

## Law versus science and the problem of eyewitness identification

By Timothy S. Eckley

*True Witness: Cops, Courts, Science, and the Battle Against Misidentification*, by James M. Doyle. Palgrave MacMillan. 2005. 223 pages. \$24.95.

*The haunting nature of Franz Kafka's The Trial lies in its everyman aspect: the main character "K." inexplicably finds himself mired in the vagaries of an unfathomable legal system from which he cannot escape. Imagine, however, if it were not fiction. Imagine you were one of the thousands of innocent people imprisoned in the United States for a crime you did not commit.*

In March, 1985, ex-marine Kirk Noble Bloodsworth was tried and convicted for the brutal murder and sexual assault of a nine-year-old girl and sentenced to death by a jury of his peers. He was law enforcement's prime suspect; the prosecution had its man. Five eyewitnesses testified at trial that they had seen Bloodsworth with the victim. After serving two years on death row, his conviction was overturned and he was retried, convicted a second time, and sentenced to two consecutive life terms. It was a crime he did not commit. It's a crime that remains unsolved.

After serving nearly nine years in prison as an innocent man, Bloodsworth was exonerated through DNA testing in 1993 and was released from

prison five months after his mother passed away. He was the first person exonerated from death row by post conviction testing utilizing DNA scientific advances. The details of Bloodsworth's story are far from unique.

According to the *Northwestern Journal of Criminal Law and Criminology* from 1989-2003 340 people were exonerated in the United States. The advent of DNA technology and improved forensic techniques has accelerated the rate of exonerations beyond everyone's expectations, concomitantly exposing alarming weaknesses in the American criminal justice system.

Documented exonerations in America date at least as far back as 1820. What may be surprising, however, is that the oldest, most reliable, most relied upon form of identifying a criminal suspect—eyewitness identification—has been shown to account for more wrongful convictions than all other factors combined. Frailties of human memory and perception have been at the heart of debates about the criminal justice system in this country for nearly 100 years. Only recently, however, in conjunction with the development of peer-reviewed, verifiable psychological science, has the legal system truly begun to acknowledge the prevalence of inaccurate eyewitness identifications and to take steps to prevent the inevitably tragic consequences.

In *True Witness*, James Doyle presents fascinating insights into the world of high-stakes academia fighting to make a difference in mainstream America. More precisely, Doyle traces the history of the strug-

gle of social scientists attempting to effect fundamental changes in the American criminal justice system by laying bare the too-often catastrophic results of blind adherence to and faith in fickle aspects of human nature.

Doyle launches frequent broadsides at the justice system, and frankly universally indicts everyone involved in the administration of justice—law enforcement, lawyers, judges—as being “derisive” towards, “patronizing” of, “hostile” to, and “reflexively” dismissive of psychology specifically, and all of science generally. The oft-repeated criticism of the court system as harboring an ongoing “hostility” and “contempt” towards science is overstated, but that tone is consistent with the balance of this fascinating nonfiction work on the history of psychology and the law, which reads like a novel.

Doyle begins with an entertaining redux of the turn of the 19<sup>th</sup> century heavyweight bout over the role of psychology in the courtroom fought by Hugo Munsterberg, the “father of applied psychology,” and Dean John Henry Wigmore, a towering legal scholar of the age. The story concludes with Attorney General Janet Reno, an unsung but crucial hero in the “law-versus-psychology battle,” and Iowa State psychology professor Gary Wells and his vision of how “psychology could play a role in improving the world,” by improving the accuracy and reliability of eyewitness identifications and procedures. Doyle reports that “each year an estimated 75,000 American prosecutions turn on eyewitness evidence.” Doyle weaves throughout a massive

amount of research the compelling stories of death row exonerees and the tribulations of heroic figures committed to preventing such catastrophes in the future.

### Challenging reliability

Hugo Munsterberg, Doyle notes, was “alert enough to notice” that moral issues in America “inexorably gravitate toward the courts.” (p.15) Munsterberg published a series of essays, ultimately collected in *On the Witness Stand*, including a discourse titled “The Memory of the Witness,” wherein he challenged the reliability of eyewitness accounts by relating his own failed recollections in testimony he gave during the trial of a suspected burglar of his own home. Alarmed and intrigued by the contamination of his own prodigious memory, Munsterberg set out to demonstrate his self-revelations of memory mistakes.

Munsterberg illustrated the relative lack of correlation between a witness’ certainty in testifying to an event and the accuracy of the testimony. He demonstrated the phenomenon that is becoming commonly known today as “confirmatory bias,” which includes the theory that perception, memory, and recall—the fundamental bases of eyewitness testimony—are subject to “suggestion, distortion, and omission, [which] was very bad news for legal procedure,” according to Doyle. (p. 21) Doyle presents a fascinating rendition of a “mock trial” between Wigmore and Munsterberg on the law vs. psychology debate and highlights the crux of the matter: “The cross-examination of ‘Munsterberg’ revealed in humbling fashion that when it came to understanding which particular witness produced a good, and which a bad, verdict psychologists were, just like lawyers, groping in the dark.” (p. 30)

Some 70 years later psychologist Robert Buckhout noted the failure of psychology to contribute significantly to the prevention of faulty eyewitness identification. By the same token, the “Great Engine” of cross-examination—that most stalwart protector of credibility in the courtroom—was like-

wise less than effective in preventing false identifications and wrongful convictions. Buckhout, taking the fight into the courtroom by way of expert testimony, “attacked the videotape version of eyewitness memory at length, explaining that memory was actually a delicate three-stage process of perception, storage, and recall, which was vulnerable at every stage . . . including the social pressures inherent in the environment of a lineup . . . to identify a suspect in order to please authority figures.” (p. 56) Despite the misgivings of many that the work of Buckhout and his colleagues was creating a dangerous weapon for the benefit of all criminal defendants, most of whom are truly guilty, “by increasing juror skepticism about all eyewitnesses,” the eyewitness identification reform movement had at least gained a toehold in the legal system.

### Preventing misidentification

While the psychological experts were indeed making inroads into the courtroom the progress was slow and the practical effect of their efforts regarding eyewitness identification was limited. Then along came Professor Gary Wells. If the legal system was unable sufficiently to identify or rectify errors in eyewitness testimony after they had been made, Gary Wells has been instrumental in developing methods of preventing mistaken identities from occurring in the first place. His formula of “estimator variables” denominated factors the criminal justice system cannot control, such as the race of the perpetrator, circumstances under which the event occurred, the length of the criminal event, and the like, and “system variables,” which are factors under the direct control of the justice system, such as the form and method of witness interviews, suspect interrogations, and identification procedures. This methodology enabled Wells to champion sequential, rather than simultaneous, line-ups and photo arrays.

By focusing on system variables, Wells and his colleagues have been able to posit additional practical reforms in law enforcement’s inter-

rogation and investigation procedures that garner significantly fewer misidentifications with only a marginal drop in positive identifications. In 1997, a working group assembled by Wells recommended to the criminal justice system four peer-reviewed, “best practices:”

1. Double-blind testing. The person supervising the identification procedure should be unaware of who the suspected perpetrator is in order to avoid contaminating the witness’ independent and objective memory.

2. Improving instructions to witnesses. Witnesses should be instructed that the suspected criminal perpetrator “may, or may not, be” in the line-up to reduce the number of “false hits.”

3. Selecting better “fillers,” by matching the witness’ description of the criminal, not law enforcement’s early suspect.

4. Gauging eyewitness confidence immediately before the influence of post-identification feedback. (pp. 164-65)

### Advancing deliberately

The United States justice system suffers a beating at the hands of James Doyle. Introspective systems of justice, such as ours, do tend to move more slowly than one might wish, especially in an era of rapid scientific advancement. Often, however, it advances quite deliberately with good reason. The courts have readily embraced DNA technology, as they have many, many other revolutionary scientific advancements.

When confronted with novel scientific evidence or theories, the judge’s role of gatekeeper of the courtroom and guardian of the jury must be played deliberately. As the then Court of Appeals for the District of Columbia noted in 1923 “Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . .” *Frye v. United States*, 293 F. 1013, 1014 (1923). Writ-

ing more recently for the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Justice Harry Blackmun observed the “important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.” The struggle is great for many reasons, including that it threatens the traditional province of the jury of determining matters of credibility and the weight of evidence, of which it is the role of the presiding judge to protect. Even Doyle acknowledges that “The science will not stay frozen forever. Will further research prove that sequential lineups are really no better than simultaneous ones?” (p. 205)

As Doyle iterates, some reluctance to accepting new scientific eyewitness identification techniques stems from the fear that guilty defendants, and defense lawyers charged with representing them, would use the mountains of information and scientific studies to cast skepticism on all eye-

witness testimony no matter how irrefutable it might otherwise be. If the standard of proof is beyond a reasonable doubt, and the crucial evidence is eyewitness identification, and any particular eyewitness identification is shown to be the product of procedure inconsistent with cutting edge standards and is thus inherently unreliable—the result is a dangerous indictment of the entire criminal justice system. “The prosecutors thought [Wells] was handing defense lawyers a new weapon with which to beat the cops over the head.” (p. 173)

### High stakes

The stakes involved with wrongful convictions could not be higher. And perhaps the justice system has blindly or stubbornly held too long to the notion of eyewitness infallibility. In this light, Doyle, the psychological researchers, and others are justly impatient and frustrated with the pace of reform. While Munsterberg may have begun this struggle nearly 100 years ago, it is really relatively recently that the pioneering work of Gary Wells and others has been done. And even so, if not for

the advent of DNA technology, psychology and overdue reform in eyewitness identification procedures would still be relegated to and subject to the vagaries of trench warfare in the courtroom governed by a legal system of rules and procedures that by design is anathema to affirmatively imposing wholesale reform beyond its own hallowed halls.

The courts, constrained by precedent, are charged with and accustomed to acting as referees, not players, in the game of law enforcement. Although they should not sit passively in light of the recent developments in forensic eyewitness identification, they are not well suited to effect systemic changes of this nature. *True Witness* should serve as a wake-up call for all stakeholders in the administration of justice to recognize that only through broad cooperation can meaningful system-wide change be accomplished. ❧

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