

EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES

*Third
Printing*

PATRICK M. WALL

New York City

With a Foreword by

STEPHEN P. KENNEDY

New York City

Showing . . .

POLICE OFFICERS . . . how to conduct an identification procedure that is reliable and not subject to attack at trial

DEFENSE LAWYERS . . . how to spot defects in identification procedure

Conviction of the innocent is more often caused by erroneous identification than by any other single factor. Yet juries are usually unaware of the danger of this type of evidence . . . police often employ identification procedures which create or increase this danger . . . and courts frequently ignore the danger and tolerate these police procedures.

No other book now in print covers the identification problem in such depth as does the present study by Mr. Wall.



CHARLES C THOMAS • PUBLISHER • SPRINGFIELD • ILLINOIS

**Eye-Witness Identification
in Criminal Cases**

Eye-Witness Identification in Criminal Cases

Third Printing

By

PATRICK M. WALL

New York City

With a Foreword by

STEPHEN P. KENNEDY

New York City



CHARLES C THOMAS • PUBLISHER

Springfield • Illinois • U.S.A.

Published and Distributed Throughout the World by
CHARLES C THOMAS • PUBLISHER
BANNERSTONE HOUSE
301-327 East Lawrence Avenue, Springfield, Illinois, U.S.A.

This book is protected by copyright. No
part of it may be reproduced in any manner
without written permission from the publisher.

© 1965, by **CHARLES C THOMAS • PUBLISHER**

ISBN 0-398-02009-4

Library of Congress Catalog Card Number: 65-11318

First Printing, 1965
Second Printing, 1971
Third Printing, 1975

*With THOMAS BOOKS careful attention is given to all details of
manufacturing and design. It is the Publisher's desire to present books
that are satisfactory as to their physical qualities and artistic possibilities
and appropriate for their particular use. THOMAS BOOKS will be true
to those laws of quality that assure a good name and good will.*

Printed in the United States of America
00-2

TO MY WIFE
MARY CATHERINE

FOREWORD

E*ye-witness Identification in Criminal Cases*, by Patrick M. Wall, examines a troublesome matter which is well up on the list of the perplexing and multi-faceted problems confronting the police, prosecutors and others engaged in the administration of criminal justice. The book deals with issues such as the law of identification evidence and the methods by which identification of suspected persons may be made more reliable.

I disagree with some of the proposals the author makes and have reservations concerning others. I do not believe, for example, that he has given sufficient consideration to the great difficulty which the police face in obtaining the participation of private citizens in police line-ups—a difficulty which may spring from the general public apathy where criminal law enforcement is concerned. Nevertheless, this book stimulates thought on the problems it discusses and, hopefully, may lead to solutions which will preserve the civil liberties of the victims and those accused of crime, as well as the public peace and good order.

This book is recommended reading for all who are engaged in criminal law enforcement.

STEPHEN P. KENNEDY

PREFACE

This volume, the contents of which were originally submitted in partial fulfillment of the requirements for the degree of Doctor of Juridical Science at the New York University School of Law, deals with the subject of eye-witness identification in criminal cases. An attempt has been made here to state its dangers, to explain the causes of those dangers, and to suggest how the problem created by those dangers might be alleviated. There are few, if any, up-to-date works devoted completely to this subject, which is one of vital concern to the administration of criminal justice. It is my hope that this book will partially fill that unfortunate void and awaken interest in this long-neglected problem.

I wish to express here my gratitude to all those who have contributed to the completion of this project. The Ford Foundation and the Institute of International Education were kind enough to award me grants which enabled me to spend a year of study in Paris, where the idea for this work was born and the research on it commenced. Professor Joseph Sweeney, of the New York University School of Law, who originally suggested the course of study, has followed its progress with interest from the beginning. Professor Gerhard O. W. Mueller, of the New York University School of Law, under whose direction this was written, has taken many hours from his busy schedule to advise me on it. Martin Erdmann, Esq., a criminal trial attorney associated with the New York Legal Aid Society, read the manuscript and suggested a number of changes in form and content, all of which were adopted. Mr. David R. Kasanof was kind enough to provide technical assistance in the preparation of the manuscript for publication. To these, and to others whose assistance I have had but who are not mentioned here, I express my thanks. I alone, of course, am responsible for whatever errors may be found herein.

Finally, I wish to thank my wife, Mary Catherine, for the encouragement she has given me and the many sacrifices she has had to make during the time I was engaged in this project.

PATRICK M. WALL

CONTENTS

<i>Foreword</i> —STEPHEN P. KENNEDY	<i>Page</i> ix
<i>Preface</i>	vii

Part I

<i>Chapter</i>		
	I. THE IDENTIFICATION PROBLEM.....	5
	Introduction	5
	A General Statement of the Problem	5
	The Causes of Erroneous Identifications	8
	Factors Aggravating the Problem	11
	A Suspect May Be Erroneously Identified by a Number of Witnesses	11
	Even Relatives and Close Friends of the Person Identified May Be in Error	13
	Even Trained Observers May Be in Error	14
	Even a Witness Who Is Positive in His Identification May Be in Error	15
	The Effect That Fear May Have Upon the Witness Is Uncertain	16
	Erroneous Identifications Occur Even in Capital Cases	17
	Juries Are Often Unduly Receptive to Evidence of Identification	19
	The Person Erroneously Identified Often Does Not Resemble the Actual Guilty Party	23
	Conclusion	24
	II. CORPOREAL IDENTIFICATION	26
	Introduction	26
	The Show-up	27
	The Line-up	40
	Giving Notice to the Suspect	42
	Who Should Conduct the Line-up?	46
	The Supervision of Witnesses	46
	The Composition of the Line-up	52

xii EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES

<i>Chapter</i>	<i>Page</i>
The Use of "Blank" Line-ups	60
Recording the Line-up	61
Miscellaneous Precautions	63
Conclusion	64
III. IDENTIFICATION BY PHOTOGRAPH	66
Introduction	66
The Danger of Suggestion	68
Proper Photographic Identification Procedure	73
Photographs Published in Newspapers	85
Conclusion	89
IV. DANGER SIGNALS	90
Introduction	90
A List of Danger Signals	90
The Witness Originally Stated That He Would Be Unable to Identify Anyone	90
The Identifying Witness Knew the Defendant Prior to the Crime, But Made No Accusation Against Him When Questioned by the Police	95
A Serious Discrepancy Exists Between the Identifying Witness's Original Description of the Perpetrator of the Crime and the Actual Description of the Defendant	97
Before Identifying the Defendant at the Trial, the Witness Erroneously Iden- tified Some Other Person	101
Other Witnesses to the Crime Fail to Identify the Defendant	107
Prior to Trial, the Witness Sees the Defendant But Fails to Identify Him	113
Before the Crime Was Committed, the Witness Had a Very Limited Op- portunity to See the Defendant	119

CONTENTS

xiii

<i>Chapter</i>	<i>Page</i>
The Witness and the Person Identified	
Are of Different Racial Groups	122
During His Original Observation of the Perpetrator of the Crime, the Witness Was Unaware That a Crime Situation Was Involved	125
A Considerable Period of Time Elapsed Between the Witness's View of the Criminal and His Identification of the Defendant	127
The Crime Was Committed by a Number of Persons	128
The Witness Fails to Make a Posi- tive Trial Identification	128
Conclusion	130

Part II

V. EVIDENCE OF PRIOR IDENTIFICATION	133
Introduction	133
Prior Corporeal Identifications	134
Prior Photographic Identifications	140
The New York Rule	147
Prior Corporeal Identifications	147
Prior Photographic Identifications	165
Conclusion	171
VI. CORROBORATION AND WARNING	180
Introduction	180
The Requirement of Corroboration	182
The Requirement of a Judicial Warning	193
Conclusion	200
VII. MISCELLANEOUS PRECAUTIONS	202
Introduction	202
The Polygraph	202

xiv EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES

<i>Chapter</i>	<i>Page</i>
Hypnosis	204
Discovery	206
Evidence of Tests and Experiments	208
Conclusion	213
VIII. CONCLUSION	214
<i>Bibliography</i>	217
Articles	217
Books	218
Interviews	220
Letters	220
Reports	220
<i>Table of Cases</i>	221
Australia	221
Canada	221
England	221
Ireland	222
United States	222
<i>Table of Constitutions and Statutes</i>	227
<i>Index</i>	229

**Eye-Witness Identification
in Criminal Cases**

PART I

Chapter I

THE IDENTIFICATION PROBLEM

I. INTRODUCTION

THE PAST DECADE HAS BEEN one of great changes in the administration of criminal justice in the United States. Most of the changes have been made by courts rather than by legislatures, and most have been procedural or evidentiary rather than substantive. The major changes have been concerned with strengthening and enforcing the rights of a person accused of crime, such as his right to counsel and to a fair trial. These rights, of course, belong to a guilty accused as well as to an innocent one, and thus the rules which enforce them benefit both guilty and innocent, without distinguishing between them. To state this fact is not to quarrel with such an equality of treatment. The main function of the criminal process, however, is to distinguish between guilt and innocence and to assure, in so far as it is humanly possible, and without the sacrifice of any of the rights of an accused, that the innocent man is found innocent, and the guilty man guilty. With respect to this function of the criminal law, very little progress has been made.

It is true, of course, that the rules of evidence holding coerced confessions inadmissible protect the innocent man who has been forced to confess to a crime, but they protect the guilty confessor as well. Moreover, despite the widespread police brutality which once existed in this country and which, in some quarters, lingers on, coerced confessions have never constituted the major problem in the administration of criminal justice. The major problem, where actual guilt or innocence is involved, has been and is now the problem posed by evidence of eye-witness identification.

II. A GENERAL STATEMENT OF THE PROBLEM

What is this problem? How serious is it? Perhaps these questions may best be answered by quoting the conclusions of a number of those who have written about the subject of identification evidence. One author, for example, has stated that:

At first the question of personal identity might seem to be the

6 EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES

simplest that could possibly come before a court. But the fact is precisely the reverse. . . . [T]he question whether a . . . man . . . is one individual or another, has proved itself over and over again, by far, instead, the most perplexing. Cases of mistaken personal identity have been all but innumerable¹

A Pennsylvania court has noted that:

There are few more difficult subjects with which the administration of justice has to deal. The carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question²

The late Judge Jerome Frank, in a book dealing with miscarriages of justice, stated that "perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions."³ Felix Frankfurter, while still a professor at Harvard Law School, wrote a book on the Sacco-Vanzetti case in which he asked:

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent — not due to the brutalities of ancient criminal procedure.

In a similar vein, a nineteenth-century author wrote that:

There are several interesting cases on record where . . . persons have been identified as the party guilty of some heinous of-

1. New York Medico-Legal Papers (3d ser.) 367, quoted in Harris, *A Treatise on the Law of Identification* § 622, n. at 435-36 (1892).

2. *Estate of Bryant*, 176 Pa. 309, 318, 35 Atl. 571, 577 (1896).

3. Frank & Frank, *Not Guilty* 61 (1957). In a classic work on the same subject, Professor Borchard similarly concluded that "perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence." Borchard, *Convicting the Innocent* at xiii (1932). And more recently, another professor has stated that "eyewitness identification is the most unreliable form of evidence and causes more miscarriages of justice than any other method of proof." Houts, *From Evidence to Proof* 10-11 (1956) (All emphasized in original).

4. Frankfurter, *The Case of Sacco and Vanzetti* 30 (1927).

fense, and executed therefor, and it was subsequently ascertained that the person was not the wretch it was thought, but an entirely different and innocent one.

Cases like this are so common that testimony as to identity should be received with great caution, not only in criminal trials but in the ordinary affairs of life.⁵

Writing at a later date, a pair of authors concluded that:

cases of mistaken identity are alarmingly frequent, and . . . criminal history is full of cases in which, by relying upon such uncertain testimony, innocent men have been compelled to serve long terms of imprisonment, or to submit even to the extreme penalty of the law.⁶

They further noted, after citing specific examples, that:

Such cases might be indefinitely multiplied, each dealing with reliable witnesses, generally those who made their observations under favorable conditions, and resulting either in the punishment of the innocent, or the escape of the guilty. It must also be remembered that while these cases were selected because the truth eventually came out, there are countless others where it never does, and there are doubtless now behind the bars, deprived of their liberty and undergoing unmerited disgrace and punishment, many innocent men, convicted upon the uncertain testimony of sight recognition.⁷

In England, after it was discovered that a man named Adolf Beck had served seven years in prison for a crime he did not commit, a committee was formed to investigate the case. The committee found that:

evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury.⁸

5. Harris, *Before and at Trial* 372 (Kerr ed. 1890).

6. Wilder & Wentworth, *Personal Identification* 37 (1918).

7. *Id.* at 40.

8. Watson, *The Trial of Adolf Beck* 250 (1924). For a shorter discussion of this case, see: Rolph, *Personal Identity* 76-92 (1957); Williams, *The Proof of Guilt* 110-13 (3d ed. 1963).

Professor Edmond Cahn has pointed out that "an honest mistake of identification . . . can hang an innocent man despite the most meticulous and fair-minded trial of his case".⁹ A present-day prosecutor has remarked that:

Proof that relies wholly on identifications made by eye-witnesses is inherently weak; persons who merely saw a thief or attacker briefly, and under conditions of stress, may—despite the best of intentions—too readily be mistaken.¹⁰

Finally, a popular novelist of the courtroom, himself a lawyer engaged in the investigation of possible miscarriages of justice, has stated that "any veteran attorney knows that circumstantial evidence is about the best evidence there is and that eyewitness identification evidence is just about the worst."¹¹

The above quotations indicate that the identification problem is serious, that it has long been recognized, and that its gravity has been attested to by lawyers, laymen, professors, judges, prosecutors and governmental committees — indeed, by all who have had occasion to study in the field of identification evidence.

III. THE CAUSES OF ERRONEOUS IDENTIFICATIONS

What are the causes of the erroneous identifications which, either in their actuality or their possibility, so vex the administration of

9. Cahn, *The Moral Decision* 258-59 (1955). See also DuCann, *Miscarriages of Justice* 186 (1960), where it is said that "honest witnesses, even in number, testifying to the identity of an accused, are not entirely to be relied upon. The numerous women and the police witnesses who purported on oath to identify [Adolf] Beck were honest enough, but the ugly fact remains that they were entirely wrong"

10. Kuh, *Careers in Prosecution Offices*, 14 J. Legal Ed. 175, 187 n.21 (1961).

11. Gardner, *The Need for New Concepts in the Administration of Criminal Justice*, 50 J. Crim. L., C. & P.S. 20, 26 (1959). On the question of circumstantial evidence, one author has warned against "the danger of placing too implicit reliance upon direct evidence in questions of identification. Wherever circumstantial evidence is found to be at variance with direct testimony, the latter ought always to be received with the greatest caution." Harris, *op. cit. supra* note 5, at 384. Recently, another author has stated that "good circumstantial evidence is better than dependence on eyewitnesses. Court records are filled with examples of eyewitnesses who were tragically wrong in their identifications." Radin, *Lizzie Borden: The Untold Story* 174 (1961). A dissenting (and, it is submitted, completely erroneous) opinion has been voiced by another author who has stated that "it is frequently impossible to obtain direct evidence of a crime, and circumstantial evidence—i.e. evidence from which it is fair to draw inferences of fact—is admissible, even although the same weight is not to be attached to it as to direct evidence." Rubinstein, *John Citizen and the Law* 319 (Pelican 4th ed. 1958).

criminal justice? Basically, there are two causes: 1) the normal and universal fallibilities of human sense perception and human memory, and 2) the susceptibility of the human mind to suggestive influences. The topic of suggestion will be treated in some detail later; the discussion here will concentrate upon the causes of error which inhere in the capacity of human beings to observe and to remember.¹²

Jeremy Bentham once stated that "witnesses are the eyes and ears of justice,"¹³ and so they are. But those eyes and ears are sometimes defective, for:

a surprisingly large number of people who are not color blind, who do not need an oculist, and who are supposed to have normal vision, in fact do not have it. They cannot recognize likenesses or differences, nor distinguish variations in form, size, and position as can persons who are normal in that respect.¹⁴

There are obstacles to accurate identification, however, even on the part of persons who are normal. These obstacles have been described in various ways by a number of authors. Wigmore, for example, observed that if we consider:

that most persons . . . have features not sharply distinctive of a few individuals (*e.g.* simply, a large nose, blue eyes), and that most observers receive only the simplest impressions of features, expressible in only the loosest language (*e.g.* large nose, dark hair), it is easy to appreciate how often the items . . ., as recorded, may be items common to many individuals, and yet may cause recognition of sameness.¹⁵

12. For a list of some of the mistakes of the senses that may victimize a witness, see Gross, *Criminal Psychology* §§ 98-103 (1911).

13. Gorphe, *L'appréciation des Preuves en Justice* 348 (1947).

14. McCarty, *Psychology and the Law* 186 (1960). With regard to color-blindness, it has been estimated that between four and eight per cent of all males never experience red or green, but see these colors as gray. Houts, *op. cit. supra* note 3, at 27-28. And one capital case has been reported where the defendant was identified mainly by the color of his hair and clothes, the identifying witness being, as was later discovered, color-blind. Gardner, *The Court of Last Resort* 8 (1952).

15. Wigmore, *The Science of Judicial Proof* § 251, at 537 (3d ed. 1937). Similarly, it has been said that "there is such likeness, as well as such difference, between many individuals, that persons who have not a clear and quick perception of form and color and expression may very easily mistake one man or woman for another, especially when they are led that way by the inquiries of an interested investigator." Harris, *op. cit. supra* note 5, at 373.

And a psychologist has pointed out that:

The difficulty is that there may be certain elements in common between the original object and one which is incorrectly recognized as the original. If one object comprises ABCD and the other CDXY, the CD overlap is enough to mislead anybody.¹⁶

Of course, just as there are no two fingerprints exactly alike, no two persons, not even identical twins, look exactly alike.¹⁷ Yet cases of mistaken identity are surprisingly frequent. The cause of this apparent anomaly is the fact that the normal person sees but a few of someone else's distinguishing characteristics, retains even fewer in his mind, and is able to revive fewer still when asked to describe the person observed or to identify one thought to be the same.¹⁸ If the characteristics of the person to be identified are similar to the characteristics of the person originally observed, as they now exist in the mind of the witness, the witness may very well recognize them, and make an erroneous identification. This is surely an oversimplification of the psychological phenomena involved in erroneous identifications, but it is complete enough for our purpose here.

The fallibility of the normal observer where personal identification is concerned has often been demonstrated by means of tests, experiments and the commission of "mock crimes" before groups of observers. The results of these experiments, familiar to most students of psychology, are usually the same: a large percentage of the test group is unable to describe accurately the person previously observed or to identify him. For example, estimates made by a group of college girls as to the height of two young men who had, without any notice, enacted a "crime" in their presence ranged from four feet eight inches to seven feet for one of the men and from four feet to six feet four inches for the other.¹⁹ In another test, a group of trained and experienced policemen ranged in their

16. Burt, *Applied Psychology* 250 (2d ed. 1957).

17. However, see Wilder & Wentworth, *op. cit. supra* note 6, at 30-33, for what the authors describe as a case "in many ways the most remarkable on record of the physical duplication of two unrelated individuals"

18. Wigmore, *op. cit. supra* note 15, § 251, at 536.

19. Vickery & Brooks, *Time-Spaced Reporting of a "Crime" Witnessed by College Girls*, 29 *J. Crim. L., C. & P.S.* 371, 373 (1938).

estimates of the height, weight and age of a man before them, some five inches, twenty pounds and fifteen years.²⁰ Similar results have been observed in actual crime situations,²¹ as well as in other tests and experiments.²²

IV. FACTORS AGGRAVATING THE PROBLEM

In addition to what has already been mentioned, there are certain other factors which aggravate the identification problem. A number of these factors merely emphasize the dangers of error in identification evidence, while others demonstrate why a judge or jury may easily be deceived by such errors. Some of these factors may be found in the following list.

A. A Suspect May Be Erroneously Identified by a Number of Witnesses

In discussing the possibility of erroneous identification, Wigmore once observed that there is a logical value in the number of witnesses who concur in the identification.²³ The soundness of his view cannot be seriously doubted, as is borne out not only by the law of probability, but also by the concern often felt when the only evidence of a defendant's guilt is his identification by a single witness.²⁴ Here, as elsewhere, there is strength in numbers.

However, although there is strength in numbers, there is, as Glanville Williams has pointed out, no real safety.²⁵ The mere fact that three or four witnesses identify a suspect provides no assurance that they are correct, especially when all have been subjected to a suggestive identification procedure. Indeed, on a number of occa-

20. Gardner, *op. cit. supra* note 14, at 82.

21. See, e.g., Frank & Frank, *op. cit. supra* note 3, at 61.

22. Literature in the field of psychology contains the results of many tests and experiments concerning the fallibility of eye-witnesses. See generally, Gorphe, *La Critique du Témoignage* (2d ed. 1927). See also: Brown, *An Experience in Identification Testimony*, 25 J. Crim. L., C. & P.S. 621 (1934); Chenoweth, *Police Training Investigates the Fallibility of the Eye Witness*, 51 *id.* 378 (1960); Comment, 2 U.C.L.A.L. Rev. 552, 553 (1955). Perhaps the best-known of the general works on the subject is Münsterberg, *On the Witness Stand* (1908).

23. Wigmore, *op. cit. supra* note 15, § 252, at 537. He also stated, however, that "if any condition that might lead to error is common to all or several of them, their coincidence loses value." *Id.* § 177, at 317.

24. See, e.g., Kuh, *supra* note 10, at 187 n.21.

25. Williams, *op. cit. supra* note 8, at 120. See also note 9 *supra*.

sions, even larger numbers of identifying witnesses have erred. In a trial in Massachusetts in 1845, the defendant proved his innocence conclusively and in so doing demonstrated the twelve witnesses who had identified him were all mistaken, "a fact, as the judge well remarked, almost sufficient to shake all confidence in human testimony."²⁶ Cases involving erroneous identifications by thirteen,²⁷ fourteen²⁸ and seventeen²⁹ witnesses have been reported, but they are by no means the most extreme examples. An English conviction for obtaining property by false pretenses was once quashed on the basis of newly discovered evidence which proved that twenty-one identifying witnesses had been mistaken.³⁰ The ill-fated Adolf Beck was identified by twenty-two witnesses, all tragically in error.³¹ At about the same time that Beck was undergoing his ordeal in England, another defendant, this one in Chicago, was placed on trial for a number of forgeries, all of which had obviously been committed by the same person, and was identified by thirty witnesses. More fortunate than Beck, he gained an acquittal by proving that he had been in jail at the time when at least one of the crimes had been committed.³²

These cases are but a few of the many which could be cited. It would be rash to argue that they prove that large numbers of identifying witnesses often err. But they do make a point well worth remembering: the guilt of a suspect is not made absolutely certain by the agreement of large numbers of identifying witnesses. They also provide an even more important lesson: since many witnesses may sometimes err, a smaller, more usual, number of eye-witnesses may be mistaken also.

26. Ram, *A Treatise on Facts as Subjects of Inquiry by a Jury* 459 (4th Amer. ed. 1890).

27. Hilton, *Handwriting Identification vs. Eye Witness Identification*, 45 *J. Crim. L., C. & P.S.* 207, 212 (1954).

28. Paiken, *Identification as a Facet of Criminal Law*, 29 *Can. B. Rev.* 372, 374 (1951).

29. Borchard, *op. cit. supra* note 3, at xxv, n.1; Rolph, *op. cit. supra* note 8, at 94.

30. Thompson, 7 *Crim. App. R.* 203 (1912).

31. Rolph, *op. cit. supra* note 8, at 80-81.

32. Wilder & Wentworth, *op. cit. supra* note 6, at 39.

B. Even Relatives and Close Friends of the Person Identified May Be in Error

That errors often occur when a witness is asked to identify a suspect as a person seen only once and for but a short time becomes more readily acceptable when it is learned that, on occasion, people have identified complete strangers as relatives or close friends, known for a lifetime. In the past, for example, people have identified the body of a total stranger as that of a daughter,³³ a mother,³⁴ a husband,³⁵ a father,³⁶ and a fiancée.³⁷ It is true, of course, that in these cases the identification attempted was of a corpse, with features more or less distorted, and the identifier, grieving over the supposed loss of a loved one, may not have made an adequate observation. Yet not all such strange errors may be so explained. In one of history's most bizarre cases of false impersonation, a man named Arnold du Tilh passed himself off as Martin Guerre, who had been absent from his home town for more than eight years. His impersonation was so perfect that he deceived the entire town, including Guerre's wife, who bore the imposter two children.³⁸ In a celebrated English case, a person later declared to be an impostor was identified as one Roger Tichborne by eighty-five witnesses, including Tichborne's mother, his solicitor, six magistrates, one general, four clergymen and seventeen servants of the Tichborne family.³⁹ A similar number of comparable persons swore that he was not Tichborne. Although there is still some dispute as to whether the man claiming to be Tichborne was an impostor or not, the point here is that in any event a large number of his close friends and relatives were quite mistaken.

These examples have obviously not been cited for the purpose of arguing that identifications made by relatives and close friends of the person identified are usually unreliable. On the contrary,

33. Ram, *op. cit. supra* note 26, at 85.

34. *Id.* at 467-68.

35. *Id.* at 468-69.

36. N.Y. World Telegram & Sun, Dec. 22, 1960 (All Sports Final), p. 5, cols. 5-6.

37. *Id.*, March 14, 1962 (All Sports Final), p. 3, cols. 2-3.

38. Ram, *op. cit. supra* note 26, at 430-42.

39. Harris, *op. cit. supra* note 1, § 613, n. at 417. For a detailed account of this fascinating case, see Woodruff, *The Tichborne Claimant* (1957).

the chances of errors being made in such identifications are quite remote. These cases have been mentioned merely to emphasize the proposition that mistakes may easily be made when a witness is asked to identify a suspect as a person seen only once, perhaps for but a short time, and often in circumstances not conducive to an adequate observation.

C. Even Trained Observers May Be in Error

In most criminal cases involving the issue of identification, the evidence on that point is given by average persons having no special training or qualifications in the field of observation of physical characteristics. Most of these people are ordinary witnesses with ordinary skills and ordinary human frailties. In some cases, however, the evidence of identification comes from police officers, who have been trained in the careful observation of distinguishing physical characteristics. Despite this training, they too may make erroneous identifications. Two of the witnesses who mistakenly identified Adolf Beck were policemen,⁴⁰ and in another English case, the Court of Criminal Appeal concluded that fourteen policemen had erred in their identification of the defendant.⁴¹ Other cases where policemen have erred might be cited,⁴² but suffice it to say that although a trained observer is somewhat less likely to make an erroneous identification than the average untrained observer, the mere fact that he has been so trained is no guarantee that he is correct in a specific case. His identification testimony should be scrutinized just as carefully as that of the normal witness, whose susceptibility to error is emphasized by the proven errors committed by those more qualified as accurate observers. Indeed, identifications made by policemen in highly competitive activities, such as undercover narcotic agents, whose chances for promotion may depend upon the number of arrests made because of their sales, should be scrutinized with special care. There is a danger that their identifications may be influenced unconsciously by their desire for promotion. Moreover, since some time often passes before the arrest of a person who has sold narcotics to them, they

40. Borchard, *op. cit. supra* note 3, at 10.

41. Hale, Hanged in Error 82 (Penguin ed. 1961).

42. See, e.g., Altavilla, *Psychologie Judiciaire* 303 (Beraud transl. 1959).

may sometimes confuse in their minds the features of a person once seen with those of one from whom they purchased narcotics at about the same time. This confusion may easily lead to the identification of an innocent person.

D. Even a Witness Who Is Positive in His Identification May Be in Error

During a prosecution for robbery in Philadelphia in 1919, a policeman testified that a witness who had positively identified the defendant at the trial had previously viewed a line-up which included the policeman and had pointed at the policeman, saying, "That's the man. I'll always remember to my dying day the faces of the guys who pulled guns on me."⁴³ In the trial of Adolf Beck, a witness from whom Beck was alleged to have taken some property identified him quite positively, saying, "I should know him among a thousand. I recognized him at once; I am quite sure he is the man."⁴⁴ In that same trial, another witness identified Beck, and added: "I have not a shadow of a doubt he is the man."⁴⁵ These three incidents illustrate a point well worth noting, and that is that the mere fact that a witness uses positive or even absolute terms is no indication that his identification is any more reliable than the normal identification. Indeed, as Borchard has said, "the positiveness of witnesses is sometimes . . . in inverse ratio to their opportunity for knowledge or to their reliability."⁴⁶

Behind this view lie two explanations, one psychological and the other practical. Psychologically, the individual who is careless in his observations and weak in memory may often be the type of person who makes snap judgments and in whom such qualities as "pride and stubbornness, make for confirmation of the original identification rather than for open-minded reconsideration."⁴⁷ And as a practical matter, even if a witness's original identification is uncertain or hesitant, he may be subjected to so many suggestive

43. Lewis, *The Worlds of Chippy Patterson* 203 (1960).

44. Watson, *op. cit. supra* note 8, at 120.

45. *Id.* at 130.

46. Borchard, *op. cit. supra* note 3, at 50. To the same effect, see Houts, *op. cit. supra* note 3, at 20.

47. Borchard, *op. cit. supra* note 3, at 261.