

RACE TO INJUSTICE

**LESSONS LEARNED FROM THE
DUKE LACROSSE RAPE CASE**

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Michael L. Seigel

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CHAPTER THIRTEEN

The Duke Lacrosse Rape Investigation: How Not to Do Eyewitness-Identification Procedures

Gary L. Wells, Brian L. Cutler, & Lisa E. Hazel

Introduction

There is no doubt about the power of eyewitness-identification evidence to obtain convictions in criminal cases. In some ways, the best evidence for this comes from the fact that approximately 75 percent of the 215 DNA-based exonerations were cases of mistaken identification that were accepted by juries as evidence that those innocent individuals were guilty.¹ But, well before the onset of forensic DNA testing in the 1990s, experiments by psychological scientists had demonstrated that mistaken identifications occur with surprising frequency and that mistaken identification testimony is difficult to distinguish from accurate identification testimony.² Hence, a central theme for psycho-

1. See Innocence Project, *Eyewitness Misidentification*, INNOCENCEPROJECT.ORG, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

2. See R.C.L. Lindsay, G.L. Wells & C. Rumpel, *Can People Detect Eyewitness Identification Accuracy Within and Between Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981); G.L. Wells, T.J. Ferguson & R.C.L. Lindsay, *The Tractability of Eyewitness Confidence and Its Implication for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981); G.L. Wells, R.C.L. Lindsay & T.J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979); G.L. Wells, R.C.L. Lindsay & J.P. Toussignant, *Effects of Expert Psychological Advice on Juror Judgments in Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980).

logical science has been the development of ways to prevent mistaken identifications from happening in the first place.³ Broad treatments of the scientific literature on eyewitness identification are available in numerous books⁴ and scholarly articles.⁵

The Duke lacrosse rape case represents an interesting problem that is, in some respects, different from the prototypical mistaken identification case. Usually, the concern is that an eyewitness will make a "genuine error" in the sense that the eyewitness is mistaken but honestly believes that the identified person is the perpetrator. If we accept the apparent consensus that a rape never even occurred in the Duke lacrosse case, then we must consider two possibilities. One is that the "victim-witness" was simply lying and never believed that the individuals she identified had raped her. The other possibility is that she had developed a false memory of being raped and somehow came to believe that these were the men who had committed the act. We have no way of knowing with certainty at this time which of these two possibilities, the assumption of lying or the assumption of genuine error, is closer to the truth. For our current purposes, however, the distinction matters little because, under either assumption, the identification procedures used in the Duke lacrosse case were profoundly flawed, dangerous, and nondiagnostic of the guilt or innocence of the accused individuals.

The principal thesis of this chapter is that the legal system had the opportunity, ability, and tools readily at its disposal to conduct a proper identification procedure. Furthermore, a proper identification procedure would have likely shown that the victim-witness was not credible and, therefore, absent other compelling evidence, charges would not have been filed. The Duke lacrosse case also holds a special irony for eyewitness scientists because the Durham Police Department had adopted new eyewitness identification procedures prior to these allegations of rape, procedures that were modeled on the best that eyewitness science had to offer.⁶ Indeed, North Carolina had al-

3. G.L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERS. & SOC. PSYCHOL. 1546 (1978).

4. See e.g., BRIAN L. CUTLER & STEVEN D. PERKOD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., 2007).

5. G.L. Wells & D.S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 32 LAW & HUMAN BEHAV. (forthcoming 2008).

6. In the interests of full disclosure, readers should note that the first two authors of this chapter were expert eyewitness consultants for the defense in the Duke lacrosse case. In addition, they consulted for the North Carolina Actual Innocence Commission to help de-

ready become a model state in leading the reform of eyewitness-identification procedures, thanks largely to its North Carolina Actual Innocence Commission, chaired by then-Chief Justice of the North Carolina Supreme Court, Beverly Lake. In fact, critical public meetings of the North Carolina Innocence Commission that announced and described the recommendations for eyewitness identification procedures took place with great fanfare on June 10, 2004, in—of all places—Durham, North Carolina.

Although the Durham Police Department adopted the North Carolina Actual Innocence Commission's recommended eyewitness identification procedures as their policy prior to the Duke case, the procedures used in that case violated what can be considered "rule one" of those procedures, which we will describe later. Precisely why the Durham Police Department's own identification procedures were not followed in this case is not clear to us. It could be argued that proper identification procedures would have been followed if the Durham Police Department itself had total control of the investigation and that it was the Prosecutor Mike Nifong who directed an identification procedure that was flawed. Additional inquiries might sort out that particular puzzle. We take no position on who created the identification procedure in the Duke lacrosse case or why it was created; we only know that it was a very bad idea.

In the remainder of this chapter, we will describe some of the eyewitness science as it relates to the basic idea of eyewitness identification and discuss why procedural safeguards are so important. Then, we will analyze the procedures used in the Duke lacrosse rape case and the behaviors of the alleged victim-witness. Finally, we will examine how the identification procedures could have been improved and how this would likely have uncovered the witness' credibility problems early in the process.

The Logic and Science of Eyewitness Identification

The general idea of eyewitness identification is relatively straightforward: If an eyewitness, whether bystander or victim, observed the perpetrator committing the crime in question, then investigators can establish the identity of that perpetrator simply by asking the witness to identify him or her. The presumption is that, if the witness had a good view and was attending to the phys-

velop the eyewitness-identification-procedure recommendations that the Durham Police Department adopted before the Duke lacrosse case.

ical appearance of the perpetrator, the witness' memory could be a valid indicator of identity. Unless the witness is motivated to lie, there seems little reason not to trust the witness, especially if the witness is certain. After all, the visual recognition of people is something that humans do repeatedly, without apparent error, in their everyday encounters. No stranger could masquerade as one's spouse, child, or coworker. And people seen at one point in time, such as high-school classmates, are often readily recognized from their photos even thirty years later.⁷

Against this backdrop of reliable facial recognition, most people do understand that recognition is not foolproof. For example, many people have had the experience of looking for their waiter or waitress in a restaurant and being unable to pick him or her out from similarly dressed counterparts even though they do not look much alike. Moreover, many of us have been in the awkward situation when being introduced to a person and saying "nice to meet you" only to have him or her respond "we met last month" or, even worse, "we met earlier tonight." But these little events tend not to shake many people's faith in eyewitness identifications of perpetrators because witnessing a crime event (or being its victim) is a meaningful, powerful event that surely creates a deep memory of the perpetrator, whereas a mere casual encounter with a stranger does not. Despite this everyday logic, however, the scientific evidence indicates that stress, which commonly accompanies being a victim or witness to a crime, actually impairs memory rather than helps it.⁸ Yes, people tend to pay more attention to serious events than to mundane ones, but attention does not guarantee an accurate memory.

It might be easy for people to understand how an eyewitness can look at a lineup and say "I don't know." That type of recognition failure is readily explained through people's common understanding of failures to pay attention when witnessing something, or the common concept of forgetting. What people understand far less is how an eyewitness can look at a lineup and identify the wrong person. People can probably grasp the idea of mistaken identification emanating from coincidental resemblance or lying but, short of the unlikely event of a defendant who bears an uncanny resemblance to the culprit or a deceptive eye-witness, why would a witness identify an innocent suspect as the culprit?

The question of why honest eyewitnesses mistakenly identify someone, rather than refuse to make an identification, is one of the most fundamental

questions that eyewitness scientists have faced. One fairly simple psychological model is based on the notions of pressure and preference. When shown a lineup, eyewitnesses have a natural tendency to feel pressured to make positive identifications. Thoughts such as "I was there, I should be able to recognize him," "People are counting on me," "I don't want to let someone get away with this crime," and "If I can't pick him out, then I have failed" are understandable when presented with a lineup. In addition, almost any lineup will include someone who looks more like the witness' memory of the perpetrator than the remaining members of the lineup. Hence, even eyewitnesses with only vague memories of the perpetrator will often have a preference for one lineup-member over the others (this is called making a relative judgment).⁹ Pressure and preference together can be a powerful force resulting in choice.

The pressure-and-preference notion, although simple, is actually quite rich in its implications for identification procedures. Pressure can be reduced by making it clear to the eyewitness that the actual perpetrator might not be in the lineup at all and, therefore, the accurate response might be "none of the above." Importantly, a pre-lineup instruction to the effect that the perpetrator might not be present in a lineup serves to make eyewitnesses much more likely to reject lineups in which the actual perpetrator is not present. However, this instruction has little effect on accurate identifications of the perpetrator when he is present in the lineup.¹⁰ There is nothing highly unusual about witnesses confronting lineups in which the actual perpetrator is not present; it simply means that the police thought that a particular person might have committed the offense but in fact he did not. Virtually every DNA exoneration case involving mistaken eyewitness identification from a lineup presented exactly that type of situation; the lineup viewed by the eyewitness did not contain the actual perpetrator.

In many jurisdictions that have reformed their lineup procedures (including the Durham Police Department), the prelineup instructions go even further to include statements such as "Do not feel that you have to make an identification" and "It is just as important to clear the innocent from suspicion as it is to incriminate the guilty." Reducing pressure to make a positive identification is one key to preventing misidentifications of innocent people

7. H.P. Bahrick, P.O. Bahrick & R.P. Witlinger, *Fifty Years of Memory for Names and Faces*, 104 *J. EXPERIMENTAL PSYCHOL.* 54 (1975).

8. C.A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 *INT'L J.L. & PSYCHIATRY* 265 (2004).

9. G.L. Wells, *The Psychology of Lineup Identifications*, 14 *J. APPLIED SOC. PSYCHOL.* 89 (1984).

10. N.M. Steblay, *Social Influence in Eyewitness Recall: A Meta-analytic Review of Lineup Instruction Effects*, 21 *LAW & HUMAN BEHAV.* 283 (1997); S.E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 *LAW & HUMAN BEHAV.* 395 (2005).

and, hence, a core element of proper identification procedures. As we will note later, this pressure was not reduced in the critical (final) identification phase of the Duke lacrosse rape case—in fact, the procedures exacerbated it.

Preference is a somewhat more complex problem. Clearly, we want the eyewitness to prefer the perpetrator: if he is in the lineup; indeed, research shows that the perpetrator naturally attracts such preferences.¹¹ The biggest problem occurs when the perpetrator is not in the lineup because there is usually someone else in it who looks more like the perpetrator than the others do, thereby resulting in the witness' preference for an innocent person. The removal-without-replacement effect, first demonstrated in an experiment fifteen years ago, illustrates the preference problem.¹² After staging a theft 200 times for 200 separate eyewitnesses, the researchers showed half of the eyewitnesses a six-person lineup that included the thief. All of these witnesses were warned that the thief might or might not be in the lineup; 54 percent correctly identified the thief, 21 percent identified no one, and the remaining 25 percent identified other lineup members. The other half of the witnesses were also warned that the thief might or might not be present and in fact viewed a lineup in which the thief was removed and not replaced with anyone (hence the term "removal without replacement"). The critical question for the study was: What will happen to the 54 percent who would have chosen the thief had he been present? Will they be added to the 21 percent who identified no one, thereby resulting in 75 percent making no identification? This turned out not to be the case. Only 11 percent of the people moved to the no-identification category, so only 32 percent of the eyewitnesses who saw the lineup without the thief did not make an identification. The remaining 43 percent simply shifted their choices to another lineup member. Hence, even though the real thief was not in the lineup and the witnesses were warned that he might not be in the lineup, preferences continued to exert an influence that resulted in mistaken identifications.

The simple notion that eyewitnesses will prefer a particular lineup member even if the perpetrator is not in the lineup is at the heart of perhaps the single most important procedural requirement: a lineup should contain only one suspect, and the remaining lineup members should be fillers.¹³ By fillers, we mean people who are known-innocents who simply fit the perpetrator's general description. The identification of a filler does not, of course, result in charges

11. S.E. Clark, R.T. Howell & S.L. Davey, *Regularities in Eyewitness Identification*, 32 *LAW & HUMAN BEHAV.* 187 (2008).

12. G.L. Wells, *What Do We Know About Eyewitness Identification?*, 48 *AM. PSYCHOL.* 553 (1993).

13. G.L. Wells & J.W. Turtle, *Eyewitness Identification: The Importance of Lineup Mod-els*, 99 *PSYCHOL. BULL.* 320 (1986).

against the identified person. Instead, it tells us that the suspect is not the perpetrator, that the eyewitness is not reliable, or both. This is a simple yet powerful principle because, if done correctly (meaning that each filler fits the general description of the perpetrator), an innocent suspect's chance of being the person who looks most like the perpetrator is far lower than the collective probability represented by the well-chosen fillers. Most proper identification procedures require at least five fillers for every suspect. Ideally, then, five out of every six witnesses who attempt an identification from a perpetrator-absent lineup will mistakenly identify a filler rather than an innocent suspect.

Primary Features of Good Eyewitness-Identification Procedures

No set of identification procedures can guarantee that mistaken eyewitness identifications will not occur. Nevertheless, some procedures are far less likely to yield mistaken identifications than others. Based on the science, a number of groups have articulated in recent years several sets of procedural recommendations for lineups and photospreads. These groups include the American Psychology-Law Society,¹⁴ the National Institute of Justice,¹⁵ and the North Carolina Innocence Commission. Although their procedural recommendations vary somewhat, they clearly have some common elements:

- A lineup should have only one suspect, with the other members being fillers.
- There should be at least five fillers for every suspect.
- Fillers should match the general description that the eyewitness gave of the culprit, and lineup administrators should take any other measures that will ensure the suspect does not stand out.
- Witnesses should be warned that the perpetrator might not be in the lineup, and told not to guess.
- Lineup administrators should take measures to avoid influencing the witness. (The American Psychology-Law Society recommendations and the North Carolina Innocence Commission recommendations explicitly state

14. G.L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *LAW & HUMAN BEHAV.* 603 (1998).

15. U.S. DEPT. OF JUSTICE, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999), <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

that the lineup administrator should not know which lineup member is the suspect, a procedure known as a double-blind lineup.)

- The lineup administrator should record a clear statement of the witness's certainty at the time of the identification.

Clearly, no set of recommendations can detail every possible way that an identification procedure might bias an eyewitness. We note, for example, that none of the three sets of recommendations discussed here specifically say not to show a suspect's photo repeatedly. But, of course, doing so familiarizes the witness with that person's face and can lead to a memory-source error (that is, the witness remembers the face from prior photos rather than the crime scene).

In the context of these clear and fairly well-defined procedural recommendations, we will now review the basic facts and procedures that the authorities used in the Duke lacrosse rape investigation.

The Duke Lacrosse Rape Investigation

At midnight on March 14, 2006, Crystal Mangum, the alleged victim-witness, and her fellow dancer began their routine. The events that occurred from that moment until the alleged rape was reported are beyond the scope of this chapter.¹⁶ The mental state of the witness during the party, however, would affect her ability to identify her attackers later. Although she initially reported having only one drink at the party, she later said that she was drunk that evening and, therefore, did not feel any pain after the alleged attack. At another time, she reported having drunk very little alcohol that evening, but becoming "fuzzy" when she and the other dancer began to perform. However, partygoers reported that she appeared intoxicated and, multiple times throughout the routine, stumbled and fell to the floor.

Later, in the early morning of March 15, Durham police questioned Mangum about the alleged attack. She named her alleged attackers—Adam, Matt, and Brett—during these three separate discussions, but she did not once give a description of them. Detective Benjamin Himan reported, however, that two days later she described them to Sergeant Mark Gottlieb and him as follows:

Adam: White male, short, red cheeks, chubby face, brown fluffy hair.

Matt: Heavyset with short haircut between 260 and 270 lbs.
Brett: Chubby.¹⁷

During the same discussion, Gottlieb took handwritten notes that he later typed into a report of all of his activities in the case. Although he did not include the names of the alleged attackers in his notes, we have attempted to match them with the names and descriptions reported by Himan:

Possibly Adam: [White male] medium height (5'8" + with Himan's build), dark hair, medium build, and had red (rose colored) cheeks

Possibly Matt: [White male], young, blonde hair, baby faced, tall and lean

Possibly Brett: [White male], 6+ feet tall, large build, with dark hair¹⁸

Two days later, the Durham police showed Mangum four separate photo lineups. The photo arrays contained only members of the lacrosse team, and each included a lacrosse player named Adam, Matt, or Brett. In accordance with the department's protocol, the person administering the test, Investigator Richard Clayton, was largely unfamiliar with the investigation and did not know which players—if any—were suspects. The witness was told that the "person who committed the crime may or may not be included. I do not know whether the person being investigated is included." Additionally, she was told to "[k]eep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in the photographs. You should not feel like you have to make an identification." Clayton described the additional instructions he gave her about the first four lineups, stating:

I informed her that if she did recognize a person in the photo in the array to be as descriptive as possible regarding the details of that person. I then told her to use a scale from 1–10 if she was able to recognize the person. [One] being the least and 10 being the highest. I gave her an example as 10 being that she positively recognized the person on the photo 100%. Each photo was displayed for 30 seconds. I showed

17. See Motion to Suppress the Alleged "Identification" of the Defendants by the Accuser, at 9–10, State v. Seligmann, Nos. 06 CRS 4331-36, 5581-83 (N.C. Super. Ct. Dec. 14, 2006) [hereinafter Motion to Suppress].

18. *Id.* For a more detailed analysis of the witness's descriptions, see Table 1 at the end of this chapter.

16. For a thorough discussion of the underlying facts, see *supra* Chapter One (Luck & Seigel).

her one photo at a time. After a photo was displayed I did not go back to any previous displayed photos in the array.¹⁹

While viewing the first lineup—Photo Array A—the witness stated that the lineup task was harder than she thought it would be and that all of the photos looked alike. Photo Array A included Reade Seligmann in position #5, and the witness said that she was 70 percent sure that she had seen him at the party but could not remember where.²⁰ In a later identification procedure, of course, she would identify Seligmann as one of her attackers. Mangum also said she was 100 percent confident that one person from Photo Array B, two from Photo Array C, and one from Photo Array D were at the party. It was eventually determined, however, that one of individuals she placed at the party with “100 percent certainty” spent that entire evening in nearby Raleigh, North Carolina, and could not have been in attendance. Clayton’s report of these four lineups concluded that the witness did not identify any of the men in the photo arrays as her attacker.

On March 21, five days after examining Photo Arrays A–D, the witness viewed two more. Once again, they only included Duke lacrosse players, and the witness received the same warnings and instructions as before. Clayton went through Photo Arrays E and F with Mangum twice. She did not identify any of the people in the lineups as an assailant. Dave Evens, whom she later identified as one of her alleged attackers, was in Photo Array F.

After Mangum had viewed the initial seven lineups but made no identification, Nifong suggested to Himan and Gottlieb that they put the mug-shot-type photographs of the lacrosse players into a group and merely ask Mangum whether she recalled seeing the individuals at the party. A little over two weeks after viewing Photo Arrays E and F, the witness to come to the station for yet another identification attempt, this time conducted in the manner suggested by Nifong. On this occasion, instead of being in a private setting with Clayton, Gottlieb and two crime-scene investigators were also present. Additionally, the police video-and audiotaped the procedure using equipment placed in plain view of the witness, which they had not done during the previous identification attempts.

Using a PowerPoint presentation, the investigators presented photographs of all forty-six lacrosse players. Even though they knew that at least two non-lacrosse players were at the party, only team members were included. Gottlieb told the witness that “we are going to sit in the far side of the room at the

desk and look at people we had reason to believe attended the party.”²¹ He reported that he

also told her it was important to tell us if she recalled seeing a particular individual at the party and to let us know how she recalled seeing them from that night, what they were doing, and any interactions she may have had or observed with a particular individual.²²

While reviewing the pictures of the forty-six lacrosse team members, Mangum claimed to recognize seventeen of them. She stated that four of the players resembled her three alleged attackers. The first person she identified was Matthew Wilson (Image 4), saying “He looked like Brett but I’m not sure.... One of the guys that assaulted me.”²³ The next person in the lineup (Image 5) was Dave Evans, and she also identified him as one of her attackers, stating “He looks like one of the guys who assaulted me sort [of].... He looks just like him without the mustache ... About 90%.”²⁴ Two photographs later, the witness identified Reade Seligmann (Image 7) as one of her attackers, saying “He looks like one of the guys who assaulted me ... 100%.... He was the one that was standing in front of me ... um ... that made me perform oral sex on him.”²⁵ Near the end of the presentation, she identified Collin Finnerty (Image 40) as one of her attackers as well, saying “He is the guy who assaulted me.... He put his penis in my anus and my vagina.... The second one ... 100%.”²⁶

During the procedure, she identified the individuals in Images 3, 4, 9, 11, 13, 15, 17, 20, 21, 26, 31, 34, 37, and 38 as being at the party. In fact, it was later determined that two of the players were not there. Eleven of them had appeared in previous lineups, but she had not identified them as having even been at the party. One individual was incorrectly identified as the person who had made an obscene comment about a broomstick. She did, ironically, identify the person who had made the obscene comment, but described him as “sitting in the kitchen ... um, making a drink.” Additionally, even though Mangum had, in previous lineups, identified five individuals as being at the party, she did not recognize three of them in the PowerPoint lineup.²⁷

21. *Id.* at 16.

22. *Id.*

23. *Id.* at 19.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 19–20.

19. Motion to Suppress, *supra* note 17, at 16.

20. *Id.* at 17.

After identifying Reade Seligmann, Dave Evans, and Collin Finnerty as her attackers, the witness made a few comments about them that deviated from her earlier descriptions. When viewing the photograph of Evans, she stated that he looked like her attacker, just without a mustache. Photographs taken of Evans in the days prior to and following the alleged attack, however, show that he did not have a mustache at that time.³⁸ Additionally, she said that she recognized Finnerty because of the freckles on his face. However, she had never mentioned freckles as a characteristic of any of her attackers before that moment. In fact, the witness was not shown a photograph of Finnerty before the PowerPoint identification procedure because he did not match any of the descriptions of her alleged attackers.

Analysis of the Identification Procedures in the Duke Case

It should be apparent to almost anyone that the identification procedures used by the investigators on the Duke case were terribly flawed. These flaws are apparent not only in contrast to the guidelines set out by the American Psychology-Law Society, the National Institute of Justice, and the North Carolina Innocence Commission, but also in contrast to the Durham Police Department's own procedures (because by this time the Durham Police Department had already adopted the North Carolina Innocence Commission's recommendations).

As an important aside, we should note that identification procedures matter the most when there are reasons to believe that the witness's memory is weak. The witness in this case was clearly drinking heavily and gave inconsistent descriptions of her attackers (see Table 1 for a summary). Hence, these were circumstances in which it was especially important to follow pristine identification procedures, which are designed to help protect innocent persons from mistaken identification.

In Table 2, found at the conclusion of this chapter, we summarize some of the important aspects of proper identification procedures and illustrate how the Duke procedures deviated from them. Perhaps the most important of these deviations was the failure to use fillers. In effect, the identification procedure, for Mangum, was like a multiple-choice question which had no wrong answer. The beauty of using fillers is that an eyewitness who is merely guessing or has

an unreliable memory is likely to err on a filler. These filler errors will call into question the credibility of the witness. Fillers in this case would have been easy to obtain. One might have contacted the University of Illinois lacrosse team, for example, and included their photos in the procedure, which would likely have revealed the witness to be picking people who clearly were not involved in the incident at all.

Clearly, the situation that was facing the investigators in this case was not a typical eyewitness identification situation in which there is a single *a priori* suspect. If all Duke lacrosse players (or, at least, those who were at the party) were considered suspects, then it would have taken roughly 230 filler photos to meet the five-filler-per-suspect requirement. One might argue that it would be unreasonable to have the witness go through about 286 photos to try to identify her attackers. But the proper alternative was not to abandon the concept of fillers altogether; instead, using a reduced number of fillers would have been acceptable. Assume, for a moment, the real possibility that the witness was randomly picking individuals from the photos during the third lineup procedure. If there had been even two true fillers for each of the forty-six suspects in that lineup, the chances that she could have avoided picking one of the known-innocent fillers in three picks is $1/33$, or only one chance in twenty-seven—a .037 percent chance.

Interestingly, when the first identification procedures were used on March 16 and March 21, the administering officers were careful to instruct the witness that the persons who committed the crime might not be included. But this warning was completely dropped in the final identification procedure. Furthermore, in this last identification procedure, the witness was assured prior to viewing that the lineup contained only persons whom the police believed to be at the party. It should not go unnoticed that it was only in this last procedure, which in effect assured the witness that there were no filler photos, that the witness made identifications of her attackers.

In addition to the officers' failure to use fillers, Mangum had failed to identify two of the three individuals that she finally picked out as her attackers when shown their pictures in prior displays. This repeated presentation of certain suspects' photos is obviously egregious; ironically, existing recommendations for proper identification procedures have spent little time discussing this issue. Indeed, they have probably overlooked this problem precisely because it seems so obvious.

Final Remarks

By now, it is clear that the alleged rape at the lacrosse party that might never occurred. Hence, it might be argued that the identification procedures were ir-

28. *Id.* at 36.

relevant. We disagree. We contend that proper procedures, including the use of fillers, would likely have shown that the witness' account was fatally flawed.

The foregoing analysis shows that the identification procedures used in the Duke lacrosse case miserably failed to protect the interests of the accused. The explanation for these breaches of both common sense and the explicit policies already adopted by the Durham Police Department are open to debate and addressed in other chapters in this volume. As eyewitness-identification scientists, it is not our task to speculate on the motives or reasoning of the investigators in this case. But we think that it is important to note that guidelines and policies for conducting eyewitness-identification procedures exist for very good reasons, and we would urge police departments to adhere to these procedures and respect their underlying principles, regardless of underlying political or social currents that might surround a given case. We also encourage departments to resist the urgings of prosecutors to deviate from the department's identification procedures after they have been carefully developed and implemented for very good reason.

Table 1
Descriptions Given by the Witnesses Compared to Characteristics of the Identified Parties

Descriptions in Himan's Report	Descriptions in Clayton's Report	Descriptions of Persons Eventually Identified by Crystal Mangum
"Adam" White male, short, red cheeks, chubby face, brown fluffy hair.	Possibly "Adam" White male, medium height (5'8" or above, with Himan's build), dark hair, with red (rose colored) cheeks.	Reade Seligmann White male, 6'1", 215 pounds, black hair.
"Matt" Heavyset, between 260 and 270 pounds, short hair.	Possibly "Matt" White male, young, blonde hair, baby-faced, tall and lean.	Dave Evans White male, 5'9", 185 pounds, brown hair.
"Brett" Chubby:	Possibly "Brett" White male, over 6', large build, dark hair.	Collin Finnerty White male, 6'5", 215 pounds, reddish-brown hair, freckled face.

Table 2
Comparison between the Identification Procedures Used in the Duke Lacrosse Rape Investigation and Three Sets of Recommended Identification Procedures

	Durham PD Rape Investigation	National Institute of Justice	American Psychology-Law Society	North Carolina Innocence Commission
Recommendations	No fillers	Recommended	Recommended	Recommended
Five fillers for each suspect	No	Recommended	Recommended	Recommended
Select fillers who fit description	No	Recommended	Recommended	Recommended
Avoid showing the same faces multiple times	No; some faces were shown two or three times	Not addressed	Recommended, although not a "core" recommendation	Recommended
Secure confidence statement at the time of identification	Yes	Recommended	Recommended	Recommended
Present the photographs sequentially	Yes	Recommended; recommends simultaneous presentation as well.	Recommended; recommends simultaneous presentation as well.	Recommended
Double-blind procedure	No	Not addressed	Recommended	Recommended