

Clarkian Logic on Trial

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### Clarkian Logic on Trial

On the first day of April of 2012 an interesting trial took place in Wells County, exactly 103 years after the famous trial described by Wigmore (1909). The defendant, D, was charged with brutally stabbing a homeless man just after the New Year. Before the police arrived on the crime scene, the perpetrator, rushing to flee the scene, knocked into a witness who had seen the stabbing, Miss Jane Takin. Three weeks after the crime, a detective called Jane and asked her to participate in a procedure to see whether she could identify the perpetrator. Detective Sy M. Taneous (whose friends call him Mel, which is his middle name) constructed a photo-lineup using his standard procedure. He selected five foils and put D's photo in position #3. After looking over the photos for several minutes, Jane identified D as the criminal.

During D's trial, the prosecution put on their star witness, Jane, who testified that she had picked D out of the photo-lineup and she reaffirmed her identification of him in court. The defense put on an expert witness, a respected psychological scientist who studies eyewitness memory, Professor William S. Devlin (whose friends called him WSD). WSD testified for over an hour, primarily about the problems with the identification procedure. He took issue, in particular, with the fact that Detective Taneous had presented the photos simultaneously and administered the identification procedure being well aware of the identity of the suspect.

In an unusual move, the prosecution, during rebuttal, put on a different eyewitness expert to counter WSD's testimony. Their expert, Professor Cleve Stark, is a well regarded psychological scientist who specializes in mathematical modeling of eyewitness identification. We obtained a transcript of Dr. Stark's cross examination by the defense attorney, and present portions of it in this commentary.

**Cross-Examination**

**Defense Attorney:** Earlier in this trial we heard that an eyewitness identified D from a photo-lineup constructed and shown by Detective Taneous, an officer who was fully aware of who the suspect was. Dr Stark, is it true that when a police officer administers a lineup and he knows the identity of the suspect, that he can influence the eyewitness?

**Stark:** Well, there is only one study that directly shows that.

**Defense Attorney:** But, wouldn't you agree that when you have a lineup administrator who is not-blind, meaning he knows who the suspect is, that he can do things that would lead the witness to pick the suspect and in some cases this pick would be an innocent person?

**Stark:** Well, yes, that could happen.

**Defense Attorney:** Then, would it not be best practice to use a blind lineup procedure, where the lineup administrator's influence is more limited?

**Stark:** Well, it depends. Under some conditions, using a blind lineup administrator can come at a cost, which, as I have written, may not necessarily be best practice.

**Defense Attorney:** When would it not be a good practice?

**Stark:** When the real criminal is present in a lineup—that is, when the police have the right guy—a blind procedure can *reduce* hits, or in other words it can make people worse at correctly identifying the real criminal.

**Defense Attorney:** So, am I understanding this correctly?....When the police have the wrong suspect, the blind procedure can *reduce* the likelihood of *mistaken identification* (or what I gather you psychologists like to call “false alarms”), but when the police have the correct suspect, the blind procedure can *reduce* the likelihood of *correct identifications* (or what you call “hits”).

**Stark:** Yes.

**Defense Attorney:** Why does that happen?

**Stark:** In a non-blind lineup procedure...

**Defense Attorney:** Like the one in this case?

**Stark:** Yes...the police officer—confident they have the real perpetrator—may intentionally or unintentionally communicate to the eyewitness who the suspect is. Having a blind procedure, removes the opportunity for the police officer to do this.

**Defense Attorney:** So would it be correct then to call the non-blind lineup a suggestive procedure? You said yourself there is an opportunity for the police officer to bias the witness to choose his suspect.

**Stark:** Well, suggestive is a strong word. The influence of the police officer could be unintentional.

**Defense Attorney:** But isn't this the same rationale that is used in medical research where evaluations are routinely done blind—to ward off even the most subtle influence that the doctor might have on the patient?

**Stark:** Well, that's what the proponents of blind testing like to argue. But I feel that to decide what is best practice in the eyewitness field, we must weigh the relative cost of moving away from the non-blind procedure. The dilemma is that if law enforcement implement the blind lineup procedure there is the risk that they could lose some correct identifications in the process. In other words, there would be a cost to using this lineup procedure. As I said earlier, it doesn't just reduce false alarms, but it also reduces hits.

**Defense Attorney:** But, if the police officer administering the lineup is communicating who the suspect might be then aren't they interfering with the procedure of gathering evidence? The identification could be based on the police officer's cues, rather than the eyewitness' memory.

**Stark:** Well...I suppose that's true.

**Defense Attorney:** If a procedure that allows the police to communicate information to the witness when gathering memory evidence is acceptable (in the interests of retaining hits). Then by the same logic would it be acceptable for a police officer to point to the police suspect and coercively force the witness to choose that position in the lineup?

**Stark:** No, that is a decidedly undesirable procedure.

**Defense attorney:** Why? It could ensure that you never lose any hits?

**Stark:** Well, I would just find that too suggestive.

**Defense Attorney:** So you find that one too suggestive, let me try another procedure on you. Suppose there was a detective who read your article and was inspired by your Clarkian Logic, and was convinced he had the real perpetrator. Would it be acceptable for him to mention to a witness that another witness had previously picked the person in position #3. Seems to me that could increase the hit rate!

**Stark:** No. I'm not lawyer, but I believe it's the case that when the police use a procedure that is impermissibly suggestive, that the procedure might be suppressed.

**Defense Attorney:** So you think that telling a witness what another witness has said is "impermissibly suggestive?" When does something go from being suggestive to being impermissibly suggestive?

**Stark:** That's not for me to decide.

**Defense Attorney:** Would you agree that we are offended by these procedures because eyewitness evidence should be the product of what the witnesses remember themselves, not the product of suggestion or coercion?

**Stark:** That is one reason they cause offense.

**Defense Attorney:** Do you agree or disagree with the idea that these scenarios may have a similar outcome. Whether the police officer circles a suspect and forces an identification, feeds details about the crime to a co-witness or somehow unintentionally communicates who the witness should select in a lineup, witnesses might testify at a trial about details or facts that are not the product of their memory, but of the suggestive procedures that they encountered during the investigation.

**Stark:** I agree with that. But....

**Defense Attorney:** So help me understand the cost of using a blind procedure.

**Stark:** You lose correct identifications.

**Defense Attorney:** But should we be concerned about the lost hits....couldn't they be due to the coercion, suggestion or information fed to the eyewitness—rather than their memory? They're not genuine hits; they're crummy hits. Should someone be convicted based on a crummy hit?

**Stark:** Crummy is not scientific term that I'm familiar with.

**Defense attorney:** Ok how about 'lucky' guess. Should someone be convicted based on a 'lucky' guess?

**Stark:** Well probably not.

**Defense Attorney:** So why are we calling that a cost? It seems to me that losing these so-called "hits" that could be the byproduct of suggestion or coercion, are perhaps not a loss at all.

**Stark:** (Witness sighs).

**Defense Attorney:** Dr. Stark, you have focused in your article and your testimony on hits and false alarms, but aren't there other reasons why the blind lineup procedure is a better procedure. I'm sure you're aware of the research discussed by WSD showing that when you give witnesses

feedback about their identification, it can artificially inflate their confidence in the identification, even when it's wrong. Doesn't the blind lineup procedure eliminate this problem?

**Stark:** Well, that issue was not within the scope of my article.

**Defense Attorney:** I have just a few more questions about "costs." You are generally concerned with the cost of losing hits. But can we really weigh hits and false alarms similarly—in the real world, arguably false alarms have not one, but two costs.

**Stark:** You'll see that I have footnoted that idea in my recent article (Clark, 2012). In that footnote I acknowledge the argument that failing to identify the real perpetrator (a consequence that is more likely when a blind lineup is used), has one negative consequence—the perpetrator may go free. Whereas identifying an innocent person (a consequence that is more likely when non-blind lineup is used) has two negative consequences, an innocent person may go to prison, and the real criminal may go free.

**Defense Attorney:** Right, I read that footnote.

**Stark:** [Surprised expression]

**Defense Attorney:** In that footnote you also say that we can't really use that cost analysis unless we know the outcome of the trial. Or in other words, to say there are two costs to a false identification is to assume that the criminal justice system does not catch the error later in the trial process. Would that be an accurate summary of what you said?

**Stark:** Yes, there are only two costs to a false alarm if the suspect is found guilty. But sometimes a witness might make a false identification in court and the defendant is acquitted, and then you don't have the two negative costs. The acquittal means the criminal justice system corrected itself.

**Defense attorney:** But suppose that a witness picked someone who was innocent, who was then forced to go to trial, and even if acquitted, that defendant would have endured the hugely stressful experience of being a defendant in a criminal trial. In that case, the criminal justice system corrected itself, but isn't there still a cost for the defendant?

**Stark:** That is one kind of cost I hadn't thought of.

**Defense Attorney:** Would you like to go through that experience?

**Stark:** Well, no.

**Defense Attorney:** I have no further questions your honor.

### **Suggestive Procedures that Retain 'Hits' are not Acceptable**

Although Dr. Stark's cross-examination focused on the suggestive nature of a non-blind line up, the same logic applies to any procedure, in any part of the investigative process when police are trying to obtain an identification or gather memory evidence. If an eyewitness selection is biased by a suggestive procedure, then the identification procedure has gone awry—it is measuring something other than memory for the crime. The purpose of an identification procedure is to collect memory as a consequence of the crime, not memory as a consequence of suggestion.

Nonetheless Clark (2012) raises the possibility that suggestive (or even coercive) procedures may benefit us under certain conditions—when the guilty base rate is high—an “...end justifies the means” argument (pp. 35). He goes on to consider these arguments more broadly in the context of gathering other kinds of evidence in an investigation, and draws links to other suggestive techniques that can also help us retain ‘hits.’

Clark is correct: years of memory research tell us that suggestive and leading questions can shape memory reports and produce more information (true and false). We know for example

that feeding people details about an event can lead them to misremember and even insert objects into an event that were never present (an increase in false alarms); the same kind of suggestion can also lead them to report more accurate information too (an increase in hits) (e.g. Loftus, Miller, & Burns, 1978; Okado & Stark, 2005; for a review see Loftus, 2005). When eyewitnesses are allowed to exchange information it can lead to a similar result: information learned after an event (right or wrong, hits or false alarms) can creep into people's memory reports (e.g. French, Garry, & Mori, 2008; Gabbert, Memon, Allan, & Wright, 2004; Paterson & Kemp, 2006). In fact there is probably a huge array of investigative strategies that Clarkian logic would embrace as potentially acceptable because they keep the hit rate high.

Clark acknowledges that some suggestive or coercive techniques may fall "...out of bounds" (pp. 37) or be "...decidedly undesirable" (pp. 35). If police use them, he argues, the public may come to distrust law enforcement—making them skeptical jurors, and unwilling eyewitnesses. So he would reject some potential procedures. But Clark has offered no guidance for determining where to draw the line between "decidedly desirable" and "decidedly undesirable." Moreover, it is hard to imagine how policy makers will deal with this fuzzy line. While policy makers might argue endlessly about where to draw that line, it seems clear that witnesses should not be reporting things that they picked up from the interviewer or from other witnesses and then relaying these facts during testimony as though they were products of their own memory. Facts misrepresented as products of memory are in some sense not legitimate regardless of whether they are correct or mistaken.

Readers might be interested in how the trial of D ended. D was convicted but later another man was arrested for stabbing a different homeless man. The new defendant confessed to a number of stabbings, including the one for which D was convicted. Since the new criminal

knew details about the first crime that only the police could have known, D was freed and pronounced actually innocent. When Detective Taneous called Jane to tell her about the new evidence and D's innocence, she was upset and wanted to meet with the detective. She called him and politely asked: "Detective Taneous, would it be possible to meet you to discuss what happened in this case?" "Of course" he said, "come down to the station." When she arrived she told the receptionist that Detective Taneous was expecting her. "Oh," said the receptionist, "You must be Miss Takin."

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