When Our Eyes Deceive Us

Being part of a system that identified and ultimately convicted the wrong man became another form of victimization.

Dahlia Lithwick
NEWSWEEK
From the magazine issue dated Mar 23, 2009

Describe the last person who served you coffee. What if I helped refresh your memory? Showed you some photos of local baristas? Pulled together a helpful lineup? Cheered exuberantly when you picked the "right" one? Now imagine that instead of identifying the person who made your venti latte last week, we had just worked together to nail a robber or a rapist. Imagine how good we would feel. Now imagine what would happen if we were wrong.

Last month, a Texas judge cleared Timothy Cole of the aggravated-sexual-assault conviction that sent him to prison in 1986. Although his victim positively identified him three times—twice in police lineups and again at trial—Cole was ultimately exonerated by DNA testing. The real rapist, Jerry Wayne Johnson, had been confessing to the crime since 1995. Unfortunately for Cole, he died in prison in 1999, long before his name was cleared.

Our eyes deceive us. Social scientists have insisted for decades that our eyewitness-identification process is unreliable at best and can be the cause of grievous injustice. A study published last month by Gary Wells and Deah Quinlivan in Law and Human Behavior, the journal of the American Psychology-Law Society, reveals just how often those injustices occur: of the more than 230 people in the United States who were wrongfully convicted and later exonerated by DNA evidence, approximately 77 percent involved cases of mistaken eyewitness identification, more than any other single factor.

Wells has been studying mistaken identifications for decades, and his objection to the eyewitness-identification system is not that people make mistakes. In an interview, he explains that eyewitness evidence is important, but should be treated—like blood, fingerprints and fiber evidence—as trace evidence, subject to contamination, deterioration and corruption. Our current criminal-justice system allows juries to hear eyewitness-identification evidence shaped by suggestive police procedures. In a 1977 case, *Manson v. Braithwaite*, the Supreme Court held that such evidence could be used if deemed "reliable." Today we know you can have a good long look, be certain you have the right guy and also be wrong. But *Manson* is still considered good law.

Jennifer Thompson was 22 the night she was raped in 1984. Throughout the ordeal, she scrupulously studied her attacker, determined to memorize every detail of his face and voice so that, if she survived, she could help the police catch him. Thompson soon identified Ronald Cotton in a photo lineup. When she—after some hesitation—again picked Cotton out of a physical lineup a few days later, a detective told her she'd picked the same person in the photo lineup.

But in this case Thompson got it wrong, although Cotton served 10 years before DNA evidence exonerated him and decisively implicated another man, Bobby Poole. The curious part of the story is that despite Thompson's determination to memorize every detail, when she first saw Poole in court she was certain she had never seen him before. Indeed, according to Wells and
Quinlivan, "even after DNA had exonerated Cotton and Thompson herself had accepted the fact that Poole was her attacker, she had no memory of Poole's face and, when thinking back to the attack, she says, 'I still see Ronald Cotton'."

In their paper, Wells and Quinlivan suggest a host of tricks the mind can play, ranging from incorporating innocent "feedback" from police investigators to increasing certainty in one's shaky memories that become reinforced over time. Add to that Thompson's determination to regain control over her life, and her need to believe that the justice system was just, and it would have been doubly hard for her to look at a police lineup that, as it happened, did not include an image of the real rapist, and walk away. To hear Thompson and other victims tell it, being part of a system that identified and ultimately convicted the wrong man became another form of victimization, and for that reason alone the system needs to be reformed.

The problems with the eyewitness-identification system cannot be laid at the feet of crime victims any more than they can be blamed on police investigators. Wells's argument for reforming our eyewitness-identification system is that the incentive for the police to subtly nudge our memories is not only uncorrected by the justice system, but also sometimes rewarded by it. Wells wants the Supreme Court to revisit the scientific basis for its 1977 decision. Whether or not the John Roberts court wishes to take up the issue of innocent prisoners—there is one test case percolating through the New Jersey courts—a few states and cities have used innocent-exoneration scandals to rethink their eyewitness-identification practices. Proposed changes include showing victims photos sequentially and explaining that the perpetrator may not be included in the lineup, and ensuring that whoever conducts the lineup has no knowledge of which person is the actual suspect.

This is not an issue that tracks the usual left-right divide. Some of the most zealous reformers of the eyewitness-identification process are lifelong conservatives who recognize that the credibility of the whole justice system is on the line each time an innocent man goes to jail and a guilty one walks free.

Lithwick is a NEWSWEEK contributing editor and a senior writer for Slate. A version of this column also appears on Slate.com.

URL: http://www.newsweek.com/id/189294

© 2009