

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

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How Not to Do Eyewitness Identification Procedures*

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% of the 210 DNA-based exonerations were cases of mistaken identification that were accepted by juries as evidence that these innocent individuals were guilty.<sup>1</sup> But, well before the onset of forensic DNA testing in the 1990s, psychological scientists had shown with their experiments that mistaken identifications occur with surprising frequency and that mistaken identification testimony is difficult to distinguish from accurate identification testimony.<sup>2</sup> Hence, a central theme for psychological science has been to develop ways to prevent mistaken identifications from happening in the first place.<sup>3</sup> Broad treatments of the scientific literature on eyewitness identification are available from numerous books<sup>4</sup> and scholarly articles.<sup>5</sup>

The Duke-lacrosse rape case represents an interesting problem that is, in some respects, different from the prototypical mistaken identification case. Usually, the

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<sup>1</sup> See Innocenceproject.org. These figures are from February 2008.

<sup>2</sup> See Lindsay, R. C. L., Wells, G. L., & Rumpel, C. (1981). Can people detect eyewitness identification accuracy within and between situations? *Journal of Applied Psychology*, 66, 79-89; Wells, G. L., Ferguson, T.J., & Lindsay, R. C. L. (1981). The tractability of eyewitness confidence and its implication for triers of fact. *Journal of Applied Psychology*, 66, 688-696; Wells, G. L., Lindsay, R. C. L., & Ferguson, T.J. (1979). Accuracy, confidence, and juror perceptions in eyewitness identification. *Journal of Applied Psychology*, 64, 440-448; Wells, G. L., Lindsay, R. C. L., & Tousignant, J.P. (1980). Effects of expert psychological advice on juror judgments in eyewitness testimony. *Law and Human Behavior*, 4, 275-286.

<sup>3</sup> Wells, G. L. (1978). Applied eyewitness testimony research: System variables and estimator variables. *Journal of Personality and Social Psychology*, 36, 1546-1557.

<sup>4</sup> E.g., Cutler, B. L., & Penrod, S. D. (1995). *Mistaken identification: The eyewitness, psychology, and the law*. New York: Cambridge University Press; Lindsay, R. C. L., Ross, D. F., Read, J. D., & Togliani, M. P. (Eds.) *Handbook of eyewitness psychology: Memory for people*. Mahwah, NJ: Lawrence Erlbaum Associates.

<sup>5</sup> Wells, G. L., & Quinlivan, D. S. (in press). Suggestive eyewitness identification procedures and the Supreme Court's reliability test in light of eyewitness science: 30 years later. *Law and Human Behavior*, in press.

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 that 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 raped her. We have no way of knowing with certainty at this time which of these two possibilities is the closer truth, the assumption of lying or the assumption of genuine error. However, for our current purposes the distinction matters little because the identification procedures used in the Duke-lacrosse case were profoundly flawed, dangerous, and non-diagnostic of the guilt or innocence of the accused individuals under either assumption.

The principal thesis of the current 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, charges would not have been filed. The Duke-lacrosse case also has a special irony to it for eyewitness scientists because the Durham Police Department had adopted new eyewitness identification procedures prior to the Duke-lacrosse case, procedures that were modeled on the best that eyewitness science had to offer<sup>6</sup>. Indeed, North Carolina had already become a model state in leading toward reformed eyewitness identification procedures, thanks largely to its North

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<sup>6</sup> In the interests of disclosure, readers should note that both of the authors of this chapter were expert eyewitness consultants for the defense in the Duke-lacrosse case. In addition, both of the authors of this chapter consulted for the North Carolina Actual Innocence Commission to help the Commission to develop its eyewitness identification procedure recommendations, which the Durham Police Department adopted before the Duke-lacrosse case.

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-lacrosse case, the procedures used in the Duke-lacrosse 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 County Prosecutor who created 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, only that it was a very bad idea.

In the remainder of this chapter, we describe some of the eyewitness science as it relates to the basic idea of eyewitness identification procedures and why it is important to build in certain procedural safeguards. Then, we describe the procedures that were used in the Duke-lacrosse rape case and the behaviors of the alleged victim-witness. Finally, we describe how the identification procedures could have been done and how this would likely have uncovered credibility problems with the witness 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 the identity of that perpetrator could be established by simply asking the witness who the perpetrator was. The presumption is that if the witness had a good view and was attending to the physical appearance of the perpetrator, the witness's 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 people do repeatedly without apparent error in their everyday encounters. No stranger could masquerade undetected as one's spouse, or child, or co-worker. And, people one has not seen for years, such as high school classmates, are readily recognized from their photos even 30 years later.<sup>7</sup>

Against this backdrop of reliable recognition of faces, most people understand that recognition is not guaranteed. For example, many people have the experience of looking for their waiter or waitress in a restaurant and not being able to pick him or her out from similarly-dressed waitpersons even though they do not look much alike. And many of us have experienced the awkward situation when being introduced to a person and saying "nice to meet you" only to have them say "we met last month" or worse "we met earlier tonight." But these little events tend to not shake many people's faith in eyewitness identifications of perpetrators because witnessing a criminal event (or being a victim of a crime) is a meaningful, powerful event that surely creates a deep memory for 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

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<sup>7</sup> Bahrick, H.P., Bahrick, P.O., & Wittlinger, R.P. (1975). Fifty years of memory for names and faces. *Journal of Experimental Psychology: General*, 104, 54-75.

accompanies being a victim or bystander witness to a crime, actually impairs memory rather than helps memory.<sup>8</sup> Yes, a witness's attention is paid more to serious events than to mundane events, 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 failure of recognition is readily explained through people's common understanding of failures to pay attention at the time of witnessing or the common concept of forgetting. What is much less well understood by people is how an eyewitness can look at a lineup and identify the wrong person. People can probably grasp the idea of mistaken identification as something emanating from coincidental resemblance or lying but, short of the unlikely event of the defendant being a near twin of the culprit or the witness lying, why would the witness identify him?

The question of why honest eyewitnesses mistakenly identify someone, rather than say 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, there is a natural tendency for eyewitnesses to feel pressure to make an identification. 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 cannot pick him out, then I have failed" are natural and understandable thoughts when presented with a lineup. In addition, almost any lineup will include someone who looks more like the witness's memory of the perpetrator than the remaining members of the lineup. Hence, even eyewitnesses with

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<sup>8</sup> Morgan, C. A., Hazlett, G., Doran, A., Garrett, S., Hoyt, G., Thomas, P., Baranoski, M., & Southwick, S. M. (2004). Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress. *International Journal of Psychiatry and the Law*, 27, 265-279.

only vague memories of the perpetrator will often have a preference for one lineup member over the others (called a relative judgment)<sup>9</sup>. 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, hence, the correct answer might be “none of the above.” Importantly, this pre-lineup instruction serves to make eyewitnesses much more likely to reject lineups in which the actual perpetrator is not present in the lineup but has little effect on accurate identifications of the perpetrator when he is present in the lineup.<sup>10</sup> 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 it was not him. Virtually every DNA exoneration case involving mistaken eyewitness identification from a lineup was exactly that type of situation; the lineup viewed by the eyewitness did not contain the actual perpetrator. In many jurisdictions that have adopted lineup reforms (including the Durham Police Department) the pre-lineup 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 of the keys to preventing identifications of innocent people and, hence, a core element of

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<sup>9</sup> Wells, G. L. (1984). The psychology of lineup identifications. *Journal of Applied Social Psychology*, 14, 89-103.

<sup>10</sup> Steblay, N. M. (1997). Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects. *Law and Human Behavior*, 21, 283-298; Clark, S. E. (2005). A re-examination of the effects of biased lineup instructions in eyewitness identification. *Law and Human Behavior*, 29, 395-424.

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 and was in fact explicitly exacerbated by the procedures.

Preference is a somewhat more complex problem. Clearly, we want the eyewitness to have a preference for the perpetrator if the perpetrator is in the lineup. And, if the perpetrator is in the lineup, research shows that the perpetrator naturally attracts such preferences.<sup>11</sup> The biggest problem occurs when the perpetrator is not in the lineup because there usually remains someone who looks more like the perpetrator than the other members of the lineup, thereby resulting in preference for someone. The removal-without-replacement effect, first demonstrated in an experiment 15 years ago, illustrates the preference problem.<sup>12</sup> After staging a theft 200 times for 200 separate eyewitnesses, half of the eyewitnesses were shown a six-person lineup that included the thief. All witnesses were warned that the thief might or might not be in the lineup and 54% correctly identified the thief whereas 21% identified no one and the remaining 25% 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 the thief was removed from the lineup and not replaced with anyone (hence, the term removal-without-replacement). The critical question for the study was: What will happen to the 54% who would have chosen the thief had he been present? Will the 54% be added to the 21% making no identification, thereby resulting in 75% making no identification? No. Only 11% was added to the no-identification category; the remaining 43% of the witnesses simply

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<sup>11</sup> Clark, S.E., Howell, R. T., & Davey, S. L. (in press). Regularities in eyewitness identification. *Law and Human Behavior*, in press.

<sup>12</sup> Wells, G. L. (1993). What do we know about eyewitness identification? *American Psychologist*, 48, 553-571.

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 resulting in mistaken choices.

The simple notion that eyewitnesses will have preferences for a particular lineup member even if the perpetrator is not in the lineup is at the heart of perhaps the most important single procedural requirement for lineups: A lineup should contain only one person suspected of being the perpetrator and the remaining lineup members should be fillers.<sup>13</sup> By fillers, we mean people who are known-innocents who simply fit the general description of the perpetrator. The identification of a filler does not, of course, result in charges against the identified person. Instead, the identification of a filler tells us that the suspect is not the perpetrator, or that the eyewitness is not reliable, or both. This is a simple yet powerful principle because, if done correctly, an innocent suspect has a much lower probability of being the person who looks most like the perpetrator than does the collective probability represented by the fillers. Most proper identification procedures require at least five fillers for every suspect. If the fillers are chosen properly, this means that five of every six witnesses who attempt an identification from a perpetrator-absent lineup will err on a filler rather than mistakenly identify 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 more likely to yield mistaken identifications than are other procedures, which is the basic foundation of the distinction between system variables and estimator variables in the scientific eyewitness

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<sup>13</sup> Wells, G. L., & Turtle, J. W. (1986). Eyewitness identification: The importance of lineup models. *Psychological Bulletin*, 99, 320-329.

identification literature.<sup>14</sup> Based on the science, several sets of procedural recommendations for lineups and photospreads have been articulated in recent years. These include the recommendations of the American Psychology-Law Society,<sup>15</sup> the National Institute of Justice,<sup>16</sup> and the North Carolina Innocence Commission. Although these procedural recommendations vary somewhat from each other, their common elements are clear:

- A lineup should have only one suspect, the remaining members being fillers
- There should be at least five fillers for every suspect
- Fillers should match the general description of the culprit that was given by the eyewitness and any other measures should be taken to ensure that the suspect does not stand out in the lineup.
- Witnesses should be warned that the perpetrator might not be in the lineup and to not 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 that the lineup administrator should not know which lineup member is the suspect and which are fillers, a procedure known as the double-blind lineup procedure).

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<sup>14</sup> *Supra* note 3.

<sup>15</sup> Wells, G. L., Small, M., Penrod, S., Malpass, R. S., Fulero, S. M., & Brimacombe, C. A. E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads, *Law and Human Behavior*, 22, 603-647.

<sup>16</sup> Technical Working Group for Eyewitness Evidence (1999). *Eyewitness evidence: A guide for law enforcement*. Washington, DC: United States Department of Justice, Office of Justice Programs.

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

Clearly, no set of recommendations can detail every possible way in which an identification procedure might bias the eyewitness. We note, for example, that none of the three sets of recommendations discussed here specifically say to not show a suspect's photo repeatedly. But, of course, repeatedly showing the photo of a suspect will serve to make that person's face familiar and could lead to a memory source error (remembering the person's face from prior photos rather than from the crime scene).

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

#### The Duke-Lacrosse Rape Investigation

At midnight on March 14th, the alleged victim-witness and her fellow dancer began their routine. Although the alleged victim-witness initially reported having only one drink at the party, she later reported that she was drunk that evening and, therefore, did not feel any pain. At another time she reported having drunk very little alcohol that evening, but becoming "fuzzy" when she and XX began their dance. However, party-goers reported that she appeared intoxicated and, multiple times throughout the routine, stumbled and fell to the floor.

Later in the morning on March 14th, the alleged victim-witness was questioned about the alleged attack. She gave different descriptions of the alleged attack to Officer G. D. Sutton, Sig. Shelton, and a Duke Police Officer. Although at times she named her

alleged attackers during these three separate discussions, she did not once give a description of them. On March 16th, however, she gave a description of her alleged attackers to Investigator Himan:

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

Matt: heavy set with short haircut between 260 and 270 lbs.

Brett: chubby.

During the same discussion, Sgt. Gottlieb took handwritten notes that he later typed into a report of all of his activities in the case. Although Gottlieb did not include names of the suspects in his notes, an attempt has been made to match them with the names and descriptions reported by Investigator Himen:

Possibly Adam: “[white male] medium height (5’8” + with Himen’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 hair

Two days later, on the evening of March 16<sup>th</sup>, while at her house the alleged victim-witness was shown four separate photo lineups. The photo arrays contained only members of the lacrosse team, and each lineup included a lacrosse player named either Matt, Adam, or Brett. Per Durham police department protocol, the person administering the test, Investigator Clayton, did not know which of the players -- if any -- were suspects and was largely unfamiliar with the investigation. 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.” Investigator Clayton described the additional instructions he gave her about the first four lineups by saying that:

I informed her that if she did recognize a person in the photo in array [sic] 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. 1 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 her one photo at a time. After a photo was displayed I did go back to any pervious [sic] displayed photos in the array (Suppression motion, page 16).

While viewing the first lineup, the alleged victim-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, a person who was identified during a later identification procedures as one of her attackers. The witness said that she was 70% sure that she had seen Seligmann at the party but could not remember where she had seen him (Suppression 12). The witness said she was 100% confident that Fred Krom from Photo Array B, Nick O’Hara and Kevin Meyer from Photo Array C, and Brad Ross from Photo Array D were at the party. However, it was determined that Brad Ross was in Raleigh, North Carolina on the evening of the party and could not have been in attendance. Investigator Clayton concluded after administering the four lineups that the witness did not identify any of the men in the lineups as her attacker.

On March 21st, five days after being shown photo arrays A-D, the alleged victim-witness viewed two more photo arrays. Once again, these lineups only included Duke lacrosse players, and the alleged victim-witness was given the same warnings and instructions about the identification as she was on March 16th . Investigator Clayton went

through Photo Arrays E and F with the alleged victim-witness two times. She did not identify any of the people in the lineups as her attacker, including Dave Evans who was in Photo Array F. She would later identify Dave Evans as one of her alleged attackers.

After having the alleged victim-witness view the initial seven lineups, District Attorney, Nifong suggested to Investigator Himen and Sgt. Gottlieb that they put together the mug shot type photographs into a group since [they were] under the impression the players at the party were members of the Duke Lacrosse Team, and instead of doing a lineup or photographic array, they would merely ask the victim to look at each picture and see if she recalled seeing the individuals at the party.

Therefore, a little over two weeks after viewing Photo Arrays E and F, on April 4th, the alleged victim-witness was asked to come to the station for yet another identification attempt that was conducted in the manner suggested by District Attorney Nifong. Instead of being in a private setting with Investigator Clayton, this time Sgt. Gottlieb, CSI Ashby, and CSI Maddry were also there. The procedure was also videotaped and audio-taped by equipment that was placed in plain view.

Photographs of all 46 of the lacrosse players were included in a power-point presentation. Even though police knew that at least two people were at the party who were not members of the lacrosse team, the only people in the lineup were lacrosse team members. The alleged victim-witness was told by Sgt. Gottlieb 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” (Suppression motion, page16). Sgt. Gottlieb reported that “I 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 (Suppression motion, page 16)

While reviewing the pictures of the 46 lacrosse team members, the alleged victim-witness claimed to recognize 17 members of the lacrosse team. She identified four of the players as looking like her three attackers. The first person she identified was Matthew Wilson (Image 4). She said “He looked like Brett but I’m not sure...One of the guys that assaulted me” (Suppression motion, page 19). The following person in the lineup (Image 5) was Dave Evans, and she also identified him as one of her attackers. She stated, “He looks like one of the guys who assaulted me sort [of]...He looks just like him without the mustache...About 90%” (Suppression motion, page 19). Two photographs later, the alleged victim-witness identified Reade Seligmann (Image 7) as one of her attackers. She said “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” (Suppression motion, page 19). While nearing the end of the photographs, the alleged victim witness identified Collin Finnerty (Image 40) as one of her attacker, saying, “He is the guy who assaulted me...He put his penis in my anus and my vagina...The second one...100%” (Suppression motion, page 19).

During the identification 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. Two of those individuals were not at the party. Eleven of those individuals had been shown to her in previous lineups and she did not identify them in those photo arrays. One of those individuals was incorrectly identified as the person who made an obscene comment about the broomstick. She did identify the person who made that

comment in the lineup but described him as “sitting in the kitchen...Um, making a drink.” Additionally, even though the alleged victim-witness identified five individuals from the lineups A-F as being at the party, she did recognize three of those individuals in the powerpoint lineup. ” (Suppression motion, pages 19-20).

After identifying Reade Seligmann, Dave Evans, and Collin Finnerty as her attackers, the alleged victim-witness made a few comments that were discrepant from her earlier descriptions. When viewing the photograph of Dave Evans, she stated that Evans looked like her attacker, just without a mustache. However, photographs taken of Evans the days prior to and following the alleged attack show that he did not have a mustache at that time (Suppression, 36). Additionally, she stated that “one of the reasons I remember [Finnerty] is because of the freckles on her face” (your report, X). However, she had never mentioned freckles as a characteristic of any of her attackers before that point. In fact, the alleged victim-witness was not shown a photograph of Finnerty before the power-point identification procedure because he did not match any of the descriptions of her alleged attackers.

#### Analysis of the Duke-Lacrosse Identification Procedures

It should be apparent to almost anyone that the Duke-lacrosse rape investigation identification procedures were terribly flawed. These flaws are apparent not only in contrast to the previous 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 recommended procedures).

As an important aside, we should note that identification procedures matter the most under conditions in which there are reasons to believe that the witness's memory is a weak one. The witness in this case was clearly drinking heavily and the witness gave inconsistent descriptions of her attackers (see Table 1 for a summary). Hence, these are circumstances in which it is especially important to not deviate from pristine identification procedures, which are designed to help protect innocent persons from mistaken identification.

In Table 2, we have summarized some of the important aspects of proper identification procedures and how the procedures used in the Duke-lacrosse investigation deviated from those procedures. One of the most important of these deviations, if not the most important, was the failure to use fillers. Recall that fillers are known-innocent lineup members who fit the general description of the perpetrator. In effect, the identification test for the witness was like a multiple-choice test for which there was 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 not result in charges against the identified person, of course, and they call into question the credibility of the witness. Fillers would have been easy to obtain. One might contact the University of Illinois lacrosse team, for example, and include their photos in the procedure. This type of procedure would likely have revealed the witness 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 230 or so filler photos to meet the requirement of five fillers for every suspect. One might argue that it would be unreasonable to have the witness go through 286 or so photos to try to identify her attackers. But, the alternative is not to abandon the concept of fillers altogether. Suppose, for instance, that the witness were randomly picking individuals from the photos and that there were two true fillers for each of the 46 suspects. Mathematically, the chances that she could avoid picking one of the known-innocent fillers in three picks is  $1/3 \times 1/3 \times 1/3$  or one chance in 27 (a probability of .037).

In addition to the failure to use fillers, there no identifications of two of the three individuals that she finally identified as her attackers when she was shown these individuals in prior displays of their photos. This repeated presentation of suspects' photos is an obviously-egregious practice even if existing recommendations for proper identification procedures have spent little time discussing this problem. Indeed, previous recommendations on proper identification procedures probably have not spent much time discussing this problem precisely because it seems so obvious.

Interestingly, when the first identification procedures were use on March 16 and March 21, the administrating officers were careful to instruct the witness that the persons who committed the crime might not be included. But, this 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 who they believed were 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.

#### Final Remarks

At this point, it is apparently conceded that a rape never occurred. Hence, it might be argued that the identification procedures were irrelevant. We disagree. We argue that proper procedures, which included the use of fillers, would likely have shown that the witness's account was flawed.

We conclude from this analysis that the identification procedures used in the Duke-lacrosse case represent a miserable failure to protect the interests of the accused. The explanation for these breaches of both common sense and violations of the explicit policies already adopted by the Durham Police Department are open to debate. As eyewitness scientists, it is not within our purview 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 the conduct of eyewitness identification procedures exist for very good reasons and we urge police departments to stick closely to these procedures and their underlying principles without regard to underlying political or social currents that might surround a given case. We also encourage police departments to resist the urgings of

prosecutors to deviate from the department's identification procedures when the department has carefully developed and adopted strong procedures.

TABLE 1

Descriptions Provided by the Witness and Characteristics of the Identified Parties

Description in Det. Himen's report	Description in Investigator Clayton's report	Description of persons identified by witness, matched to prior descriptions by alleged actions during the attack
Adam: white male, short, red cheeks, chubby face, brown fluffy hair	Possibly Adam: white male, medium height (5'8" + with Himen's build), dark hair, medium build, and had red (rose colored) cheeks	Reade Seligmann: 6'1" and weighed 215 pounds with black hair
Matt: heavy set with short haircut between 260 and 270 lbs	Possibly Matt: white male, young, blonde hair, baby faced, tall and lean	Dave Evans: 5'9" and weighed 185 lbs, brown hair
Brett: chubby	Possibly Brett: white male, 6+ feet tall, large build, with dark hair	Colin Finnerty: 6'5", 215 lbs, reddish-brown hair, freckled face

TABLE 2

Identification Procedures Used in the Duke Lacrosse Rape Investigation and  
 Recommendations of the National Institute of Justice, the American Psychology-Law  
 Society, and the North Carolina Innocence Commission

Identification Procedures	Used in Duke Lacrosse case?	NIJ recommendation ?	APLS recommendation ?	N. Carolina Commission recommendation ?
One suspect per minimum five fillers?	NO	YES	YES	YES
Select fillers who fit description?	NO	YES	YES	YES
Avoid showing same faces on different occasions?	NO; some shown 2 and 3 times.	NO; not addressed	YES; but not a core recommendation	YES
Secure confidence statement at the time of ID?	YES	YES	YES	YES
Use sequential?	YES	YES, BUT ALSO SIMULTANEOUS	YES, BUT ALSO SIMULTANEOUS	YES
Use double-blind procedure?	NO	No recommendation either way	YES	YES