RECONCILING THE LAW WITH THE SCIENCE OF EYEWITNESS IDENTIFICATION

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What’s the problem?

Eyewitness misidentification is the leading cause of wrongful convictions

Eyewitness misidentification has played a role in over seventy percent of convictions overturned by DNA evidence.

Innocence Project, *Eyewitness Misidentifications*

What goes wrong?

Why are we so bad at evaluating the reliability of eyewitness identifications?

Eyewitness identification testimony is very powerful

Eyewitness is typically honest and sincere in belief about identity of perpetrator

Events described can be traumatic and emotional

The science of eyewitness identifications is not intuitive

- Richard S. Schmechel, et al., *Beyond the Ken? Testing Juror's Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177 (2006)

Can we do better?

Central questions

How reliable is eyewitness memory?

Why do eyewitnesses make errors?

Can eyewitness error be prevented?

- (and accurate memory preserved?)

How can eyewitness evidence be evaluated?

Real cases inform us:

Real cases inform us:

Well-intentioned confident eyewitnesses can be wrong

Circumstances under which errors occur

- Traditional identification practices (lineups)
- Culprit-absent lineups

Inadequacy of existing legal safeguards

Eyewitness memory is highly malleable.

- Not like a video recorder

Eyewitness confidence is highly malleable.

- Confidence-on-stand and accuracy not necessarily related.

How are eyewitnesses vulnerable?

Pressure on eyewitness: to generate a detailed and coherent narrative of what happened and who is responsible

Processes of perception, memory, and decision-making that are *adequate* for us *most* of the time may not work ideally for eyewitnesses

Predictable errors in judgment

Most predictable: failure to discern the *absence* of the guilty culprit in the lineup

In lab and field: Eyewitness ID error rate

There is no single "rate" of eyewitness error

Lab: push the ID error rate around by changing

- Circumstances of the crime
- Offender
- Eyewitness
- Procedures used to collect evidence.

More than memory: *Decision* affected by pressure, motivation, assumptions, imagination, and external intrusions on memory

Protection and Evaluation of Memory as Trace Evidence

Seal off area (Isolate witness)

Immediately, not later (memory deteriorates)

Don't mix samples (memory conformity)

Take samples carefully (best practices)

Experts only (trained in memory principles)

- Every exchange: vulnerable to contamination

Once contaminated, it's ruined

Store safely (document) Memory will decay, change

Why do eyewitnesses make errors?

Stages of Eyewitness Memory:

At time of crime:

- Perception
- Encoding the memory

At time of investigation:

- Retention
- Retrieval of the memory (interviews, IDs)

To evaluate eyewitness evidence:

Timeline: Follow memory stages

Conditions for encoding (estimator variables)

Evolution of witness narrative and experience across time
- Contamination or loss of memory
- Changes in description, confidence
- Interactions with co-witnesses, media, etc.

Identification tasks (system variables)
- Composite, show-up, lineup array, live lineup
- Include (non-surprising) court ID

Best practices used?

Estimator variables: Set the stage…

Law assumes the eyewitness memory is based only on the crime event…what the witness could view/hear and encode into memory at that time.

Perception: distance, illumination, obstacles

1. Assess/Recreate the scene

What could be perceived?

Illumination, distance, obstacles

- Security video/phone video

Duration of the event

- Witnesses tend to overestimate

Condition of the Witness

- Intoxication, age, glasses, hearing aids, etc.?
- Stress, violence, injury

What could be seen of the offender?

- Disguises/coverings
- Stranger or familiar
- Salient features, distinctive tattoos, hair, scar
- Race of offender vs. victim (cross-race effect)

Where was attention? (eyes on the culprit)

- Competition for attention, distractions
- Weapon-focus
- Complexity, multiple perps, action
- Stress: Fight or flight

Documentation at the time, including 911 call:

Description of the offender

Did you know this person? How so?

View

Attention

See facial features? Distinctive? Elaborate…

Would you be able to recognize?

Clothing…weapon…car…

2. Protect/Assess evolution of “memory” across time

Document on time line…

Memory loss

Memory interference

Separate the witnesses

Interview sooner rather than later

Cognitive Interview (provide cues to memory, not leading or contaminating info)

Video/audiotape

Track potential influences (friends, Internet, media, police, etc.)

3. Protect/Assess identification evidence

How many identifications were attempted?

Under what circumstances?

Were there attempts that did not result in IDs of the suspect?

(Filler IDs and no-IDs are useful information)

Did the ID'd-suspect match the description?

Evaluation of identification procedure: Lineup structure

Can witness can make an ID without memory?

Is there means to detect an unreliable witness?

Is there protection for innocent suspect?

Evidence Failure:

- All-suspect lineup
- Show-up
- Biased lineup (suspect stands out)

Best Practice

Lineup Structure

Only one suspect per lineup

Suspect surrounded by 5+ known-innocents

Every lineup member fits description

Suspect does not stand out

Evaluation of identification procedure: Lineup procedure

Can witness be influenced by administrator?

Can witness be pressured by instructions?

Can witness be influenced by presentation format?

Evidence failure:

- Lineup administrator cues (non-blind admin.)
- Biased instructions, pressure witness to pick
- Simultaneous lineup (“closest”)

Best practice

Lineup Procedure

Double-Blind lineup administration

Unbiased Cautionary Instruction: “The person you saw may or may not be in this lineup…”

Sequential Presentation of lineup

Identification time/verbalization

Video/audio documentation

Specific eyewitness vulnerability:

Post-Identification feedback

Confidence inflation and memory distortion

Best practice

Take a confidence statement at the time of the ID and prior to any feedback.

Use a double-blind lineup procedure.

Specific eyewitness vulnerability:

Witness remembers the face, but confuses or assumes wrong context = identity blending

Witness “solves the crime” on the Internet

Repeated identification procedures increase the likelihood of an identification, even if wrong

And increase witness confidence.

Best practice

Do not show the same suspect to the same witness in multiple identification tasks; only first one counts.

Evaluate potential for “viewings” of suspect prior to lineup and/or in-court ID

Documentation of lineup and exchange:

Photos: how many? How selected? Who were the fillers?

How many arrays did the witness see?

Other persons/witnesses present?

Verbalizations, qualifiers, questions (and answers)?

Identify or discuss more than one lineup member?

What, if anything stated to witness prior to lineup?

What, if anything, stated after ID, lineup?

Issues of suggestibility: Handcuffs? Clothing?

From a juror's perspective:

Eyewitness has no reason to lie

Eyewitness is very confident

Eyewitness picked *him* from the lineup.

How to explain?

For jurors, not obvious:

- Limits to human perception and memory
- Reconstructive memory process
- Confidence inflation
- Memory errors by omission, also by commission
- Power of identification procedures to shape witness memory and decisions

National Academy of Sciences (2014)

- Eyewitness science is sound
- Police training and education
- Scientific framework evidence (experts)

Thank you

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