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Applying Eyewitness Identification Research to the Legal System: A Glance at Where We Have Been and Where We Could Go☆

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Psychologists have made attempts to apply psychological knowledge on eyewitness issues to the legal system for over a century. But it was not until the 1990s that an organization of psychological researchers (the American Psychology-Law Society) made concrete recommendations in a white paper concerning eyewitness identification. These recommendations, along with the discovery of wrongful convictions from mistaken identification, have shaped policies and practices in many jurisdictions across the U.S. We discuss the white paper recommendations and how those recommendations have held up over time. Then, we discuss a more recent idea concerning the need for a reasonable-suspicion requirement before subjecting an individual to the inherent risk of an identification procedure.

Keywords: Eyewitness identification, Legal application, Lineup procedures

Perception, memory, and decision-making are imperfect and psychologists have been applying this knowledge to the legal system for over 100 years. One of the most productive aspects of this application has come from programmatic experimental research on eyewitness identification and reliability, which began in earnest in the mid to late 1970s. But the legal system in the United States did not take seriously the problem of mistaken eyewitness identification until the mid-1990s when forensic DNA testing began uncovering cases of innocent people who were mistakenly identified by eyewitnesses and convicted by juries. Today, scientific psychology has a voice in the legal system on eyewitness issues, and this voice is heard by courts, police, and policy makers.

Psychology has played a major role over the last two decades in effecting change in the U.S. legal system regarding eyewitness identification evidence. In 1999, for example, the first U.S. national guidelines for law enforcement on the collection and preservation of eyewitness evidence were developed by the National Institute of Justice, commissioned by the U.S. Department of Justice (National Institute of Justice, 1999). These guidelines relied heavily on input from psychological researchers and the psychological literature on eyewitness identification (see Wells et al., 2000). Also, significant state Supreme Court cases in New Jersey (*State v. Henderson*, 2011), Oregon (*State v. Lawson*, 2012), and other states have looked to eyewitness identification research to help fashion new rules governing the admissibility of eyewitness identification evidence in court. Likewise, the recommended policies for lineups that were put forth by the International Association of Chiefs of Police (2013) relied heavily in psychological research. A growing number of states (e.g., North Carolina, Ohio, Connecticut, Kansas, Illinois, New Jersey, Maryland, and Vermont), now have laws requiring double-blind lineup administration, a procedural recommendation that came from eyewitness researchers. Furthermore, all except two U.S. states now permit expert testimony in court on eyewitness identification issues. These are examples of huge changes in how the legal system collects and interprets eyewitness identification evidence in the U.S., largely spurred and informed by psychological research.

A prominent event that helped shape these changes in how the legal system handles eyewitness identification evidence was the publication of the white paper on lineups, commissioned by

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the American Psychology-Law Society (Wells et al., 1998). In the current article we describe the five recommendations that were contained in the white paper, the foundation for those recommendations, the impact of those recommendations, and how those recommendations have held up to the test of time.

The American Psychology-Law Society Recommendations on Lineups

The APLS white paper outlined five recommendations for the collection and preservation of eyewitness identification evidence (Wells et al., 1998). Specifically, the recommendations were that:

1. A lineup should contain only one person who is a possible suspect with the remaining members being known-innocent fillers.
2. Lineup fillers need to be chosen carefully so that the suspect does not stand out based on how the witness described the culprit (or for other reasons).
3. The person conducting the lineup should not know which person is the suspect and which are merely fillers (the double-blind lineup).
4. Pre-lineup instructions should warn the witness that the culprit might not be in the lineup.
5. Witnesses should be asked to indicate how certain they are in any identification that is made.

Ironically, some eyewitness researchers seem to have a false memory that the AP-LS white paper also made other recommendations known to improve lineup fairness, such as sequential lineups. But, it did not. Instead, the white paper was a relatively conservative proposition containing only these five recommendations. The white paper was a 20-month project involving public postings of drafts, wide distribution, public meetings at conferences, and extensive peer review. The white paper was also the first peer-reviewed publication to document DNA exonerations—the characteristics of the first 40 DNA exoneration cases were discussed as well as the dominant role that mistaken eyewitness identification played in those wrongful convictions.

Why These Five Recommendations and How Have They Held Up?

The idea of the AP-LS white paper on lineups was to formulate a small number of widely supported conclusions based on the eyewitness identification literature, grounded in science. Grounding in science does not necessarily mean that a recommendation rests directly on lab data from eyewitness identification experiments. For example, there was little data at the time comparing double-blind versus non-blind lineup administration. But, there is a strong analogy between police conducting a lineup and researchers conducting an experiment (Wells & Luus, 1990). After all, police have a hypothesis (that their suspect is the perpetrator), create a design (embed the suspect among fillers), execute a procedure (instruct witnesses before viewing), gather the data (record any identifications and collect confidence statements), and interpret the results (increase or decrease their belief that the suspect is the culprit based on the lineup results). But experiments are consistently shown to be susceptible to experimenter effects (e.g., Rosenthal & Rubin, 1978), and the idea of conducting a lineup using a double-blind procedure is an obvious way to export this knowledge to improve the police practice of conducting lineups. Until psychology advocated the double-blind lineup, the legal system had never considered such an idea.

Whereas the double-blind lineup recommendation stemmed from the lineups-as-experiments analogy and our knowledge of how to prevent external influence from testers by using double-blind testing methods, the other four recommendations were grounded in empirical lab data. The eyewitness identification literature had good evidence at that time that poor lineup fillers increase the risk of mistaken identifications (e.g., Wells, Rydell, & Seelau, 1993) and that failure to warn witnesses that the culprit might not be in the lineup increases the risk of mistaken identifications (e.g., Malpass & Devine, 1981). Furthermore, empirical data showed that the certainty of the witness was diagnostic of the accuracy of the witness (e.g., Sporer, Penrod, Read, & Cutler, 1995), but only if a certainty statement is taken at the time of the identification while it was still uncontaminated by confirming feedback (Wells & Bradfield, 1998).

How has the white paper been received by the justice system? All the evidence indicates that it has been received quite well. The five recommendations in the white paper formed the model on which the NIJ guidelines on eyewitness identification were built (National Institute of Justice, 1999) and these guidelines were distributed to the more than 16,000 law enforcement agencies across the U.S. These same five recommendations remain at the core of specific reforms put forth by the Innocence Project, the International Association of Chiefs of Police, and many other legal bodies. And, the five recommendations in the white paper underpin the numerous state and local-level reforms to eyewitness identification procedures that continue to unfold across U.S. jurisdictions.

Overall, it appears to us that the AP-LS recommendations have held up well to the test of time. In 2014, a review of the eyewitness identification literature was conducted by a committee of the National Research Council (2014). The NRC report supports all five of the AP-LS white paper recommendations and goes even further to make additional recommendations (e.g., videotaping all identification procedures, police training).

At the same time, it is not surprising that now, nearly two decades later, there are a few researchers who have questioned some aspects of these recommendations. For example, one researcher has questioned the use of double-blind procedures when conducting lineups (Clark, 2012). Clark does not disagree that lineup administrators can influence witness choices, but Clark argues that nudges from a lineup administrator tend to more readily shift a witness from an incorrect identification to a correct identification of the culprit, rather than shifting the witness to an identification of an innocent suspect. And, if the lineup administrator is usually correct (i.e., the suspect in the lineup is the actual culprit), then single-blind administration might produce better results than double-blind.

Maybe this is true, at least under some conditions. But the justice system clearly requires that eyewitness identification