Endnotes

1. This is essentially the approach followed by the American Law Institute in drafting its *Model Code of Pre-Arraignment Procedure* (Washington, 1975). In its Code it provided for such matters as the right to counsel at identification procedures, the suppression of evidence of identification, and the general conditions under which identifications should be made. It then provided that "[a]ny law enforcement agency engaged in identification procedures ... shall issue regulations ... implementing the provisions of this Article." The Code then lists a number of objectives of a fair eyewitness identification procedure (Article 160.1(2)).

2. In England there has been some dispute as to whether or not pretrial identification procedures should be subject to statutory control. Traditionally, the conduct of lineups has been governed simply by a circular prepared by the Home Office, *infra* note 12. However, the *Devlin Report*, *infra* note 12, recommended that the rules should be enacted as a schedule to a statute (p. 150). This has also been urged by a number of commentators: see *Justice Memorandum*, 1974, *infra* note 12, p. 17, and Walker and Brittain, *infra* note 24, p. 20. Although the rules were revised by the Home Office in light of the recommendations of the *Devlin Report*, they were not incorporated in a schedule to a statute. Most recently, The Royal Commission on Criminal Procedure (hereinafter cited as the *Philips Report*), Cmnd. 8092 (London: HMSO, 1981), p. 69, recommended that "when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control ...".

   The Scottish Working Group on *Identification Procedure under Scottish Criminal Law*, Cmnd. 7096 (Edinburgh: HMSO, 1978), p. 9, noted that the *Devlin Report*'s recommendation to embody some of their recommendations in legislation involved no major departure from "what has become traditional in English law, which in criminal matters favours codification or legislation". However, they noted that in the Scottish legal tradition, practically the whole of criminal law was still left to the common law; therefore, they suggested that the guidelines they recommended should not become statutory, but should be published by HMSO (p. 39).

3. *British North America Act, 1867*, s. 91(27) (U.K.).

4. *Id.*, s. 92(14).

5. See, in particular, ss. 452(1)(*f*)(i), 453(1)(*i*)(i) and 450 (2)(*d*)(i) of the *Criminal Code*, R.S.C. 1970, c. C-34.

6. R.S.C. 1970, c. I-1.

7. (1977), 73 D.L.R. (3d) 491, at 531.

8. (1978), 90 D.L.R. (3d) 161, at 193.

9. *Id.*, p. 193.

10. See generally W. Bellack, *The Constitutionality of the Proposed Guidelines for the Conduct of Pretrial Eyewitness Identification Procedures*, a paper prepared for the Law Reform Commission and on file at the Commission.

11. In the spring of 1979 the Law Reform Commission received the guidelines used in conducting lineups by police forces in the following cities: Toronto, Edmonton, Vancouver, Montréal and Guelph. In drafting these guidelines, we were assisted by these local rule-making efforts. However, although most police forces have a set of guidelines for their members to follow when conducting identification procedures, such guidelines often have shortcomings. They are often far from comprehensive; on many important questions they provide little guidance; they differ from police department to police department; they are often not followed; and, at least in some instances, they do not reflect good law enforcement practices.

12. Home Office, *Identification Parades and the Use of Photographs for Identification*, Home Office Circular No. 109 (London: HMSO, 1978) (hereinafter referred to as *Home Office Circular on Identification Parades*, 1978). The circular contains two separate codes, one governing parades, the other the use of photographs. Each code is divided into rules and a more detailed narrative for the assistance of the police called Administrative Guidance. Neither the rules nor the guidance have any authority in law; they are similar in authority to "Judges' Rules". The circular was published two years later, and embodies many of the recommendations of the *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (London: HMSO, 1976) (hereinafter referred to as the *Devlin Report*). For a comparison of the recommendations of the *Devlin Report* and the rules proposed in the *Home Office Circular 109, 1978*, and a critique of the circular for failing to adopt more of the recommendation of the *Devlin Report*, see M. Walker and B. Brittain, *Identification Evidence: Practices and Malpractices: A Report of JAIL* (London: JAIL, 1978). See also Justice, *Evidence of Identity: Memorandum to Lord Devlin's Committee* (London: Plumridge, 1974) (hereinafter referred to as *Justice Memorandum, 1974*).

13. The regulations for the District of Columbia; Clark County, Nevada; New York City; and Oakland, California are reprinted as appendices in F. Read, "Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?" 17 *University of California at Los Angeles Law Review* 339 (1969). Regulations in Los Angeles; New Orleans; and Richmond, Virginia are discussed in Note, "Protection of the Accused at Police Lineups", 6 *Columbia Journal of Law and Social Problems* 345 (1970). The regulations of the Pittsburgh Police Department are set out in an appendix in Comment, "Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution", 29 *University of Pittsburgh Law Review* 65 (1967).

14. See D. E. Murray, "The Criminal Lineup at Home and Abroad", [1966] *Utah Law Review* 610; Comment, "Possible Procedural Safeguards Against

Mistaken Identification by Eye-Witnesses", 2 *University of California at Los Angeles Law Review* 552 (1955); Note, "Due Process at the Lineup", 28 *Louisiana Law Review* 259 (1968); Read, "Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?" 17 *University of California at Los Angeles Law Review* 339 (1969); Sobel, *Eye-Witness Identification* (New York: Clark Boardman, 1972), ch. 7.

15. American Law Institute, *A Model Code of Pre-Arraignment Procedure* (Washington, D.C.: 1975), ss. 10.3, 160.1-160.7.

16. Project on Law Enforcement Policy and Rulemaking, *Model Rules: Eyewitness Identification*, revised draft, (Arizona: April 1974).

17. Great Britain, Criminal Law Revision Committee, *Eleventh Report; Evidence (General)*, Cmnd. 4991, (London: H.M.S.O., 1972), paras. 196-203; Scotland, Scottish Home and Health Department, *Criminal Procedure in Scotland — Second Report (Thomson Committee)*, Cmnd. 6218 (Edinburgh: HMSO, 1975), chapters 12, 46, and *Identification Procedure under Scottish Criminal Law*, Cmnd. 7096 (Edinburgh: HMSO, 1978); South Australia, Criminal Law and Penal Methods Reform Committee, *Second Report: Criminal Investigation* (Adelaide: A. B. James, Government Printer, 1974), chapters 6, 9, and *Third Report: Court Procedure and Evidence* (Adelaide: A. B. James, Government Printer, 1975), ch. 8; Commonwealth of Australia Law Reform Commission, *Report No. 2: Criminal Investigation* (Canberra: Australian Government Publishing Service, 1975); New Zealand, Criminal Law Reform Committee, *Report on the Question of Whether an Accused Person Under Arrest Should Be Required to Attend an Identification Parade* (Wellington: Government Printer, 1972), and *Report on Identification* (Wellington: Government Printer, 1978).

18. See, for example, *An Act Relating to the Investigation by Members of the Australian Federal Police of Offences Against the Laws of the Commonwealth and of the Australian Capital Territory, and for Purposes Connected Therewith*, ss. 35, 36, Bill 246, given first reading in The Senate, The Parliament of the Commonwealth of Australia, November 18, 1981.

19. See, for example, the essays collected in M. Porgrebin, *The Invisible Justice System: Discretion and the Law* (Cincinnati: Anderson Publishing, 1978).

20. This list of the objectives to be achieved by a detailed regulation of the police conduct of pretrial identification procedures could be considerably lengthened. Professor Kenneth Culp Davis, in his treatise on *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), pp. 90-91, suggests the following objectives:

> The objectives of a good program for reform of police practices should be (1) to educate the public in the reality that the police make vital policy, (2) to induce legislative bodies to redefine crimes so that the statutory law will be practically enforceable, (3) to rewrite statutes to make clear what powers are granted to the police and what powers are withheld, and then to keep the police within the granted powers, (4) to close the gap between the pretenses of the police manuals and the actualities of police behavior, (5) to transfer most of the policy-making

power from patrolmen to the better qualified heads of departments, acting on the advice of appropriate specialists, (6) to bring policy-making out into the open for all to see, except when special need exists for confidentiality, (7) to improve the quality of police policies by inviting suggestions and criticisms from interested parties, (8) to bring the procedure for policy determination into harmony with the democratic principle, instead of running counter to that principle, (9) to replace the present police policies based on guesswork with policies based on appropriate investigations and studies made by qualified personnel, and (10) to promote equal justice by moving from a system of ad hoc determination of policy by individual officers in particular cases to a system of central policy determination and a limitation of the subjective judgment of individual officers to the application of the centrally determined policy.

21. Even when confronted directly with an important identification issue, the Supreme Court of Canada seems reluctant to suggest standards for the proper conduct of police identification procedures. See S. A. Cohen, *Due Process of Law: The Canadian System of Criminal Justice* (Toronto: Carswell, 1977), p. 84, citing *R.* v. *Marcoux* (1976), 24 C.C.C. (2d) 1, [1976] 1 S.C.R. 763.

22. In the United States, when the Supreme Court was concerned about the dangers of improper police conduct in pretrial identification procedures, it seized upon the constitutional safeguards of right to counsel and the right to due process, and invoked the exclusionary rule because it was unable to draft a comprehensive statute or regulations that might have minimized the risks of wrongful conviction. See H. R. Uriller, *The Process of Criminal Justice: Investigation and Adjudication*, 2nd ed. (St. Paul, Minn.: West, 1979). This obviously was not necessarily the most efficient manner of dealing with the problem.

23. Great Britain, Criminal Law Revision Committee, *supra* note 17, para. 196. Judge Carl McGowan of the District of Columbia Circuit Court of Appeals has noted that many experts feel that faulty identifications present "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished". C. McGowan, "Constitutional Interpretation and Criminal Identification", 12 *William and Mary Law Review* 235, at 238 (1970). The drafters of the American Law Institute's *A Model Code of Pre-Arraignment Procedure*, *supra* note 15, observed that "a wide variety of experienced persons consider and have considered the pre-trial identification as a crucial factor in the fair and accurate determination of guilt or innocence, and a factor as to which certain kinds of error, once committed, are particularly hard to remedy and particularly likely to lead to unjust results" (p. 422). See generally the views of the commentators referred to in note 24, *infra*.

24. See E. B. Block, *The Vindicators* (New York: Doubleday, 1963); E. M. Borchard, *Convicting the Innocent* (New Haven: Yale University Press, 1932); R. Brandon and C. Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: Archon Books, 1973); P. Cole and P. Pringle, *Can You Positively Identify This Man?* (London: André Deutsch, 1974); *Devlin Report*, *supra* note 12; J. Frank and B.

Frank, *Not Guilty* (1957; reprint ed., New York: Da Capo Press, 1971); F. Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* (Boston: Little, Brown and Co., 1927); E. Gardner, *The Court of Last Resort* (New York: Pocket Books, 1952); *Justice Memorandum*, *supra* note 12; P. Hain, *Mistaken Identity: The Wrong Face of the Law* (London: Quartet Books, 1976); L. Hale, *Hanged in Error* (Baltimore: Penguin Books, 1961); M. Houts, *From Evidence to Proof: A Searching Analysis of Methods to Establish Fact* (Springfield, Illinois: Charles C. Thomas, 1956); National Council of Civil Liberties, *Memorandum of Evidence to the Devlin Committee on Identification Parades and Procedure* (London, 1974), Appendix; F. O'Connor, " 'That's the Man': A Sobering Study of Eyewitness Identification and the Polygraph", 49 *St. John's Law Review* 1 (1974); C. H. Rolph, *Personal Identity* (London: Michael Joseph, 1957); P. M. Wall, *Eye-Witness Identification in Criminal Cases* (Springfield, Illinois: Charles C. Thomas, 1965); M. Walker and B. Brittain, *supra* note 12, [this book, detailing a number of cases of wrongful conviction in England, was published by a group called "Justice Against the Identification Laws"]; B. Wentworth and H. Wilder, *Personal Identification* (Boston: R. G. Badger, 1918); J. H. Wigmore, *The Science of Judicial Proof*, 3rd ed. (Boston: Little, Brown & Co., 1937), pp. 250-254; G. Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed. (London: Stevens and Sons, 1963), pp. 119-120; W. Willis, *An Essay on the Principles of Circumstantial Evidence*, 7th ed. (London: Butterworth & Co., 1937), pp. 192-202.

25. In addition to the studies referred to in the text, see Judge Jerome Frank, who, in a book dealing with miscarriages of justice, stated that "[p]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions". Frank and Frank, *supra* note 24, p. 61. Houts also concludes from his studies that "eyewitness identification is the most unreliable form of evidence and causes more miscarriages of justice than any other method of proof". Houts, *supra* note 24, pp. 10-11.

26. Borchard, *supra* note 24, p. xiii.

27. Brandon and Davies, *supra* note 24, p. 24.

28. The terms of reference for the committee were:

> To review, in the light of the wrongful convictions of Mr. Luke Dougherty and Mr. Laszlo Virag and of other relevant cases, all aspects of the law and procedure relating to evidence of identification in criminal cases; and to make recommendations. (*Devlin Report*, *supra* note 12, p. vii)

29. See M. A. Méndez, " 'Memory, That Strange Deceiver', Book Review of The Psychology of Eyewitness Testimony by A. Daniel Yarmy", 32 *Stanford Law Review* 445 (1980).

30. See O. Hilton, "Handwriting Identification vs. Eyewitness Identification", 45 *Journal of Criminal Law, Criminology and Police Science* 207, at 212 (1954).

31. See S. Paikin, "Identification as a Facet of Criminal Law", 29 *Canadian Bar Review* 372 (1951).

32. See Borchard, *supra* note 24, pp. 1-3.

33. See Rolph, *supra* note 24, p. 81.

34. *R.* v. *Craig* (1933), 49 C.L.R. 429, at 446 (Aust. H.C.). Both Wigmore and Morgan, the outstanding scholars in the area of the law of evidence, have thoroughly analysed the logical processes of testimonial proof. See, in particular, Wigmore, *supra* note 24; E. M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept", 62 *Harvard Law Review* 177, at 184 (1948).

35. *R.* v. *Browne and Angus* (1951), 11 C.R. 297, 99 C.C.C. 141 at 147, (1951) 1 W.W.R. (N.S.) 449. See also *R.* v. *Harrison (No. 3)* (1951), 12 C.R. 314, 100 C.C.C. 143 at 145, (1951) 2 W.W.R. (N.S.) 318 (B.C. C.A.); *R.* v. *Yates* (1946), 85 C.C.C. 334 (B.C. C.A.); *R.* v. *Smith*, [1952] O.R. 432 at 436, 103 C.C.C. 58 at 61 (Ont. C.A.).

36. For citation to the literature of the various efforts psychologists have made to alert lawyers and judges to the psychological process of testimonial proof, see N. Brooks, "Psychology and the Litigation Process: Rapprochement?" in Law Society of Upper Canada, Department of Continuing Education, *Psychology and the Litigation Process* (Toronto: 1976), pp. 26-29; see also the literature cited in note 37, *infra*.

37. The literature published in the last six years is voluminous. For a review, see B. R. Clifford and R. Bull, *The Psychology of Person Identification* (London: Routledge and Kegan Paul, 1978); F. J. Levine and J. L. Tapp, "The Psychology of Criminal Identification: The Gap From Wade to Kirby", 121 *University of Pennyslvania Law Review* 1079 (1973); E. F. Loftus, *Eyewitness Testimony* (Cambridge, Mass.: Harvard University Press, 1979); F. D. Woocher, "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification", 29 *Stanford Law Review* 969 (1977); A. D. Yarmey, *The Psychology of Eyewitness Testimony* (New York: Free Press, 1979); Symposium, "Eyewitness Behaviour" in 4 *Law and Human Behavior* (No. 4) 237-394 (1980).

38. Somewhat surprisingly, although the courts have never thoroughly analysed the psychological process of proof, they have been aware that the real danger in eyewitness testimony has been with the honest but mistaken witness. Indeed, in a number of cases, appeal courts have overturned jury verdicts where the trial judge has suggested to the jury that they need only be convinced of the identifying witness's honesty. For example, in a 1947 case from British Columbia, two police officers had identified the accused as the culprit and the trial judge told the jury there was no possibility of the police officers being mistaken in their identification of the accused. He went on to say that "if the defence's statement is true, Detectives McDonald and Pinchin are not honest, but they are perjurers and have come here and deliberately perjured themselves". *R.* v. *McClellan* (1947), 4 C.R. 425 at 426. The British Columbia Court of Appeal ordered a new trial because the jury was misled about the real dangers of eyewitness testimony.

    In a robbery case where the defence was one of mistaken identity, the Ontario Court of Appeal ordered a new trial because the charge given by

the trial judge on the issue of identity was substantially the same as what was then required by section 134 of the *Criminal Code* to be given by trial judges in rape cases. Mr. Justice Jessup stated that in his opinion:

> . . . such a charge is insufficient with respect to an issue of identification by an eyewitness because it tends to caution the jury only on the credibility of the witness and not also on the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection. (*R.* v. *Sutton*, [1970] 2 O.R. 358 at 368)

39. For a review of the literature, see Loftus, *supra* note 37, ch. 5; see also K. H. Marquis, J. Marshall, and S. Oskamp, "Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony", 84 *Harvard Law Review* 1620 (1971).

40. See, for example, A. Doob and H. Kirshenbaum, "Bias in Police Lineups — Partial Remembering", 1 *Journal of Police Science and Administration* 287 (1973).

41. A psychologist, in clarifying the role of applied eyewitness testimony research, has referred to the variables that affect eyewitness accuracy but which cannot be controlled as "estimator" variables, and to those variables that can be controlled in the criminal justice system as "system" variables. G. L. Wells, "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables", 36 *Journal of Personality and Social Psychology* 1546 (1978).

42. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined". Wall, *supra* note 24, p. 26; but see Woocher, *supra* note 37, p. 970.

43. R. Buckhout, A. Alper, S. Chern, O. Silverberg and M. Slomovits, "Determinants of Eyewitness Performance on a Lineup", 4 *Bulletin of the Psychonomic Society* 191 (1974) (approximately 40 per cent correct identification); R. Buckout, "Nearly 2000 Witnesses Can Be Wrong", 2 *Social Action and the Law Newsletter* (No. 3) 7 (1975) (In this study a purse-snatching was staged on television. Only 15.3 per cent of the 2,145 viewers who responded to a questionnaire correctly identified the "mugger" from a lineup held subsequently. Simply by guessing the viewers would have selected the "mugger" 14.3 per cent of the time); E. Brown, K. Deffenbacher and W. Sturgill, "Memory for Faces and the Circumstances of Encounter", 62 *Journal of Applied Psychology* 311 (1977) (approximately 50 per cent correct identification); H. R. Dent and F. Gray, "Identification in Parades", 1 *New Behaviour* 366 (1975) (approximately 14 per cent correct identification); see also G. L. Wells, M. R. Leippe and T. M. Ostrom, "Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification", 63 *Journal of Applied Psychology* 345 (1978). Of course these precise accuracy rates are quite meaningless because they reflect the varied conditions under which the studies were done and for many reasons may not be translatable to real-life crime situations. As well, of course, in

real life, false identifications do not pose a threat of wrongful conviction unless the witness chooses the police suspect out of the lineup; if someone else is chosen the police will be aware of the error. See R. C. L. Lindsay and G. L. Wells, "What is an Eyewitness-Identification Error?: The Effect of Lineup Structure Depends on the Definition of a False Identification", unpublished. However, these studies do provide a general indication of the unreliability of eyewitness testimony. It might be the case that in real-life situations, because of the traumatic nature of a real crime and the influences of police investigation, the rate of accuracy is even much lower.

44. Devlin, *supra* note 12, p. 7.

45. *U.S.*v. *Wade*, 388 U.S. 218 (1967).

46. *Id.*, p. 229, quoting G. Williams and H. A. Hammelman, "Identification Parades: Part I", [1963] *Criminal Law Review* 479 at 482.

47. See B. Clifford, "The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification", [1979] *Criminal Law Review* 153.

48. Williams, *supra* note 24, pp. 119-120 ("It would be pleasant, but unduly optimistic, to think that the danger inherent in identification evidence by comparative strangers to the accused is now generally recognized. The fact is that juries do not recognize its unreliable nature..."); see also Frank and Frank, *supra* note 24, pp. 19-23. Borchard, whose observation was based upon his study of sixty-five cases of wrongful conviction, noted that "[j]uries seem disposed more readily to credit the veracity and reliability of the [eyewitness] victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi character witnesses, or other testimony." Borchard, *supra* note 24, p. xiii.

49. See the survey of prosecuting attorneys in Lavrakas and Bickman, "What Makes a Good Witness?", presented to the American Psychological Association, Chicago, 1975, cited and discussed in Loftus, *supra* note 37, pp. 12-13.

50. *Devlin Report*, *supra* note 12, appendix B.

51. "Reports and Proposals: Identification Issues", 19 *Criminal Law Reporter* (BNA) 2416 (August 18, 1976).

52. See E. Loftus, "Reconstructing Memory: The Incredible Eyewitness", 8 *Psychology Today* (No. 7) December 1974, p. 17, reprinted in 15 *Jurimetrics* 188 at 189 (1975).

53. See, for example, R. C. L. Lindsay, G. L. Wells and C. M. Rumpel, "Can People Detect Eyewitness- Identification Accuracy Within and Across Situations?" 66 *Journal of Applied Psychology* 79 (1981).

54. See G. L. Wells, R. C. L. Lindsay and T. J. Ferguson, "Accuracy, Confidence and Juror Perceptions in Eyewitness Identification", 64 *Journal of Applied Psychology* 440 (1979).

55. See generally A. G. Goldstein, "The Fallibility of the Eyewitness: Psychological Evidence", in B. D. Sales, ed., *Psychology in the Legal Process* (New York: Spectrum, 1977), pp. 223, 225-227.

56. See Brandon and Davies, *supra* note 24, p. 42 ("Most of us, in our everyday lives, when we meet someone, *recognize* him; it is relatively unusual to have to make an identification that does not involve a large area of recognition. Because this generally works in everyday life, we trust it; and this trust is mistakenly extended to areas of identification where it ought not to apply ").

57. See generally, the *Devlin Report*, *supra* note 12; Loftus, *supra* note 37; Woocher, *supra* note 37; D. Starkman, "The Use of Eyewitness Identification Evidence in Criminal Trials", 21 *Criminal Law Quarterly* 361 (1978-79); S. Saltzburg, *American Criminal Procedure: Cases and Commentary* (St. Paul, Minn.: West, 1980), p. 548 and following.

58. The case for detailed and carefully constructed pretrial eyewitness identification procedures was made by one author by stating the following propositions. He stated that if the propositions are accepted, then we must also accept that our system of justice requires "the goverment to use more, rather than less, reliable identification procedures when doing so is neither unduly expensive nor otherwise damaging to legitimate government interests".

    (1) Studies indicate that eyewitness identification presents grave dangers of error.

    (2) Studies indicate that the usual dangers can be exacerbated by suggestive procedures, which may be employed intentionally or unknowingly by law enforcement personnel.

    (3) Once improper suggestion affects a witness, it may be difficult — impossible sometimes — to remove the lingering influence of the suggestion.

    (4) Measures can be taken which would reduce suggestiveness and thereby reduce some of the dangers of misidentification.

    (5) The eyewitness may be unaware of the true dangers of misidentification and overconfident about his or her ability to "finger" the right person.

    (6) Photographic procedures present special problems of reliability because the witness making the identification does not have all the sensory data available at a lineup.

    (7) Police officers often will not be aware of the real dangers of misidentification or the extent to which certain police conduct may contribute to those dangers.

    (8) Jurors may not appreciate the dangers of misidentification or the suggestiveness of certain police procedures.

    (9) Without a videotape reproduction of an identification, reconstructing what happened in an effort to discover whether suggestive procedures were used, and if so to what extent, often may be impossible.

    (10) Once suggestive techniques affect an identification, it is difficult to measure how important the effect is on subsequent identifications.

(11) In many instances, identification procedures can be improved at minimal cost to the government and with no non-pecuniary harm to governmental interests.

(12) Our system of justice rests in large part on the assumption that the innocent should be protected against erroneous convictions, even though protection of the innocent produces acquittals of persons who, in fact, are guilty.

S. A. Saltzburg, *American Criminal Procedure: Cases and Commentary* (St. Paul, Minn.: West, 1980), pp. 544-545.

59. In *The King* v. *Dwyer and Ferguson*, [1925] 2 K.B. 799 at 803, 18 Cr. App. R. 145 at 148, 41 T.L.R. 186 (C.C.A.), a case involving eyewitness identification evidence, the court noted, "it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person". Of course, the erection of any effective safeguards against the danger of unjust convictions invariably imposes a cost in terms of fewer convictions of the guilty. This fact was openly acknowledged in the *Devlin Report*, *supra* note 12, p. 7:

> . . . the only way of diminishing the risk [of mistaken identification] is by the erection of general safeguards which will inevitably increase the burden of proof ... in the end and overall our recommendations are bound to mean that the benefit of a higher acquittal rate will be bestowed on the guilty as well as on the the innocent. Some of the guilty will be violent criminals.

60. See generally Doob and Kirshenbaum, *supra* note 40.

61. This phenomenon is similar to that found in psychological experiments where experimenters have found that "subjects in experiments seem concerned that their data be useful for the experimenter". (*Id.*, p. 288)

62. In *U.S.* v. *Wade*, *supra* note 45, pp. 230-232, the Supreme Court of the United States noted that:

> The defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Participants' names are rarely recorded or divulged at trial.... In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

63. For example, Rule 9 of *Home Office Circular 109, 1978* provides:

> An officer concerned with the investigation of the case against the suspect shall take no part in the arrangements for or the conduct of the parade, and if present at the parade shall not intervene in any way and should be so positioned that he can at all times be seen by those forming the parade line.

64. This was a recommendation of *Devlin Report*, *supra* note 12, p. 124. In a Canadian case, the judge criticized the officers investigating the crime for taking part in a lineup proceeding to the extent of selecting the individuals who appeared in the lineup with the accused:

Someone with authority, independent I suggest, independent of the investigation then at hand, upon viewing the suspect, ought to determine then and there the requirements of the individuals who shall form the line-up, having regard to the age, build, colour, complexion and dress ... of the accused at that time. Such precautions are essential. (*R.* v. *Opalchuk* (1958), 122 C.C.C. 85 at 94 (Ont. Co. Ct.), per Latchford J.)

65. An Indian court gave the following justification for this procedure:

> This practice is based on sound reason. Magistrates are more conversant with the procedure to be followed to ensure their proper conduct; they can be more relied upon; they are less amenable to extraneous influences; they are more easily available, they can act with great authority over the police and the jail staff who have to arrange for the parade. Experience too is invaluable, and accordingly ... identification proceedings should be conducted by experienced Magistrates and ... they should attend at least six identification parades for instructional purposes before they can hold one unaided. (*Asharfi* v. *State* (1961), 48 A.I.R. (A) 153 at 158)

66. In *Re Kamaraj Goundar* (1960), 47 A.I.R. (M) 125 at 130, the Court remarked that everyone — especially police — should be excluded from identification proceedings.

67. This rationale was given by a court in the following terms:

> The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurence are to identify them from the midst of other persons without any aid from any other source. That is why provisions are made that the police are not to be present at the time of the parade. Identification in the test identification parade loses much value if the Sub-Inspector has been with the identifying witnesses for some time before the parade is held. (*Provash Kumar Bose* v. *The King* (1951), 38 A. I. R. (C) 475 at 477)

68. Accordingly, it was said in *Kartar Singh* v. *The Emperor* (1934), 21 A.I.R. (L) 692 at 693, that

> . . . the presence of the two Head Constables of Police in the room where the identification was held was really most objectionable.
>
> The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair and upright and free from taint of any sort. The police should inspire confidence in the public....

69. See M. Scaparone, "Police Interrogation in Italy", [1974] *Criminal Law Review* 581. Judicial supervision of identification procedures is also a feature of the Spanish and Mexican Codes of Criminal Procedure. See Murray, *supra* note 14, pp. 625-627.

70. See P. M. Wall, *supra* note 24, p. 46.

71. *Supra* note 15.

72. There is a substantial amount of literature on the advantages of having judicial supervision of interrogation practices. Most of the arguments in

favour of judicial supervision of interrogation would also apply to the judicial supervision of lineups. See Law of Evidence Project, *Compellability of the Accused and the Admissibility of his Statements*, Study Paper No. 5 (Ottawa: Law Reform Commission of Canada, 1973) and the literature cited therein.

73. An American case nicely illustrates the kind of suggestion that can, even unintentionally, be made when the officer in charge of the lineup knows the identity of the suspect. In *State* v. *Lewis*, 296 So. 2d 824 (La. Sup. Ct., 1974) the witness picked the "third from right" when the accused was third from her left. The officer then asked the witness if she knew her left from her right. The accused was then identified. Surprisingly, the court did not recognize the impropriety of the officer's conduct.

74. See generally R. Rosenthal, *Experimenter Effects in Behavioral Research* (New York: Appleton-Century-Crofts, 1966).

75. See J. E. Smith, R. J. Pleban and D. R. Shaffer, "Effects of Interrogator Bias and a Police Trait Questionnaire on the Accuracy of Eyewitness Identification", 116 *Journal of Social Psychology* 19 (1982); see generally Doob and Kirshenbaum, *supra* note 40, p. 288; Levine and Tapp, *supra* note 37, p. 1115.

76. See Doob and Kirshenbaum, *supra* note 40, p. 288.

77. The following charge to the jury by a trial judge in New South Wales is typical:

> [I]f the only identification in a case were by a witness who first saw an accused in the dock ... then that would be very dangerous identification and you would certainly, I imagine, not act upon it, because you have the situation of a courtroom, a man charged with the crime, and the witnesses identifying him, being human beings, would very easily say, if he is in the dock and he is charged with it: "I am pretty sure that is the man". (*R.* v. *Chapman* (1969), 91 W.N. (N.S.W.) 61 at 69 (N.S.W. Ct. Cr. App.))

Another Australian trial judge charged a jury in these terms:

> [I]f a man is pointed out to a witness by himself under a light, or still more in the dock ... that in effect is an effort by the police to force him (the witness) into saying "That is the man." That ... is the use of suggestion — "Of course he must be the man, I see him in the dock accused of murder and he must be the man." (*Davies and Cody* v. *The King* (1937), 57 C.L.R. 170 at 179 (Aust. H.C.))

In the same case, the High Court of Australia went on to remark:

> [I]f a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question. (p. 182)

78. See *R.* v. *Browne and Angus*, *supra* note 35, p. 149 ("This is a type of identification described as wrong and prejudicial to the accused"); *R.* v. *McGeachy*, [1969] 2 C.C.C. 98 at 105 (B.C. C.A.) ("The significant thing was that the usual line-up ... was, for some unexplained reason, not held. It was of dominant importance that it should have been held"); *R.* v. *Howick*, [1970] *Criminal Law Review* 403 (C.C.A.) ("it is usually unfair to ask a witness to make an identification for the first time in court"); *R.* v. *Glass*, 64 N.Z.L.R. 496, [1945] N.Z. L.R. 249 (N.Z. C.A.); *R.* v. *John*, [1973] *Criminal Law Review* 113 (C.C.A.); *R.* v. *Gaunt*, [1964] N.S.W.R. 864 (N.S.W. Ct. Cr. Appr.); *R.* v. *Maarroui*, 92 W.N. (N.S.W.) 757, [1970] 3 N.S.W.R. 116 (N.S.W. Ct. Cr. App.).

79. In *R.* v. *Gaunt*, *supra* note 78, p. 866, two of the three witnesses identified the appellant in the company of police officers. The other witness identified the appellant at trial. The Court of Appeal noted: "The learned chairman directed the jury 'the main point is one of identification, the only question is whether they [the three witnesses] could posibly be mistaken,' but this, we think, was not sufficient to bring to their minds an adequate note of warning." A new trial was ordered in this case even though there was other Crown evidence. *R.* v. *Howick*, *supra* note 78 and *R.* v. *Maarroui*, *supra* note 78, are other cases in which convictions were quashed because the respective trial judges failed to point out the possibility of error attaching to this type of identification evidence.

80. In *R.* v. *Browne and Angus*, *supra* note 35, p. 150, the issue of a warning was not discussed, but, although other circumstantial evidence also pointed to the two accused, the convictions were quashed. O'Halloran J.A. stated:

> In my judgment, with deference, identification of the kind presented in this case, (a dock identification), is valueless in the sense that it is dangerous for a Court to act upon it in any respect. Its inherent tendencies toward honest mistake and self-deception are so pervasive that they destroy any value that could otherwise attach to it even in a lesser role of "some evidence." The strange failure to hold a line-up in this case invites criticism in more pointed language than I have used.

In *R.* v. *McGeachy*, *supra* note 78, pp. 113-114, it is not clear that a warning had been given. In this case the witness's pretrial evidence was ambivalent; it was not until trial that she was able to give any kind of positive identification, and even then the "dock" identification was made with some reservations. The conviction was quashed because the identificaton evidence "was of such a dubious character and lacked that degree of certainty which the law requires in order to convict".

81. In a Nova Scotia case the accused's request that he be allowed to sit in the body of the court because of the importance of the identification issue was refused on the ground that the right to compel the accused's appearance for trial included requiring him to identify himself in open court: *Re Conrad and the Queen* (1973), 12 C.C.C. (2d) 405 (N.S. S.C.). Similarly, in a case before the Ontario High Court of Justice, it was held that there had been no denial of natural justice nor of the accused's right to a full answer and defence where the Justice had excluded the public from a preliminary inquiry on a charge of rape, at the Crown's request, including friends of the

accused who had come dressed like him in order to test the victim's ability to identify the accused: *Re Regina and Grant* (1973), 13 C.C.C. (2d) 495. Both of these decisions were referred to in *Dubois* v. *The Queen* (1975), 29 C.R.N.S. 220 (B.C. S.C.) where McKay J. concluded that whether an accused should be permitted to sit in the public section of the courtroom where identification is at issue is a matter within the presiding judge's discretion. The refusal of such a request is not a denial of natural justice. However, McKay J. did point out that this form of in-court identification is used regularly.

82. For example, in *R.* v. *Keane* (1977), 65 Cr. App. R. 247 (C.C.A.), a conviction was quashed in part because no proper identification parade had been held (instead, the police had held a confrontation at the station) even though the victim "claimed to recognise the appellant as one whom he knew well by sight on the streets where they lived" (p. 249). The court noted that the victim had earlier mistakenly identified the accused's fraternal twin brother at their home.

83. For example, in *R.* v. *Mackenzie* (1979), 65 A.P.R. 363 (P.E.I. S.C.), the eyewitness claimed a previous "acquaintance" with the accused and his dock identification was accepted without comment.

84. In *R.* v. *Ayles* (1956), 119 C.C.C. 38 (N.B. C.A.), in which the witness identified the suspect as being an ex-patient of the Saint John's Tuberculosis Hospital and known to him, the judge in commenting on an improperly conducted pretrial identification procedure said:

> In my view the showing of photographs to Cunningham had no effect upon his evidence being solely for the purpose of ascertaining the name of the intruder.... He was definite in his assertion that he immediately recognized the intruder as an ex-patient known to him. (p. 52)

85. The following passage in *R.* v. *Smierciak*, [1947] 2 D.L.R. 156 at 157, [1946] O.W.N. 871 at 872, 2 C.R. 434 at 436, 87 C.C.C. 175 at 177 (Ont. C.A.) is typical of the comment that is frequently made by judges in emphasizing the importance of pretrial identification procedures when the witness has never seen the offender prior to the incident in question:

> If a witness has no previous knowledge of the accused person, so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness.

86. See *R.* v. *Yates* (1946), 1 C.R. 237 at 247, [1946] 2 D.L.R. 521 at 530, [1946] 1 W.W.R. 449 at 459, 62 B.C.R. 307, 85 C.C.C. 334 at 345 (B.C. C.A.).

87. For example, in *R.* v. *Robertson* (1979), 45 A.P.R. 529 at 532-533 (N.S. C.A.), the trial judge was quoted as cautioning the jury that "we can make mistakes even with acquaintances. People that we know reasonably well, we can be a little uncertain on occasion where another individual closely resembles them is or is not the person that we know."

88. In *R.* v. *Turnbull*, [1977] Q.B. 224 at 228, [1976] 3 W.L.R. 445 at 447, [1976] 3 All E.R. 549 at 552, 63 Cr. App. R. 132 at 137 (C.C.A.), the leading case laying down the mandatory rule of caution, the court stated:

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

In *Sutton* v. *The Queen*, [1978] W. Aust. R. 94 (W. Aust. S.C.) the witness "testified that she saw three men fleeing from the scene, one of whom she recognized as a man named 'Mole', whom she subsequently identified as the appellant at a police identification parade" (p. 94). The conviction was quashed because the warning given at trial did not meet the standard laid down in *R.* v. *Turnbull*.

89. In two Canadian cases, robbery victims later identified people in bars as their assailants. The police arrived and questioned the suspects in the presence of the victims: *R.* v. *Smith*, [1952] O.R. 432, 14 C.R. 304, 103 C.C.C. 58 (Ont. C.A.); and *R.* v. *Babb* (1972), 17 C.R.N.S. 366, [1972] 1 W.W.R. 705, (B.C. C.A.). There was no need for any formal pretrial identification proceedings in these cases, and none were carried out (although in the latter case the police showed the witness a single photograph of the accused, prior to trial, and were criticized by the court for doing so).

90. See *infra* note 426.

91. [1977] R. de J. 134 (Que. Ct. of Sess.). See also *R.* v. *Yates*, *supra* note 86; *R.* v. *Cleal* (1941), 28 Cr. App. R. 95 (C.C.A.); *R.* v. *Chapman*, *supra* note 77.

92. *R.* v. *Racine*, [1977] R. de J. 134 at 135 (Que. Ct. of Sess.).

93. *Raspor* v. *The Queen* (1958), 99 C.L.R. 346, 32 Aust. L.J.R. 190 (Aust. H.C.).

94. *Id.*, p. 349 (C.L.R.).

95. See *supra* note 10.

96. S. E. Asch, "Effects of Group Pressure upon the Modification and Distortion of Judgment", in E. Maccoby, T. M. Newcomb and E. Hartley, eds., *Readings in Social Psychology*, 3rd ed. (New York: Holt, 1958), p. 393; S. E. Asch, "Opinions and Social Pressure", [1955] *Scientific American* (No. 5) 193.

97. This was the procedure followed in *R.* v. *Harrison (No. 3)*, *supra* note 35. The British Columbia Court of Appeal did not comment on the propriety of the practice.

98. For example, in *R.* v. *Dickman* (1910), 5 Cr. App. R. 135, 26 T.L.R. 640 (C.C.A.), two witnesses were instructed to look through an open door at two persons in a room at the police station. The witnesses then discussed one of the occupant's appearance over tea before viewing the lineup. Although at this time they decided that the person seen was not the killer, at the lineup they identified him. The appeal in this case was dismissed and, while the court criticized the suggestive procedure utilized, no comment was made about the propriety generally of allowing witnesses to view the suspect together and discuss the matter between themselves.

99. (1959), 29 W.W.R. 141, 31 C.R. 127, 125 C.C.C 56 (B.C. C.A.). Another case in which it was suggested that it was improper for witnesses to view photographs together is *R.* v. *Opalchuk*, *supra* note 64, p. 94. In that case it appears that the witnesses were permitted to examine photographs together prior to the arrest of the suspect. The conviction was quashed and the judge noted "the glaring errors in the conduct of the line-up and the use, the improper use, I suggest, of pictures before the line-up together with the evidence as given by Le Bouef and Potter about reviewing the sixteen pictures together in the back of the police cruiser".

100. *Id.*, pp. 143-144 (W.W.R.), 130 (C.R.), 60 (C.C.C.). The court went on to point out that the course followed in this case was all the more objectionable since one of the witnesses was an adult and the other two were young boys who would be particularly vulnerable to suggestion. The conviction in this case was, however, upheld on appeal, since the appellate court felt that "the opportunity of each of the three witnesses to observe the men who committed the robbery ... together with the very definite and emphatic character of the evidence given ... justified the Magistrate in convicting" (p. 142 (W.W.R.), 129 (C.R.), 58 (C.C.C.)).

101. See A. Alper, "Eyewitness Identification: Accuracy of Individual vs. Composite Recollections of a Crime", 8 *Bulletin of the Psychonomic Society* 147 (1976); A. H. Rupp, *Making the Blind See: Effects of Discussion on Eyewitness Reports*, Rep. No. CR-19 (1975), Center for Responsive Psychology; E. F. Loftus and Greene, "Warning: Even Memory for Faces May Be Contagious", 4 *Law and Human Behavior* 323 (1980); O. H. Warnick and G. S. Sanders, "The Effects of Group Discussion on Eyewitness Accuracy", 10 *Journal of Applied Social Psychology* 249 (1980) (group discussion increased the overall accuracy of individual eyewitness reconstruction).

102. Alper, *supra* note 101.

103. In *R.* v. *Dickman*, *supra* note 98, for instance, the witnesses agreed over tea that a person they had seen in the police station was not the offender; they then went to the lineup and pointed the same man out. In *R.* v. *Opalchuk*, *supra* note 64, one witness, after making her selection of a photograph, communicated this to another witness who had not yet chosen a photograph. In *R.* v. *Maarroui*, *supra* note 78, one eyewitness pointed out the suspect to another, and in *R.* v. *Gilling*, (1916), 12 Cr. App. R. 131 (C.C.A.), there was evidence that the eyewitness had discussed the accused's personal appearance after having seen the suspect. In all of these cases the courts failed to comment on both the desirability and the effect that these incidents had on the weight of the identification evidence.

104. *R.* v. *W.*, [1947] 2 S.A.L.R. 708 (So. Africa S.C., App. Div.).

105. *Id.*, p. 713.

106. *R.* v. *Nara Sammy*, [1956] 4 S.A.L.R. 629 (So. Africa S.C., Transvaal Prov. Div.).

107. *Id.*, p. 631. In *R.* v. *Y. and Another*, [1959] 2 S.A.L.R. 116 (So. Africa S.C., Witwatersrand Local Div.), one witness's identification of the

accused was completely disregarded because the complainant's husband was also present at the lineup and told her "that he (pointing to the suspect) was one of the persons who outraged her" (p. 118). The court went on to give a detailed criticism of the procedures adopted in the case:

> [A]lthough it might not be an irregularity, it is a matter for comment that as in the present case the three Crown witnesses were detained together in a room before the parade and of course strong grounds for criticism emerge on this portion of the case. I do not wish to cast any criticism upon the investigating officer because he has not been able to give evidence but it seems very clear that no one of the safeguards which are referred to in one of these decided cases namely *inter alia* a warning that they should not discuss the question of identification at all was prescribed. (p. 119)

108. *Italian Code of Criminal Procedure*, art. 362, as described by Murray, *supra* note 14, p. 625.

109. *Supra* note 64.

110. *Id.*, p. 93.

111. *Id.*, p. 94. See also *R.* v. *Dickman*, *supra* note 98, p. 143 (Cr. App. R.), p. 642 (T.L.R.), in which the court said:

> The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it was so.

112. (1910), 5 Cr. App. R. 270 (C.C.A.).

113. *Id.*, p. 273. The conviction was quashed in the case, although the court implied that if a warning had been given to the jury it might have upheld the conviction.

114. *U.S.* v. *Person*, 478 F.2d 659 (1973).

115. *Id.*, p. 661.

116. See generally R. S. Malpass and P. G. Devine, "Eyewitness Identification: Lineup Instructions and the Absence of the Offender", 66 *Journal of Applied Psychology* 482 (1981).

117. See, for example, R. F. Garton and L. R. Allen, "Recognition Memory of Paced and Unpaced Decision-Time for Rare and Common Verbal Material", 35 *Perceptual and Motor Skills* 548 (1972).

118. See R. S. Malpass and P. G. Devine, "Guided Memory in Eyewitness Identification Lineups", 66 *Journal of Applied Psychology* 343 at 349 (1981) ("Providing an opportunity for eyewitnesses to rehearse extensively their recollections of a witnessed offense increased their accuracy in identifying the offender after a substantial interval, without increasing identification errors ").

119. See the articles referred to in note 57, *supra*.

120. But see Egan and Smith, "Improving Eyewitness Identification: An

Experimental Analysis", a paper presented at the American Law Society Convention, Baltimore, October, 1979.

121. In a number of cases, judges have recognized the danger that witnesses will be anxious to make an identification. Thus, the Supreme Court of South Africa suggested that a witness "might think it is his duty to point out somebody, and an act of disrespect to or criticism of the police if he is not able to do so". *Supra* note 106, pp. 631-632. Another judge of the South African Supreme Court referred to the fact that victims of crimes may make lineup identifications in order to satisfy their wish that somebody be made to pay for their sufferings, as stemming from the "innate and instinctive desire that there shall be retribution": *R.* v. *Masemang*, [1950] 2 S.A.L.R. 488 at 493 (So. Africa S.C., App. Div.)

The Devlin Committee compiled some statistics that it suggested indicates that witnesses do not feel under great pressure to pick someone out. Their statistics revealed that in only about one-half of all lineups did witnesses make an identification. Out of a total of 2,116 parades, no one was picked out in 984 instances (Appendix B, p. 163). Admittedly, this might be taken as an indication that the problem may not be so severe as some commentators suggest, and while it is encouraging that a large number of people do not submit to pressures to make identifications at lineups, it should not be concluded that people never, or only seldom, pick out innocent suspects because they consider it their public duty to do everything possible to assist the police. Furthermore, in most Canadian cities, as our survey revealed, witnesses fail to pick someone as the person they saw in a much smaller number of cases. The following approximate percentages were given by police officers in response to the question, "How often are lineups held and no one is identified?": Toronto — 10 per cent; Kingston — 50 per cent; Regina — 25 per cent; Halifax — 40 per cent; Fredericton — 20 per cent; Vancouver — 16 per cent; Calgary — 10 per cent; Montréal — 50 per cent; Sherbrooke — 10 per cent.

122. R. Buckhout, "Determinants of Eyewitness Performance in a Lineup", Report No. CR-9 (New York: Center for Responsive Psychology, 1974). Similarly in another study, one group of witnesses was told that the offender was in the lineup while another group was told that he may or may not be in the lineup (in fact, the offender was present in one-half of the lineups viewed by each group). Subjects who had been given the high expectancy instruction were significantly more likely to mistakenly identify a person from a lineup that did not contain the offender: D. F. Hall and T. M. Ostrom, "Accuracy of Eyewitness Identification after Biasing and Unbiasing Instructions", paper presented at the annual meeting of the American Psychological Association, 1975.

123. In 1979, Jane Blouin, then a doctoral student in psychology at Carleton University, assisted the Law Reform Commission of Canada in running a series of empirical studies in order to test some of the assumptions underlying present practices relating to pretrial identification procedures. Questions such as the following were tested: the effect of pre-lineup questionnaire procedures on the witness's ability to identify a suspect, the importance of context on a witness's ability to identify a suspect, the

relative merits of six-person vs. twelve-person lineups, the effectiveness of mugshot presentations vs. live lineups, and the effect of various pre-lineup instructions on an eyewitness. A paper describing these experiments and the results was prepared by Jane Blouin, "Four Experimental Studies on Procedural Influences on Eyewitness Identification Accuracy." The paper is on file at the Commission.

124. For a further study which tends to show that if witnesses know that the police are parading someone they have reason to suspect, the witnesses will feel social pressure to make an identification, thus lowering their criteria for identification, see A. Upmeyer and W. K. Schreiber, "Effects of Agreement and Disagreement in Groups on Recognition Memory Performance and Confidence", 2 *European Journal of Social Psychology* 109 (1972).

125. See *U.S.* v. *Person*, *supra* note 114, p. 661 ("[T]he mere fact that suspects are included within the line-up, and that witnesses know or assume this to be the case, is an inescapable aspect of line-up identification procedure"). The danger that witnesses might be under some presure to select the person who "looks most like" the person they saw is illustrated in *R.* v. *Ross*, [1960] *Criminal Law Review* 127 (C.C.A.), where the eyewitness admitted during cross-examination: "Well, I expected the man to be there on the identification parade and I picked out the man who looked most like the man who had engaged me."

126. *R.* v. *Rosen* (1969), 90 W.N. (N.S.W.) 620 (N.S.W. Ct. Cr. App.).

127. *Id.*, p. 622.

128. See, *supra* note 99, p. 142 (W.W.R.), 128 (C.R.), 58 (C.C.C.). See also *R.* v. *Masemang*, *supra* note 121.

129. *Supra* note 106.

130. *Id.*, p. 631.

131. H. D. Ellis, G. M. Davies and J. W. Shepherd, "Experimental Studies of Face Identification", 3 *Journal of Criminal Defence* 219 at 230 (1977). See also studies cited in note 208, *infra*.

132. *Devlin Report*, *supra* note 12, p. 120.

133. *Id.*, p. 121.

134. See G. L. Wells, T. J. Ferguson and R. C. L. Lindsay, "The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact", 66 *Journal of Applied Psychology* 688 (1981) (finding that the inflation of confidence may be greater for inaccurate witnesses than for accurate witnesses).

135. The studies are reviewed in K. A. Deffenbacher, "Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?", *Law and Human Behavior* 243 (1980); and M. R. Leippe, "Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence", 4 *Law and Human Behavior* 261 (1980).

136. See E. F. Loftus, D. G. Miller and H. J. Burns, "Semantic Integration of

Verbal Information into a Visual Memory", 4 *Journal of Experimental Psychology: Human Learning and Memory* 19 (1978).

137. Deffenbacher, *supra* note 135.

138. *R.* v. *Spatola*, [1970] 3 O.R. 74 at 82, 10 C.R.N.S. 143 at 152, [1970] 4 C.C.C. 241 at 249 (Ont. C.A.).

139. See for instance, *R.* v. *Sutton*, *supra* note 38:

> [W]hen the third photograph was shown she made a tentative identification. What she then said, in any event, was "this looks like the man that robbed me" and "If this fella had blue eyes and a beard ...".
>
> [A]fter again viewing the accused through the door, Miss Brennan said "I'm almost positive that is him but I don't want to swear to it, I don't want to make a mistake".
>
> The next day Miss Brennan asserted to the police that her identification of the appellant as the robber was certain .... (p. 360)

140. In *R.* v. *Cleal* (1941), 28 Cr. App. R. 95 (C.C.A.) a court of appeal quashed a conviction because a child victim expressed uncertainty in his identification and his testimony was uncorroborated, the court of appeal noted that: "When the boy was asked as a last question in cross-examination: "Do you think you may have made a mistake about this man and it may have been another man?", he answered: "Yes, Sir, I might" (p. 101). Similarly, the Nova Scotia Court of Appeal, in quashing a conviction in *R.* v. *Rehberg* (1973), 5 N.S.R. (2d) 14, noted: "Where the one witness who had contact with the person who sold him the stolen articles, states, under oath, that it could have been someone other than the accused, then it is difficult to see how identity can be properly established ...". (p. 16)

In both of these cases there was no opportunity for the witness to express uncertainty at an earlier point since no pretrial identification procedures had been held. Other cases where the witness's expressed uncertainty quite likely influenced the court in quashing the conviction are: *R.* v. *Opalchuk*, *supra* note 64, *R.* v. *Sutton*, *supra* note 38, *R.* v. *Hederson*, [1944] 2 D.L.R. 440; *R.* v. *Hayduk*, 81 C.C.C. 132 (Ont. CA.), [1935] 4 D.L.R. 419, [1935] 2 W.W.R. 513, 64 C.C.C. 194, 43 Man. R. 209 (Man. C.A.); *McGeachy*, *supra* note 78; *R.* v. *Ross*, *supra* note 125.

141. See *R.* v. *Newell* (1927), 27 S.R. (N.S.W.) 274 at 275 ("Some people, as we know, habitually express themselves with a greater degree of caution then others. It is very largely a question of temperament ").

142. In *R.* v. *Harvey* (1918), 42 O.L.R. 187, the witness at trial was unable to make a positive identification and it appears that no pretrial identification had been made. The witness stated at trial: "To the best of my knowledge, he was the man.... There is another man here to-day, and I am undecided which it is ... I am not certain ... I don't want to make any mistake" (pp. 188-189). The court of appeal, however, stated that this was sufficient evidence of identification to go to the jury and it could not be said that there was "no evidence" upon which a conviction could rest. For other cases where the defence unsuccessfully argued that the witness's reserva-

tions about the identification fatally weakened the case against the accused, see *R.* v. *Nepton* (1971), 15 C.R.N.S. 145 (Que. C.A.); *R.* v. *Richards*, [1964] 2 C.C.C. 19 (B.C. C.A.).

In *R.* v. *Maynard* (1979), 69 Cr. App. R. 309 (C.C.A.), defence counsel made the interesting argument that the fact that the eyewitness had not wavered in her identification of the accused was an indication that it was unreliable. He argued that "[A]dherence to a possibly mistaken identification ... [is] one of the characteristics of the honest but unreliable witness" (p. 315). The court did not disagree with this submission but declined to apply it as a blanket principle. The court stated: "In theory, of course, this is possible, but there can be no certain generalisation in these matters ..." (p. 315).

143. See studies cited *infra*, note 189.

144. *Supra* note 89.

145. *Id.*, p. 61 (C.C.C.), 436 (O.R.), 307 (C.R.). Also in *R.* v. *Browne and Angus*, *supra* note 35, p. 302 (C.R.), 147 (C.C.C.), 455 (W.W.R.(N.S.)). O'Halloran J.A. noted:

> Unless the witness is able to testify with confidence what characteristics and what "something" has stirred and clarified his memory or recognition, then an identification confined to "that is the man", standing by itself, cannot be more than a vague general description and is untrustworthy in any sphere of life where certitude is essential.

146. See *Home Office Circular 109, 1978*, *supra* note 12.

147. On the probative value of non-identifications, see generally G. L. Wells and R. C. L. Lindsay, "On Estimating the Diagnosticity of Eyewitness Nonidentification", 88 *Psychological Bulletin* 776 (1980).

148. (1954), 110 C.C.C. 382, [1955] O.W.N. 90, 20 C.R. 137 (Ont. H.C.).

149. See *R.* v. *Dunlop, Douglas and Sylvester* (1976), 33 C.C.C. (2d) 342 at 347 (Man. C.A.); *R.* v. *Demich* (1951), 102 C.C.C. 218 (B.C. C.A.); *R.* v. *Harrison (No. 3)*, *supra* note 35; *R.* v. *Hederson*, *supra* note 140; *R.* v. *McDonald* (1951), 13 C.R. 349, 4 W.W.R. (N.S.) 14, 101 C.C.C. 78 (B.C. C.A.); *R.* v. *Dixon* (1953), 8 W.W.R. (N.S.) 88, 16 C.R. 108, 105 C.C.C. 16 (B.C. C.A.); *R.* v. *Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247 (C.C.A.), *R.* v. *Wainwright* (1925), 19 Cr. App. R. 52 (C.C.A.); *R.* v. *Osborne and Virtue*, [1973] 1 All E.R. 649 at 653, [1973] 1 Q.B. 678, [1973] 2 W.L.R. 209, [1973] *Criminal Law Review* 178, 57 Cr. App. R. 297 (C.C.A.).

150. See D. G. Miller and E. F. Loftus, "Influencing Memory for People and Their Actions", 7 *Bulletin of the Psychonomic Society* 9 (1976); E. F. Loftus "Unconscious Transference in Eyewitness Identifications", 2 *Law and Psychology Review* 93 (1976).

151. Brown, Deffenbacher and Sturgill, *supra* note 43; G. W. Gorenstein and P. C. Ellsworth, "Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness", 65 *Journal of Applied Psychology* 616 (1980); G. Davies, J. Shepherd and H. Ellis, "Effects of Interpolated

Mugshot Exposure on Accuracy of Eyewitness Identification", 64 *Journal of Applied Psychology* 232 (1979).

152. For example, in *R.* v. *Goode*, [1970] S.A.S.R. 69, the Supreme Court of South Australia, in allowing the accused's appeal from conviction for armed robbery, noted that the only identifying witness had picked the accused's photograph from a group of eighteen, but commented that "[t]here was no evidence as to how far, if at all, the originals of the other seventeen photographs resembled the applicant" (p. 70). In *R.* v. *Simpson and Kenney*, [1959] O.R. 497, 30 C.R. 323, 124 C.C.C. 129 (Ont. C.A.), the dissent felt that the appeal from conviction should have been allowed. This opinion was based in part upon the weakness of the identification evidence and the fact that a crucial discrepancy could not be cleared up, since there was no record of the identification procedure:

> A detective of police swore that he had shown Mr. Spackman six photographs of different persons, including one of the appellants, Simpson, before he was called to identify that appellant at the trial, but Mr. Spackman said he had been shown but one photograph — that of Simpson, a front and side view. Who was right? (p. 134 (C.C.C.), 502 (O.R.), 328 (C.R.))

153. In *R.* v. *Prentice*, [1965] 4 C.C.C. 118, 52 W.W.R. 126 for example, the British Columbia Court of Appeal, in dismissing an appeal from conviction, appeared not to grasp the significance of the problem:

> The witnesses Stuart and Micner were shown a number of pictures prior to the trial and both identified the picture of the accused from among these pictures. The pictures of the persons other than the accused were not produced at the trial, and the accused now complains that he suffered prejudice because of this. I cannot agree.
>
> The Magistrate, by his reasons for judgment, has demonstrated that he was aware of the danger occasioned by witnesses identifying a photograph prior to a trial and being influenced by his memory of the photograph more than by his remembrance of what he actually saw at the scene. The identification cannot be impeached upon this ground, as the Magistrate has instructed himself correctly. (p. 119 (C.C.C.), 127-128 (W.W.R.))

What the court failed to appreciate was that the Magistrate could not possibly determine what prejudice the accused might have suffered without first comparing his appearance to that of the persons depicted in the other photographs.

154. (1976), 16 N.S.R. (2d) 271 (N.S. S.C.).

155. *Id.*, pp. 299, 305.

156. Compare *R.* v. *Christie*, [1914] A.C. 545, 83 L.J.K.B. 1907, with *R.* v. *Harrison*, [1946] 3 D.L.R. 690, 86 C.C.C. 166 (B.C. C.A.).

157. *R.* v. *Evensen* (1916), 33 W.N. 106 (C.C.A.); *R.* v. *Eden*, [1970] 2 O.R. 161, [1970] 3 C.C.C. 28 (Ont. C.A.).

158. See *R.* v. *Cleal*, *supra* note 140, p. 96 (The accused's statement, "I have

never seen the boy before", made when confronted with the victim, was put into evidence).

159. See, *supra* note 148.

160. The Australian Law Reform Commission in its *Criminal Investigation Report No. 2* (Interim Report — September 5, 1975) concluded that counsel should be entitled to be present "to give advice to his client prior to the commencement of a parade, and to act as a source of general reassurance to him during it if the client requires it".

161. *Home Office Circular 109, 1978*, rule 2.

162. *Code de Procédure Pénale* (1959), p. 118.

163. D. Poncet, *La protection de l'accusé par la Convention Européene des Droits de l'Homme: Étude de droit comparé* (Genève: Librairie de l'Université-Georg & Cie S.A., 1977), p. 164.

164. *German Code of Criminal Procedure* (English version) (London: Sweet and Maxwell Ltd., 1965), p. 79.

165. See Murray, *supra* note 14, p. 625.

166. See Rule 504 and commentary.

167. The question was discussed, however, in an Indian case:

> Since justice must not only be done but must be seen to be done, the accused must be afforded reasonable opportunity not only to safeguard his interest but to satisfy himself that the proceedings are conducted fairly and honestly. Hence if he requests for the presence of his counsel at the test identification, his request should never be turned down, though of course the counsel is not entitled to take any part in the actual holding of the test. Similarly the prosecution too have a right to be represented by counsel if they wish to do so. (*Asharfi* v. *State*, *supra* note 65, p. 168)

168. See for example Read, *supra* note 13; Comment, "Lawyers and Lineups", 77 *Yale Law Journal* 390 (1967); N. R. Sobel, "Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods", 38 *Brooklyn Law Review* 261 (1971); Comment, "The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts", 36 *University of Chicago Law Review* 830 (1969); Comment, "Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution", 29 *University of Pittsburgh Law Review* 65 (1967); J. D. Grano, "Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 *Michigan Law Review* 719 (1974); Note, "Criminal Procedure — Due Process — Right to Counsel at Pre-trial Identification", 78 *West Virginia Law Review* 84 (1975); Woocher, *supra* note 37.

169. See *supra* note 45.

170. *Id.*, pp. 226-227.

171. *Id.*, pp. 235, 236-237.

172. *Id.*, p. 241.

173. 388 U.S. 263 (1967).

174. *Id.*, p. 273.

175. 388 U.S. 293 (1967).

176. 406 U.S. 682 (1972).

177. C. A. Pulaski, "Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection", 26 *Stanford Law Review* 1097 at 1103 (1974).

178. 413 U.S. 300 (1973).

179. 409 U.S. 188 (1972). This decision, although it concerned a case that had arisen before the *Wade* trilogy, has been held applicable to post-*Wade* cases. See *Manson* v. *Braithwaite*, 432 U.S. 98 (1977), where a show-up identification used by the police seven months after the assault, instead of a lineup, was found to be admissible evidence.

180. If duty counsel is not available, legal aid will have to provide a lawyer.

181. The Devlin Committee had this to say in its *Report*:

> We consider it desirable that a suspect should always have a solicitor representing him at a parade, but the evidence we have had about the fair way in which parades are conducted by the police and the lack of complaint about them does not lead us to conclude that it is an absolute necessity. (p. 115)

182. See *supra* note 15, p. 433.

183. A survey of the reported cases indicates that the courts consider one of the most effective means of disclosing the possibility that witnesses are mistaken in their identification of the accused is to point to discrepancies between their description of the offender and the actual appearance of the accused. The cases are legion. However, citation to a few will illustrate the weight that the courts give to this information: In *R.* v. *Peterkin* (1959), 30 C.R. 382 (Que. Ct. of Sess.), the witness asserted that the offender had a trench coat thrown over his right arm to conceal a weapon he was carrying, but the accused testified that he was left-handed. He was acquitted at trial before the Quebec Court of Sessions. In *R.* v. *Aiken*, [1925] V.L.R. 265, the Supreme Court of Victoria noted that the witness had given a description to the police in which he described the man who stole a motorcycle as about 5'10" whereas the accused was only 5'5½". In *R.* v. *Craig*, *supra* note 34, a judge of the High Court of Australia pointed out in his dissenting judgment that one of the identifying witnesses described the murderer as having "fairly broad Irish features" but, he remarked, "to such description, Craig would appear not to answer" (p. 448). In yet another example, both witnesses in a case involving forgery stated that the culprit was clean-shaven. The accused offered evidence proving that he had a mustache at the time of the offence: *R.* v. *Gilling*, *supra* note 103. In *R.* v. *Schrager* (1911), 6 Cr. App. p. 253 (C.C.A.), both witnesses to an assault said that the assailant was wearing light clothes. They both

identified the accused who was found sitting in a cab near the scene of the assault. However, the accused was wearing dark clothes. It was suggested that he had changed, but as no other clothes were found, the Court of Criminal Appeal quashed his conviction.

In *Chartier* v. *Attorney General of Quebec* (1979), 9 C.R. 97 (3d) (S.C.C.) the appellant argued that his arrest was wrongful because his features did not exactly match those described by all of the witnesses. The court commented, "[r]egardless of the number of similar characteristics, if there is one dissimilar feature there is no identification" (p. 138).

Finally, in one case, all four witnesses said the robber was about 5'6" or 5'7" in height. The accused's height was 5'11½". O'Halloran J.A. of the British Columbia Court of Appeal stated:

> If the robber had been 5 feet, 11½ to 6 feet tall, it would have been plainly noticeable. For all four witnesses to make an error of four or five inches in height would be an extraordinary coincidence.... Each witness had ample opportunity to compare the robber's height with his or her own height. This unanimous evidence of the robber's height discloses too great a difference with appellant's actual height to permit appellant being mistaken for the robber, *even if appellant had been found to resemble the robber in all other respects*. (*R.* v. *Harrison (No. 3)*, *supra* note 35, p. 319 (C.R.), 322-323 (W.W.R.), 147 (C.C.C.) — Emphasis added)

184. For example, in a case heard by the British Columbia Court of Appeal, the victim of an assault committed in a pickup truck failed to mention the colour of the truck. The accused's truck was of a very distinctive colour and the court considered the witness's failure to mention this fact in quashing the accused's conviction: *R.* v. *Gagnon* (1958), 122 C.C.C. 301 (B.C. C.A.). However, in many cases the courts do not appear to place much weight on the witness's failure to mention the suspect's distinguishing characteristics in their description. For example, in *R.* v. *Dixon*, *supra* note 149, the poor state of the accused's teeth was very noticeable at trial, and yet, although the court noted that the witness had not described or noted the condition of the suspect's teeth, the court placed little weight on this omission and dismissed the accused's appeal from conviction. In a Nova Scotia case, the Court of Appeal dismissed the accused's appeal with little apparent concern for the fact that the witness purported to identify the accused in a lineup on the basis of a prominent "hickey" on the accused's neck, even though he had failed to mention this distinguishing mark to the police when first asked to describe the robbers: *R.* v. *Smith* (1975), 12 N.S.R. (2d) 289.

185. Courts of appeal will frequently quash convictions if the witnesses are unable to offer a description of the suspect before identifying him or her, or if their descriptions are so vague that they are of no real assistance in finding a suspect. In *R.* v. *Smith*, *supra* note 89, pp. 438-439 (O.R.), the witness's description was simply that the assailant was wearing a windbreaker and was bareheaded. At trial the magistrate attempted to evince some type of concrete description but the answers he received were vague. When asked about the contours of the appellant's face: "a half kind

of a smile"; distinguishing features: "I would say he is younger and I would say he was hungry for dough"; specific features: "he did not look like a fellow who would do such a dirty thing. His features were nice. . . [N]ice eyes; low forehead and his hair combed nice."

The Court of Appeal concluded:

> If the identification of an accused depends upon unreliable and shadowy mental operations, without reference to any characteristic which can be described by the witness, and he is totally unable to testify what impression moved his senses or stirred and clarified his memory, such identification, unsupported and alone, amounts to little more than speculative opinion or unsubstantial conjecture, and at its strongest is a most insecure basis upon which to found that abiding and moral assurance of guilt necessary to eliminate reasonable doubt. (p. 436)

The Nova Scotia Court of Appeal, in *R.* v. *Shaver* (1970), 2 N.S.R.(2d) 225 (N.S. C.A.), quashed a conviction because it rested entirely upon identification and the eyewitnesses (police officers) were unable to describe the appellant in any satisfactory manner:

> Constable Cheverie's recollection was based entirely on the fact that the boy wore bluish clothing. Constable Murray was more secure in his view and did suggest that he recognized the features, although, as I have said, the trial judge found nothing distinctive about the features of the boy. When Constable Gamache found him in the Volkswagen the boy was wearing a bright blue shirt. That is the sum total of the identification of this youth. (p. 231)

A conviction was also quashed in *R.* v. *McDonald* (1951), 4 W.W.R. (N.S.) 14, 13 C.R. 349, 101 C.C.C. 78 (B.C. C.A.), where the verdict of guilty was based solely upon the identification evidence of two eyewitnesses. The Court of Appeal, in commenting upon the reliability of their evidence, noted that both of them gave only a "vague, general and unrecognizable description of the robber". (p. 18 W.W.R. (N.S.), 353 (C.R.), 82 (C.C.C.)). The court further commented that "[t]here is no nexus between the general description and the individual person. A description which fits 50 men equally can identify no one of them". (p. 18 W.W.R. (N.S.), 354 (C.R.), 83 (C.C.C.)).

In *R.* v. *Yates*, *supra* note 86, the conviction was quashed because the only evidence implicating the appellant was the identification of a child. Moreover, the child's identification evidence was not very compelling:

> Although she was with the man who assaulted her for over an hour in broad daylight her description of him was most meagre. She could not remember the colour of his hair or his eyes or any other feature which might enable him to be identified or to distinguish him from other men. She was only able to identify him by her recollection of his face and the fact that he was "young with a low cut moustache." (p. 244 (C.R.), 528 (D.L.R.), 456-457 (W.W.R.), 317 (B.C.R.), 342 C.C.C.))

The Court of Appeal also noted:

With respect, the learned Judge ought to have told the jury that such testimony, standing alone, could furnish nothing to distinguish the appellant from dozens of other men who easily fit that general description, and that, standing alone, it was too weak and indefinite to establish any characteristic or combination of traits by which an individual may be recognized and his identity proven. (p. 238 (C.R.), 522 (D.L.R.), 450 (W.W.R.), 310-11 (B.C.R.), 335-36 (C.C.C.))

A conviction was also quashed in *R.* v. *Browne*, *supra* note 35. Here the evidence pointing to the two accused was highly inconclusive and the description of them was vague and unsupported by other pretrial identification evidence:

All they could say was, one boy was tall and the other short.... Mrs. Clark could not describe the dress of either boy because "it was too dark." If it was too dark to obtain even a general impression of the kind of clothes the boys wore, it is understandable it was also too dark to enable Mrs. Clark to obtain a reliable impression of anything about their appearance that could identify them individually.... Mrs. Munro said that while she saw the boys' faces, yet in the fright of the moment, the darkness, and the suddenness of the attack from behind, she could not say the boys in the Court were the criminals; she said "they resembled them very much." (p. 146 (C.C.C.))

186. If the witness's description of the accused is incredibly detailed, the inference might be that the witness received prompting from the police or from some other source, and therefore the reliability of his or her entire evidence is severly undermined. Such was the case in *R.* v. *Craig*, *supra* note 34. The proprietor of a garage at which a particular car stopped for gasoline, identified the accused as the driver of the car. Even though she did not leave the car the witness described the passenger in the car in the following detailed terms:

There was a girl sitting in the front seat of the car, on the left side. She was a girl with a full face. She had rather bright eyes. She rather struck me as being a happy sort of girl, rather wide mouth. She had a long mouth, I would say. She gave me the impression that she was rather happy. She had that look. I should say she was about 18 years of age. I have the impression that she was wearing some beads around her neck. I could not say what colour they were. (p. 446)

In commenting adversely upon the reliability of this witness, a judge of the High Court of Australia (in dissent) noted:

It seems reasonably clear that in giving this detailed description Harvey is unconsciously relying upon the photograph of Bessie O'Connor, which was published in the newspapers as early as December 17th, or upon some other description of her, rather than upon his real recollection of the girl who was in the car. He seems to have had no occasion or reason for specially noting the features or characteristics of the girl. (p. 447)

187. Thus, in *R.* v. *Spatola*, *supra* note 138, Laskin J.A., as he then was, said, "Where some distinguishing marks are noticed and later verified, there is a strengthening of credibility according to the nature of such marks". (p. 82 (O.R.), 153 (C.R.N.S.), 249 (C.C.C.)). In *R.* v. *McKay* (1966), 61 W.W.R. (N.S.) 528 (B.C. C.A.), the appeal from conviction was dismissed in part because the witness's description of the two accused largely fits their physical appearance:

> The two accused were similar in stature to the persons described both in themselves and as compared to one another; that they wore very similar dress when picked up shortly after the occurrence; that Mr. Bruner had a scratched nose as described by Mr. Mostron; that Mr. Bruner had a broken or oddly shaped nose as described by Mr. Buyer.... (p. 530)

188. This argument was made by defence counsel in *R.* v. *Audy (No. 2)* (1977), 34 C.C.C. (2d) 231 (Ont. C.A.). The judge in noting the argument said:

> This of course was based upon the conflicting descriptions given to the police by the eyewitnesses shortly after the robbery occurred; upon the failure of witnesses who might have been expected to identify the appellant, if he were one of the robbers, but who were not able to do so; and the fact that several of the persons who were in one sense or another spectators at the event could not identify the appellant. (p. 236)

The appeal was, however, dismissed since the trial judge had given a general warning to the jury about the dangers of identification evidence and there was clearly some evidence to support the verdict, since three witnesses had selected the appellant from photographs and a lineup. See also *R.* v. *Pett and Bird*, 10 J.P. Supp. 48, [1968] *Criminal Law Review* 388 (C.C.A.)

189. See T. H. Howells, "A Study of Ability to Recognize Faces", 33 *Journal of Abnormal and Social Psychology* 124 (1938); G. H. Davies, J. Shepherd and H. Ellis, "Remembering Faces: Acknowledging Our Limitations", 18 *Journal of the Forensic Science Society* 19 (1978); K. R. Laughery and R. H. Fowler, "Sketch Artist and Identi-Kit Procedures for Recalling Faces", 65 *Journal of Applied Psychology* 307 (1980); Christie and Ellis, "Photofit Construction versus Verbal Descriptions of Faces", 66 *Journal of Applied Psychology* 358 (1981).

190. See R. S. Malpass, H. Lavigueur and D. E. Weldon, "Verbal and Visual Training in Face Recognition", 14 *Perception and Psychophysics* 285 (1973); M. M. Woodhead, A. D. Baddeley and D. C. V. Simmonds, "On Training People to Recognize Faces", 22 *Ergonomics* 333 (1979); R. S. Malpass, "Training in Face Recognition", in G. Davies, H. Ellis and J. Shepherd, eds., *Perceiving and Remembering Faces* (New York: Academic Press, 1981).

191. E. Belbin, "The Influence of Interpolated Recall Upon Recognition", 2 *Quarterly Journal of Experimental Psychology* 163 (1950).

192. L. Williams, "Application of Signal Detection Parameters in a Test of Eyewitnesses to a Crime", *Psychology Thesis*, Brooklyn College, S.U.N.Y., 1-31 (1975).

193. *Id.*, p. 21.

194. J. Marshall, *Law and Psychology in Conflict*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1980); D. G. Hall, "Obtaining Eyewitness Identifications in Criminal Investigations: Two Experiments and Some Comments on the Zeitgeist in Forensic Psychology", Thiel College, unpublished manuscript, 1976; G. Davies, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978).

195. See Blouin, *supra* note 123.

196. See Hall, *supra* note 194.

197. There are a number of possible explanations as to why detailed questioning of witnesses might interfere with their ability subsequently to identify the suspect. First, since facial recognition may be primarily a visual memory process, police questioning may create a conflict between the witness's verbal and visual processes that detracts from the clarity of the witness's visual image. Second, since witnesses will invariably only give a partial description of the person they saw, they may make a commitment to their limited memory of the suspect which subsequently influences and biases their identification of a suspect. Third, and this is simply a commonsense notion, since people are not particularly good at describing appearances, there is a danger that witnesses who have previously provided the police with an inaccurate description of the offender might at subsequent identification proceedings feel compelled only to identify someone fitting the description given earlier. Having committed themselves to a certain position, the witnesses will experience dissonance if faced with a person who bears a strong resemblance to their image of the offender but whose appearance does not correspond with their previous description. This dissonance may be resolved by the witness's unconsciously altering his image of the offender's appearance to fit the description already given to the police. An honest but mistaken identification might thereby be given.

198. This argument was made in the *Devlin Report*, *supra* note 12. Although not fully persuaded by the argument, the Devlin Committee did not recommend that police be obliged to obtain descriptions; only that as a matter of administrative practice they do so whenever practicable. They wrote in their report:

> Our conclusion is that descriptions are not of sufficient evidential value to be made the subject of legal rules whose operation might handicap the search for the criminal. There should, however, be an administrative rule that the police are to obtain descriptions wherever practicable, which we believe will be in the great majority of cases. We think that there should be a legal duty to supply a description [to the defence] if one has been obtained. (p. 107)

The Home Office Circular which implemented many of the recommendations of the *Devlin Report* did not contain any rules dealing with taking descriptions. See *supra* note 12.

199. J. M. Mandler and R. E. Parker, "Memory for Descriptive and Spatial Information in Complex Pictures", 2 *Journal of Experimental Psychology: Human Learning and Memory* 38 (1976).

200. Doob and Kirshenbaum, *supra* note 40.

201. For example, in one study which involved viewing a filmed assault, subjects who responded freely, without questioning, were 91 per cent accurate in their recall of 21 per cent of the available information; subjects given open-ended questions showed 83 per cent accuracy in recalling 32 per cent of the information; subjects given highly structured (leading questions and multiple choice) questioning were 64 per cent accurate in recalling 77 per cent of the available information. J. P. Lipton, "On the Psychology of Eyewitness Testimony", 62 *Journal of Applied Psychology* 90 (1977). See also H. M. Cady, "On the Psychology of Testimony", 35 *American Journal of Psychology* 110 (1924); T. J. Snee and D. E. Fush, "Interaction of the Narrative and Interrogatory Methods of Obtaining Testimony", 11 *Journal of Psychology* 229 (1941).

In another study, a film of a scuffle among five people was shown to subjects who gave a free report of the film, and were then given one of four differently structured interviews. Open-ended interviews included either moderate guidance or high guidance; and structured interviews were either multiple choice or leading questions. Similarly to Lipton, above, the authors of this study, Marquis, Marshall and Oskamp found that accuracy of reports was negatively related to completeness. The free reports were 93 per cent accurate and 28 per cent complete; reports based on moderate-guidance open-ended questions were 90 per cent accurate and 47 per cent complete; high-guidance open-ended reports were 87 per cent accurate and 56 per cent complete; multiple-choice reports were 82 per cent accurate and 83 per cent complete; leading question reports were 81 per cent accurate and 84 per cent complete. K. H. Marquis, J. Marshall and S. Oskamp, "Testimony Validity as a Function of Question Form, Atmosphere and Item Difficulty", 2 *Journal of Applied Social Psychology* 167 (1972). While the completeness of these reports closely parallels those of Lipton's study, the subsequent loss in accuracy found in Marquis is far less severe. Marquis reports that the trade-off of accuracy for completeness is much greater for questions determined in a pilot study to be difficult, than it is for questions determined to be easy. One plausible explanation for these findings is that witnesses are more vulnerable to the effects of specific or suggested questioning when their memory of the issue is less clear. They may be more resistant to suggestive questioning regarding events for which their memories are strong. For easy questions, direct questioning produces more completeness with little loss in accuracy, while for difficult questions, the loss in accuracy with highly structured questioning is greater.

This explanation has been confirmed by a subsequent study which found "no significant difference in recall accuracy under narrative and interroga-

tive reports" where only easy items were provided. B. Clifford and J. Scott, "Individual and Situational Factors in Eyewitness Testimony", 63 *Journal of Applied Psychology* 352 at 357 (1978). However, since the police will have no way of knowing whether they are asking a witness to recall easy or difficult details, in order to obtain accurate answers, a free narrative should always be used first, as suggested in the text. This order of questioning has been suggested by several psychologists: See, for example, E. R. Hilgard and E. F. Loftus, "Effective Interrogation of the Eyewitness", 27 *International Journal of Clinical and Experimental Hypnosis* 342 at 349 (1979):

> Given that one procedure (narrative form) is better in terms of enhancing accuracy while another (interrogatory form) leads to more completeness, which procedure should be used in interrogation? In fact, there is now sound psychological basis for proposing that both forms should be used, but the order in which they should occur is important. It is generally agreed that the narrative report should come first, followed by the interrogatory report form. That is, first let the witness tell the story in his or her own words, and when the witness is finished, then begin asking a set of specific questions.

202. *Id.*

203. Loftus, *supra* note 37, p. 93.

204. See generally studies cited in notes 37, 201 and 203, *supra*.

205. Loftus, *supra* note 37.

206. *Id.*, pp. 94-97.

207. R. J. Harris, "Answering Questions Containing Marked and Unmarked Adjectives and Adverbs", 97 *Journal of Experimental Psychology* 399 (1973).

208. See R. Hastie, R. Landsman and E. F. Loftus, "Eyewitness Testimony: The Dangers of Guessing", 19 *Jurimetrics Journal* 1 (1978); Loftus, *supra* note 37, p. 82 and following (urging a witness to guess can reduce the reliability of a later eyewitness report).

209. Hall, *supra*, note 194, p. 17 ("It seems to be the case that asking a subject to concentrate on minor, obscure details of a face interferes with the subject's ability to obtain other more general and more useful bits of information about the face").

210. See *supra*, note 135.

211. See *supra*, notes 37, 191.

212. See generally Yarmey, *supra* note 37, pp. 147-152; Clifford and Bull, *supra* note 37, pp. 99-110.

213. For a detailed description, see J. F. Wiley, "Recent Developments in

Criminal Identification Techniques: The Penry Composite Photograph", *Crown Newsletter* 1 (June, 1976).

214. See Yarmey, *supra* note 37, p. 147.

215. See studies discussed in Yarmey, *supra* note 37, p. 151.

216. See, for example, H. Ellis, J. Shepherd and G. Davies, "An Investigation of the Use of the Photo-fit Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); G. Davies, H. Ellis and J. Shepherd, "Cue Saliency in Faces as Assessed by the 'Photofit' Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); G. Davies, H. Ellis and J. Shepherd, "Cue Saliency in Faces as Assessed by the 'Photofit' Technique", 6 *Perception* 263 (1977); G. Davies, "Face Recognition Accuracy as a Function of Mode of Representation", 63 *Journal of Applied Psychology* 180 (1978); G. Davies, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978); J. W. Shepherd, H. D. Ellis, M. McMurran and G. M. Davies, "Effect of Character Attribution on Photofit Construction of a Face", 8 *European Journal of Social Psychology* 263 (1978).

217. See generally Yarmey, *supra* note 37, p. 150.

218. See studies cited in Clifford and Bull, *supra* note 37, p. 103. Previous studies found, however, that asking individuals to recall faces would reduce their later recognition performance.

219. (1971), 60 Q.J.P.R. 24 (Queensland District Ct.).

220. *Id.*, p. 25

221. *R.* v. *Kobelnak* (unreported, Toronto), referred to in Wiley, *supra* note 213.

222. The *Devlin Report*, *supra* note 12, traces the use of the identification parade to the 1860s, when it "appears to have been invented by the police, probably in response to judicial criticism of cruder methods of identification such as a direct confrontation between the witness and the suspect" (p. 3). In fact, evidence of earlier use of this method of identification is provided in an 1853 case where "the witness had been taken to the county prison, and ten men were shown to him ... [and] he had pointed out one of those ten men...". *R.* v. *Blackburn* (1853), 6 Cox. C.C. 333 at 338.

223. *R.* v. *Smith and Evand* (1908), 1 Cr. App. R. 203 at 204 (the accused's application for leave to appeal was refused because there was sufficient independent evidence to justify their convictions). See also *Chapman* v. *The King* (1911), 7 Cr. App. R. 53 at 55 (C.C.A.) ("That is not a satisfactory way of identification"); *R.* v. *Williams* (1912), 8 Cr. App. R. 84 at 88 (C.C.A.) ("[T]he mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory").

224. *R.* v. *Gaunt*, *supra* note 78.

225. *Id.*, pp. 865-866. In another case where the accused was shown alone to a witness, who was then asked whether he was the man in question, the High Court of Australia agreed with the view previously taken by England's Court of Criminal Appeal: "They treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection": *Davies and Cody* v. *The King*, *supra* note 77, p. 181. Other Australian cases in which courts have voiced dissatisfaction with identifications obtained at confrontations between the witness and the accused are: *R.* v. *Aiken*, *supra* note 183; *R.* v. *Evensen* (1916), 33 W.N. 106 (Aust., Ct. Cr. App.); *R.* v. *Harris*, (1971), S.A.S.R. 447 (Sup. Ct., So. Aust.); *R.* v. *Martin* [1956] V.L.R. 87 (Sup. Ct., Vict.).

226. *R.* v. *Gaunt*, *supra* note 78, p. 866. See also *Davies and Cody* v. *The King*, *supra* note 77.

227. *R.* v. *Smierciak*, *supra* note 85, pp. 157-158 D.L.R., 872 O.W.N., 436-437 C.R., 177 C.C.C. In a recent Nova Scotia case, however, the Court of Appeal dismissed the accused's appeal without commenting on the fact that the two witnesses had identified the accused at a police station confrontation: *R.* v. *Johnson* (1976), 17 N.S.R. (2d) 494.

228. See also *People* v. *Martin*, [1956] G.R. 26.

229. It is not clear from the cases whether the identification evidence is to be completely ignored in such cases, and thus the independent evidence alone must justify the conviction, or whether the appeal court in reviewing the evidence can place some weight on the identification evidence if it appears reliable in spite of the method of identification.

230. See, *supra* note 175.

231. *Id.*, p. 302.

232. See, *supra* note 179.

233. *Id.*, p. 198.

234. *Id.*, p. 199.

235. *Manson* v. *Braithwaite*, *supra* note 179.

236. See *supra* note 150.

237. See Rule 505(1) and commentary.

238. H. R. Dent and G. M. Stephenson, "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses", in D. P. Farrington, K. Hawkins and S. M. Lloyd-Bostock, *Psychology, Law and Legal Processes* (London: Macmillan, 1979), 195 at 201 "The results showed that identification performance was best in the one-way screen condition, with 40 per cent correct identifications, and worst in the conventional parade condition, with 18 per cent correct identifications .... There were thirty per cent correct identifications in the colour slides condition"; E. Brown, K. Deffenbacher, and W. Sturgill, "Memory for Faces and the Circumstances of Encounter", 62 *Journal of*

Applied Psychology 311 at 315 (1977). It is difficult to compare recognition accuracy for the lineups vs. mugshots in this study, as mugshots were presented only an hour after exposure, while lineups were conducted after one week. However, it is interesting to note that recognition accuracy was 72 per cent in the mugshot phase, and dropped to 51 per cent (when mugshots had not been seen) in the lineup phase. More interesting, however, is the fact that false identifications also dropped from 45 per cent with mugshots to 8 per cent with lineups. Thus, it would seem that mugshot presentations encourage subjects to make more identifications; however, the advantage of more correct identifications is offset by the greater number of false identifications with mugshots than with lineups. Indeed the authors concluded "it would appear that our subjects found it easier to recognize live criminals when they reappeared live — even when that appearance occurred a week later — than to recognize them from photographs" ; D. Egan, M. Pittner and A. G. Goldstein, "Eyewitness Identification: Photographs vs. Live Models", 1 *Law and Human Behavior* 199 (1977) (Witnesses who viewed a "criminal" in person were divided into two groups, one of which later viewed a live lineup, the other of which was shown mugshots of the same people as appeared in the lineup. Witnesses viewing the lineup were able correctly to pick out the criminal 98 per cent of the time while those who were presented with the criminal's photograph were only able to pick him out 85 per cent of the time. Indeed, the authors suggested that the 12 per cent difference may be understated since other factors which influence accurate identifications were not taken into account).

239. For instance, in *R.* v. *Nagy* (1967), 61 W.W.R. 634 (B.C. C.A.), one of the two witnesses had identified the accused in a store two days after the commission of the offence. Thereafter both witnesses identified the accused from ten photographs displayed by the police. The British Columbia Court of Appeal held that this identification evidence was sufficient to convict without expressing a preference for lineup identification evidence. Similarly in *R.* v. *Prentice*, *supra* note 153, photographic identification evidence was held to be sufficient to convict, even though a lineup would have been possible, since a description of the accused and the license plate number of his truck led the police to a likely suspect. Again, in *R.* v. *Richards*, *supra* note 142, the court failed to comment upon the improper procedures used to procure the identification evidence. The witness had failed to identify the accused from two series of photographs but was later "successful" when shown a single photograph of the accused alone; clearly a suspect had already been selected and thus a lineup could have been staged. Finally, a witness in *R.* v. *Spatola*, *supra* note 138, told the police that he recognized one of the robbers and gave a detailed description of the man. The witness then picked out a photograph of the accused from twelve photographs; no lineup was held. Although a new trial was held because the trial judge failed to give a general warning about the inherent frailties of eyewitness identification, no mention was made of the failure to hold a lineup.

240. (1961), 45 Cr. App. R. 220, [1961] *Criminal Law Review* 541 (C.C.A.).

241. *Id.*, p. 224 (Cr. App. R.).

242. (1962), S.R. (N.S.W.) 563, 79 W.N. (N.S.W.) 423, [1962] N.S.W.R. 1034 (N.S.W. Ct. Cr. App.).

243. *Id.*, p. 563 (S.R. (N.S.W.)). In both *Seiga*, *supra* note 240, and *Bouquet*, *id.*, the accused's appeal from conviction was dismissed. The courts held that the failure of the police to arrange a lineup affected the weight, but not the admissibility, of the identification evidence. In *Seiga* the court stated: "While the court disapproves of the conduct of the detective constable, that conduct does not in the opinion of the court afford sufficient ground for setting aside the conviction" (p. 224). In *Bouquet*, the judge noted that "[t]he use of photographs in this way, in lieu of a personal identification parade, goes to the weight and sufficiency of the evidence rather than to its admissibility and may be specially significant when there is no other evidence identifying the accused" (p. 560).

244. *R.* v. *Russell*, [1977] N.Z.L.R. 20 (N.Z. C.A.).

245. *Id.*, p. 28.

246. In *R.* v. *Dean*, [1942] O.R. 3, [1942] 1 D.L.R. 702, 77 C.C.C. 13 (Ont. C.A.), the witness was shown "a number of photographs to see whether he could help them in their search for the man who had escaped, by picking out his photograph". (p. 4 (O.R.)) The photograph the witness picked was that of the accused, who was arrested two years later. The court stated:

> [F]or the purpose of aiding the Crown in apprehending the guilty party (whoever he might be) Boivin was shown a variety of photographs and was asked whether he could pick out from among those photographs a picture of the second man who took part in the assault in question. ... In my opinion this exhibition of photographs to Boivin for the assistance of the police in discovering the wanted criminal was a proceeding entirely warrantable and proper .... (p. 10 (O.R.))

Photographs were also shown to witnesses by the police during the initial stages of their investigation when they had no suspect, and such a practice was approved in *R.* v. *Cadger* (1957), 119 C.C.C. 211 (B.C. C.A.) and in *R.* v. *Dixon*, *supra* note 149.

In *The King* v. *Hinds*, [1932] 2 K.B. 644, the Court of Criminal Appeal expressed approval of the following direction given to the jury at trial:

> [T]here is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. (p. 645)

It is interesting to note the reference made to the practice of showing a single photograph to witnesses. In this case, the witnesses were, in fact, shown a series of photographs. That perhaps accounts for the failure of the Court of Criminal Appeal to correct this obvious error.

The Supreme Court of South Australia had this to say in *R.* v. *Goode*, *supra* note 152, p. 79:

In cases where the victim cannot name the criminal an obvious, and indeed on occasions an indispensable, method of police investigation, is to offer a number of photographs for the victim's inspection, and this is legally unobjectionable, so long as he is not shown a photograph of the accused alone but given a number to choose from, covering as far as possible a range of persons roughly similar in appearance.

And the Supreme Court of Victoria in *R.* v. *Voss*, [1963] V.R. 22, stated that:

[T]he use of photographs by the police for the purpose of assisting them in their investigation is a matter which is quite proper and a procedure which is well recognized.

247. *R.* v. *Armstrong*, [1941] Qld. S.R. 161 at 163, 35 Qld. J.R.R. 76 (Qld. C.C.C.A.); see also *R.* v. *Kingsland* (1919), 14 Cr. App. R. 8 (C.C.A.).

248. In *R.* v. *Bagley*, [1926] 2 W.W.R. 513, [1926] 3 D.L.R. 717, 37 B.C.R. 353, 46 C.C.C. 257 (B.C. C.A.), there were six eyewitnesses to the robbery of a bank in Nanaimo, British Columbia. Several weeks after the robbery, they were called to the police station at Nanaimo where they were shown a number of photographs, including some photographs of the accused, who was being detained with other suspects on suspicion by the police in Seattle, Washington. Martin J. A., for the majority, wrote:

[I]n the present [case] I cannot perceive any good ground for holding that it was unfair to take the course adopted. It seems to me entirely reasonable that the Crown officers here should before sending prospective witnesses into a foreign state to identify persons therein detained on strong suspicion take the precaution of showing them sets of photographs in the usual fair and cautious way that has long been in practice here instead of embarking them upon purely speculative and expensive journeys at great and unnecessary cost to the country .... (pp. 519-520 (W.W.R.))

However, Chief Justice MacDonald in his dissenting opinion rejects the argument that the propriety of the procedure adopted should be determined on the basis of convenience. He noted the decisions of the English Criminal Court of Appeal, which embody "the opinions of a large number of eminent Judges", showing that it is wrong for police to exhibit to witnesses photographs of people who are already under arrest. In reference to the procedure adopted in the case on appeal he stated:

It was urged by Crown counsel, that the English rule in this regard, or what is tantamount to a rule, could not be applied in all its strictness in Canada, because of the difference in local conditions brought about by the extent of our sparsely settled territories and the inconvenience and expense of carrying witnesses long distances to make personal identification. I do not agree that any such distinction can be maintained. An accused person in Canada is entitled to as fair a trial as one in any other part of the Empire, and as the question involved here is one touching the fairness of the trial and the danger to the accused of the course which is here criticized, no question of inconvenience or expense can be allowed to affect that right. (p. 514 (W.W.R.))

Chief Justice MacDonald, in his dissent, referred to the English case of *R.* v. *Haslam* (1925), 19 Cr. App. R. 59 (C.C.A.). Based on this English case, identification evidence, such as that at issue in *Bagley*, would have been held valueless and a conviction based exclusively on it would have been set aside. Nevertheless, in another English case, *R.* v. *Chadwick, Matthews and Johnson*, *supra* note 149, where there were two witnesses to a robbery in Coventry, the police took pictures of four suspects, whom they were holding in Sheffield, and sent them to Coventry where they were displayed, among others, to the two witnesses. The court had this comment:

> In view of the explanation which has been given of the reason why the photographs were sent from Sheffield to Coventry (namely, that the police might know whether to detain the four men — whom they already had in custody — or not), it is clear that no blame attaches to the police in regard to the course which was pursued. (p. 249)

However, the court did show dissatisfaction with the identification procedure used in that the photographs of the accused men were exhibited on different cards than the other photographs since the Sheffield police used different cards than the Coventry police. Furthermore, after having identified the accused from these distinctive photographs, the witnesses were then required to identify the accused from lineups.

249. (1931), 56 C.C.C. 263, 50 Que. K.B. 300 (Que. C.A.).

250. *Id.*, p. 268 (C.C.C.). A more proper course of action would have been to show the apartment employees an array of photographs.

251. See, for example, K. E. Patterson and A. D. Baddeley, "When Face Recognition Fails", 3 *Journal of Experimental Psychology: Human Learning and Memory* 406 (1977).

252. *Asharfi* v. *State*, *supra* note 65, p. 162.

253. See *supra* note 150.

254. [1941] 2 D.L.R. 480, 76 C.C.C. 270 (Ont. C.A.).

255. *Id.*, p. 480 (D.L.R.). The same observation was made by the United States Supreme Court in *Simmons* v. *U.S.*, 390 U.S. 377 at 383-384 (1968): "the witness thereafter is apt to retain in his memory the image of the photograph rather than that of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification". The High Court of Australia has made a similar observation:

> [I]nspection of a photograph of the person in custody before viewing him naturally tends to impress on the mind the characteristics shown in the photograph, so that the witness, however honest he may be, tends to identify the person in custody with the person shown in the photograph rather than with the person whom he himself saw previously. (*Davies and Cody* v. *The King*, *supra* note 77, pp. 181-82)

256. In *R.* v. *Dean*, *supra* note 246, p. 5, for instance, Robertson C.J.O. remarked: "There can be no doubt that the act of the police in showing Boivin the photograph of [the appellant] to refresh his memory before

asking him to identify his assailant at the 'line-up', is open to some adverse comment." A similar view was expressed in *The King* v. *Dwyer and Ferguson*, *supra* note 59 at p. 802: "It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph." Again, in *R.* v. *Haslam*, *supra* note 248, p. 60, this procedure was criticized: "The appellant had already been arrested, and the effect of what was done was to give the witnesses — or certainly three of them — an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible." For similar comments see: *R.* v. *Goss* (1923), 17 Cr. App. R. 196 at 197; *R.* v. *Watson*, [1944] 2 D.L.R. 801 at 803, [1944] O.W.N. 258, 81 C.C.C. 212 (Ont. C.A.); *R.* v. *Simpson*, *supra* note 152, p. 136 (C.C.C.); and *R.* v. *Sutton*, *supra* note 38, p. 361 (O.R.).

Only one case has ventured in the opposite direction on this point. Mr. Justice Barclay in *Baxter* v. *The Queen* (1952), 106 C.C.C. 15 at 19 (Que. Q.B.) remarked that:

> Counsel for the defence claims that the force of these identifications is greatly weakened because the witnesses were shown photographs and newspaper pictures [and subsequently identified the appellant in a lineup] .... But both these witnesses failed to identify any photographs or newspaper pictures, so that the danger of identification after seeing photographs is not present in this case.

Clearly the danger of the use of such evidence was not understood.

257. *The King* v. *Dwyer and Ferguson* , *supra* note 59, p. 802 (K.B.).

258. Thus, in *R.* v. *Baldwin* (1944), 82 C.C.C. 15 (Ont. C.A.) it was held:

> Evidence as to identity, given by witnesses who have seen photographs of an accused after his arrest, (whether in newspapers or otherwise) is not, by reason of such fact, rendered inadmissible, although it is improper for the police to permit any display of photographs of persons who have been arrested before they have been identified by everyone who might be called as a witness as to identity, and evidence so procured will lose much of the weight that it otherwise might have, and it is the duty of the trial Judge under such circumstances to call the attention of the jury to what has happened, and properly to caution the jury.

See also *R.* v. *Martin*, *supra* note 225.

In *R.* v. *Hunjan* (1978), 68 Cr. App R. 99 (C.C.A.), the court quashed the conviction because it could not be certain that the jury would have reached the same result had the trial judge given the proper warning. He failed to point out that:

> [I]dentification witnesses may be, and frequently are, highly convincing though they may honestly be totally mistaken .... [S]everal identifying witnesses may all suffer from that defect .... [M]istakes in identification are possibly the easiest mistakes which any witness can make .... [T]hree of the officers had seen a photograph of the appellant between

the time when the events took place and the time when the identification parade was held .... [T]he obvious danger [is] that in complete honesty these men may have been identifying the person in the photograph rather than the person whom they had seen at or near the public house on that evening. (p. 103)

Similarly, in *R.* v. *Sutton*, *supra* note 38, a conviction was quashed because the trial judge cautioned the jury only on the credibility of the witness and failed to elaborate on the problems of identification evidence generally and, in particular, failed to underline the fact that the witness had identified the appellant prior to the lineup even when the police had pointed out a photograph of the appellant.

When a Court of Appeal considers the decision of a trial judge sitting alone, it will likewise attempt to ascertain whether the judge was aware of the problems with this type of evidence. Thus, in *Baxter* v. *The Queen*, *supra* note 256; *R.* v. *Prentice*, *supra* note 153; and *R.* v. *Goldhar*, *supra* note 254, the appeals from conviction were dismissed since the judges had evidently properly instructed themselves regarding the probative value of the evidence when photographic identification had preceded corporeal identification.

259. The court in *The King* v. *Hinds*, *supra* note 246, p. 646, for instance, said that the photographic display was used "with the object of ascertaining whether they could pick out a person not yet in custody so that he might be arrested on suspicion". The display and the lineup were properly conducted and thus special instructions by the trial judge were not required. Other cases which seem to support this view are *R.* v. *Watson*, *supra* note 256; *R.* v. *Fannon* (1922), 22 S. R. (N.S.W.) 427, 39 W.N. (N.S.W.) 130 (N.S.W. Ct. Cr. App.); *R.* v. *Cadger*, *supra* note 246; *R.* v. *Haslam*, *supra* note 248; *R.* v. *Seiga*, *supra* note 240; *R.* v. *Bagley*, *supra* note 248; *R.* v. *Bouquet*, *supra* note 242; and *R.* v. *Doyle*, [1967] Vict. L.R. 698 (Vict S.C.).

260. [1938] N.Z.L.R. 139 (N.Z. S.C.).

261. *Id.*, p. 141.

262. *Id.*, p. 141-142. See also *R.* v. *Bagley*, *supra* note 248, in which prospective witnesses were shown photographs of suspects, including that of the accused. Some of these witnesses later identified the accused in a lineup. MacDonald C.J.A., in dissent, held that while the trial judge "referred several times to the fact that photos were shown to the several witnesses ... he made no comment upon the effect of that on the weight of the witnesses' testimony. That phase of the matter was apparently not present to his mind, and in these circumstances the verdict cannot be sustained". (p. 515 (W.W.R.)) However, the majority sustained the conviction.

263. *R.* v. *Dickman*, *supra* note 98, p. 142-143 (Cr. App. R.).

264. (1960), 129 C.C.C. 336 (B.C. C.A.).

265. O'Halloran J.A., dissenting, pointed out that the cross-examiantion of the witness disclosed that he was unable to point to any physical or other

characteristic upon which identification of the accused could be rationally based. Furthermore, not only did the identification take place several months after the alleged transaction in question, but the witness had never known or seen the accused previously. While the accused completely denied the transaction and was not shaken on cross-examination, the story of the witness was false in two particulars and may have been motivated by self-interest. Taking these doubts together, O'Halloran J.A. was of the opinion that the witness's testimony was insufficient to prove beyond a reasonable doubt that the accused was the guilty person.

266. *Supra* note 183.

267. *Supra* note 34.

268. *Supra* note 68.

269. (1951), 52 G.L.J. 1123 (Hyderabad H.C.).

270. *Id.*, p. 1125.

271. (1952), 53 Cr. L.J. 265, 39 A.I.R. 59 (Allahabad H.C.).

272. *Id.*

273. *Dhaja Rai* v. *The Emperor*, [1948] A.I.R. (A) 241 (Allahabad H.C.).

274. See generally E. Ratushny, *Self-Incrimination in the Canadian Criminal Process*. (Toronto: Carswell, 1979), p. 292 and following.

275. A number of states in the United States now provide by statute or rule of court that a court order can be obtained compelling a suspect to attend an identification procedure, including a lineup. Indeed such a court order can be obtained in most states with a showing of less than probable cause. See Commentary to Section 170 of the American Law Institute, *Model Code*, *supra*, note 15, p. 475; Y. Kamisar, W. R. LaFave, and J. H. Israel, eds., *Modern Criminal Procedure: Cases, Comments and Questions* (St. Paul, Minn.: West, 1980), p. 708-710. If there is probable cause and judicial authorization of a lineup, participation can be made a condition of pretrial release and an uncooperative defendant can be held in contempt. See *Doss* v. *United States*, 431 F. 2d 601 (9th Cir., 1970).

276. As a matter of interest, in the United States the defendant can be cross-examined at trial about uncooperativeness, and the prosecutor can argue that a failure to cooperate is evidence of guilt. See *United States* v. *Parhms*, 424 F. 2d 152 (9th Cir., 1970), cert. denied 400 U.S. 846. But see D. E. Seidelson, "The Right to Counsel: From Passive to Active Voice", 38 *George Washington Law Review* 849 (1970).

277. See *Marcoux and Solomon* v. *The Queen* (1975), 29 C.R.N.S. 211 at 219, [1976] 1 S.C.R. 763, 60 D.L.R. (3d) 119 at 127, 29 C.R.N.S. 211.

278. For a review of these values see generally L. W. Levy, *Origins of the Fifth Amendment* (New York: Oxford University Press, 1968); M. Berger, *Taking the Fifth* (Lexington, Mass.: Lexington Books, 1980); L. Mayers, *Shall We Amend The Fifth Amendment?* (Westport, Conn.: Greenwood Press, 1959); J. A. Maguire, *Evidence of Guilt: Restrictions upon Its Discovery or Compulsory Disclosure* (Boston: Little, Brown and Co.,

1959); E. Ratushny, *supra* note 274; E. W. Cleary, *McCormick's Handbook of the Law of Evidence* (St. Paul, Minn.: West Publishing, 1972).

279. For example, in *Dallison* v. *Caffery*, [1965] 1 Q.B. 348, [1964] 3 W.L.R. 385, [1964] 2 All E.R. 610 (Eng. C.A.), Lord Denning M.R. said:

> When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence .... The constable can put him [the suspect] up on an identification parade to see if he is picked out by witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. (p. 367 (Q.B.))

In the same vein, Dickson J. in *Marcoux and Solomon* v. *The Queen*, *supra* note 277, p. 771 (S.C.C.), sanctioned the use of reasonable compulsion to secure a lineup identification of a suspected person:

> Reasonable compulsion to this end is in my opinion an incident to the police power to arrest and investigate, and no more subject to objection than compelling the accused to exhibit his person for observation by a prosecution witness during a trial.

280. In the United States, the courts have consistently held that the privilege against self-incrimination only applies to evidence of a testimonial or communicative nature. See generally Cleary, *supra* note 278, p. 264 and following; Berger, *supra* note 278, p.80 and following.

281. Commenting on the privilege against self-incrimination as contained in the *Bill of Rights*, Laskin J., as he then was, observed in *Curr* v. *The Queen*, [1972] S.C.R. 889 at 912:

> I cannot read s. 2(d) as going any farther than to render inoperative any statutory or non-statutory rule of federal law that would compel a person to criminate himself before a court or like tribunal through the giving of evidence, without concurrently protecting him against its use against him.

In *Marcoux and Solomon* v. *The Queen*, *supra* note 277, p. 768 (S.C.C.), Dickson J., in reviewing the privilege against self-incrimination, said: "The limit of the privilege against self-incrimination is clear. The privilege is the privilege of a witness not to answer a question which may incriminate him."

282. See, *supra* note 277, pp. 770-771 (S.C.R.).

283. Dickson J. said:

> I should make it clear, however, that I do not think evidence of the offer and refusal of a line-up will be relevant and admissible in every case in which identification of an accused is in issue. Admissibility will depend upon the circumstances of the case. If, at trial, it unfolds that the Crown must explain the omission of a line-up or accept the possibility of the jury drawing an adverse inference, then in those circumstances it would seem that evidence of refusal is both relevant and admissible. In other circumstances I do not think such evidence should normally be

tendered. The danger, as I see it, is that it may impinge on the presumption of innocence, the jury may gain the impression there is a duty on the accused to prove he is innocent. However, on the facts of the present case, I have no doubt whatever that evidence of Marcoux's refusal to take part in the line-up was admissible, coming as it did after the issue was opened by defence counsel.... (pp. 774-775 (S.C.R.))

In this case defence counsel launched a vituperative attack upon the police. It was maintained that the investigating officer had broken "every rule in the book" by not holding a lineup, that the instructions and pamphlets of the Metropolitan Toronto Police had been "spat upon" and that what had occurred at the police station was a "mockery" (p. 766 (S.C.R.)). This development, in the view of Mr. Justice Dickson, made the evidence of the accused's refusal admissible:

> As to the admissibility of evidence of refusal by Marcoux to participate in a line-up, it is only necessary to observe that the trial tactics of defence counsel made this evidence admissible beyond any question; admissible, not for the purpose of proving guilt, but to explain the failure to hold an identification parade and the necessity, as a result, to have Fleskes confront Marcoux, a procedure which counsel for Marcoux so roundly critized. (p. 773 (S.C.R.))

The Marcoux case is discussed in E. Ratushny, *supra* note 274, p. 56-58. For a critical comment see S. A. Cohen, *supra* note 21, pp. 82-85.

In a recent Ontario case, a *voir dire* was held to determine whether evidence of the accused's refusal should be admitted. The accused offered as an explanation the fact that he wanted to consult first with his lawyer. However, since the accused had on a previous occasion been advised by his lawyer not to appear in a lineup, the court was of the view that the prosecution was entitled to proceed with a dock identification. Citing *Marcoux* in support of his decision, the trial judge ruled at the end of the *voir dire* that the evidence of the accused's refusal was admissible by way of explanation for the adoption by the police of a less-than-ideal method of identification. *R.* v. *Holberg and Russell* (1978), 42 C.C.C. (2d) 104 (Ont. Co. Ct.).

284. Noting that statisticians generally employ a 5 per cent level for establishing significance, this has led two statisticians to suggest that a lineup should ideally consist of twenty participants. W. R. Bytheway and M. Clarke, "The Conduct and Uses of Identificaion Parades", [1976] *Journal of Criminal Law* 198 at 201.

285. See K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure, Target Position, Pose Position and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971); K. R. Laughery, P. K. Fessler and D. R. Tenorvitz, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974).

286. See generally on the importance of lineup size, G. L. Wells, M. R. Leippe, and T. M. Ostrom, "Guidelines for Empirically Assessing the Fairness of a Lineup", 3 *Law and Human Behavior* 285 (1979); R. S.

Malpass, "Effective Size and Defendant Bias in Eyewitness Identification Lineups", 5 *Law and Human Behavior* 299 (1981).

287. *Home Office Circular 109, 1978*, Rule 14.

288. See American Law Institute, *supra* note 15, p. 434; Project on Law Enforcement Policy and Rulemaking, *supra* note 16, p. 15; Wall, *supra* note 24, p. 53. To further illustrate the diversity in practice, French police officials normally use five or six distractors in a lineup. The Italian *Code of Penal Procedure* requires that once compulsory procedures as to the use of a witness have been completed, a judge is to secure the appearance of two or more persons resembling the suspect. See Murray, *supra* note 14.

289. See, *supra* note 77.

290. See, *supra* note 140.

291. *Satya Narain* v. *State* (1953), 40 A.I.R. 843; *Emperor* v. *Chhadammi Lal* (1936), 23 A.I.R. (A) 373; *Anwar* v. *State* (1961), 48 A.I.R. (A) 50; *Asharfi* v. *State*, *supra* note 65.

292. *Dal Chand* v. *State* (1953), 40 A.I.R. (A) 123.

293. *R.* v. *Jeffries* (1949), 68 N.Z.L.R. 595, [1949] N.Z. Gaz. L.R. 433 (N.Z. C.A.).

294. See Murray, *supra* note 14.

295. *Home Office Circular 109, 1978*, Rule 14.

296. *Id.*, Rule 15.

297. *R.* v. *Dunlop, Douglas and Sylvester*, *supra* note 149.

298. *Parker and Yates* (unreported, B.C. C.A.); *R.* v. *Demich*, *supra* note 149.

299. *R.* v. *Baldwin*, *supra* note 258.

300. *Ram Singh* v. *Emperor* (1943), 30 A.I.R. 269 at 271 (Oudh).

301. *R.* v. *Olia*, [1935] S.A. 213 at 216 (T.P.D.).

302. See Doob and Kirshenbaum, *supra* note 40; see also Loftus, *supra* note 37, p. 146.

303. See Clifford and Bull, *supra* note 37, pp. 196-198.

304. See Doob and Kirshenbaum, *supra* note 40.

305. *Codigo De Procedimientos Para El Distrito Y Territorios Federales* (1931), art. 219.

306. *Home Office Circular 109, 1978*, Rule 14.

307. For example, in a Canadian case it was said that "it should appear that the selection of the other person to form the line-up has been made fairly, so that the suspect will not be conspicuously different from all the others in age or build, colour or complexion or costume or in any other particular": *R.* v. *Goldhar and Smokler*, (1941), 76 C.C.C. 270 at 271-272, [1941] 2 D.L.R. 480 at 481, per Robertson C.J.O. A New Zealand court stated

that "[t]he only satisfactory method of identification where suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, build, clothing, and condition of life, and the witness is then asked, without prompting or assistance, to recognize the offender": *R.* v. *Jeffries*, *supra* note 293, p. 602 (N.Z. L.R.).

308. A few examples should illustrate the variance in lineup participants that the courts are prepared to accept. In *R.* v. *Olbey*, [1971] 3 D.L.R. 225, 13 C.R.N.S. 316, 4 C.C.C. (2d) 103 (Ont. C.A.), the eight participants including the accused ranged in height from 5 feet 4 inches to 6 feet 1 inch; they ranged in weight from 135 pounds to 210 pounds. The accused was 5 feet 4 inches and weighed 135 pounds. Since the accused fell at the very bottom of the represented range of heights and weights, it could be argued that the numerical composition of the lineup did not reflect the likelihood of him being selected purely by chance. The Ontario Court of Appeal, however, expressed no dissatisfaction with the composition of this lineup. In an earlier case, on the other hand, *R.* v. *Opalchuk*, *supra* note 64, a county court judge from Ontario studied a photograph of the lineup from which the accused was selected and concluded that it was "far, far from what is required by law". Yet it would appear that the accused in this case fell much closer, at least with respect to height and weight, to the median of the range represented in the lineup, than did the accused in *Olbey*. The county court judge said:

> On the evidence before me, on my analysis of the line-up I find this: The majority of the line-up were within 1 or 2 inches of the height of the accused. None was his exact height, one was 3 inches shorter and three were 2 inches shorter. None of those in the line-up was of the exact weight of the accused. They ran from 26 lbs under his weight to 30 lbs over his weight. Only one came within 3 lbs of his weight, another within 5. Three only in the line-up were of the same age as the accused. One was 10 years younger, one was 9 years younger, two were 8 years younger, one was 4 years younger, one was 3 years younger, and one was 9 years older. None had black hair, and from my observations here it appears to me (as it did to one of the witnesses to whom I will refer later), that the accused has black hair. It looks almost jet black to me from here, though I may be in error. Three in the line-up had blonde hair and seven had varying degrees of brown hair. As to complexion two were dark, six were fair, one was ruddy and one unspecified. Need I particularize further? I conclude this part by saying the clothes on the other ten in the line-up and the colours thereof varied, it seems to me, as their height, weights and complexions. In any event, it is patent this line-up was far, far from what is required by law.... (pp. 91-92 (C.C.C.))

A year earlier, the British Columbia Court of Appeal voiced no criticism of a lineup consisting of eight men in addition to the accused. They ranged in age from 17 to 25 years and in weight from 130 pounds to 160 pounds. The accused was 26 years old and weighed 140 pounds: *R.* v. *Cadger*, *supra* note 246. However, in another British Columbia case the Court of Appeal quashed the accused's conviction when it was revealed that the witness had described the offender as a "tall and well built man" and the evidence

disclosed that the accused "was the only 'tall, well built man' among the seven [lineup participants]. His height [was] six feet, two inches, and the next tallest man in the line-up was five feet, ten inches": *R* v. *McDonald*, *supra* note 149, p. 352 (C.R.).

The Québec Court of Appeal set aside the accused's conviction in *Nepton* v. *The Queen*, *supra* note 142, p. 162, involving the following facts:

> The appellant was placed in the centre with two other persons on each side. The appellant had black hair while the other four had blond or brown hair. The other four persons were taller or shorter than the appellant. The appellant was dressed differently from the others.

The same court noted disapprovingly in *Sommer* v. *The Queen* (1958), 29 C.R. 357 at 361, that the accused "was however the biggest of the persons in the lineup...".

309. See, *supra* note 99.

310. [1971] 2 O.R. 549, 3 C.C.C. (2d) 153 (C.A.).

311. *Id.*, pp. 157-158 (C.C.C.).

312. *R.* v. *Pett and Bird*, *supra* note 188.

313. See Doob and Kirshenbaum, *supra* note 40.

314. Houts, *supra* note 24, p. 15.

315. Rolph, *supra* note 24, p. 35.

316. For example, see *R.* v. *Sutton*, *supra* note 38, where the suspect had the word "luck" tatooed on his knuckles, there is no indication that attempts were made to disguise the hands of the participants by, for example, requiring them to wear gloves, hold their hands behind their back, or in their pockets. In *R.* v. *Smith*, *supra* note 184, the witness stated that he recognized the accused at a lineup because of a hickey on his neck.

317. See *supra* note 65, p. 160.

318. (1950), 48 Allahabad L.J. 354 (Allahabad H.C.).

319. *Id.*, p. 354.

320. See *supra* note 65.

321. *Id.*, p. 160.

322. *Codice di Procedura Penale*, (1930), article 360.

323. See *supra* note 305, article 219.

324. For example, in an Australian case, *Raspor* v. *The Queen*, *supra*, note 93, the suspect had been described as a motorcyclist, wearing a leather jacket and leather cap. At the parade he was identified while wearing a similar coat and carrying a cap. The accused was not granted leave to appeal and the lineup procedure was not commented upon. In *R.* v. *Martell and Currie* (1977), 23 N.S.R. (2d) 578 at 582, 32 A.P.R. 578 at 582 (N.S. S.C. App. Div.), it was claimed "that the line-up was unfair in that only

the men in it who wore clothes exactly like those described by Mr. Borgia were the appellants...". The court nevertheless dismissed the appeal, admitting however that the lineup "arguably may not have been perfect (what line-up is or can be?) in ensuring adequate uniformity in the appearance of all the men in it." (p. 583 (A.P.R.)).

In *R.* v. *Blackmore*, [1970] 14 C.R.N.S. 62 (Ont. C.A.), the accused was subjected to an informal viewing by the witness. He was one of seven black people in a group of twenty-five to thirty people held in a detention room. The witness stated that the robber had worn a mauve-coloured shirt and trousers. The accused was the only person in the detention room so dressed. In dismissing the accused's appeal, the court relied upon the witness's emphatic statement that he had identified the accused on that occasion upon seeing his face and did not even notice what he was then wearing.

325. For example, in *R.* v. *Dunlop, Douglas and Sylvester*, *supra* note 149, all the accused were known as members of a motorcycle gang. At one of the several lineups one of the accused was identified while wearing "a club T-shirt with a club symbol" (p. 347). Although no particular comment was made on this, two of the accused's appeals from conviction were successful, partly because of the overall weakness of the identification evidence. The victim of an attempted rape in a South African case, *R.* v. *Masemang*, *supra* note 121, p. 448, could only remember her assailant's clothes — in particular a dark maroon jersey. The other ten people in the lineup wore red sweaters but they were noticeably lighter than the accused's. The court stated that the lineup was "conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused." The court in *R.* v. *Harris*, *supra* note 225, quashed the conviction because the trial judge failed to articulate a warning about the dangers of eyewitness testimony. Little weight was attributed to the identification evidence because the witness saw

> . . . a man in a reddish or orange T-shirt on the roof. Several hours later he sees a man in an orange T-shirt in the same suburb in the custody of the police. There would be a strong tendency in the human mind in such a case to reach the conclusion of identity. (p. 450)

In *R.* v. *Smith and Evand*, *supra* note 223, p. 203, the two appellants were identified alone "mainly by their clothes". The appeal was dismissed because other evidence supported the conviction, but the court did say that the procedure adopted rendered the identification evidence "nearly valueless". In *R.* v. *Jeffries*, *supra* note 293, the fairness of the lineup was challenged on the grounds that

> it was contended that the suspects would look so different from Police officers, with blood on their clothing, and, in one case, on the hands, that it was inevitable that the suspects would be identified.
>
> [T]hey were wearing old clothes, and were not as well dressed as the other members of the parade .... (p. 597)

The conviction in this case was affirmed on other grounds.

326. (1958), 29 C.R. 357 (Que. C.A.).

327. See, *supra* note 89.

328. *Id.*, p. 435 (O.R.).

329. In France, see P. Wall, *supra* note 24; Mexican *Code of Penal Procedure*, *supra* note 305, articles 217-224. The English rules, in *Home Office Circular on Identification Procedures, 109 (1978) supra* note 12, allow a suspect to select his own position in the lineup (Rule 6). He must also be informed of his right to change his place after each viewing (Rule 21).

330. See *supra* note 142.

331. *Id.*, p. 162. Another case from Québec in which the fact that the accused stood in the middle of the lineup was noted in discussing the unfairness of the lineup is *Sommer* v. *The Queen*, *supra* note 326. And in *R.* v. *Cadger*, *supra* note 246, p. 213, it was noted that the appellant was identified from a lineup consisting of "eight young men in addition to the appellant who was stationed in the centre of the group." In at least one case, *R.* v. *Minichello*, [1939] 4 D.L.R. 472, 54 B.C.R., 72 C.C.C. 413 (B.C. C.A.), the accused's position in the lineup was the subject of specific complaint. In this case, however, the facts do not show where he was positioned and the court held that the complaint was not substantial: "Marshall picked out the accused in a line-up at the police station. The criticism of his evidence in that connection, viz., in respect to the position of the accused in the line-up is not of a substantial character" (p. 415).

332. Many Codes of Criminal Procedure explicitly provide for such objections. For example, the Mexican *Code of Penal Procedure* allows the person being identified to request the exclusion from the group of those persons who do not resemble the suspect. It is then within the discretion of the instructor judge whether to abide by the request. Furthermore, a suspect may suggest even greater precautions than those provided by the Code and it is then up to the judge to accede to the proposals, as long as they will not prejudice the truth or appear non-useful or malicious. *Supra* note 305, article 220.

    The English Home Office Circular rules state that a suspect should be expressly asked if he or she has objection to the persons present or the arrangements made. It goes on to provide that "[a]ny objections should be recorded and, where practicable, steps should be taken to remove the grounds for objection." *Home Office Circular on Identification Parades 109 (1978)*, Rule 16.

333. See Doob and Kirshenbaum, *supra* note 40.

334. In, for example, *Nepton* v. *The Queen*, *supra* note 142, p. 146, there was a conflict between the testimony of two eyewitnesses and the police as to the makeup of the lineup from which the accused was selected; Mr. Justice Hyde noted "I offer the suggestion that the police should adopt the practice which I have noted in some instances of photographing the line-up so that there could be no dispute as to its composition." In another case, in reviewing the fairness of the lineup, the court noted, "[h]aving examined the photographs I agree with counsel for the appellant that the appellant ... (and co-accused) appear different in appearance and dress from all the others." *R.* v. *Smith*, *supra* note 184, pp. 298-299.

335. See *R.* v. *Sommer*, *supra* note 326; *R.* v. *Sutton*, *supra* note 38; *R.* v. *Gaunt*, *supra* note 78; *Raspor* v. *The Queen*, *supra* note 93.

336. Dent and Stephenson, *supra* note 238.

337. *Asharfi* v. *State*, *supra* note 65, p. 161.

338. (1936), 65 C.C.C. 214 (Man. C.A.).

339. See, *supra* note 258.

340. *Id.*, p. 24.

341. Other cases in which a witness viewed a lineup and identified a suspect as the offender when the offender's face had been fully or partially concealed by a mask at the time of the offence are: *Baxter* v. *The Queen*, *supra* note 256; *R.* v. *Harrison* (No. 3), *supra* note 97; *R.* v. *Kervin* (1974), 26 C.R.N.S. 357 (N.S. C.A.); *R.* v. *Olbey*, *supra* note 308; *R.* v. *Hederson*, *supra* note 140; *R.* v. *Donnini*, [1973] V.R. 67 (Sup. Ct., Vict.). In *R.* v. *Millichamp*, [1921] Cr. App. R. 83, the witness stated that he saw a burglar running away but that he did not see his face. At the lineup the witness did not pick the accused out until all of the participants were requested to turn around. One wonders whether the witness would have identified the accused from a view of his back, if he had not first seen his face.

Another English case in which a witness who admitted to not having seen the offender's face was shown the body and face of the suspect at a lineup is *R.* v. *Bundy* (1910), 5 Cr. App. R. 270 (C.C.A.). The suspect was identified but this was undoubtedly because the police had pointed him out to the witness and stated that he "resembled the man the police suspected of having committed the larceny" (p. 271).

Two other cases in which the witness did not see the offender's face but nonetheless identified the suspect because of his build, clothing and voice are: *R.* v. *Gaunt*, *supra* note 78; *R.* v. *Miles and Haines* (1948), 42 Q.J.P.R. 21, [1947] Qld. St. R. 180 (Qld. Ct. Cr. App.).

342. For a general discussion of the problems of voice identification see Clifford and Bull, *supra* note 37, pp. 118 and following. See also Saslove and Yarmey, "Long-term Auditory Memory: Speaker Identification", 65 *Journal of Applied Psychology* (1980); A. G. Goldstein "Recognition Memory for Accented and Unaccented Voices", 17 *Bulletin of the Psychonomic Society* 217 (1981); B. Clifford, "Voice Identification by Human Listeners", 4 *Law and Human Behavior* 373 (1980).

343. [1955] S.C.R. 593, 21 C.R. 217.

344. *Id.*, p. 602 (S.C.R.), 230 (C.R.).

345. *Supra* note 277.

346. *Id.*, pp. 770-771 (S.C.R.).

347. See, for example, *R.* v. *Braumberger* (1967), 62 W.W.R. 285 at 288 (B.C. C.A.) ("identification by recognition of voice is permissible").

348. See, for example, *R.* v. *Miles*, *supra* note 341, p. 25 (where the witness described the suspect's voice as effeminate); and *Raspor* v. *The Queen*, *supra* note 93, p. 349 (where the witness described the suspect as speaking "with a marked foreign accent").

349. In *R.* v. *Murray (No. 2)*, [1917] 1 W.W.R. 404 at 408 (Alta. S.C.), it was said that:

> There can be no doubt that evidence of identity by means of identification of the voice alone is sufficient evidence. We identify people many times a day in this way in conversations over the telephone. It is scarcely necessary to support this proposition by authority....

350. *Supra* note 308.

351. *Id.*, p. 228.

352. *Supra* note 34.

353. *Id.*, p. 447.

354. *Supra* note 277.

355. *Id.*, in [1976] 1 S.C.R. 763 at p. 770.

356. Thus in *R.* v. *Donnini*, *supra* note 341, p. 69, it is reported that:

> A young woman clerk, Mrs. Judith Riseley, inspected the parade and later gave evidence that she had recognized the applicant as the smaller man at the robbery. She said she had declined to touch him because she was too nervous to do so.

357. See generally D. M. Thomson, "Person Identification Influencing the Outcome", 14 *Australia and New Zealand Journal of Criminology* 49 (1981).

358. G. H. Bower and M. B. Karlin, "Depth of Processing Pictures of Faces and Recognition Memory", 108 *Journal of Experimental Psychology* 751 (1974). D. Godden and A. Baddeley, "When Does Context Influence Recognition Memory?", 71 *British Journal of Psychology* 99 (1980); E. Winograd and N. T. Rivers-Bulkeley, "Effects of Changing Context on Remembering Faces", 3 *Journal of Experimental Psychology: Human Learning and Memory* 397 (1977).

359. Godden and Baddeley, *supra* note 358.

360. *Id.*, p. 99.

361. *Id.*, p. 104.

362. One experimenter, G. Feingold, "The Influence of Environment on Identification of Persons and Things", 5 *Journal of Criminal Law and Criminology* 39 at 47 (1914), has asserted that on the basis of the reliable studies:

> The proper way to obtain successful recognition is not to bring the witness into the police court, but to bring the supposed lawbreaker to the scene of the crime and to have the witness look at him precisely in the

same surroundings and from the same angle at which he saw him originally.

363. See generally, G. Lefcourt, "The Blank Line-up: An Aid to the Defense", 14 *Criminal Law Bulletin* 428 (1978).

364. *Devlin Report* , *supra* note 12, p. 120.

365. See *People* v. *Brown*, No. 1798 (N.Y. Cty. Ct., 1972); and, *People* v. *Hibbs*, No. 1930 (Bronx Cty. Ct., 1974), both referred to in Lefcourt, *supra* note 363.

366. Quoted in Lefcourt, *supra* note 363, p. 431.

367. 60 A. 2d 824 (Penn. Sup. Ct., 1948).

368. *Id.*

369. *People* v. *Kennedy*, 58 N.E. 652 (N.Y. Ct. App., 1900).

370. *Id.*

371. *People* v. *Guerea*, 358 N.Y.S. 2d 925. (Crim. Ct. Bronx Cty., 1974).

372. *Id.*, p. 928.

373. See generally Clifford and Bull, *supra* note 37, p. 203.

374. See *supra* note 150.

375. Some cases in which the repeated showing of a suspect's photograph to prospective witnesses escaped the courts' criticism are: *R.* v. *Audy (No. 2)*, *supra* note 188; *R.* v. *Bagley*, *supra* note 248; *R.* v. *Mingle*, [1965] 2 O.R. 753, [1965] 4 C.C.C. 172 (Mag. Ct.); *R.* v. *Opalchuk*, *supra* note 64; and *R.* v. *Fannon*, *supra* note 259.

376. *Simmons* v. *United States*, 390 U.S. 377 at 386, n. 6 (7th Cir., 1968).

377. See commentary following Rule 501.

378. See commentary following Rule 502.

379. Two Canadian cases in which a witness who had picked out the accused's photograph during the police's search for suspects was not later asked to attempt identification at a lineup are: *R.* v. *Louie*, *supra* note 264; and *R.* v. *Mingle*, *supra* note 375. In neither of these cases did the court comment on the procedure followed.

380. *The Queen* v. *Goode*, *supra* note 152, p. 79.

381. *R.* v. *Dean*, *supra* note 246.

382. This problem arose in an American case, *U.S. ex. rel. Reed* v. *Anderson*, 343 F. Supp. 116 (1972). The accused's mug shot was dated one day after the crime while the others had dates several years old.

383. *State* v. *Alexander*, 503 P. 2d 777 (Ariz. Sup. Ct., 1976).

384. *Rudd* v. *Florida*, 477 F. 2d 805 (5th Cir., 1973).

385. *Id.*, at p. 811.

386. *Supra* note 38.

387. K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971); K. R. Laughery, P. K. Fessler, D. R. Tenorvitz, and D. A. Yovlick, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974).

388. W. Stern, "Abstracts of Lectures on the Psychology of Testimony and on the Study of Individuality", 21 *American Journal of Psychology* 270 (1910).

389. See Yarmey, *supra* note 37, p. 121; A. Zavala and J. Paley, eds., *Personal Appearance Identification* (Springfield, Ill.: Charles C. Thomas, 1972), p. 314. ("The studies showed that after about fifty mug shots performance of witnesses begins to deteriorate.")

390. See A. Zavala, *supra* note 389, p. 314.

391. See generally Yarmey, *supra* note 37, p. 121.

392. R. Buckhout, "Eyewitness Testimony", 231 *Scientific American* (No. 6) 23 at 27 (1974). ("Research on memory has ... shown that if one item in the array of photographs is uniquely different — say in dress, race, height, sex or photographic quality — it is more likely to be picked out. Such an array is simply not confusing enough for it to be called a test.")

See also R. Buckhout, D. Figueroa and E. Hoff, "Eyewitness Identification: Effects of Suggestion and Bias in Identification from Photographs", 6 *Bulletin of the Psychonomic Society* 71 at 74 (1975).

393. *Id.*, pp. 73-74.

394. K. R. Laughery, "Photograph Type and Cross-Racial Factors in Facial Identification", in A. Zavala and J. Paley, eds., *supra* note 389, Chapter V; A. Paivio, T. B. Rogers and P. C. Smythe, "Why Are Pictures Easier to Recall than Words?", 11 *Psychonomic Science* 137 (1968); K. R. Laughery, J. F. Alexander and A. B. Lane, "Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position and Type of Photograph", 55 *Journal of Applied Psychology* 477 (1971).

395. See Laughery, *supra* note 394, p. 39.

396. Sussman, Sugarman, Zavala, "A Comparison of Three Media Used in Identification Procedures", in A. Zavala and J. Paley, eds., *supra* note 389, Chapter XI.

397. For example, recent research indicates that photographs presented in a three-quarter pose are more identifiable than full-face poses. See K. E. Patterson and A. D. Baddeley, "When Face Recognition Fails", 3 *Journal of Experimental Psychology: Human Learning and Memory* 406 (1977); F. L. Krouse, "Effects of Pose, Pose Change, and Delay on Face Recognition Performance", 66 *Journal of Applied Psychology* 651 (1981).

398. *R.* v. *Johnson*, *supra* note 227, p. 495 ("The four separate photographs, including that of the appellant, were filed as an exhibit. We have inspected them and note that they are photographs of four remarkably similar-looking,

long-haired youths"); *R.* v. *Russell*, *supra* note 244, p. 29 ("to ensure that no injustice was done to the appellant we have inspected the photographs which were shown to Miss Berkland and we are satisfied that the general similarity of four of the men depicted in them provided her with a very real test of her ability to identify the photograph of the appellant"); *R.* v. *Nagy*, *supra* note 239, p. 635, ("the police authorities produced 10 pictures, of persons of some similarity in appearance").

399. *R.* v. *Pace*, *supra* note 154, p. 299.

400. *Id.*, p. 307.

401. For example in *U.S.* v. *Harrison*, 457 F. (2d in 1972), only the accused was clean shaven; in *Caywood* v. *State*, 311 N.E. 2d 845 (Ind. Ct. App., 1974), the accused had a noticeable lighter skin colour than the others pictured; in *Haberstroh* v. *Montayne*, 362 F. Supp. 838 (W.D.N.Y., 1973), only the accused's photograph remotely fit the description given by the witness; in *United States* v. *Fernandez*, 456 F. 2d 638 (2d Cir., 1972), no photograph in the array remotely resembled the suspect's skin colour and hairdo; in *State* v. *Wettstein*, 501 P. 2d 1084 (Utah Sup. Ct., 1972), the accused was the only person in the photographs to have a mustache.

402. For example, the following procedures received little or no criticism from the courts. In *U.S.* v. *Bell*, 457 F. 2d 1231 (5th Cir., 1972), only the accused's photograph provided a full-length view; in *People* v. *Hudson*, 287 N.E. 2d 297 (Ill. Ct. App., 1972), the accused's colour photograph was displayed with nineteen black and white photographs; in *State* v. *Farrow*, 294 A. 2d 873 (N.J. Sup. Ct., 1972), the accused's photograph was one inch larger in length and width than the four others; in *U.S.* v. *McGhee*, 488 F. 2d 781 (5th Cir., 1974), the accused's was the only photograph which was in focus; in *U.S. ex rel. Clemmer* v. *Mazurkiewicz*, 365 F. Supp. 1158 (E.D. Penn., 1973), of nine photographs shown to the witness only the accused's was not a mug shot; in *U.S. ex rel. Reed* v. *Anderson*, *supra* note 382, the accused's mug shot was dated one day after the crime while the others had dates several years old; and in *State* v. *Williams*, 526 P. 2d 714 (Ariz. S.C., 1974), the accused's photograph was unique in being a Polaroid photo and somewhat smaller than the others.

403. *Supra* note 149.

404. In *R.* v. *Smierciak*, *supra* note 85, two weeks after a man attempted to cash a forged cheque, the bank teller was shown a single photograph of the accused whom she identified as the man in question. In quashing the accused's conviction, Mr. Justice Laidlaw stated:

> [I]f a witness has no previous knowledge of the accused person so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias created directly or indirectly.... Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected

person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person. (p. 157-158)

In *R.* v. *Babb*, *supra* note 89, the witness had already pointed out the accused to the police as the person who had assaulted him three weeks before. The accused was a transvestite whom the witness had only seen dressed in women's clothing. Two weeks later, the police invited the witness to the police station and showed him a single photograph of the accused, depicting him as a male. In quashing the conviction, the court criticized this method of identification:

> At this time in judicial history certainly almost every police force in the country must know and appreciate the frequently announced attitude of the courts of our country with reference to showing a single photograph to a complainant who might later be called upon to testify and identify that person.... In the circumstances, the showing of this picture to the complainant was, I think, highly irregular and completely and totally unjustified. (p. 372)

405. See, for example, *R.* v. *Goode*, *supra* note 152, p. 79; *R.* v. *Sutton*, *supra* note 38, p. 309; and *R.* v. *Courtney* (1956), 74 W.N. (N.S.W.) 204 (N.S.W. Ct. Cr. App.), p. 205. The convictions in these cases were quashed because the jury had not been warned about the unreliability of single-photograph identification.

406. *Astroff* v. *The King* (1931), 50 Que. K.B. 300, 56 C.C.C. 263 (Que. C.A.); *R.* v. *Ayles*, *supra* note 84; *R.* v. *Richards*, *supra* note 142; and *R.* v. *Griffiths*, [1930] Vict. L.R. 204, [1930] Arg. L.R. 121 (Vic. S. Ct.).

407. *R.* v. *Griffiths*, *supra* note 406, p. 207.

408. *State* v. *Farrow*, 294 A. 2d 873 (N.J. Sup. Ct., 1972).

409. *Supra* note 220. For example, in *R.* v. *Johnson*, *supra* note 227, the two witnesses separately identified the accused's photograph from a group consisting of only three others. And in *R.* v. *Braumberger*, *supra* note 347, photographs of the three suspected bank robbers were placed together in a group containing the photographs of only four other men.

410. *R.* v. *Pace*, *supra* note 154, p. 307.

411. *State* v. *Watson*, 345 A. 2d 532 (Conn. S. Ct., 1973).

412. *U.S.* v. *Ash*, *supra* note 178.

413. *Supra* note 248.

414. *R.* v. *Bagley*, [1926] 3 D.L.R. 717-718, 37 B.C.R. 353, 46 C.C.C. 257.

415. *R.* v. *Kervin* (1974), 26 C.R.N.S. 357 (N.S. C.A.).

416. *R.* v. *Pace*, *supra* note 154.

417. *Supra* note 78.

418. Rule 201 of the Arizona Report's Model Rules, *supra* note 16, makes provision for confrontations in such circumstances:

An officer may arrange a confrontation between a suspect and a witness whenever the suspected is arrested or temporarily detained within two hours of the offence, and the witness is cooperative and states that he might recognize the person who committed the offense, [and a lineup valid under these Rules cannot be promptly arranged].

The ALI's Model Code, *supra* note 15, contains a similar provision. It is justified on the grounds of "countervailing policy considerations of prompt accuracy and police efficiency" (p. 436).

419. The research in this area has produced divergent results and any generalization might be hazardous, but compare A. G. Goldstein and J. E. Chance, "Visual Recognition Memory for Complex Configurations", 9 *Perceptual Psycholophysics* 237 (1978); K. R. Laughery, P. K. Fessler and D. R. Tenorvitz, "Time Delay and Similarity Effects in Facial Recognition", 59 *Journal of Applied Psychology* 490 (1974); A. G. Goldstein, "The Fallibility of the Eyewitness: Psychological Evidence", in B. D. Sales, ed., *Psychology in the Legal Process* (New York: Spectrum, 1977), p. 223; H. Ellis, "An Investigation of the Use of the Photo-fit Technique for Recalling Faces", 66 *British Journal of Psychology* 29 (1975); M. R. Courtois and J. H. Mueller, "Target and Distractor Typicality in Facial Recognition", 66 *Journal of Applied Psychology* 639 (1981); G. Davies, H. Ellis, and J. Shepherd, "Face Identification: The Influence of Delay Upon Accuracy of Photofit Construction", 6 *Journal of Police Science and Administration* 35 (1978); F. L. Krouse, "Effects of Pose, Pose Change, and Delay on Face Recognition Performance", 66 *Journal of Applied Psychology* 651 (1981).

420. Although there are no reported cases dealing with this question, in *R.* v. *Denning and Crawley* (1958), 58 S.R. (N.S.W.) 359 at 361, (N.S.W. C.C.A.), the police stopped the accused on the street and told him that there had just been an attempted robbery nearby. The accused "denied being concerned with it and asked to be taken there. The police did so". He was identified by the witnesses and subsequently convicted at trial.

421. *Supra* note 175.

422. *Id.*, p. 302.

423. For example, in *R.* v. *Smith and Evand*, *supra* note 223, the appellants were identified alone at the police station. In dismissing the appeal from conviction, the court said:

> [T]here was a good deal that was unsatisfactory about the identification at the police station.... Such methods as were resorted to in this case make this particular identification nearly valueless, and police authorities ought to know that this is not the right way to identify. However, apart from that, there was ample evidence of identification.... (p. 204)

The conviction in *R.* v. *Williams*, *supra* note 223, was quashed in part because:

> The case for the prosecution at the trial evidently rested on the identification by Fulcher; this identification was not properly carried out; Fulcher saw the appellant alone in the police station, and did not pick

him out from among other men. In the opinion of the Court, the mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory. (p. 88)

Similarly, the conviction in *R.* v. *Keane*, *supra* note 82, was quashed because the identification "was achieved at a confrontation organised by P. S. Pitches at the police station, the circumstances of which robbed it of any great value" (p. 249).

424. For example, in *R.* v. *Gagnon*, *supra* note 184, the accused was brought by the police before a woman who had been brutally assaulted earlier that evening. In quashing the accused's conviction the British Columbia Court of Appeal noted:

> The manner in which she made that identification also weakens the force of that evidence. Two police officers took Gagnon into the complainant's presence, and one asked her if he was the man. She said he was. She did not pick Gagnon out of a line-up. Those circumstances increased the need for careful examination of the evidence in the light of the probabilities in order to avoid the possibility of innocent mistake in identification. (p. 302)

Similarly, in *R.* v. *Preston*, [1961] Vict. R. 761 (Vict. S.C.), the accused was brought before the witness about an hour after a housebreaking incident:

> The fact that the man was brought back to the witness by a police constable might be said to originate a suggestion in the witness's mind that this was the man who had committed the breaking, entering and stealing, and was a matter which should have called for some comment by the trial judge. Finally, in this case, there was no parade. I have said that as a matter of law a parade is not necessary, but it is one feature which the learned judge might have drawn to the attention of the jury. (p. 763)

425. *Supra* note 422.

426. *Id.*, p. 361.

427. *Ibid.*

Selected Bibliography

I. Legal Materials

A. Books

ARCHBOLD, J. F. *Pleading, Evidence and Practice in Criminal Cases*. 39th ed. London: Sweet and Maxwell, 1976.

BERGER, M. *Taking the Fifth*. Lexington, Mass.: Lexington Books, 1980.

BLOCK, E. B. *The Vindicators*. New York: Doubleday, 1963.

BORCHARD, E. M. *Convicting the Innocent*. New Haven: Yale University Press, 1932.

BRANDON, R., and DAVIES, C. *Wrongful Imprisonment: Mistaken Convictions and Their Consequences*. London: Archon Books, 1973.

COHEN, S. A. *Due Process of Law: The Canadian System of Criminal Justice*. Toronto: Carswell, 1977.

COLE, P., and PRINGLE, P. *Can You Positively Identify This Man*? London: André Deutsch, 1974.

DAVIS, K. C. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969.

FRANK, J., and FRANK, B. *Not Guilty*. New York: Da Capo Press, 1957, rep. 1971.

FRANKFURTER, F. *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen*. Boston: Little, Brown and Co., 1927.

GARDNER, E. *The Court of Last Resort*. New York: Pocket Books, 1952.

HAIN, P. *Mistaken Identity: The Wrong Face of the Law*. London: Quartet Books, 1976.

HALE, L. *Hanged in Error*. Baltimore: Penguin Books, 1961.

HOUTS, M. *From Evidence to Proof: A Searching Analysis of Methods to Establish Fact*. Springfield, Illinois: Charles C. Thomas, 1956.

LEVY, L. W. *Origins of the Fifth Amendment*. New York: Oxford University Press, 1968.

MAGUIRE, J. A. *Evidence of Guilt: Restrictions upon Its Discovery or Compulsory Disclosure*. Boston: Little, Brown and Co., 1959.

MAYERS, L. *Shall We Amend the Fifth Amendment?* Westport, Conn.: Greenwood Press, 1959.

PONCET, D. *La protection de l'accusé par la Convention Européenne des Droits de l'Homme: Étude de droit comparé.* Geneva: Librairie de l'Université-Georg & Cie S.A., 1977.

PORGREBIN, M. *The Invisible Justice System: Discretion and the Law.* Cincinnati: Anderson Publishing, 1978.

RATUSHNY, E. *Self-Incrimination in the Canadian Criminal Process.* Toronto: Carswell, 1979.

ROLPH, C. H. *Personal Identity.* London: Michael Joseph, 1957.

SOBEL, N. *Eye-Witness Identification.* New York: Clark Boardman, 1972.

URILLER, H. R. *The Process of Criminal Justice: Investigation and Adjudication.* 2d ed. St. Paul, Minn.: West Publishing, 1979.

WALKER, M., and BRITTAIN, B. *Identification Evidence: Practices and Malpractices — A Report of JAIL.* London: JAIL, 1978.

WALL, P. M. *Eye-Witness Identification in Criminal Cases.* Springfield, Illinois: Charles C. Thomas, 1965.

WEMER, P. *In the Last Resort: A Critical Study of the Supreme Court of Canada.* Toronto: Carswell, 1974.

WENTWORTH, B., and WILDER, H. *Personal Identification.* Boston: R. G. Badger, 1918.

WIGMORE, J. H. *The Science of Judicial Proof.* 3rd ed. Boston: Little, Brown and Co., 1937.

WILLIAMS, G. *The Proof of Guilt: A Study of the English Criminal Trial.* 3rd ed. London: Stevens and Sons, 1963.

WILLIS, W. *An Essay on the Principles of Circumstantial Evidence.* 7th ed. London: Butterworth and Co., 1937.

B. Articles

1. Canada

CARR, D., and PAAS, T. "The Defence of Alibi" (Ontario) *Crown Newsletter* 15-30 (September, 1979).

CHASSE, K. "Out of Court Identification and the Rule against Hearsay" (Ontario) *Crown Newsletter* 1-17 (April, 1976).

MACFARLANE, B. A. "Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude It from Evidence" 16 *Criminal Law Quarterly* 149-177 (1973-1974).

MALONEY, A. "The Admissibility of Photographs in Criminal Cases and Resultant Prejudice to an Accused Fair Trial" 1 *Criminal Reports, New Series* 167-183 (1967).

MCGIVERN, G. "The Law and Visual Identification" 39 *R.C.M.P. Gazette* (No. 5) (1972).

PAIKIN, S. "Identification as a Facet of Criminal Law" 29 *Canadian Bar Review* 372-380 (1951).

RATUSHNY, E. "Self-Incrimination: Nailing the Coffin Shut" 20 *Criminal Law Quarterly* 312-354 (1977-1978).

WILEY, J. F. "Recent Developments in Criminal Identification Techniques: The Penry Composite Photograph" (Ontario) *Crown Newsletter* 1-6 (June, 1976).

2. England

GRAYSON, E. "Identifying Turnbull" [1977]*Criminal Law Review* 509-516.

HEYDON, J. D. "Current Trends in Evidence" 8 *Sydney Law Review* 303-322 (1977).

"Identification" [1979] *Criminal Law Review* 339.

"Identification Evidence" [1967] *Criminal Law Review* 255-256.

"Identification Parades" [1969] *Criminal Law Review* 109-110.

LIBLING, D. F. "Evidence of Past Identification" [1977] *Criminal Law Review* 268-280.

"The Use of Photographs for the Purpose of Identification" [1978] *Criminal Law Review* 343-350.

"Methods of Identification of Suspects" 11 *Australian Law Journal* 39 (1937).

"Mistaken Identity" [1974] *Criminal Law Review* 333.

SAMUELS, A. "Identification Evidence" 125 *New Law Journal* 1146-1149 (1975).

"Identification and Alibi: The Duty of the Defending Solicitor" 121 *Solicitors' Journal* 841-842 (1977).

SCAPARONE, M. "Police Interrogation in Italy" [1974] *Criminal Law Review* 581-588.

WEINBERG, M. "The Admissibility of Out-of-Court Identification Evidence in Criminal Cases" 12 *Melbourne University Law Review* 543-566 (1980).

WILLIAMS, G. "Evidence of Identification: The Devlin Report" [1976] *Criminal Law Review* 407-422.

3. The United States

ARROWSMITH, J. A. "Comment: Right to Counsel at Photographic Lineups — People v. Lawrence" [1972] *Utah Law Review* 100-108.

ATWOOD, J. W. "Comment: The Right to Counsel During Pretrial Identification Proceedings — An Examination" 47 *Nebraska Law Review* 742-758 (1968).

BARBIERI, F. "Admissibility of In-Court Identification — Unnecessarily Suggestive Out-of-Court Identifications — Due Process" 11 *Akron Law Review* 763-775 (1978).

CLARK, T. J. "Comment: Criminal Law — Right to Counsel at Pretrial Identification — Prospective Application" 19 *Case Western Reserve Law Review* 410-422 (1968).

CRAWFORD, M. G. "Comment: Due Process in Extra Judicial Identifications" 24 *Washington and Lee Law Review* 107-113 (1967).

"Criminal Procedure — Lineups — Right to Counsel: 'Independence' of In-Court Identification of Criminal Defendant from Previous Lineup Identification Inadmissible due to Absence of Counsel — State v. Redmond, 75 Wash. Dec. 2d 64, 448 P. 2d 938 (1968)" 45 *Washington Law Review* 202-209 (1970).

"Criminal Procedure — Photo Identifications — Stovall Prospectivity Rule Invoked to Avoid Extension of Right to Counsel" 43 *New York University Law Review* 1019-1029 (1968).

DAVIS, S. M. "Comment: Title 11 of the Omnibus Crime Control and Safe Streets Act of 1968 As It Affects the Admissibility of Confessions and Eyewitness Testimony" 40 *Mississippi Law Journal* 257-285 (1969).

FAGAN, T. P. "Fourth Amendment — In-Court Identifications" 71 *Journal of Criminal Law and Criminology* 488-498 (1980).

FULLER, D. L. "Criminal Procedure — Due Process — Right to Counsel at Pretrial Identifications" 78 *West Virginia Law Review* 84-99 (1975).

GRANO, J. D. "Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 *Michigan Law Review* 717-798 (1974).

HAWORTH, C. R. "The Right to Counsel During Police Identification Procedures" 45 *Texas Law Review* 504-525 (1967).

HENRY, E. L. "Due Process Standards for the Admissibility of Eyewitness Identification Evidence" 26 *University of Kansas Law Review* 461-474 (1978).

JONAKAIT, R. N. "Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?" 52 *University of Colorado Law Review* 511-528 (1981).

JORDAN, J. "Photographic Methods of Suspect Identification in Light of United States v. Wade" 33 *University of Pittsburgh Law Review* 307-316 (1971).

JOSEPH, C. C. "Due Process at the Lineup" 28 *Louisiana Law Review* 259-264 (1968).

LASKER, E. "Comment: Possible Procedural Safeguards Against Mistaken Identification by Eye-Witnesses" 2 *University of California at Los Angeles Law Review* 552-557 (1955).

"Lawyers and Lineups (Comment)" 77 *Yale Law Journal* 390-402 (1967).

LEFCOURT, G. "The Blank Line-Up: An Aid to the Defense" 14 *Criminal Law Bulletin* 428-432 (1978).

MCGOWAN, C. "Constitutional Interpretation and Criminal Identification" 12 *William and Mary Law Review* 235-251 (1970).

MUELLER, P. O. "Comment: Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution" 29 *University of Pittsburgh Law Review* 65-88 (1967).

MURRAY, D. E. "The Criminal Lineup at Home and Abroad" [1966] *Utah Law Review* 610-628.

NEWMAN, A. "Admissibility of Extrajudicial Identifications" 32 *Oklahoma Law Review* 462-474 (1979).

O'CONNOR, F. " 'That's the Man': A Sobering Study of Eyewitness Identification and the Polygraph" 49 *St. John's Law Review* 1-30 (1974).

OLIPHANT, L. D. "The Lineup: The Sixth Amendment, Article 31, and the Right to Counsel" 31 *Federal Bar Journal* 58-72 (1972).

PARKER, F. J. "American Criminal Identifications: Whistling in the Dark" [1973] *International Journal of Criminology and Penology* 253-268.

"Protection of the Accused at Police Lineups" 6 *Columbia Journal of Law and Social Problems* 345-373 (1970).

PULASKI, C. A. "Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection" 26 *Stanford Law Review* 1097-1121 (1974).

PURCELL, W. R. "Manson v. Brathwaite: Looking for the Silver Lining in the Area of Eyewitness Identifications" 35 *Washington and Lee Law Review* 1079-1087 (1978).

READ, F. "Lawyers at Lineups: Constitutional Necessity of Avoidable Extravagance?" 17 *University of California at Los Angeles Law Review* 339-407 (1969).

"Regulation and Enforcement of Pre-Trial Identification Procedures" 69 *Columbia Law Review* 1296-1306 (1969).

"The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts (Comments)" 36 *University of Chicago Law Review* 830-853 (1969).

"The Role of the Defense Lawyer at a Line-Up in Light of the Wade, Gilbert, and Stovall Decisions" 4 *Criminal Law Bulletin* 273-296 (1968).

SALISBURY, T. "Eyewitness Identifications: A New Perspective on Old Law" 15 *Tulsa Law Journal* 38-69 (1979).

SEIDELSON, D. E. "The Right to Counsel: From Passive to Active Voice" 38 *George Washington Law Review* 849-872 (1970).

SOBEL, N. R. "Assailing The Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods" 38 *Brooklyn Law Review* 261-325 (1971).

TOPHAM, G. B. "Constitutional Law — Right to Counsel Limited to Post

Indictment Lineups — State v. Delahunt, 401 A. 2d. 1261 (R.I. 1979)" 14 *Suffolk University Law Review* 601-616 (1980).

VELMEN, G. F. "Testing the Assumptions of *Neil* v. *Biggers*: An Experiment in Eyewitness Identification" 16 *Criminal Law Bulletin* 358-368 (1980).

II. Reports, Bills, Statutes, etc.

A. Australia

An Act Relating to the Investigation by Members of the Australian Federal Police of Offences against the Laws of the Commonwealth and of the Australian Capital Territory, and for purposes connected therewith (Bill 246). First reading: The Senate, The Parliament of the Commonwealth of Australia, November 18, 1981.

Law Reform Commission of Australia, *Criminal Investigation Report No. 2 Interim*. Canberra: Australian Government Publishing Service, 1975.

South Australia, Criminal Law and Penal Methods Reform Committee, *Second Report: Criminal Investigation*. Adelaide: A. B. James, Government Printer, 1974.

South Australia, Criminal Law and Penal Methods Reform Committee, *Third Report: Court Procedure and Evidence*. Adelaide: A. B. James, Government Printer, 1975.

B. Canada

Bellack, W. *The Constitutionality of the Proposed Guidelines for the Conduct of Pretrial Eyewitness Identification Procedures*. Ottawa: Law Reform Commission of Canada, 1981.

Criminal Code, R.S.C. 1970, c. C-34.

Law of Evidence Project, *Compellability of the Accused and the Admissibility of His Statements, Study Paper No. 5*. Ottawa: Law Reform Commission, 1973.

C. Great Britain

British North America Act, 1867 (U.K.) & 31 Vict., c. 3.

Criminal Law Revision Committee, *Eleventh Report Evidence (General)* (Cmnd. 4991). London: Her Majesty's Stationery Office, 1972.

Criminal Procedure in Scotland (Second Report). Edinburgh: Her Majesty's Stationery Office, 1975.

Departmental Commission on Evidence of Identification in Criminal Cases (Devlin Report). London: Her Majesty's Stationery Office, 1976.

Identification Parades and the Use of Photographs for Identification, Home Office Circular No. 109. London: Her Majesty's Stationery Office, 1978.

Identification Procedure under Scottish Criminal Law (Cmnd. 7096). Edinburgh: Her Majesty's Stationery Office, 1978.

Justice, Evidence of Identity: Memorandum to Lord Devlin's Committee. London, Cambridge: Plumridge, 1974.

Memorandum of Evidence to the Devlin Committee on Identification Parades and Procedures (October 1974).

The Royal Commission on Criminal Procedure (The Philips Report) (Cmnd. 8092). London: Her Majesty's Stationery Office, 1981.

D. New Zealand

Criminal Law Reform Committee. *Report on Identification.* Wellington: Government Printer, 1978.

Criminal Law Reform Committee. *Report on the Question of Whether an Accused Person under Arrest Should be Required to Attend an Identification Parade.* Wellington: Government Printer, 1972.

E. United States

A Model Code of Pre-Arraignment Procedure. Washington, D.C.: The American Law Institute, 1975.

Project on Law Enforcement Policy and Rulemaking. *Model Rules: Eyewitness Identification, revised draft.* Arizona, 1974.

III. Psychological Materials

A. Books

CLIFFORD, B. R., and BULL, R. *The Psychology of Person Identification.* London: Routledge and Kegan Paul, 1978.

FARRINGTON, D. P., HAWKINS, K., and LLOYD-BOSTOCK, S., eds. *Psychology, Law and Legal Processes*. London: The Macmillan Press, 1979.

KAMISAR, Y., LAFAVE, W. R., and ISRAEL, J. H., eds. *Modern Criminal Procedure; Cases, Comments and Questions*. 5th ed. St. Paul, Minn.: West Publishing, 1980.

LOFTUS, E. F. *Eyewitness Testimony*. Cambridge, Mass.: Harvard University Press, 1979.

MARSHALL, J. *Law and Psychology in Conflict*. 2nd ed. Indianapolis: Bobbs-Merrill, 1980.

RICHARDSON, J. R. *Modern Scientific Evidence Civil and Criminal*. 2nd ed. Cincinnati: W. H. Anderson, 1974.

ROSENTHAL, R. *Experimenter Effects in Behavioral Research*. New York: Appleton-Century-Crofts, 1966.

SAKS, M. J., and HASTIE, R. *Social Psychology in Court*. New York: Van Nostrand Reinhold, 1978.

SALES, B. D., ed. *Psychology in the Legal Process*. New York: Spectrum, 1977.

SALTZBURG, S. A. *American Criminal Procedure: Cases and Commentary*. St. Paul, Minn.: West Publishing Company, 1980.

YARMEY, A. D. *The Psychology of Eyewitness Testimony*. New York: Free Press, 1979.

ZAVALA, A., and PALEY, J., eds. *Personal Appearance Identification*. Springfield, Ill.: Charles C. Thomas, 1972.

B. Articles

ALPER, A., BUCKHOUT, R., CHERN, S., HARWOOD R., and SLOMOR-ITS, M. "Eyewitness Identification: Accuracy of Individual vs. Composite Recollections of a Crime" 8 *Bulletin of the Psychonomic Society* 147-149 (1976).

ASCH, S. E. "Effects of Group Pressure upon the Modification and Distortion of Judgments" In E. Maccoby, T. M. Newcomb and E. Hartley, eds., *Readings in Social Psychology*, 3rd ed. (New York: Holt, 1958), 393-401.

"Opinions and Social Pressure" [1955]*Scientific American* (No. 5) 193.

ATTNEAVE, F. "Criteria for a Tenable Theory of Form Perception" In W. Wathen-Dunn, ed., *Models for the Perception of Speech and Visual Form* (Cambridge, Mass.: M.I.T. Press, 1967), 56-67.

BELBIN, E. "The Influence of Interpolated Recall upon Recognition" 2 *Quarterly Journal of Experimental Psychology* 163-169 (1950).

BIEDERMAN, I., RABINOWITZ, J., GLASS, A., and STACY, E. "On the Information Extracted from a Glance at a Scene" 103 *Journal of Experimental Psychology* 597-600 (1974).

BLOUIN, J. "Four Experimental Studies on Procedural Influences on Eyewitness Identification Accuracy" Ottawa: Law Reform Commission of Canada, 1979.

BOWER, G. H., and KARLIN, M. B. "Depth of Processing Pictures of Faces and Recognition Memory" 108 *Journal of Experimental Psychology* 751-757 (1974).

BROOKS, N. "Psychology and the Litigation Process: Rapprochement?" In *Psychology and the Litigation Process* (Toronto: Law Society of Upper Canada — Department of Continuing Education, 1976), 1-26.

BROWN, E., DEFFENBACHER, K., and STURGILL, W. "Memory for Faces and the Circumstances of Encounter" 62 *Journal of Applied Psychology* 311-318 (1977).

BUCKHOUT, R. "Determinants of Eyewitness Performance in a Lineup, Report No. CR-9" New York: Center for Responsive Psychology, 1974.

"Eyewitness Testimony" 231 *Scientific American* (No. 6) 23-31 (1974).

"Nearly 2000 Witnesses Can Be Wrong" 2 *Social Action and the Law Newsletter* (No. 3) 7 (1975).

"Psychology and Eyewitness Identification" 2 *Law and Psychology Review* 75-91 (1976).

BUCKHOUT, R., ALPER, A., CHERN, S., SILVERBERG, O., and SLOMOVITS, M. "Determinants of Eyewitness Performance on a Lineup" 4 *Bulletin of the Psychonomic Society* 191-192 (1974).

BUCKHOUT, R., FIGUEROA, D., and HOFF, E. "Eyewitness Identification: Effects of Suggestion and Bias in Identification from Photographs" 6 *Bulletin of the Psychonomic Society* 71-74 (1975).

CADY, H. M., "On the Psychology of Testimony" 35 *American Journal of Psychology* 110 (1924).

CALLAWAY, J. W., NOWICKI, S., and DUKE, M. P. "Overt Expression of Experimenter Expectancies, Interaction with Subject Expectancies and Performance on a Psychomotor Task" 14 *Journal of Research in Personality* 27-39 (1980).

CAMPS, F. E. "Eyewitness Evidence" 5 *Journal of Forensic Sciences* 1-9 (1960).

CARTER, R. J. "Identification Evidence" In R. J. Carter and R. E. Salhany, eds., *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972), 247-258.

CHANCE, J. E., and GOLDSTEIN, A. G. "Reliability of Face Recognition Performance" 14 *Bulletin of the Psychonomic Society* 115-117 (1979).

CLIFFORD, B. "The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification" [1979] *Criminal Law Review* 153-163.

"Voice Identification by Human Listeners" 4 *Law and Human Behavior* 373 (1980).

CLIFFORD, B., and SCOTT, J. "Individual and Situational Factors in Eyewitness Testimony" 63 *Journal of Applied Psychology* 352-359 (1978).

COURTOIS, M. R., and MUELLER, J. H. "Target and Distractor Typicality in Facial Recognition" 66 *Journal of Applied Psychology* 639 (1981).

DALLETT, K., and WILCOX, S. G. "Remembering Pictures vs. Remembering Descriptions" 11 *Psychonomic Science* 139-140 (1968).

DAVIES, G., ELLIS, H., and SHEPHERD, J. "Cue Saliency in Faces as Assessed by the 'Photofit' Technique" 6 *Perception* 263-269 (1977).

"Effects of Interpolated Mugshot Exposure on Accuracy of Eyewitness Identification" 64 *Journal of Applied Psychology* 232-237 (1979).

"Face Identification: The Influence of Delay upon Accuracy of Photofit Construction" 6 *Journal of Police Science and Administration* 35-42 (1978).

"Face Recognition Accuracy as a Function of Mode of Representation" 63 *Journal of Applied Psychology* 180-187 (1978).

"Similarity Effects in Face Recognition" 92 *American Journal of Psychology* 507-523 (1979).

DEFFENBACHER, K. A. "Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?" 4 *Law and Human Behavior* 243-260 (1980).

DEFFENBACHER, K. A., LEU, J. R., and BROWN, E. L. "Memory for Faces: Testing Method, Encoding Strategy and Confidence" 94 *American Journal of Psychology* 13-26 (1981).

DENT, H. R., and GRAY, F. "Identification in Parades" 1 *New Behaviour* 366 (1975).

DENT, H. R., and STEPHENSON, G. M. "Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses" In D. P. Farrington, K. Hawkins, and S. M. Lloyd Bostock, eds., *Psychology, Law and Legal Processes* (London: Macmillan, 1979) 195-206

DOOB, A., and KIRSHENBAUM, H. "Bias in Police Lineups — Partial Remembering" 1 *Journal of Police Science and Administration* 287-293 (1973).

DUBIN, C. L. "Identification Procedures and Police Lineups" In *Law Society of Upper Canada, Special Lectures: Evidence* (Toronto: De Boo, 1955) 329-342.

EGAN, D., PITTNER, M., and GOLDSTEIN, A. G. "Eyewitness Identification: Photographs vs. Live Models" 1 *Law and Human Behavior* 199-206 (1977).

ELLIS, H. D. "Recognizing Faces" 66 *British Journal of Psychology* 409-426 (1975).

ELLIS, H. D., DAVIES, G. M., and SHEPHERD, J. W. "Experimental Studies of Face Identification" 3 *Journal of Criminal Defence* 219-234 (1977).

"An Investigation of the Use of the Photo-fit Technique for Recalling Faces" 66 *British Journal of Psychology* 29-37 (1975).

FEINGOLD, G. "The Influence of Environment on Identification of Persons and Things" 5 *Journal of Criminal Law and Criminology* 39-51 (1914).

FISHMAN, D. B., and LOFTUS, E. F. "Expert Psychological Testimony on Eyewitness Identification" 4 *Law and Psychology Review* 87-103 (1978).

GARCIA, L. T., and GRIFFITT, W. "Impact of Testimonial Evidence as a Function of Witness Characteristics" 11 *Bulletin of the Psychonomic Society* 37-40 (1978).

GARTON, R. F., and ALLEN, L. R. "Recognition Memory of Paced and Unpaced Decision-Time for Rare and Common Verbal Material" 35 *Perceptual and Motor Skills* 548-550 (1972).

GAULT, R., and CADY, H. M. "Minor Studies from the Psychological Laboratory of Northwestern University" 35 *American Journal of Psychology* 110-112 (1924).

GODDEN, D., and BADDELEY, A. "When Does Context Influence Recognition Memory?" 71 *British Journal of Psychology* 99-104 (1980).

GOLDSTEIN, A. G. "The Fallibility of the Eyewitness: Psychological Evidence" in B. D. Sales, ed., *Psychology in the Legal Process* (New York: Spectrum Publications, 1977) 223-247.

GOLDSTEIN, A. G., et al. "Recognition Memory for Accented and Unaccented Voices" 17 *Bulletin of the Psychonomic Society* 217 (1981).

GOLDSTEIN, A. G., and CHANCE, J. E. "Visual Recognition Memory for Complex Configurations" 9 *Perceptual Psycholophysics* 237 (1978).

GOLDSTEIN, A. G., JOHNSON, K. S., and CHANCE, J. E. "Face Recognition and Verbal Description of Faces from Memory" A paper presented at the annual meeting of the Psychonomic Society, Washington, D.C., 1977.

GORENSTEIN, G. W., and ELLSWORTH, P. C. "Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness" 65 *Journal of Applied Psychology* 616-622 (1980).

HALL, D. F. "Obtaining Eyewitness Identifications in Criminal Investigations: Two Experiments and Some Comments on the Zeitgeist in Forensic Psychology" A paper, Thiel College.

HALL, D. F., and OSTROM, T. M. "Accuracy of Eyewitness Identifications after Biasing and Unbiasing Instructions" A paper, Ohio State University, 1975.

HARRIS, R. J. "Answering Questions Containing Marked and Unmarked Adjectives and Adverbs" 97 *Journal of Experimental Psychology* 399-401 (1973).

HASTIE, R., LANDSMAN, R., and LOFTUS, E. F. "Eyewitness Testimony: The Dangers of Guessing" 19 *Jurimetrics Journal* 1-8 (1978-1979).

HILGARD, E. R. and LOFTUS, E. F. "Effective Interrogation of the Eyewitness" 27 *International Journal of Clinical and Experimental Hypnosis* 342-357 (1979).

HILTON, O. "Handwriting Identification vs. Eyewitness Identification" 45 *Journal of Criminal Law, Criminology and Police Science* 207-212 (1954).

HOCHBERG, J., and GALPER, R. E. "Recognition of Faces: 1. An Exploratory Study" 9 *Psychonomic Science* 619-620 (1967).

HOWE, M. J. A. "Recognition Memory for Photographs in Homogeneous Sequences" 24 *Perceptual and Motor Skills* 1181-1182 (1967).

HOWELLS, T. H. "A Study of Ability to Recognize Faces" 33 *Journal of Abnormal and Social Psychology* 124-127 (1938).

JUOLA, J. F., FISCHLER, I., WOOD, C. T., and ATKINSON, R. C. "Recognition Time for Information Stored in Long-term Memory" 10 *Perception and Psychophysics* 8-14 (1971).

KATZ, L. S., and REID, J. F. "Expert Testimony on the Fallibility of Eyewitness Identification" 1 *Criminal Justice Journal* 177-206 (1977).

KROUSE, F. L. "Effects of Pose, Pose Change, and Delay on Face Recognition Performance" 66 *Journal of Applied Psychology* 651 (1981).

LAUGHERY, K. R., ALEXANDER, J. F., and LANE, A. B. "Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph" 55 *Journal of Applied Psychology* 477-483 (1971).

LAUGHERY, K. R., FESSLER, P. K., TENORVITZ, D. R., and YOVLICK, D. A. "Time Delay and Similarity Effects in Facial Recognition" 59 *Journal of Applied Psychology* 490-496 (1974).

LAUGHERY, K. R., and FOWLER, R. H. "Sketch Artist and Identi-Kit Procedures for Recalling Faces" 65 *Journal of Applied Psychology* 307 (1980).

LEIPPE, M. R. "Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence" 4 *Law and Human Behavior* 261-274 (1980).

LEONARDO, D. "The Potential Fallibility of Eyewitness Testimony and the Need for Procedural Safeguards in the Identification Process" 15 *Court Review* 8-21 (1976).

LEVINE, F. J., and TAPP, J. L. "The Psychology of Criminal Identification: The Gap from Wade to Kirby" 121 *University of Pennsylvania Law Review* 1079-1131 (1973).

LEVY, A. S., and HESHKA, S. "Similarity and the False Recognition of Prototypes" 1 *Bulletin of the Psychonomic Society* 181-183 (1973).

LEZAK, M. D. "Some Psychological Limitation on Witness Reliability" 20 *Wayne Law Review* 117-133 (1973).

LINDSAY, R. C. L., and WELLS, G. L. "What is an Eyewitness-Identification Error? The Effect of Lineup Structure Depends on the Definition of a False

Identification" (September 1979, University of Alberta.)

"What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy" 4 *Law and Human Behavior* 67-77 (1980).

LINDSAY, R. C. L., WELLS, G. L., and RUMPEL, C. M. "Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?" 66 *Journal of Applied Psychology* 79-89 (1981).

"Juror's Detection of Eyewitness-Identification Accuracy Within and Across Situations" (University of Alberta, July 1979.)

LIPTON, J. P. "On the Psychology of Eyewitness Testimony" 62 *Journal of Applied Psychology* 90-95 (1977).

LOFTUS, E. F. "The Eyewitness on Trial" 16 *Trial* (No. 10) 30-35 (1980).

"Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification" 65 *Journal of Applied Psychology* 9-15 (1980).

"Reconstructing Memory: The Incredible Eyewitness" 8 *Psychology Today* (No. 7) 116-119 (1974); reprinted in 15 *Jurimetrics* 188 (1975).

"Unconscious Transference in Eyewitness Identifications" 2 *Law and Psychology Review* 93-97 (1976).

LOFTUS, E. F., MILLER, D. G., and BURNS H. J. "Semantic Integration of Verbal Information into a Visual Memory" 4 *Journal of Experimental Psychology: Human Learning and Memory* 19-81 (1978).

MALPASS, R. S., and DEVINE, P. G. "Eyewitness Identification: Lineup Instructions and the Absence of the Offender" 66 *Journal of Applied Psychology* 482-489 (1981).

"Guided Memory in Eyewitness Identification Lineups" 66 *Journal of Applied Psychology* 343-350 (1981).

"Realism and Eyewitness Identification Research" 4 *Law and Human Behavior* 347-358 (1981).

MALPASS, R. S., LAVIGUEUR, H., and WELDON, D. E. "Verbal and Visual Training in Face Recognition" 14 *Perception and Psychophysics* 285-292 (1973).

MANDLER, J. M., and PARKER, R. E. "Memory for Descriptive and Spatial Information in Complex Pictures" 2 *Journal of Experimental Psychology: Human Learning and Memory* 38-48 (1976).

MARQUIS, K. H. MARSHALL, J., and OSKAMP, S. "Testimony Validity as a Function of Question Form, Atmosphere and Item Difficulty" 2 *Journal of Applied Social Psychology* 167-186 (1972).

"Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony" 84 *Harvard Law Review* 1620-1643 (1971).

MATTHEWS, M. L. "Discrimination of Identitist Constructions of Faces: Evidence for a Dual Processing Strategy" 23 *Perception and Psychophysics* 153-161 (1978).

MAULDIN, M. A., and LAUGHERY, K. R. "Composite Production Effects on Subsequent Facial Recognition" 66 *Journal of Applied Psychology* 351-357 (1981).

MÉNDEZ, M. A. " 'Memory, That Strange Deceiver' Book Review of The Psychology of Eyewitness Testimony by A. Daniel Yarmey" 32 *Stanford Law Review* 445-452 (1980).

MILLER, A. G., BAER, R., and SCHONBERG, P. "The Bias Phenomenon in Attitude Attribution: Actor and Observer Attitudes" 37 *Journal of Personality and Social Psychology* 1421-1431 (1979).

MILLER, D. G. and LOFTUS, E. F. "Influencing Memory for People and Their Actions" 7 *Bulletin of the Psychonomic Society* 9 (1976).

MORGAN, E. M. "Hearsay Dangers and the Application of the Hearsay Concept" 62 *Harvard Law Review* 177-219 (1948).

MUELLER, J. H., CARLOMUSTO, M., and GOLDSTEIN, A. G. "Orienting Task and Study Time in Facial Recognition" 11 *Bulletin of the Psychonomic Society* 313-316 (1978).

NICKERSON, R. S. "A Note on Long-Term Recognition Memory for Pictorial Material" 11 *Psychonomic Science* 58 (1968).

ORENSTEIN, H. B., and HAMILTON, K. M. "Memory Load, Critical Features and Retrieval Processes in Facial Recognition" 45 *Perceptual and Motor Skills* 1079-1087 (1977).

PACHELLA, R. G. "The Truth and Nothing But the Truth" 26 *Contemporary Psychology* 85-87 (1981).

PAIVIO, A., ROGERS, T. B., and SMYTHE, P. C. "Why Are Pictures Easier to Recall than Words?" 11 *Psychonomic Science* 137-138 (1968).

PATTERSON, K. E., and BADDELEY, A. D. "When Face Recognition Fails" 3 *Journal of Experimental Psychology: Human Learning and Memory* 406-417 (1977).

"Reports and Proposals: Identification Issues" 19 *Criminal Law Reporter* (BNA) 2416 (August 18, 1976).

RUPP,A. H. *Making the Blind See: Effects of Group Discussion on Eyewitness Reports, Report No. CR-19.* New York: Center for Responsive Psychology, 1975.

"Effects of Group Interaction of Eyewitness Reports" A paper presented at the meeting of the Eastern Psychological Association, New York, 1976.

SHEPARD, R. N. "Recognition Memory for Words, Sentences, and Pictures" 6 *Journal of Verbal Learning and Verbal Behavior* 156-163 (1967).

SHEPHERD, J. W., ELLIS, H. D., MCMURRAN, M., and DAVIES, G. M. "Effect of Character Attribution on Photofit Construction of a Face" 8 *European Journal of Social Psychology* 263-268 (1978).

SNEE, T. J., and FUSH, D. E. "Interaction of the Narrative and Interrogatory Methods of Obtaining Testimony" 11 *Journal of Psychology* 229-236 (1941).

SNYDER, M., and URANOWITZ, S. W. "Reconstructing the Past: Some Cognitive Consequences of Person Perception" 36 *Journal of Personality and Social Psychology* 941-950 (1978).

STARKMAN, D. "The Use of Eyewitness Identification Evidence in Criminal Trials" 21 *Criminal Law Quarterly* 361-386 (1978-1979).

"Symposium: Eyewitness Behaviour" 4 *Law and Human Behavior* 237-394 (1980).

TEASDALE, J. "If Seeing is Believing — A Cautionary Tale — I" 124 *New Law Journal* 803-805 (1974).

THOMSON, D. M. "Person Identification Influencing the Outcome" 14 *Australia and New Zealand Journal of Criminology* 49 (1981).

"The Case Against Personal Identification" 13 *Fortnightly Law Journal* 87-88 (1943).

UPMEYER, A., and SCHREIBER, W. K. "Effects of Agreement and Disagreement in Groups on Recognition Memory Performance and Confidence" 2 *European Journal of Social Psychology* 109-128 (1972).

WARNICK, O. H., and SANDERS, G. S. "The Effects of Group Discussion on Eyewitness Accuracy" 10 *Journal of Applied Social Psychology* 249-259 (1980).

"Why Do Eyewitnesses Make So Many Mistakes?" 10 *Journal of Applied Social Psychology* 362-366 (1980).

WELLS, G. L. "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables" 36 *Journal of Personality and Social Psychology* 1546-1557 (1978).

WELLS, G. L., LEIPPE, M. R. and OSTROM, T. M. "Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification" 63 *Journal of Applied Psychology* 345-351 (1978).

"Guidelines for Empirically Assessing the Fairness of a Lineup" 3 *Law and Human Behavior* 285 (1979).

WELLS, G. L. and LINDSAY, R. C. L. "On Estimating the Diagnosticity of Eyewitness Nonidentification" 88 *Psychological Bulletin* 776 (1980).

WELLS, G. L., LINDSAY, R. C. L., and FERGUSON, T. J. "Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification" 64 *Journal of Applied Psychology* 440-448 (1979).

"The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact" 66 *Journal of Applied Psychology* 688 (1981).

WILLIAMS, G., and HAMMELMAN, H. A. "Identification Parades: Part I" [1963] *Criminal Law Review* 479-490. "Part II" [1963] *Criminal Law Review* 545-555.

WILLIAMS, L. *Application of Signal Detection Parameters in a Test of Eyewitness to a Crime Report No. CR-20.* New York: Center for Responsive Psychology, 1975.

WILLMER, M. A. P. "On the Value of the Information Obtained from an Identity Parade" 33 *International Criminal Police Review* 36-45 (1978).

WINOGRAD, E., and RIVERS-BULKELEY, N. T. "Effects of Changing Context on Remembering Faces" 3 *Journal of Experimental Psychology: Human Learning and Memory* 397-405 (1977).

WOODHEAD, M. M., BADDELEY, A. D., and SIMMONDS, D. C. V. "On Training People to Recognize Faces" 22 *Ergonomics* 333 (1979).

WOOCHER, F. D. "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification" 29 *Stanford Law Review* 969-1030 (1977).

YARMEY, A. D., and JONES, H. P. T. "Is Eyewitness Identification a Matter of Common Sense?" SSRC Law and Psychology Conference, Trinity College, Oxford, April 6-8, 1981.

ZIMMERMAN, J., and KIMBLE, G. A. "Effects of Incentive on False Recognition" 97 *Journal of Experimental Psychology* 264-266 (1973).

Table of Cases

Canada

R. v. *Armstrong* (1959), 29 W.W.R. 141; 31 C.R. 127; 125 C.C.C. 56 (B.C. C.A.)

Astroff v. *The King* (1931), 50 Que. K.B. 300; 56 C.C.C. 263 (Qué. C.A.)

Attorney General of Quebec and Keable v. *Attorney General of Canada* (1978), 90 D.L.R. (3d) 161 (S.C.C., 1978)

R. v. *Audy (No. 2)* (1977), 34 C.C.C. (2d) 231 (note 173).

Ayles v. *The Queen* (1956), 8 D.L.R. (2d) 399; 119 C.C.C. 38 (N.B. C.A.)

R. v. *Babb*, [1972] 1 W.W.R. 705; 17 C.R.N.S. 366 (B.C. C.A.)

R. v. *Bagley*, [1926] 3 D.L.R. 717; 2 W.W.R. 513; 37 B.C.R. 353; 46 C.C.C. 257 (B.C. C.A.)

R. v. *Baldwin*, [1944] 3 D.L.R. 762; 82 C.C.C. 15 (Ont. C.A.)

Baxter v. *The Queen* (1952), 15 C.R. 265; 106 C.C.C. 15 (Qué. C.A.)

R. v. *Beaubien* (1979), 16 A.R. 398 (Dist. Ct.)

Attorney General of Quebec v. *Begin*, [1955] S.C.R. 593; [1955] 5 D.L.R. 394; 21 C.R. 217; 112 C.C.C. 209, rev'g 21 C.R. 33

R. v. *Belanger* (1975), 24 C.C.C. (2d) 10 (Ont. C.A.)

R. v. *Blackmore*, [1971] 2 O.R. 21; 14 C.R.N.S. 62; 2 C.C.C. (2d) 397 (Ont. C.A.)

R. v. *Braumberger and Coullier* (1967), 62 W.W.R. (N.S.) 285 (B.C. C.A.)

R. v. *Browne and Angus* (1951), 1 W.W.R. (N.S.) 449; 11 C.R. 297; 99 C.C.C. 141 (B.C. C.A.)

R. v. *Cachia*, [1954] O.W.N. 36; 17 C.R. 367; 107 C.C.C. 272; (Ont. C.A.)

R. v. *Cadger* (1957), 119 C.C.C. 211 (B.C. C.A.)

Chartier v. *Attorney General of Quebec* (1979), 9 C.R. (3d) 97 (S.C.C.)

R. v. *Churchman and Durham*, [1955] O.W.N. 90; 20 C.R. 137; 110 C.C.C. 382 (Ont. H.C.)

Re Commonwealth of Puerto Rico and Hernandez (1972), 8 C.C.C. (2d) 433 (Ont. Co. Ct.)

Re Commonwealth of Puerto Rico and Hernandez (No. 2) (1973), 15 C.C.C. (2d) 56 (F.C.A.)

Re Conrad and The Queen (1973), 12 C.C.C. (2d) 405 (N.S. S.C.)

Curr v. *The Queen*, [1972] S.C.R. 889; 26 D.L.R. (3d) 603; 18 C.R.N.S. 281; 7 C.C.C. (2d) 181, aff'g [1971] 4 C.C.C. (2d) 42 note, which aff'd [1971] 3 O.R. 167; 4 C.C.C. (2d) 24

Rex v. *Dean*, [1942] O.R. 3; [1942] 1 D.L.R. 702; 77 C.C.C. 13 (Ont. C.A.)

R. v. *Demich* (1951), 102 C.C.C. 218 (B.C. C.A.)

DiIorio and Fontaine v. *Warden of The Common Jail of Montréal and Brunet* (1977), 73 D.L.R. (3d) 491 (S.C.C.)

R. v. *Dixon* (1953), 8 W.W.R. (N.S.) 88; 16 C.R. 108; 105 C.C.C. 16 (B.C. C.A.)

Dubois v. *The Queen* (1975), 29 C.R.N.S. 220 (B.C. S.C.)

R. v. *Dunlop, Douglas and Sylvester* (1976), 33 C.C.C. (2d) 342 (Man. C.A.) rev'd on other grounds, [1979] 2 S.C.R. 881

R. v. Eden, [1970] 2 O.R. 161; [1970] 3 C.C.C. 280 (Ont. C.A.)

R. v. *Francis and Barber* (1929), 51 C.C.C. 343 (Sask. C.A.)

R. v. *Gagnon* (1958), 122 C.C.C. 301 (B.C. C.A.)

R. v. *Gillis* (1980), 77 A.P.R. 259 (N.S. Co. Ct.)

R. v. *Goldhar*, *Rex* v. *Smolker*, [1941] 2 D.L.R. 480; 76 C.C.C. 270 (Ont. C.A.)

Re Regina and Grant (1973), 13 C.C.C. (2d) 495 (Ont. H.C.)

R. v. *Grimaldi (No. 2)*, [1979] 1 W.W.R. 554 (Alta. S.C.)

R. v. *Harrison*, [1928] 3 D.L.R. 224; [1928] 1 W.W.R. 973; 40 B. C.R. 53; 49 C.C.C. 356 (B.C. C.A.).

R. v. *Harrison*, [1946] 3 D.L.R. 690; 86 C.C.C. 166 (B.C. C.A.)

R. v. *Harrison* (1950), 1 W.W.R. (N.S.) 158; 11 C.R. 250; 99 C.C.C. 96 (B.C. C.A.)

R. v. *Harrison (No. 3)* (1951), 2 W.W.R. (N.S.) 318; 12 C.R. 314; 100 C.C.C. 143 (B.C. C.A., 1951)

R. v. *Harvey and Taylor* (1918), 42 O.L.R. 187 (C.A.)

R. v. *Hayduk* (1935), 43 Man. R. 209; [1935] 4 D.L.R. 419; [1935] 2 W.W.R. 513; 64 C.C.C. 194 (Man. C.A.)

R. v. *Hederson*, [1944] 2 D.L.R. 440; 81 C.C.C. 132 (Ont. C.A.)

R. v. *Holberg and Russell* (1978), 42 C.C.C. (2d) 104 (Ont. Co. Ct.)

R. v. *Howarth* (1970), 13 C.R.N.S. 329; 1 C.C.C. (2d) 546; 13 Cr. L.Q. 109 (Ont. C.A.)

R. v. *Jarrett* (1975), 25 C.C.C. (2d) 241 (N.S. C.A.)

R. v. *Johnson* (1976), 17 N.S.R. (2d) 494 (N.S. C.A.)

R. v. *Jones*, [1971] 2 O.R. 549; 3 C.C.C. (2d) 153 (C.A.)

R. v. *Kervin* (1974), 26 C.R.N.S. 357 (N.S. C.A.)

R. v. *Kobelnak*, unreported, see note 221.

R. v. *Kolnberger* (1970), 1 C.C.C. (2d) 121 (Alta. C.A.)

R. v. *Louie* (1960), 129 C.C.C. 336 (B.C. C.A.)

R. v. *MacLean* (1975), 27 C.C.C. (2d) 57 (B.C. Co. Ct.)

R. v. *MacKenzie* (1979), 65 A.P.R. 363 (P.E.I. S.C.)

R. v. *Marcoux and Solomon (No. 2)*, [1973] 3 O.R. 861; 23 C.R.N.S. 51; [1974] 13 C.C.C. (2d) 309 (C.A.), aff'd [1976] 1 S.C.R. 763; 60 D.L.R. (3d) 119; [1975] 29 C.R.N.S. 211; [1976] 24 C.C.C. (2d) 1

R. v. *Martell and Currie* (1977), 32 A.P.R. 578; 23 N.S.R. (2d) 578 (N.S. C.A.)

R. v. *McClellan*, [1947] 2 W.W.R. 44; 4 C.R. 425; 89 C.C.C. 144 (B.C. C.A.)

R. v. *McDonald* (1951), 4 W.W.R. (N.S.) 14; 13 C.R. 349; 101 C.C.C. 78 (B.C. C.A.)

R. v. *McGeachy*, [1969] 2 C.C.C. 98 (B.C. C.A.)

R. v. *McKay and Bruner* (1966), 61 W.W.R. (N.S.) 528 (B.C. C.A.)

R. v. *McLaren*, [1935] 3 D.L.R. 165; [1935] 2 W.W.R. 188; 63 C.C.C. 257 (Alta. S.C.)

R. v. *Mingle*, [1965] 2 O.R. 753; [1965] 4 C.C.C. 172 (Mag. Ct.).

R. v. *Minichello*, [1939] 4 D.L.R. 472; 54 B.C.R. 294; 72 C.C.C. 413 (B.C. C.A.)

R. v. *Murray and Mahoney* (1915), 9 W.W.R. 804 (Alta. S.C.).

R. v. *Murray and Mahoney (No. 2)* (1916), 33 D.L.R. 702; 77 W.W.R. 404; 10 Alta. L.R. 275; 27 C.C.C. 247 (S.C.)

R. v. *Nagy* (1967), 61 W.W.R. (N.S.) 634 (B.C. C.A.)

Nepton v. *The Queen* (1971), 15 C.R.N.S. 145 (Qué. C.A.)

R. v. *Olbey*, [1971] 3 O.R. 225; 13 C.R.N.S. 316; 4 C.C.C. (2d) 103 (Ont. C.A.)

R. v. *Opalchuk* (1958), 122 C.C.C. 85 (Ont. Co. Ct.)

R. v. *Pace* (1976), 16 N.S.R. (2d) 271 (N.S. S.C.)

R. v. *Pelletier* (1973), 13 C.C.C. (2d) 266 (B.C. C.A.)

R. v. *Peterkin* (1959), 30 C.R. 382 (Que. Ct. of Sess.)

R. v. *Prentice* (1965), 52 W.W.R. (N.S.) 126; [1965] 4 C.C.C. 118 (B.C. C.A.)

R. v. *Racine*, [1977] R. de J. 134 (Qué. Ct. of Sess.)

R. v. *Rehberg* (1973), 5 N.S.R. (2d) 14 (N.S. S.C.)

R. v. *Richards*, [1964] 2 C.C.C. 19 (B.C. C.A.)

R. v. *Robertson* (1979), 45 A.P.R. 529 (N.S. S.C.)

R. v. *Shaver* (1970), 2 N.S.R. (2d) 225 (S.C.)

R. v. *Simpson and Kenney*, [1959] O.R. 497; 30 C.R. 323; 124 C.C.C. 129 (Ont. C.A.)

R. v. *Smierciak*, [1947] 2 D.L.R. 156; [1946] O.W.N. 871; 2 C.R. 434; 87 C.C.C. 175 (Ont. C.A.)

R. v. *Smith* (1975), 12 N.S.R. (2d) 289 (N.S. C.A.)

R. v. *Smith*, [1952] O.R. 432; 14 C.R. 304; 103 C.C.C. 58 (Ont. C.A.)

Sommer v. *The Queen* (1958), 29 C.R. 357 (Qué. C.A.)

R. v. *Spatola*, [1970] 3 O.R. 74; 10 C.R.N.S. 143; [1970] 4 C.C.C. 241 (Ont. C.A.)

R. v. *Sutton*, [1970] 2 O.R. 358; 9 C.R.N.S. 45; [1970] 3 C.C.C. 152 (Ont. C.A.)

R. v. *Travers* (1966), 49 C.R. 339 (B.C. C.A.)

Vezeau v. *The Queen* (1976), 28 C.C.C. (2d) 81 (S.C.C.)

R. v. *Watson*, [1944] 2 D.L.R. 801; [1944] O.W.N. 258; 81 C.C.C. 212 (Ont. C.A.)

R. v. *Yates*, [1946] 2 D.L.R. 521, [1946] 1 W.W.R. 449; 62 B.C.R. 307; 1 C.R. 237; 85 C.C.C. 334 (B.C. C.A.)

R. v. *Zarichney* (1936), 65 C.C.C. 214 (Man. C.A.)

Australia

R. v. *Aiken*, [1925] L.R. 265 (F.C.)

R. v. *Armstrong*, [1941] Qd. S.R. 161; 35 Qd. J.P.R. 76 (C.C.A.).

R. v. *Beble*, [1979] Qd. S.R. 278 (C.C.A.)

R. v. *Boardman*, [1969] V. R. 151 (S.C.)

R. v. *Bouquet*, 62 S.R. (N.S.W.) 563; 79 W.N. (N.S.W.) 423; [1962] N.S.W.R. 1034 (C.C.A)

R. v. *Chapman* (1969), 91 W.N. (N.S.W.) 61 (C.C.A.)

R. v. *Courtney* (1956), 74 W.N. (N.S.W.) 204 (C.C.A.)

Craig v. *The King* (1933), 49 C.R. 429; 7 A.L.J.R. 212 (Aust. H.C.)

Davies v. *The King* (1937), 57 C.R. 170 (Aust. H.C.)

R. v. *Denning and Crawley* (1958), 58 S.R. (N.S.W.) 359; 75 W.N.(N.S.W.) 383 (C.C.A.)

R. v. *Donnini*, [1973] V.R. 67 (S.C.), aff'd on another ground, 47 A.L.J. R. 69; [1972-73] A. Argus L.R. 1093 (Aust. H.C.)

R. v. *Doyle*, [1967] V. R. 698 (S.C.)

Duff v. *R.* (1979), 28 L.R. 663 (Fed. Ct. of Aust.)

R. v. *Evensen* (1916), 33 W.N. (N.S.W.) 106 (C.C.A.)

R. v. *Fannon and Walsh* (1922), 22 S.R. (N.S.W.) 427; 39 W.N.(N.W.S.) 130 (C.C.A.)

R. v. *Gaffney*, [1968] V.R. 417 (S.C.)

R. v. *Gaunt*, [1964] N.S.W.R. 864 (C.C.A.)

R. v. *Goode*, [1970] S.A.S.R. 69 (S.C.)

R. v. *Griffiths*, [1930] V.L.R. 204; 36 Argus L.R. 121 (S.C.)

R. v. *Harris* (1971), 1 S.A.S.R. 447 (S.C.)

R. v. *Keeley and Alexander*, [1980] V. R. 571 (S.C.)

R. v. *King* (1975), 12 S.A.S.R. 404 (S.C.)

R. v. *Maarroui*, 92 W.N. (N.S.W.) 757; [1970] 3 N.S.W.R. 116 (C.C.A.)

R. v. *Martin*, [1956] V.L.R. 87 (S.C.)

R. v. *Miles and Haines*, [1947] Q. S.R. 180; 42 Q.J.P.R. 21 (C.C.A.)

R. v. *Newell* (1927), 27 S.R. (N.S.W.) 274; 44 W.N. (N.S.W.) 91 (C.C.A.)

R. v. *Preston*, [1961] V.R. 761 (S.C.)

Raspor v. *The Queen* (1958), 99 L.R. 346; 32 A.L.J.R. 190 (Aust. H.C.)

R. v. *Riley (No. 2)* (1971), 66 Q.J.P.R. 24 (Dist. Ct.)

R. v. *Rosen* (1969), 90 W.N. (N.S.W.) 620 (C.C.A.)

R. v. *Smith*, [1979] 2 N.S.W.L.R. 304 (C.C.A.)

Sutton v. *The Queen*, [1978] W.A.R. 94 (S.C.)

R. v. *Voss*, [1963] V.R. 22 (S.C.)

England

R. v. *Blackburn* (1853), 6 Cox C.C. 333 (Staffordshire Spring Assizes, Oxford Circuit)

R. v. *Bundy* (1910), 5 Cr. App. R. 270 (C.C.A.)

R. v. *Chadwick, Matthews and Johnson* (1917), 12 Cr. App. R. 247 (C.C.A.)

Chapman v. *The King* (1911), 7 Cr. App. R. 53 (C.C.A.)

R. v. *Christie*, [1914] A.C. 545; 83 L.J.R.(K.B. division) 1097 (House of Lords)

R. v. *Cleal* (1941), 28 Cr. App. R. 95 (C.C.A.)

Dallison v. *Caffery*, [1965] 1 Q.B. 348; [1964] 3 W.L.R. 385; [1964] 2 All E.R. 610 (C.A.)

R. v. *Dickman* (1910), 5 Cr. App. R. 135; 26 T.L.R. 640 (C.C.A.)

R. v. *Dwyer and Ferguson*, [1925] 2 K.B. 799; 18 Cr. App. R. 145; 41 T.L.R. 186 (C.C.A.)

R. v. *Gardner* (1915), 80 J.P. 135 (C.C.A.)

R. v. *Gilling* (1916), 12 Cr. App. R. 131 (C.C.A.)

R. v. *Goss* (1923), 17 Cr. App. R. 196 (C.C.A.)

R. v. *Haslam* (1925), 19 Cr. App. R. 59 (C.C.A.)

R. v. *Hinds*, [1932] 2 K.B. 644 (C.C.A.)

R. v. *Howick*, [1970] Crim. L.R. 403 (C.C.A.)

R. v. *Hunjan* (1979), 68 Cr. App. R. 99 (C.C.A.)

R. v. *John*, [1973] Crim. L.R. 113 (C.C.A.)

R. v. *Keane* (1977), 65 Cr. App. R. 247 (C.C.A.)

R. v. *Kingsland* (1919), 14 Cr. App. R. 8 (C.C.A.)

R. v. *Lamb* (1980),71 Cr. App. R. 198 (C.A.)

R. v. *Lawrenson*, [1961] Crim. L.R. 398 (C.C.A.)

R. v. *Long* (1973), 57 Cr. App. R. 871 (C.C.A.)

R. v. *Maynard* (1979), 69 Cr. App. R. 309 (C.C.A.)

R. v. *Melany* (1924), 18 Cr. App. R. 2 (C.C.A.)

R. v. *Millichamp* (1924), 16 Cr. App. R. 83 (C.C.A.)

R. v. *Osbourne and Virtue*, [1973] 1 Q.B. 678; [1973] 2 W.L.R. 209; [1973] 1 All E.R. 649; [1973] Crim. L.R. 178; 57 Cr. App. R. 297 (C.C.A.)

R. v. *Palmer* (1914), 10 Cr. App. R. 77 (C.C.A.)

R. v. *Parks*, [1961] Crim. L.R. 825 (C.C.A.)

R. v. *Pett*, [1968] Crim. L.R. 388 (C.C.A.)

R. v. *Phillips* (1924), 18 Cr. App. R. 151 (C.C.A.)

Reid v. *The Queen*, [1979] 2 W.L.R. 221 (P.C.)

R. v. *Ross*, [1960] Crim. L.R. 127 (C.C.A.)

R. v. *Schrager* (1911), 6 Cr. App. R. 253 (C.C.A.)

R. v. *Seiga*, [1961] Crim. L.R. 541; 45 Cr. App. R. 220 (C.C.A.)

R. v. *Smith and Evand* (1908), 1 Cr. App. R. 203 (C.C.A.)

R. v. *Turnbull*, [1977] Q.B. 224; [1976] 3 W.L.R. 445; [1976] 3 All E.R. 549; 63 Cr. App. R. 132 (C.C.A.)

R. v. *Van Der Vyver*, [1961] Crim. L.R. 399 (C.C.A.)

R. v. *Wainwright* (1925), 19 Cr. App. R. 52 (C.C.A.)

R. v. *Watson*, [1814-23] All E.R. Rep. 334 (K.B.)

R. v. *Weeder* (1980), 71 Cr. App. R. 228 (C.C.A.)

R. v. *Whitfield*, [1968] Crim. L.R. 613 (C.C.A.)

R. v. *Williams* (1912), 8 Cr. App. R. 84 (C.C.A.)

India

Anwar v. *State* (1961), 48 A.I.R. 50 (Allahabad A.C.)

Asharfi v. *State* (1961), 48 A.I.R. 153 (Allahabad H.C.)

Babu v. *State* (1950), 48 Allahabad L.J. 355 (Allahabad H.C.)

Emperor v. *Chhadammi Lal* (1936), 23 A.I.R. 373 (Allahabad H.C.)

Dal Chand v. *State* (1953), 40 A.I.R. 123 (Allahabad H.C.)

Daryao Singh v. *State* (1952), 53 Cr. L.J. 265; 39 A.I.R. 59 (Allahabad H.C.)

Dhaja Rai v. *The Emperor* (1948), 35 A.I.R. 241 (Allahabad H.C.)

Re Kamaraj Goundar (1960), 47 A.I.R. 125 (Madras H.C.)

Kartar Singh v. *The Emperor* (1934), 21 A.I.R. 692 (Lahore H.C.)

Mohd. Kasim Razvi v. *State* (1951), 52 Cr. L.J. 1123 (Hyderabad H.C.)

Provash Kumar Bose v. *The King* (1951), 38 A.I.R. 475 (Calcutta H.C.)

Ram Singh v. *Emperor* (1943), 30 A.I.R. 269 (Oudh Chief C.)

Satya Narain v. *State* (1953), 40 A.I.R. 385 (Allahabad H.C.)

Ireland

Arthurs v. *Attorney General of Northern Ireland* (1970), 55 Cr. App. R. 161 (H. L.)

The People v. *Casey (No. 2)*, [1963] I.R. 33 (S.C.)

The People v. *Martin*, [1956] I.R. 22 (C.C.A.)

New Zealand

R. v. *Duffy*, [1979] 2 N.Z.L.R. 432 (C.A.)

R. v. *Glass*, [1975] N.Z.L.R. 496; [1945] N.Z. Gaz. L.R. 249 (C.A.)

R. v. *Ireland*, [1938] N.Z.L.R. 139 (S.C.)

R. v. *Jeffries*, 68 N.Z.L.R. 595; [1949] N.Z. Gaz. L.R. 433 (C.A.)

R. v. *Russell*, [1977] 2 N.Z.L.R. 20 (C.A.)

Papua-New Guinea

State v. *John Beng*, [1976]P.N.G.L.R. 471 (Nat. Ct. at J.)

Scotland

Bennett v. *H.M. Advocate*, [1976] Sessions Cases 1 (Ct. of Justiciary)

South Africa

R. v. *M.*, [1959] 7 S.A.L.R. 434 (S.C., App. Div.)

R. v. *Masemang*, [1950] 2 S.A.L.R. 488 (S.C., App. Div.)

R. v. *Nara Sammy*, [1956] 4 S.A.L.R. 629 (S.C., Transvaal Prov. Div.)

R. v. *Olia*, [1935] S.A.L.R. 213 (S.C., Transvaal Prov. Div.)

R. v. *W.*, [1947] 2 S.A.L.R. 708 (S.C., App. Div.)

R. v. *Y.*, [1959] 2 S.A.L.R. 116 (S.C., Witwatersrand Local Div.)

United States

State v. *Alexander*, 503 P. 2d 777 (Ariz. Sup. Ct., 1972)

U.S. ex rel. Reed v. *Anderson*, 343 F. Supp. 116 (Del., 1972)

U.S. v. *Ash*, 413 U.S. 300 (D.C. Cir., 1973)

U.S. v. *Bell*, 457 F. 2d 1231 (5th Cir., 1972)

People v. *Brown*, No. 1798 (N.Y. Cty. Ct., 1972)

Commonwealth v. *Carter*, 297 A. 2d 505 (Pa. Super. Ct., 1972)

Caywood v. *State*, 311 N.E. 2d 845 (Ind. C.A., 1974)

State v. *Cooper*, 237 N.E. 2d 653 (Ohio C.P., 1968)

U.S. ex rel. Mealy v. *Delaware*, 489 F. 2d 993 (3rd Cir., 1974)

State v. *Dessureault*, 453 P. 2d 951 (Ariz. Sup. Ct., 1969)

Doss v. *U.S.*, 431 F. 2d 601 (9th Cir., 1970)

State v. *Farrow*, 294 A. 2d 873 (N.J. Sup. Ct., 1972)

U.S. v. *Fernandez*, 456 F. 2d 638 (2d Cir., 1972)

Gilbert v. *California*, 388 U.S. 263 (Cal. Sup. Ct., 1967)

People v. *Guerea*, 358 N.Y.S. 925 (Bronx Cty. Ct., 1974)

Haberstroh v. *Montanye*, 362 F. Supp. 838 (W.D.N.Y., 1973)

People v. *Hibbs*, No. 1930 (Bronx Cty. Ct., 1974)

U.S. v. *Hines*, 455 F. 2d 1317 (JD.C. Cir., 1972)

People v. *Hudson*, 287 N.E. 2d 297 (Ill. Ct. App., 1972)

People v. *Kennedy*, 58 N.E. 652 (N.Y. Ct. App. 1900)

Kirby v. *Illinois*, 406 U.S. 682 (Ill. 1st Dist. Ct. App., 1972)

State v. *Lewis*, 296 So. 2d 824 (La. Sup. Ct., 1974)

Manson v. *Brathwaite*, 432 U.S. 98 (2d Cir., 1977)

Martin v. *United States*, 462 F. 2d 60 (5th Cir., 1972)

U.S. ex rel. Clemmer v. *Mazurkiewicz*, 365 F. Supp. 1158 (E.D. Penn., 1973)

U.S. v. *McGhee*, 488 F. 2d 781 (5th Cir., 1974)

Neil v. *Biggers*, 409 U.S. 188 (6th Cir., 1972)

Odom v. *Israel*, 372 F. Supp. 1310 (E.D. Ill., 1974)

U.S. v. *Parhms* 424 F. 2d 152 (9th Circ., 1970)

U.S. v. *Person*, 478 F. 2d 659 (D.C. Cir., 1973)

Commonwealth v. *Robinson*, 60 A. 2d 824 (Pa. Sup. Ct., 1948)

Rudd v. *State of Florida*, 477 F. 2d 805 (5th Cir., 1973)

People v. *Shaw*, 286 N.E. 2d 3 (Ill. Ct. App., 1972)

Simmons v. *United States*, 390 U.S. 377 (7th Cir., 1968)

Stovall v. *Denno*, 388 U.S. 293 (2d Cir., 1967)

U.S. v. *Wade*, 388 U.S. 218 (5th Cir., 1967)

State v. *Watson* 345 A. 2d 532 (Conn. S.C., 1973)

State v. *Wettstein*, 501 P. 2d 1084 (Utah Sup. Ct., 1972)

State v. *Williams*, 526 P. 2d 714 (Ariz. S.C., 1974)

U.S. v. *Williams*, 469 F. 2d 540 (D.C. Cir., 1972)