense, not prosecutor, who decided the outcome. This reliance on defense counsel to help us get to the truth was a key element in the first cases in which the Supreme Court sought to bring constitutional regulation to eyewitness identification.[4]

But defenders are not duty bound to see that the truth comes out. If the client is guilty they are obliged



It is critical to establish an identification before the eyewitness is subject to outside suggestion and a false identification is made. A false identification often has irreversable consequences.

to use all legally permissible means to see that the truth does not come out. This became particularly clear when we thought about what a lawyer should do at a lineup. Suppose the client tells his lawyer "Yeah, I stole the stuff but I'm sure no one saw me inside." Then the lawyer sees his client in a proposed line-up of seven, six of whom are Hispanic, and his client is the only blond white man in the group. Does

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counsel want a fairer or more accurate lineup, one more likely to elicit the truth? If he gets one and the identification is made, he has deprived his client of a good argument at trial. What if the police ask the lawyer for suggestions to improve the lineup and agree that they will follow these suggestions? Does the lawyer improve the process to the detriment of his client? The dilemma here is stark because, unlike interrogation, the lawyer can not simply advise his client not to participate in the lineup. The identification procedure is going to happen. The lawyer is not authorized to decide simply that it is right to have a fair identification parade; the lawyer is only authorized to seek the kind of parade that is good for the client.

Many eventually accepted this state of affairs where, in a trial, getting to the truth was not the single overriding value.[5] I think they did so for two reasons. First, the thought was that, in nearly all cases, the truth came out anyway. Second, there were important social values found in procedural fairness and in giving the defendant a meaningful role in his or her defense. The price of an occasional criminal going free was thought to be worth paying to achieve these good things. This tradeoff has always been controversial. It might not survive a public referendum.

The tradeoff also rests on premises that professionals find hard to accept. It is not easy to find scholars (though not so hard to find judges) who actually believed that trial was really a good way to get at the truth in hard cases; the scholarly defense of the system was based upon its service to other democratic values. And even where the adversarial system could work, it was dependent on having a skilled, adequately funded advocate on both sides of the case. This last condition was often unmet.

In the decades that followed the criminal procedure upheavals of the 1960s, there was a lukewarm to cool acceptance of the way criminal cases were handled: lukewarm to cool because we were in the midst of a rise in crime that lasted for decades and, only relatively recently, subsided; accepted because there was much in popular media, shows like *NYPD Blue* and *Law and Order*, that portrayed a system that got the right result. The right result is the common result, but it is not because of our system of trials. It is because, in most cases, there is no serious question of guilt. The evidence is usually more than good enough and, if it isn't, the prosecutors frequently won't take a chance on the case. Perfection is unattainable, but getting it right in the largest percentage of cases is not good enough even if that percentage is in the high nineties. The consequences of error are too grave.

But still we toddled along with what we had. The volume of criminal cases, which was associated with the rise in crime and the relatively poorly funded defense services, led to fewer trials and what Judge Lynch called an administrative system of criminal justice. We would be that way today but for recent events.

The public, as opposed to the defenders of the world, was generally worried only about the guilty going free. New science and today's news made them worry, at least a little, about the innocent being found guilty.

For this reason the importance of finding the truth about guilt is valued more highly today than it has been in many years. We might be in the midst of a tectonic shift in perspective about crime, investigation and the accused.

Some of this might seem strange to say to the public. Haven't we always thought that the end of the criminal justice system was to find out the truth? Most people did, but no one who labors in this field believes that truth is always revealed or acted upon. There are unjustified convictions and unjustified acquittals. Even under the better practices that we will someday have, we will never reach perfection because the truth is elusive, often beyond the ability of humans to discover. But we won't stop prosecuting. Crime has a devastating effect on its victims and a large effect on the society in which we live. We have never decided to leave the guilty or the innocent to the judgment of heaven. We ought then to do the best we can to lock up all the guilty and free all the innocent, knowing that we will sometimes fail.

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What Has Led Us to Try Now?

The short answer to this question is that there is no sudden change, just a gaudy tipping point. The shift to concern for truth has been building for a while.

Start with *Miranda v. Arizona*[6] and the de-emphasis on admissions of guilt. *Miranda* can now be read as an implied endorsement of the reliability of eyewitnesses and, perhaps, of the very forensic evidence that is now under attack, say, bite marks, and even of reliable evidence excludible under the Fourth Amendment. The Court understood it was holding that even voluntary confessions, whose truth value was unquestioned, were to be excluded from evidence. This de-emphasis of truth and re-emphasis on procedural protections did not last very long. The Supreme Court limited the scope of *Miranda*.[7] The Court (in an opinion written by Justice Thurgood Marshall) also decided to permit the police to use deception to induce confessions[8] and narrowed the scope of the exclusionary rules based on the Fourth Amendment.[9]

The idea of science in law enforcement is relatively new. Identification by fingerprinting, for example, was not broadly accepted in the United States until the 1920s.

Despite this renewed endorsement of the value of confessions, there is no doubt that the Supreme Court, and every sane person for that matter, would prefer that guilt be determined by incontestable evidence like that found three times every week in New York, Miami and Las Vegas by an infallible corps of Crime Scene Investigators. It is science that created that gaudy tipping point.

The entry of science into the courtroom started at a very slow pace. Most of the earliest expert testimony from doctors and alienists was admitted into evidence because the law permitted *anybody* to offer opinion evidence.

Fingerprints are a good example of the early evidence of experts. Fingerprints were used for identification in India in the 1850s.[10] Written work appeared in 1881 and Galton's book was published in England in 1892.[11] By 1910, fingerprinting itself was in fairly wide police use.[12] Despite this, it was not until 1911 that a reviewing court approved its use, but broad acceptance did not come until the 1920s, and it was not until the 1940s that courts said the prosecution would no longer have to prove that no two fingerprints are alike.[13] The course of admission of other forms of identification evidence was similar. It took time to get the courts to approve comparative micrography, microanalysis, questioned documents. Most of the first scientific evidence dealt with traces and marks which the jurors themselves could perceive-friction ridges, striations on bullets and so forth. As the twentieth century went on, and science itself began to deal with things not directly observable, the law began to take in serology, general chemistry and neutron activation analysis. In all these cases, though, one reason the courts moved slowly was the resistance of defense counsel to the admission of such evidence because it rarely served any purpose other than to incriminate their clients.

DNA evidence was accepted with amazing speed precisely because it could exonerate as well as incriminate. There were very few to fight tooth and nail against its admissibility because the prosecutor or defender who objected vigorously to DNA evidence knew that, in the next case, they might be offering that same evidence. DNA, too, came to the courts at a time when standards of what constituted reliable and valid science had become clearer. DNA analysis had the advantage of service as a tool in many sciences, not merely criminalistics. The broader use of DNA analysis meant the discipline had been critically reviewed by many more scientists than, say, fingerprints.

It is true that the advent of closer judicial scrutiny of expert witnesses in recent years[14] has called into question much of the science that is offered in the courtroom, but the outcome of disputes about questioned document examination, serology, fiber analysis,

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(maybe, even fingerprints) are not for today's discussion. DNA survived its first tests and it proved that there were a small, but nonetheless very meaningful, number of wrongful convictions. DNA science teaches there is, in a certain class of cases, a class of evidence that, if properly handled, is conclusive. Of course, properly handled is not inevitable, but it put forth an implicit message. We can get to the truth better than we had gotten to it before. And this is why pilot programs are undertaken: not because eyewitnesses can become the legal equivalent of recombinant strands of DNA, but because DNA showed that we can do better. Obviously only if we try to do better.

There will be attention paid to the causes of wrongful convictions, now the predominant element is bad eyewitness identifications. So too, we will look at error rates in particular kinds of cases.[15] These studies might help us in our scrutiny of past errors.

Professional investigators of crime have known for hundreds of years that evidence can lead to the wrong person, that some eyewitness identifications are worthless, that some confessions are worthless and that some forensic analyses are worthless. From the perspective of the police and prosecutors, the solution was either not to charge in those cases or to drop the charges if already brought. The defense often proposed this solution. The problem was handled in house and there was always the final safeguard of the trial.

What DNA told the public is that a trial does not protect adequately against these errors if the prosecutor decides to go forward with the case. DNA put an enormous dent into the idea that the adversary system is the best way to protect against false convictions. The belief that even good faith errors made earlier in the process will be detected and repaired as the case moved through our adversary system has lost some of its hold on our society. While the adversary system might serve many social values apart from its detecting the truth of accusations, all these values collectively seem no longer to outweigh the risk of that the judgments it produces may be untrustworthy. It is not that these values are to be disregarded, it is the degree to which they are fostered that is questioned. When a crime victim sees the perpetrator unjustly acquitted, it is small consolation to tell them that it is better that ten guilty men go free than one innocent man be convicted, but the society as a whole accepts, or at least understands, this policy. Now the message is, not only do we let those ten guilty go free by the way, we also send quite a few innocent men to prison too. That message is not well received.

So the turn now is to making things right before the lawyers in the adversary system get their hands on it.

What Can We Expect from Science?

Science proceeds by evaluating ideas, theories, guesses, conjectures, hopes and dreams. It does this by experiments of all sorts and observations.

The idea that there is science in law enforcement is not so old. Early criminology was a form of moral philosophy as in Cesare Beccaria.[16] One of its first scientists was an anthropologist Cesare Lombroso,[17] who died less than one hundred years ago. Many of his theses seem laughable today but he used the inductive method of science as well as he could. Our understanding of criminology is still very much in flux. We seem to know that more police officers and more people in prisons are good at reducing crime rates. Some of the standard explanations about strong economies, too many people under thirty, order maintenance policing, strong gun laws, capital punishment, changing drug habits and markets all remain unproved.[18] But we are not talking about criminology here, it is criminalistics or police science which largely concerns itself with helping to find out, by examination of physical objects, who did what, when and how.

In recent times, I have noted, some accepted police science has come under question. This is not unique to police science. The scientific enterprise is filled with failure and mistakes. There is a well-known maxim offered to some first-year medical students which runs this way: "half of what we teach you will be wrong, we just don't know which half."

Mistakes in science are not limited to earlier centuries like the phlogistan theory of fire. The theory is a laughing stock today but it was clever in its time. The inventor believed there was a combustible substance-phlogistan-consumed by combustion which required air. After the phlogistan was gone the residue weighed less than the original product as is demonstrated by the case of ashes which weigh less than the burnt log.

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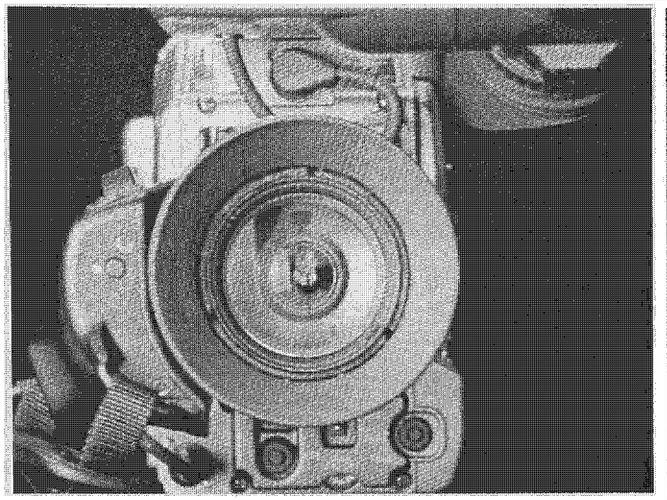

Recent experiments have studied and compared eyewitness identification procedures including the use of moving video versus photographs, culprit-absent lineups versus culprit-present lineups, and foil selection by culprit description versus selection by suspect resemblance.

How can psychological science enhance the effectiveness of identification procedures? An international comparison.

Tim Valentine, Stephen Darling and Amina Memon[1]

The sequential double-blind method protects the guilty, moving video images protect the innocent (a little), but foil selection strategy makes no difference.

The reliability of eyewitness identification has attracted concern from the legal profession in England for at least 100 years. In 1904 a committee of enquiry was established to investigate the trials of Adolf Beck. Incredibly, on two separate occasions Adolf Beck was wrongly convicted on the basis of mistaken eyewitness identification. In both trials, multiple eyewitnesses identified Beck as a confidence trickster who stole jewellery from them. The crimes were subsequently found to have been committed by William Wyatt. The 1904 Committee of enquiry led directly to the establishment of a Court of Appeal.[2]

Concern about further wrongful convictions based on mistaken identification led to a government enquiry into the reliability of eyewitness identification evidence, chaired by Lord Devlin, which reported in 1976.[3] The Devlin report led directly to a landmark judgement in the English Court of Appeal, which established a requirement that in cases of disputed identification the trial judge must caution the jury about the dangers of eyewitness identification evidence. The judge should point out that confident eyewitnesses may be mistaken and instruct the jury to consider carefully the circumstances of the identification.[4]

From this historical perspective, it is unsurprising to learn that mistaken eyewitness identification is also a major problem for the United States courts. Nevertheless, the extent of the problem has proved to be greater than many may have anticipated. The work of the U.S. Innocence Project, which to date has led to 183 prisoners being exonerated by new DNA evidence, found that mistaken eyewitness identification was a factor contributing to three-quarters of the original wrongful convictions.[5]

Recent developments to eyewitness identification procedures

Eyewitness identification procedures used in the United States and the United Kingdom have some important differences. In the United States, live lineups and identification from arrays of photographs are both frequently used to collect formal eyewitness identification. Traditionally, in the United Kingdom all formal eyewitness identification evidence has been obtained from live lineups. Identification from arrays of photographs has never been permitted as a formal means of identification. Over the last few years video has replaced almost all live lineups. This innovation has been made possible by development of sophisticated computer systems used to compile video lineups from a standardised database of moving video clips.

Recently identification procedures in the United States have been the subject of consultation with eyewitness researchers. Identification from arrays of photographs is still widely used, but the U.S. National Institute of Justice set up a Technical Working Party for Eyewitness Evidence to review procedure and produced a guide to best practice.

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Recent developments to identification procedures in the USA

The U. S. National Institute of Justice document *Eyewitness identification: A guide for law enforcement* ("the Guide")[6] includes the following guidance:

- The foils in a lineup should be selected to generally match the witness' description of the culprit.
- There should be a minimum of five foils.
- The witness should be advised that the culprit may or may not be in the lineup.
- The witness should state in their own words how confident they are of any identification.

Two methods of lineup presentation are endorsed by the Guide: 1) a *simultaneous* lineup, in which the witness is permitted to inspect all of the photographs or lineup members before making an identification and 2) a *sequential* lineup, in which the witness sees one photograph or person at a time and makes a decision prior to viewing any other photograph or person.[7] The guide does not express any preference for one method over the other. The procedures mentioned here do not form an exhaustive list of the provisions in the Guide. It should be noted that the guidance is a recommendation of best practice and has no direct legal force.

In an earlier 'white paper,' written under the auspices of the American Psychology - Law Society ("AP-LS"),[8] psychologists had advocated that the person who administers a lineup should not know which person in the lineup is the police suspect. That is to say that the administrator should be 'blind' to the identity of the suspect. This procedure is known as 'double-blind' as neither the administrator nor the witness has prior knowledge of who the suspect is in the lineup. This measure was strongly advocated by researchers because it removes all possibility of the witness being influenced by the lineup administrator. Such influence can be very subtle and may occur without any intention or awareness of either the administrator or the witness. The double-blind procedure is well established as an important aspect of scientific enquiry. For example, neither the patient nor the clinical staff should know which patients received a placebo in a drug trial. A recommendation of the double-blind method is conspicuously absent from recommended best practice in the Guide on eyewitness identification.

Research based on identification from photograph arrays suggests that mistaken identification can be reduced by sequential presentation of the photographs as outlined in the Guide.[9] However, the Guide did not include the important stipulation of a 'sequential double-blind method.' Under sequential presentation instructions the witness should make a decision after viewing each photograph as to whether he or she is the culprit. If the witness rejects the photograph they are shown the next photograph. The procedure stops when the witness makes an identification. The method endorsed by researchers crucially stipulates that the witness should not know how many photographs are in the lineup, the witness is given unbiased instructions (e.g., that the person they saw may or may not be in the lineup) and, importantly, that the administrator is blind to the identity of the suspect.[10]

Video identification has a number of important benefits [including]. . . dramatically reduc[ing] the delay before an identification can be organized, . . . usually produc[ing] a video lineup within two hours of request, . . . [has] a large database of video clips from which to select foils, . . . and [employs] a laptop which can be taken to a witness who is unable to attend the police station.

Sequential presentation is believed to reduce mistaken identification by reducing the opportunity for the witness to make a relative judgement. In the traditional simultaneous presentation, a witness who believes that the culprit is in the lineup may identify the person who most looks like the person they saw, having had the opportunity to view all the photographs in an array. Sequential presentation aims to prevent relative judgements by forcing the witness to make

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(**Valentine**, *continued from page* 22)

independent judgements to each lineup member. Sequential presentation has been adopted in some jurisdictions in the United States. However, in some cases the strict procedure advocated by researchers has not been followed in all of its aspects. It is worth noting that researchers did not include sequential presentation amongst the recommendations of the AP-LS white paper.[11]

Recent developments to identification procedures in England & Wales

The Police and Criminal Evidence Act of 1984 ("PACE") which applies in England and Wales (but not in Scotland or Northern Ireland), includes a code of practice for identification by eyewitnesses ("code D"). The code can be revised without the need for new primary legislation. In recent years the code has been revised on an annual basis. The current code of practice (2005)[12] includes the following provisions:

- A lineup that includes one suspect must consist of at least eight foils.
- The foils must resemble the suspect in age, general appearance and position in life.
- The suspect has the right for their legal representative to be present during the identification procedure.
- The person who administers the lineup cannot be involved in the investigation of the case (but note that the administrator does know who the suspect is).
- Witnesses must be advised that the person they saw may or may not be present.
- Witnesses must be advised that if they cannot make a positive identification they should say so.
- Witnesses must view each member of the lineup twice before making any identification.
- Video identification should be used unless there is a reason why a live identification is more appropriate.

Although the code of practice does not have statutory force, trial judges have the discretion to exclude or allow eyewitness identification evidence. Therefore police forces have systems in place to demonstrate compliance with the code.

Two different IT systems are in widespread use in British police forces to provide video identification. VIPER™ (Video Identification Procedure Electronic Recording) and PROMAT™ (Profile Matching).[13] The systems produce similar formats of video lineup, but each has its own database of images. Lineups consist of 15 second clips of each person shown one after another. The sequence starts with a head and shoulders shot of the person looking directly at the camera, who slowly turns their head to present a full right profile to the camera. The person then slowly rotates their head to present a full left profile to the camera. Finally the person returns to looking directly into the camera in a full-face pose.

Research on video identification

Research has demonstrated that VIPER video lineups from real criminal cases were fairer to the suspects than conventional 'live' lineups,[14] and that VIPER video lineups were equally fair to white European and African–Caribbean suspects.[15] In these studies, participants (known as 'mock witnesses') were shown a set of videos of VIPER lineups or a set of photographs of live lineups held as part of the investigation of the case. For each lineup they were given the first description of the offender made by the original witness. The mock witnesses were required to choose, on the basis of the witness' description, the lineup member who they think is most likely to be the police suspect. Therefore, a 'mock witness' simulates a witness who (a) has no memory of the culprit at the time of the identification procedure; (b) can remember the description they previously gave to the police and (c) nevertheless, makes an identification from the lineup. If the lineup is perfectly fair, and all members fit the description, the mock witness would have no basis on which to make their selection and would merely have to guess who is the suspect. Therefore, if a large number of the mock witnesses are asked to make a selection they would select the suspect on 11 percent of occasions (1 in 9) from each lineup, because the lineups all contained a suspect and eight foils.

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Using this procedure 25 percent of mock witnesses (1 in 4) chose the suspect in the live lineups, more than expected by chance (25 percent vs. 11 percent).[16] In comparison, 15 percent of mock witnesses selected the suspect from the videos of VIPER lineups.[17] Statistical analysis showed that the VIPER lineups were significantly fairer than the live parades (15 percent vs. 25 percent), and the VIPER lineups were not significantly less fair than expected by chance (15 percemt vs. 11 percent).[18]

Previous data from real cases suggested that live lineups may be less fair to ethnic minorities than to white Europeans. Therefore, the fairness of VIPER lineups of African–Caribbeans and of white Europeans was compared. The VIPER parades were found to be equally fair to suspects of both ethnic groups.[19]

Benefits of video identifications

Video identification has a number of important benefits compared to live lineups. First, use of video can dramatically reduce the delay before an identification can be organized. Live lineups have been subject to long delays to enable a selection of appropriate foils to be available to stand on a lineup (typically of one to three months).[20] In contrast, VIPER can usually produce a video lineup within two hours of request. Second, approximately 50 percent of live lineups in England and Wales were cancelled, for example, due to failure of a bailed suspect to attend, failure of the witness to attend or lack of suitable volunteers.[21] Cancellations contribute to a further increase in delay before the witness can view a lineup. Since the introduction of video identification, the proportion of procedures cancelled has fallen to around five percent.[22] Third, availability of a large database of video clips from which to select foils (approxiamtely 12,000) makes lineups fairer to the suspect. Fourth, use of video is less threatening to victims, who no longer have to attend an identification suite where their attacker may be physically present. A further advantage is that a laptop can be taken to a witness who is unable to attend the police station. In a recent high-profile case, Abigail Witchalls, a victim of an attack who was left paralysed, was able to view a video lineup from her hospital bed, and a suspect was eliminated from the enquiry as a result.

Can psychological science improve the effectiveness of video identification?

An empirical investigation was recently conducted in our laboratory to investigate whether the effectiveness of the British video identification procedure could be enhanced by adopting: (a) a sequential double-blind procedure and (b) selecting foils that match the witness description of the culprit rather than foils who resemble the suspect. The impact of using moving rather than still video images was also investigated. Substantial laboratory experiments designed to simulate a forensically relevant situation as closely as possible are described.

Sequential double-blind presentation

Video identification naturally yields a sequential presentation. Research based on identification from photograph arrays suggests that sequential presentation can reduce mistaken identifications when the witness is required to make a decision after viewing each person as to whether he or she is the culprit. However, the current PACE code of practice does not allow any advantage of sequential presentation to be realised because it requires witnesses to view the entire lineup twice before making any decision.[23] Thus, the question arises of whether video identification procedures could be improved by allowing the sequential double-blind instructions to be used.

We compared the outcomes of lineups when participant witnesses viewed a video lineup conducted under sequential double-blind instructions to the outcomes when following the procedures currently used by the police.[24] Although the lineup administrator in police lineups is not blind to the identity of the suspect, for consistency *all* lineups in our experiments were conducted double-blind. All of the lineups were constructed under supervision of the police using the VIPER national database of foils. A video clip of the actors who played the role of a thief in our experiment were recorded at VIPER-equipped police stations under standardised conditions, following the same procedure as used with police suspects. Approximately 200 students were recruited in small groups to take part in a study on mood and health. During the procedure the witnesses viewed an unexpected staged theft of a laptop. They gave a written description of

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Figure 1

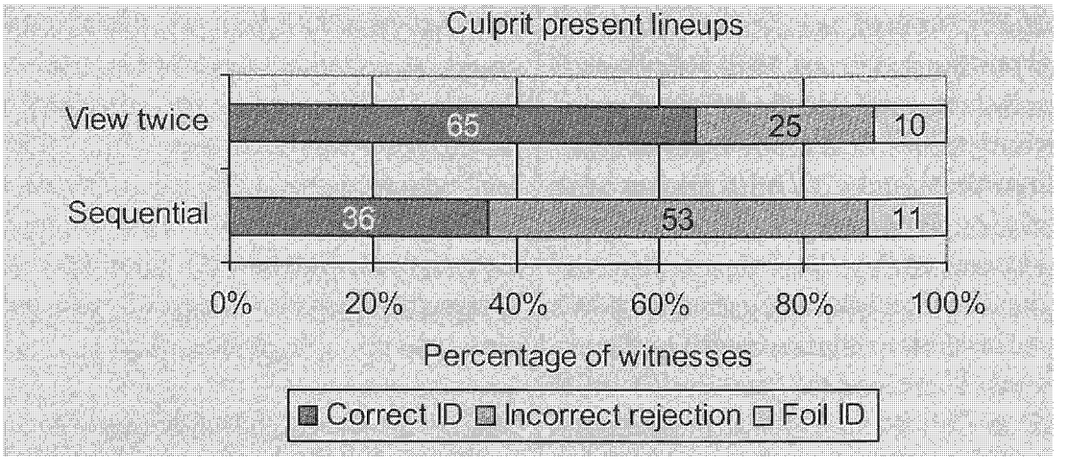

Figure 1: The outcome of culprit present video lineups run under the existing 'view the lineup twice' instruction and the sequential method. All lineup were administered double-blind. Statistically there were significantly more correct identifications of a guilty suspect made under the view twice instructions ($p<.05$).

the culprit. Participants returned after approximately seven days to view a video lineup. Half of the participants saw a lineup that included the culprit, half saw a lineup which included an innocent suspect. The foils in the lineups were always the same people. The experimenter, who could not see the faces on the video screen, did not know whether the culprit was in the lineup. All witnesses were advised that the person they saw may or may not be present in the lineup, and that if they could not make a positive identification they should say so. Under the sequential double-blind instructions, witnesses saw the video of the first lineup member. They were asked if he was the culprit, or if they would like to see the clip again. If the witness identified the lineup member as the culprit the procedure ended. If they rejected the line member they were shown the next clip. The witness was told that once they had proceeded to the next lineup member they could not change their mind or go back to view a previous image. They were not told how many people were in the lineup. In the control condition, following the existing code of practice, witnesses were instructed to watch the entire lineup twice before making any identification. They could ask to see the video clips of any of the lineup members again prior to make an identification.

Under sequential double-blind instructions there were significantly fewer correct identifications from culprit present video lineups compared to the existing procedure (36 percent vs. 65 percent of witnesses, see Figure 1). There were also fewer mistaken identifications of foils from culprit absent lineups (23 percent to 10 percent), but the latter effect was not statistically significant (Figure 2). The sequential instructions appear to reduce the rate of choosing, and therefore suppress correct identifications as well as incorrect identifications.

Sequential double-blind viewing instructions are believed to reduce the number of mistaken identifications by making it difficult for witnesses to make a relative judgement. In our experiment we asked the witnesses whether they had compared the faces of lineup members with each other or whether they had considered each person one at a time. 93 percent of witnesses who viewed a culprit present lineup answered 'one at a time', regardless of the viewing instructions they had been given. The naturally sequential presentation of a video lineup may make relative judgements very difficult even under the existing procedure. When these data for the culprit absent lineups are considered the proportion of witnesses answering 'one at a time' dropped to 80 percent under both lineup instructions. Thus, the presence of the culprit influenced the strategy witnesses used but the sequential double-blind instructions did not.

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Figure 2

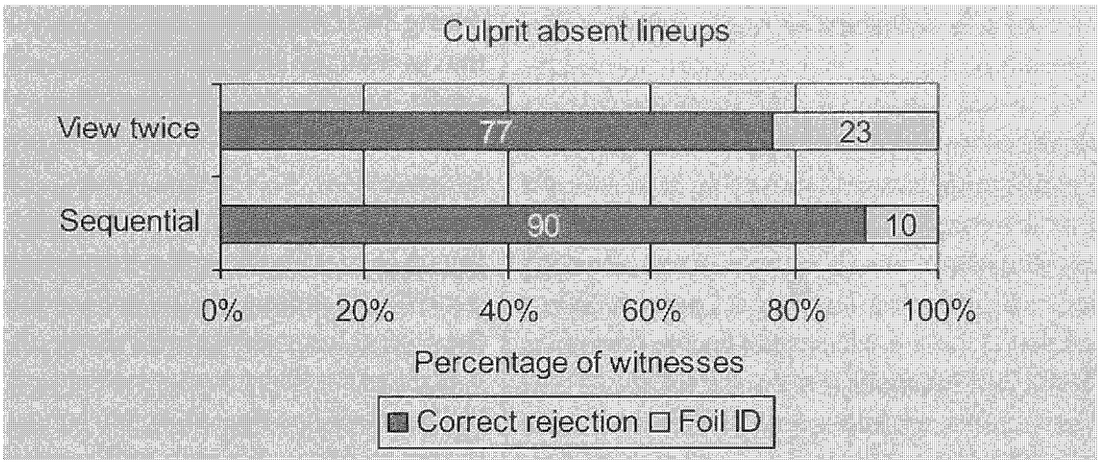

Figure 2: The outcome of culprit absent video lineups run under the existing 'view the lineup twice' instruction and the sequential method. All lineups were administered double-blind. There were no statistically significant differences between the outcomes.

Recent research clearly shows that there is a reduction in the number of correct identifications of offenders under sequential double-blind instructions. In 2001, a combined analysis of 23 studies reported this effect.[25] The Illinois Pilot Program, an evaluation of the sequential double-blind produce in real cases conducted by the Chicago Police, found the same effect.[26] We have also found a reduction in correct identifications in a laboratory study under realistic conditions using video lineups constructed from the police national database of foils under police supervision. Although sequential double-blind presentation may provide some modest protection to innocent suspects, it did not show a reliable effect in our laboratory.

Moving images compared with stills

As part of the same experiment we have also investigated whether the moving images used in video identification contribute to its success compared to single full-face images, as frequently used in American photograph lineups. Intuition suggests that witnesses may be more likely to be able to identify a culprit from a moving video sequence that allows the face to be seen from a variety of angles. However, results from the live staged-incident experiment using video lineups showed that this was not the case. The rate of correct identification from culprit present video lineups was the same for 15-second moving video clips and for static full-face images presented on a monitor for 15 seconds (Figure 3). When the culprit was not in the lineup, there were significantly fewer mistaken identifications of foils from moving clips than from still images (Figure 4). Thus the use of moving video clips improves the fairness of lineups without affecting the sensitivity of the procedure. The same trend was found in a subsequent experiment, but the difference in mistaken identifications from culprit absent lineups between moving and still images was not statistically significant. When data was combined from an experimental condition which was common to both experiments, based on the existing identification procedure (i.e. viewing all lineup members twice), the advantage for moving images in culprit absent lineups was still significant. In conclusion, use of moving images may offer some protection to innocent suspects, but the size of any effect is small.

Research comparing selection of foils by culprit description and by suspect resemblance

The aim of a further experiment was to investigate whether video identifications could be made more reliable by using a culprit-description strategy, rather than a suspect-resemblance strategy to select the foils.[27]

(**Valentine**, *continued on page* 35)

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(Ebbesen/Finklea, *continued from page* 12)

with higher rates of filler choices. This pattern remains constant across those lineups known to contain only a single suspect.

We recorded a total of 257 high confidence identifications (including all suspect structures and relationship categories). Of these 186 were suspect choices, 64 were no choices, and seven were filler choices. Thus, the rate of known errors for high confidence choices was 7/257 or 2.7 percent When looking solely at those single-suspect lineups containing identifications of strangers, it is of some interest to note that there was only one known error (filler choice) out of a total of 65 high confidence identifications regardless of lineup type and procedure. Out of 81 high confidence stranger identifications (for both single and multiple-suspect lineups), there was also only one filler choice.

If witnesses were influenced by investigators in the simultaneous and not the sequential/blind procedure, then they should be more confident in their choices, on average, in the simultaneous than the sequential procedure. When we examined the percentage of highly confident witnesses ("That's him. I'm certain."; "100 percent sure."; "100 percent absolutely positive."; "I'm positive that's the one that shot me."; "Yep, that's him. I'm sure, 200 percent") for each lineup procedure, 78.3 percent and 77.1 percent were highly confident in their choices and 7.8 percent and 9.8 percent expressed low confidence ("I think that's him, but I can't be positive.", ""He looks like the guy, but I'm not positive.", "#1 could have been the passenger.", "Only 45 percent sure.") in the simultaneous and sequential lineup procedure, respectively. Thus, contrary to the investigator influence explanation, witnesses were not more confident in their choices under the simultaneous than sequential lineup procedure.

We can test the investigator influence explanation even more precisely by noting that if the administrator was leaking cues to pick the suspect (and not the fillers) during the simultaneous lineups, only those witnesses that picked the suspect would have the consensual validation of the their choices. Those who picked the fillers would actually be disagreeing with the administrator's influence attempt. This reasoning predicts that the witnesses viewing the simultaneous lineup (and who chose the suspect) should be more confident in those choices than witnesses who chose the suspect from a sequential lineup. In contrast, those who chose the fillers from a simultaneous lineup should be less confident than those who chose fillers from a sequential lineup. We analyzed the percent of witnesses who expressed high confidence for suspect choices and witnesses who expressed high confidence for filler choices. For simultaneous lineups, 69 out of 87 (or 79.3 percent of the) witnesses who chose the suspect did so with high confidence. For sequential lineups, 118 out of 140 (or 84.3 percent of the) witnesses who chose the suspect did so with high confidence. Thus, if anything, contrary to the investigator bias explanation, witnesses were more likely to be confident in their suspect choices in sequential/blind lineups than in simultaneous lineups.

When the filler choices were examined, 66.7 percent of the filler choices made to simultaneous lineups and 21.5 percent made to sequential lineups were done so with high confidence. While the Ns are small, the trend is nonetheless opposite to the investigator influence explanation for the results. Thus, those who chose a filler from a simultaneous lineup were more confident even though their choices should have disagreed with

(Ebbesen/Finklea, *continued on page* 28)

Table 3. Number and Percent of Suspect and Filler Choices as a Function of Racial Similarity of Witness/ Victim and Culprit for All Lineups Containing Race Information

Racial Similarity	Number of Choices			Percent of Choices	
	Suspect	Filler	No Choice	Suspect	Filler
Other Race	126	13	127	47.37	4.86
Same Race	303	18	138	66.01	3.92
Total	429	31	265		

(**Ebbesen/Finklea**, *continued from page* 27)

the influence attempts of the administrator (assuming they existed).

iii) Investigator bias and cross-racial identifications

General consensus among experts is that an own-race bias exists such that witnesses are more accurate in their selections from lineups of their own race than in their selections from lineups containing individuals of a different race.[17] Consistent with this idea, results from the Illinois Pilot Program[18] (Table 3) indicate the probability that witness/victims chose a suspect increased when the suspect and witness were of the same race compared to when they were of different races. However, the filler choice rates were unaffected. Thus, when witness/victims attempted to identify suspects who were in a different racial group than their own, they were less likely to identify the suspect as the culprit and were no more likely to make a known error by identifying a filler. Another way to describe this result is that when confronted with an other-race lineup, suspects were less likely to choose someone as the perpetrator.

Examining the cross-racial data yields findings inconsistent with the notion of stronger investigator bias in simultaneous lineups. Investigator bias should be predictably stronger when memory for the culprit is weak. Research on the own-race bias would suggest that witnesses have weaker memory for culprits of another race than for culprits of their shared race. It would be hypothesized then, that effects of investigator bias would be more sizeable between simultaneous and sequential lineups given cross-racial identifications than would be seen in same-race simultaneous and sequential identifications. Suspect choice rates in same- and other-race simultaneous lineups were 188/267 (70.41 percent) and 74/140 (52.86 percent) respectively, while filler choice rates were 3/267 (1.12 percent) and 4/140 (2.86 percent). These rates can be compared to suspect choices in same- and other-race sequential lineups at 115/192 (59.9 percent) and 51/125 (40.8 percent) respectively, while filler choice rates were 15/192 (7.81 percent) and 9/125 (7.2 percent). Data is included from both single and multiple-suspect lineups.

As can be seen, the increase in suspect choice rates from sequential to simultaneous lineups was not larger when witnesses had presumed weaker memories for other-race suspects (40.8 percent v. 52.9 percent) than stronger memories for same-race suspects (59.9 percent v. 70.4 percent). In addition, the decrease in filler choices was not larger for other-race fillers (7.2 percent v. 2.9 percent) than same-race fillers (7.9 percent v. 1.1 percent). In short, these results are inconsistent with the investigator influence explanation.

Addressing critics of the Illinois Pilot Program

Some critics may argue that the results of the Illinois study are compromised by a confound between lineup procedure and blind testing. That is, the sequential lineups were conducted by investigators blind to the identity of the suspect in the lineup, whereas the investigators administering simultaneous lineups were not blind to the suspect's identity. These conditions, however, were proposed as a package deal, meaning that the double-blind sequential lineup represents the policy as it would and should be instantiated over the traditional lineup. Thus, in evaluating the proposed policy change, we compared the components of the proposed change with the standing policy. Had the effects of lineup procedure and blind testing been evaluated independently, researchers would not be able to draw conclusions about the suggested policy change as a whole. The Illinois Pilot Program[19] was not designed to test the varying options of simultaneous/blind, simultaneous/non-blind, sequential/blind and sequential/non-blind. These four procedures would need to be evaluated separately for the most comprehensive assessment. The primary conclusion researchers can make is that the sequential double-blind procedure, as tested in Illinois, is not superior to traditional simultaneous lineups.

Previous field studies that promote the success of sequential double-blind lineups, such as that in Hennepin County, MN,[20] have not included traditional simultaneous control groups to fully examine the proposed policy change. Regardless, results of the Hennepin County program closely mirror those of the Illinois Pilot Program[21] with a 54 percent suspect identification rate and eight percent filler choice rate

(**Ebbesen/Finklea**, *continued on page* 29)

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(**Ebbesen/Finklea**, *continued from page* 28)

for all known single-suspect, double-blind sequential lineups. Had a control group been included, is it not possible that they would have also seen a higher rate of suspect identifications and lower rate of filler choices in traditional single-suspect, simultaneous lineups? The error on which researchers have clearly focused is that of reducing false identifications, while omitting the consequences of a witness failing to select the suspect.

With respect to any policy, the details must be clearly articulated. Simply indicating that a sequential lineup procedure is to be instituted is insufficient. There are several procedural variations of a sequential lineup, which if altered and implemented in different combinations, may dramatically affect any resulting eyewitness decision. One such variation is the inclusion of a stop rule, in which witnesses are told they will not be allowed to view the remaining alternatives in the lineup once they have made a positive identification. If no stop rule is included (following the sequential lineup procedure of the present study), an interesting psychological phenomenon arises. Suppose a witness positively identifies a foil in the lineup before the suspect is shown. What do witnesses do when they then see the suspect? Do they raise their decision criterion at that point? Do they dismiss the suspect's photo because now that they believe they have completed the task of making a selection, are no longer paying careful attention to the lineup? In other words, we need to determine where witnesses set their decision criterion for making a selection from the lineup and whether this decision criterion is set differentially for simultaneous and sequential lineup procedures.[22]

These issues beg the question regarding the decision strategy witnesses use in their selections. One key variable in this decision process is the witness' strength of memory for the culprit. Also, a witness' ability to discriminate between the actual culprit and innocent foils may depend on: how similar innocent foils appear to the culprit, how similar the culprit's looks in the lineup are to his looks at the time of the crime, and how similar an innocent suspect's looks in the lineup are to the culprit's looks at the time of the crime. It is also important to know what witnesses use as their standard for determining this degree of match. When witnesses are presented with items is sequence, rather than all at once, we raise the distinct possibility that witnesses will use different decision criterion for different items as they progress through the sequence.

One of the key problems with the nature of a sequential protocol containing a stop rule is that it prevents the witness from being able to choose the best lineup member when there is more than one that is above the witness's decision criterion for a good match. Thus, in low similarity lineups where the witness' ability to discriminate (between the suspect and foils) is high, and the witness' criterion for choosing is high, one would see a small difference in selection choices using different decision strategies.[23] Conversely, in high similarity lineups, we might expect that one of the foils presented before the suspect might be a "good enough" match for the witness to pick him. However, were this foil and the suspect presented side by side, the witness might choose the suspect because the suspect is an even better match to the witness' memory than is the foil. One consequence of this is that more foils will be chosen when the suspect is placed later in the lineup.

When witness/victims attempted to identify suspects who were in a different racial group than their own, they were less likely to identify the suspects as the culprit and were no more likely to make a known error by identifying a filler. Another way to describe this result is that when confronted with an other-race lineup, suspects were less likely to choose someone as the perpetrator.

All foils that meet or exceed the witness' criterion for making a positive identification will be chosen before the witness even gets to see the suspect.

From the Illinois Pilot Program data,[24] we were able to examine differences in the rate of sequential lineup fillers selected before and after the suspect appeared in the lineup. Of the 21 sequential lineup foil choices (compared to a total of six simultaneous lineup foils chosen), 13 were selected by witnesses before the witness had the opportunity to view the suspect in the lineup, while eight were chosen after the suspect

(**Ebbesen/Finklea**, *continued on page* 30)

(**Ebbesen/Finklea**, *continued from page* 29)

was viewed. Eliminating the pre-suspect foil choices in sequential lineups, the difference in filler choice rates between the two lineup procedures is virtually eliminated. Interestingly, these results suggest that the higher rate of foil choices seen in sequential lineups may be driven by pre-suspect fillers that meet or exceed a witness's decision criterion for making a positive identification.

Future Research

Evident from the current discussion, more laboratory and field research is needed to examine the efficacy of varying methods of conducting eyewitness identification lineups. Sequential double-blind lineups do not appear to yield fewer known errors than traditional simultaneous lineups. No single study can yield definitive results or subsequent recommendations that are to be widely applied.[25] These findings should encourage more law enforcement agencies to conduct further research to scientifically investigate the costs and benefits that would be associated with instituting a given policy change. As seen from the different pattern of findings in Chicago and Evanston compared to those in Joliet, any policy changes must be evaluated against jurisdictional differences in the outcome and perhaps adjusted accordingly.

Furthermore, procedural variants of sequential lineups should be clearly defined and examined before any policy recommendations should be enacted, and the same holds for details of the double-blind procedure. In addition to the aforementioned option of including a stop rule, sequential lineups can differ in protocol based on several factors: what witnesses believe about the size of the lineup, what happens to lineup items after they are viewed, how many passes through the lineup a witness is given, and where in the lineup the suspect is positioned. The specifics of the sequential procedure may play an important role in eyewitness accuracy. For example, providing witnesses with information on the number of alternatives in the lineup could create pressure for the eyewitness to select someone before the end of the lineup is reached, or it may build expectations toward the end of the lineup that the culprit is not present. Conversely, if witnesses are not told how many faces are in the lineup, they may withhold making a selection, believing there are always more alternatives to be seen. If each alternative remains in view after it is presented, witnesses may utilize these as comparisons to the current item upon which they are deciding. Another possibility is to remove each item from view after a yes/no decision has been made, forcing an absolute decision for each item. Also, allowing multiple passes through a lineup may lead witnesses to withhold a selection until all lineup members have been viewed and compared to one another.

Yes, the specifics of a particular protocol can easily be defined as to which procedure will be utilized. However, research has not yet been conducted to determine how all procedural variations of sequential lineups interact to produce different results, nor has it been determined how foil choice rates and suspect (guilty suspect vs. innocent suspect) choice rates are affected by these combinations. Further research is needed regarding the double-blind procedure and its effects on accuracy as well. Options to be evaluated include witnesses making selections in private, in front of a blind administrator, or on a computer screen. The main argument for a double-blind procedure stems from the presumed possibility of investigators inadvertently sending signals to witnesses, thus influencing their selections.[26] Perhaps, though, the mere presence of an investigator (blind or not) may differentially affect witness selections. For this reason, the recommended blinding procedure should be evaluated with witnesses making their final selections without any investigator contact. Alternatively, simply telling the witnesses that they should not assume that the investigator knows who the suspect is might be more than sufficient to produce whatever benefits researchers believe might be achieved with the more complex double-blind procedure.

When research is proposed to compare polices, all recommendations for change should include methods and measures that will allow one to monitor which procedure is more successful; before commencing research, the measures of success should be defined and agreed upon before any policy change is instituted. In the present domain, work that uses DNA, for example, to establish the accuracy of suspect choices would avoid criticisms about the use of filler choices

(**Ebbesen/Finklea**, *continued on page 44*)

(**Doyle**, *continued from page* 16)

enforcement purposes independent of reliability issues. Chicago, for example, has recently paid $15,000,000 to plaintiffs who proved that police "tipped" lineup witnesses.[7] In all likelihood that award will generate a legion of similar suits—some justified, most unjustified, but all expensive to defend. "Double-blind" administration of lineups and arrays can allow the police effectively to defend themselves against such claims: a "double-blind" administrator can't tip anyone. Double-blind techniques will also allow prosecutors to insulate the investigators from similar defense attacks in criminal trials.

There is a new zone of cooperation developing, where mutual education occurs between the street, the lab and the courtroom. This zone has been increasingly utilized in the aftermath of the DNA exoneration cases. Where practitioners have ventured into this zone, in Boston, New Jersey and Minnesota, for example, they have found the results to be rewarding—to mark a place in which to generate genuine improvements in practice. It presents novel challenges, but it also promises significant rewards. It was with those rewards (and those challenges) in mind that we joined with our colleagues to form the John Jay Center For Modern Forensic Practice, an effort to build a model of a neutral, academic venue where practitioners and scientists can meet to protect the innocent and catch the guilty—to get, in the words of Hennepin County District Attorney Amy Klobuchar, "Stronger cases and more justice."

Still, there isn't much point in involving scientists in these discussions unless we will allow them to "do science"—to approach the empirical questions we have identified with their proven, rigorous procedures. The Illinois Legislature posed an empirical question, and it ought have, but did not, receive an empirical answer derived by accepted scientific practice. We think that there are ways to apply the "objective scientific methodologies" that the Illinois Legislature wanted in the field. All of us have a lot to learn both from rigorous field studies and from the complementary future laboratory studies that must answer questions that the field studies are structurally unable to approach. As a next step along the path we have sketched a proposed protocol for future eyewitness field studies, which is reproduced below. Like everything else in this new zone of cooperation our suggestion is up for discussion.

We believe one particular aspect of the situation deserves priority treatment—the advent of efficient, reliable, convenient digital technology. Inevitably this technology because of its convenience and flexibility will soon begin to dominate eyewitness investigative procedures. That looming fact provides a spur to immediate further field studies, but it can also be a very significant aid to conducting those field studies. The capacity of new technologies to capture data and facilitate a simple, witness-driven identification encounter with a minimum of disruption in police operations can help to unravel many of the practical difficulties that led to the fatally confounded study recounted in the Mecklenburg Report. The capacity to simply standing on the far side of a laptop while the witness makes choices and records his or her level of confidence can allow the police to accomplish a great deal in the way of preserving both scientific rigor and investigative continuity.

One hundred years after Hugo Munsterberg first upbraided the legal system about its misuse of eyewitness memory,[8] we still have a lot to learn from each other about the resolution of cases that turn on eyewitness memory. The learning should be around the conference table with everyone included, not in the courtroom, or through the press release. Our hope is that conference tables at academic institutions around the country may provide the neutral ground where all parties can engage the science to inform local practice. One of the things we'd bring to the conference table is the protocol that follows:

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[1] James Doyle was a panelist for *New Policies, New Practices: Fresh Perspectives on Eyewitness Identification* on April 21, 2006 at Loyola University Chicago School of Law. He and his co-authors are from the Center of for Modern Forensic Practice, John Jay College of Criminal Justice at the City University of New York.

[2] *See* Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures by Sheri H. Mecklenburg, Program Director (Mar. 17, 2006) *available at* www.chicagopolice.org.

(**Doyle**, *continued on page* 46)