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Should We Be Concerned About Street Identifications?

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Abstract: The use of street identification procedures – informal procedures in which witnesses attempt to identify an offender, usually soon after the commission of a crime and close to where it occurred – has attracted significant concern. These procedures are generally thought to give rise to a greater risk of mistaken identification because they lack the safeguards of formal procedures conducted under controlled conditions. This article describes the findings of empirical research undertaken by the authors. The research had three broad objectives. The first was to collect data which would provide some indication of the extent to which street identifications are used by police in England and Wales. The second was to compare the reliability of street identifications and video identification procedures involving the use of foils. The final objective was to investigate the influence that a street identification procedure would have on a subsequent video identification procedure involving the same witness and suspect. The findings suggest that substantial numbers of street identifications are conducted but, perhaps counter-intuitively, in terms of the risk of mistaken identification of innocent suspects, such procedures may be no less reliable than video identification procedures. Following identification of a suspect in a street identification, there is a very high likelihood that a formal procedure involving the same suspect and witness will result in the suspect being identified again, notwithstanding that the suspect is innocent.

It is widely acknowledged that our attempts at identifying others are stalked by significant risk of error. Psychologists have explored the vulnerabilities of the cognitive processes that we rely on when performing this task, and their findings are set out in a substantial and growing scientific literature on the subject. These findings have influenced, to a greater or lesser extent, the way in which identification evidence is obtained from eyewitnesses and dealt with at trial, in most common law jurisdictions.¹

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¹ See for example, New Zealand Law Commission, *Evidence*, Report 55, volume 2, Evidence Code and Commentary (1999, Wellington), p.129; Australian Law Reform Commission, *Evidence*, Volume 1, Report

In many of those jurisdictions, the procedures that the police and other law enforcement agencies ought to use to obtain identification from witnesses are prescribed in statutory codes of practice, or in codes that are issued by prosecution and law enforcement agencies themselves. The purpose of prescription is to ensure that the risk of mistaken identification is mitigated as far as possible, given the resources that are available. This is done by adopting various measures intended to control matters that are known to have an adverse effect on the accuracy of eyewitness identifications generally. Witnesses are typically warned, for example, that the person they saw on the earlier relevant occasion may, or may not, appear in the procedure. They are instructed that if they cannot make a 'positive identification' they should say so. In England and Wales, the procedure is also recorded, so that the way in which it was conducted can be subject to effective *ex post* scrutiny. Perhaps the most conspicuous attempt to mitigate the risk of mistaken identification is the use of foils in the procedure – persons who resemble the suspect.

However, it may not always be possible to obtain identification evidence from a witness under the ideal conditions that carefully prescribed procedural arrangements would establish. In jurisdictions such as England and Wales, those in Australia that have adopted uniform evidence legislation,² and New Zealand, in which a statutory duty to conduct formal identification procedures can be said to exist, the duty is qualified. There are various circumstances in which resort to an informal identification procedure – a procedure that does not take place under conditions that mitigate the risk of mistaken identification to the same extent as a formal procedure – may be justified. The suspect may be of unusual appearance, or may withhold the co-operation required to conduct the form of procedure likely to produce the most reliable identification evidence. Perhaps the most common and contentious qualification of the duty to conduct formal identification procedures concerns the use of 'street identifications.'³ Such procedures are generally conducted soon after the commission of an offence, where it is believed that the offender might still be in the immediate vicinity. They take two broad forms. In the first, a witness is driven around the area in which the offence was committed in the hope that he or she will be able to identify the offender among those who are present. The second occurs where a person who matches a description provided by the witness or complainant is detained by police officers. Here the witness and suspect will be brought together and the former will be asked whether the person detained is the

No. 26 Interim, (1985, Canberra), chapter 18. Procedures adopted in Ohio (Ohio Code §2933.83, available at <http://codes.ohio.gov/orc/2933.83>) perhaps reflect most closely, the procedural recommendations of those engaged in empirical research to a greater extent than procedures prescribed in any other common law jurisdiction. Procedures must be 'blind', that is to say, the person conducting the procedure, in which a series of images is shown to the witness, must not know who the suspect is. Witnesses must make a decision in relation to one image before they are permitted to view the next, and where an identification is made, a measure of the witness's confidence in the identification is to be taken.

² Victoria, New South Wales, Tasmania, ACT, Northern Territory, Norfolk Islands.

³ See s.45(4)(e) Evidence Act 2006 (NZ); s.114(3)(c)(ii) Evidence Act 1995 (Cth)(Australia). The position in England and Wales is discussed in the text below.

offender – a procedure that we will refer to hereafter as a ‘street confrontation’ or a ‘confrontation conducted in the street’.

It is commonly thought that the use of either form of street identification procedure exposes a suspect to risks that formal identification procedures, if well-designed, ought to suppress. However, there is perhaps greater cause for concern in respect of confrontations conducted in the street. The fact that the suspect has been detained may be taken by the witness to indicate that the police believe him or her to be the culprit. Moreover, it has been pointed out that where an innocent suspect is identified in a street identification soon after the commission of an offence nearby, it is unlikely that he will have a defence of alibi. The most obvious way in which a formal procedure might be thought to shield an innocent suspect against the risk of mistaken identification by a witness who is willing to make an identification on the basis of inadequate memory for the culprit,⁴ is by spreading that risk across all of those who appear in the procedure. Where it is conducted under ideal conditions, in a procedure comprising the suspect and 8 foils who bear a resemblance to him, the probability of an innocent suspect being wrongly identified by a such witness ought to be 1:9 or 0.11. In a confrontation conducted in the street, the probability will be 1. These probabilities relate to the risk of mistaken identification in a procedure in which a witness has made an identification on the basis of an inadequate recollection of the culprit. But the risk to which suspects are in fact exposed will depend on a range of variables, not least the extent to which witnesses are willing to make such an identification in any given circumstances. Those who have expressed concern about the use of street confrontations claim that such procedures are inherently suggestive, and a witness who is taken to confront a suspect who has been ‘detained’ by the police is more likely to identify him than would be the case if he were to be presented in a formal identification procedure - typically a video identification procedure. In other words, the risk of mistaken identification of an innocent suspect is greater than it would be in a formal procedure. Claims regarding the suggestiveness of street identifications and the increased risk that attends them appear plausible, but what is the extent of empirical support for such claims?

Relatively few studies have explored either the reliability of street identifications, or the extent to which they are used by the police in the very early stages of investigations. Surveys of police practice in the United States suggest they account for as few as 30%,⁵ and as many as 77% of identification procedures conducted in a

⁴ All identifications are to some extent speculative. As the High Court of Australia noted in *Craig v R* (1933, p. 446): “An honest witness who says ‘the prisoner is the man who drove the car’ whilst appearing to affirm a simple, clear and impressive proposition, is... asserting... that the resemblance between the original impression, and the prisoner is sufficient to base a judgment not of resemblance, but of identity.” There is an implicit acknowledgment here that any act of identification involves some degree of subjective evaluation.

⁵ D. McQuiston and R. Malpass, ‘Eyewitness Identification in Criminal Cases: An Archival Study’, (2001) Paper presented at the fourth biennial meeting of the Society for Applied Research in Memory and

particular police district.⁶ As for reliability, Steblay *et al*, have analysed the combined findings of 12 studies that compared the accuracy of 'lineups' and 'showups'.⁷ These terms are used in North America (and unfortunately, seem to have been adopted by psychologists in all common law jurisdictions) to describe respectively, a procedure in which the suspect (or an image of the suspect) is presented to the witness along with a number of foils, and a procedure in which only the suspect (or an image of the suspect) is presented. This analysis revealed that where an innocent suspect was presented, mistaken identifications were made in 15% of 'showups' and 43% of 'lineups'. The proportion of mistaken identifications in lineups, includes identification of an innocent suspect or a foil. If instances in which a foil is mistakenly identified are excluded the rate of mistaken identification of an innocent suspect is 15% in showups and 10% in lineups.⁸

Interesting though these findings may be, they have little bearing on questions concerning the use of street identifications in England and Wales. As we have indicated the terms 'lineup' and 'showup' are polysemic terms and can be used to describe procedures that are far removed from the kind of procedures used by the police in England and Wales. In one of the studies included in Steblay's analysis, for example, participants were presented with a photograph of a suspect around a week after witnessing a staged crime – a procedure that Steblay and her colleagues suggested was more 'realistic' than some of the others that were included in their analysis. Clearly, the extent to which we think an experiment to be 'realistic', will depend on the legal framework that provides our point of reference. Empirical studies comparing 'showups' with 'lineups' that can be found in the literature have all been conducted in North America. Unsurprisingly then, to the extent that the researchers who conducted these experiments attempted to replicate procedures that are, in fact, used to obtain identification evidence from witnesses in criminal investigations, the attempt would have been to replicate procedural norms and practices in that part of the common law world. The 'showups' that were being compared to 'lineups' comprised a wide variety of procedures, none of which bear close resemblance to the kind of circumstances in which a street identification might be conducted – a 'live' confrontation between a suspect, and a witness who observed the culprit engaged in wrongdoing. The 'lineups' to which the

Recognition, Knigston, Ontario, Canada, cited in N. Steblay, J. Dysart, S. Fulero, and R. Lindsay, 'Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison', (2003) 27 *Law and Human Behavior* 523.

⁶ R. Gonzalez, P. Ellsworth and M. Pembroke, 'Response Biases in Lineups and Showups', (1993) 64 *Journal of Personality and Social Psychology* 525. See also, H. Flowe, E. Ebbesen, C. Burke, and P. Chivabunditt, 'At the Scene of the Crime: An Examination of the External Validity of Published Studies on Line-up Identification Accuracy, (2001), Paper presented at the American psychological Society Conference, Toronto, Canada, cited in Steblay *et al*, *ibid.* who found that 55% of identification procedures in a sample of 488 identification procedures conducted in a large US metropolitan area were confrontations.

⁷ Steblay *et al*, *op. cit.* n.5.

⁸ The proportion of incorrect identification of an innocent suspect is based on analysis of only 5 studies – those in which it was possible to differentiate mistaken identification of suspect and foils in the figure for incorrect identifications.

showups were being compared were procedures in which participants were invited to make an identification from a number of photographs. In England and Wales, once the police have a 'known suspect', that is to say, there is sufficient information known about a person to justify his or her arrest, Code D of the Police and Criminal Evidence Act 1984, Codes of Practice, requires a video identification procedure to be conducted. The existing experimental research has several limitations with regard to its application to police practice in England and Wales.

This article describes empirical research undertaken by the authors to address a lack of relevant (ecologically valid)⁹ empirical research on the use of street identification procedures. The research comprises two components, both conducted with the co-operation of a number of police forces in England. The first component is concerned with the *incidence* of street identification procedures. It comprises the first (as far as we are aware) systematic survey of the use of such procedures in England and Wales. It appears that neither the Home Office nor police forces collect such data. If street identifications do in fact expose suspects to a significantly higher risk of mistaken identification than would be the case with formal procedures, we currently have no indication as to how many suspects are exposed to this risk. The second component of the research comprises a number of laboratory experiments that address assumptions regarding suggestiveness and reliability on which concern about the use of street identifications appear to be grounded. They are designed to establish whether a suspect is more likely to be mistakenly identified in a confrontation conducted shortly after the commission of an offence, than in a video identification procedure conducted some time later.

The experiments address a further issue. In *R v Forbes*,¹⁰ the House of Lords held that where a suspect has been identified in a street identification procedure, the duty to conduct a formal identification remains, and the police are to arrange a video identification involving the same suspect and witness. The available empirical research suggests that where a suspect is identified by a witness in an identification procedure, and is then presented to the same witness in a second procedure, there is a very high likelihood that the witness will identify the suspect again, even if the initial identification was of an innocent suspect. These findings, if replicated in experiments that reflect the way in which a suspect might be presented to witnesses in repeated identification procedures in England and Wales – in a street confrontation and subsequent video identification procedure – would be of considerable significance both for those responsible for the drafting of the Code, and for those who provide custodial advice to suspects who have been identified in a confrontation conducted in the street.

The survey component of the research is set out in the first section of the article. The second section provides an account of the laboratory studies, and the third and final

⁹ An 'ecologically valid' study is one that attempts to replicate the conditions in which the phenomenon being examined occurs in the real world.

¹⁰ [2001] 1 All ER 686.

part of the article considers the implications of the findings of both components of the research for law and practice. Scientific papers setting out detailed statistical analysis of the results of the studies and experiments described in parts I and II of this article have been published in scientific journals.¹¹

I. The Use of Street Identifications.

The aims of the first component of the research were twofold: (i) to throw some light on the question of how frequently street identification procedures are used, and (ii) to discover what happens following a street identification, that is, what is the next procedural step – subsequent formal identification procedure, charge, no further action etc. This component of the research comprised two studies. In Study 1, data were collected from specialist street robbery squads operating in three police districts. The data collection period was 3 months in two of the districts, and 7 months in the third. Officers in those squads were asked to complete a questionnaire recording the details of offences investigated, whether a street identification was conducted, the circumstances of procedures that were conducted (whether descriptions were obtained prior to the procedures, whether the witness and suspect were known to one another, *etc.*), the outcome of the procedure, whether a formal procedure was conducted subsequently, and the disposition of the case – whether the suspects was charged, cautioned, or subject to no further action.

Data relating to 696 offences were collected. Some form of identification procedure was attempted in respect of 219 of these offences. A total of 163 street identifications were attempted, resulting in 27 suspects being identified. There were far fewer video identifications conducted, only 37, but these resulted in a much higher proportion of suspects being identified (19 suspects; 51.4%) than in street identification procedures (27 suspects in 163 procedures; 16.6%). In a relatively small number of cases a suspect who had been identified in a street identification procedure was presented to the same witness in a subsequent video identification procedure. Although there were only 5 video identifications conducted in such circumstances, the suspect was identified by the witness in all 5 of them (100%). There were 37 video identification procedures involving witnesses who had not taken part in a street identification. In these, only 51.4% of the witnesses identified the suspect.

¹¹ The field studies are reported in J. Davis, T. Valentine, A. Memon and A. Roberts, 'Identification on the Street: A Field Comparison of Police Street Identifications and Video Lineups in England', *Psychology, Crime & Law* (forthcoming). For a full scientific report of experimental component of the research see, T. Valentine, J. Davis, A. Memon and A. Roberts, 'Show-ups and Their Influence on Subsequent Video Lineups', (2012) 26 *Applied Cognitive Psychology* 1. This paper reports the findings of an additional experiment that explores the effect of clothing on a witness's identification decisions in a street identification. It also compares the confidence that witnesses have in their identifications in street confrontations and video identification procedures.

It was not possible on the basis of the data provided to determine the proportions of street confrontations, and cases in which the witness had been taken on a tour of the locality in an attempt to find the culprit, that were represented in the total number of street identifications that were attempted. However, the data did reveal that in all cases in which a suspect was identified involved the use of a confrontation conducted within 2 hours of the commission of the offence that was being investigated. In most cases in which no suspect was identified, the witness had been taken on a tour of the vicinity. Of the 37 video identification procedures that were conducted as a first procedure (i.e. there was no prior street identification), 8 were conducted within 24 hours of the offence. The longest delay was 94 days, and the average across the 37 procedures reported in the study was 14 days. The data revealed that a suspect was significantly more likely to be identified where a video identification was conducted within 7 days, than in procedures that were conducted more than 7 days after the commission of the offence.

Data concerning charging and prosecution decisions were also collected. All suspects who were identified first in a street identification and then by the same witness in a subsequent video identification were charged. The great majority of suspects who were identified in a video identification procedure were charged (82.4%), far higher than the proportion of suspects identified only in a street identification procedure (52.2%). Consistent with findings in other studies, eyewitness identification appeared to be an important form of evidence.¹² There was a prosecution in only 7% of cases in which there was no identification evidence. In these cases, suspects had either been arrested at the scene, found in possession of stolen goods, named by a witness claiming familiarity, identified either by a police officer from CCTV footage or a result of DNA analysis.

The aim in Study 2 was to find out more about the use of multiple identification procedures involving the same suspect and witness. Study 1 turned up very few such cases. In Study 2, data relating to all video identification procedures conducted at one city centre identification suite over a period one year were collected and divided into cases in which suspects had previously been identified in a street identification and those in which this had not occurred. Data were also collected on whether the street identification had been one in which the suspect had been presented to the witness singularly or was presented as one of a group of people. Questionnaires similar to those

¹² In a study of arrests at 10 police stations across in England and Wales, eyewitness identification evidence was provided by a police officer in 40% of all cases, by an independent witness in 23% of cases, by the victim in 23% of cases and by security officer in 10%; C. Phillips and D. Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes*, Home Office Research Study 185 (1998: London, Home Office). Similarly, a survey of lawyers conducted under the auspices of the Royal Commission on Criminal Justice in 1993, suggested that eyewitness identification evidence was an important component of the prosecution case in 25% of all contested cases; M. Zander and P. Henderson, *The Royal Commission on Criminal Justice, Crown Court Study*, Research Study No. 19, (1993: London, HMSO).

employed in Study 1 were used. Additional questions were included concerning the type of offence and the manner in which the street identification was conducted (solo drive by - witness pointed out suspect to police; solo confrontation - witness chose from one person; or group confrontation - witness pointed out suspect from a group of at least three persons). A questionnaire was completed (prior to any video identification procedure being held) whenever a suspect had been identified in a street identification.

Over the course of the 12 month period of the study, 365 sets of video images were compiled. In a significant number of the cases, the compositions were viewed by more than one witness, resulting in a total of 558 procedures being conducted. Some procedures were conducted on the day of the offence. The longest delay was 116 days. The mean delay was approximately 16 days. Seventy-seven of the 558 procedures that were conducted involved a suspect who had previously been identified in a street identification.¹³ Of these suspects, 49 (62.7%) had been identified in a street identification in which s/he had been presented to the witness singularly, and 28 (37.3%) had been presented as part of a group. None was identified as a result of the witness being driven around the locality in which the crime had been committed. In 32 video identification procedures, the participating witness was the person who had identified the suspect in a prior street identification.¹⁴

The suspect was identified in 280 of the 558 video identification procedures conducted (50.2%). However, the proportion of suspects identified in a video identification by witnesses who had previously identified that suspect in a street identification was significantly higher (81.3%), than those who had not (48.3%). However, identification rates did not differ significantly according to whether the original street identification had been one in which the witness was presented singularly (79.2%) or as part of group (87.5%). Of the 32 video identification procedures involving a witness who had previously identified the suspect in a street confrontation, 44% were conducted within 24 hours of the offence, and 66% within a week of the offence. The longest delay was 112 days - for four suspects all accused of the same crime, and all identified in both a street identification and a video procedure by a single witness.

All 24 suspects (100%) identified in both a street identification and video identification procedure by the same witness, were charged. Two further suspects identified in a street identification by one witness, and from a video procedure by a

¹³ Offences included assault (49.4%), criminal damage (15.6%), sexual offences (13.0%: sexual assault, 6.5%, indecency, 5.2%, rape, 1.3%), robbery (9.1%), theft (9.1%), and burglary (2.6%).

¹⁴ These 32 lineups were of 29 individuals suspected of 21 different crimes. Code D, provides that once one witness has identified a suspect, any others should view the suspect in a video lineup. However, the data collected in the study revealed that one suspect was simultaneously identified by three child witnesses in a street identification. All three witnesses also later identified the suspect in a video lineup. A further suspect was simultaneously identified by two adult witnesses in a street identification, but neither identified that suspect from a subsequent video lineup.

second were also charged. The cases of all suspects identified in a street identification, but not identified by the same witness in a subsequent video procedure were discontinued ($n = 5$).

The first component of the study, provides data concerning the use of street identification procedures. But although it sheds some light on the frequency with which they are used, these data reveal nothing about the risk of error. Likewise, they demonstrate that street identifications are often followed by a video identification procedure involving the same suspect and witness, but tell us nothing about the desirability of this practice. These issues were explored in three experiments conducted in the second component of the research. The experiments were designed to address two questions - (i) how accurate (or inaccurate) are street identifications compared with video identification procedures? and (ii) how does a street identification influence a subsequent video identification procedure involving the same witness and suspect?

II. How Reliable Are Street Identifications, and What Effect Do They Have on Subsequent Video Identification Procedures?

As we pointed out in the introduction, the majority of research on confrontations (showups) has been conducted in the United States, where it is common for witnesses to be invited to identify a suspect from an array of police photographs (a 'mugshot album'). The aim of the research described here was to compare the reliability (or accuracy) of a confrontation conducted soon after a culprit had been observed in a staged event, with that of a video identification procedure. The experiments were designed to maximise ecological validity – to recreate, as far as possible in a laboratory study, the kind of conditions that witnesses taking part in street identifications and video identifications as part of criminal investigation are likely to experience. The event that the participants in the study observed was a live (rather than a filmed) event and the subjects were confronted with the suspect in person (a 'live confrontation'). The participants were given no prior warning that they would witness the staged event, or that they would be asked to participate in identification procedures. The video identification procedures employed in the experiments used images drawn from police databases, were compiled by police operators, using selection criteria that would be used to create a set of images for use in a police procedure, and were conducted according to the directions set out in Code D of the Police and Criminal Evidence Act 1984 Codes of Practice, as were the confrontations.

Experiment 1

The aims of Experiment 1 were: (i) to compare the reliability of a street confrontation and a video identification procedure, and (ii) to examine whether a confrontation has any effect on the outcome of a video identification procedure conducted 15 minutes after the confrontation.

Two actors (see figure 1) were recruited from a pool of 30 undergraduates who responded to an advertisement. They were selected on the basis of their similarity to one another. Both were white European, 21 years old, 5'4" tall, of slim build, pale olive complexion, and dark brown hair. The innocent suspect had long hair which was tied back for all of the identification trials. The culprit had short hair. To obscure this difference during the live incident, the culprit wore a black scarf.



Figure 1. Innocent suspect (left) and culprit (right) actresses in Experiment 1.

The participants were staff and students at Goldsmiths, University of London. Valid data were obtained from 283 of them (54 male: 229 female: age 18-67 years). The participants were unaware of the true purpose of the experiment prior to a staged incident, in which the actor entered a lecture theatre and confronted the experimenter regarding an allegation of plagiarism. She was eventually directed to leave the room, and was accompanied by the experimenter.

(i) Accuracy of Confrontation (Street Identification) v Video Identification Procedure

In the first phase of the experiment, a third of the participants were presented with either the culprit or the innocent suspect in a live confrontation, and a third with a single video clip of the culprit or innocent suspect. The remainder of the participants did

not take part in a confrontation. Live and video confrontations were conducted so that the effect of the change of media - from a *live* confrontation to a *video* identification procedure - could be compared with results obtained from two procedures conducted using the same media – video confrontation and video identification procedure.

After observing the staged incident, participants were informed that the purpose of the study was to test event memory. They were given a brief explanation as to how the police might arrange a confrontation in the street between witness and suspect, shortly after the commission of a crime. They were informed either that an actor would enter the room, or that an image of an actor would be displayed on a screen. A warning was given that the ‘suspect actor’ may or may not be the person they observed during the incident, and the participants were directed that if they could not recognize her they should make a negative response. For the live confrontation an actor (either the culprit or the innocent suspect) entered the room and remained for around 1 minute. The video confrontation was conducted using a single image of the culprit or innocent suspect taken from a compilation made for a video identification procedure. Around 15 minutes later, all participants (those who observed an actor in a live confrontation, a video confrontation, or had not participated in any form of confrontation) participated in a video identification procedure, in which either the culprit or innocent suspect appeared. Participants were asked to watch the entire sequence of video images twice before making a decision.

In confrontations in which the *culprit* was presented, 65.3% of participants made a correct identification. Where the *innocent suspect* was presented in this kind of procedure, 5.3% of participants made an incorrect identification. Where the *culprit* was presented in a video identification procedure, 67.6% of participants correctly identified the culprit, 9.2% selected an innocent foil, and 23.2% made an incorrect rejection, i.e. made no identification. Of those participants who took part in a video identification involving the *innocent suspect*, 12.1% incorrectly identified the suspect, 29.8% identified a foil, and 58.1% made a correct rejection of all who appeared in the procedure. A lower proportion of participants who were confronted with a live suspect made an identification (51.1%), than those who were confronted with a single video image of the suspect (79.2%) or who participated in a full video identification procedure including foils (83%). Furthermore, fewer correct identifications of the *culprit* were made in live confrontations (51.1%), than either a video confrontation (79.2%) or a full video identification procedure including foils (72.3%). More incorrect identifications were made in video identification procedures (4.3% the innocent suspect and 38.3% a foil) than in either form of confrontation (live confrontation 4.2%, video confrontation 4.3%).

(ii) Effect of Confrontation (Street Identification) on Subsequent Video Identification

In Experiment 1, data that permit direct comparison of the accuracy of street identifications and video identification procedures were supplemented by a further set of data relating to the effect that a street identification has on a subsequent video identification procedure involving the same witness and suspect. Data were used in respect of both video and live confrontations that were followed by a video identification procedure. The interval between a confrontation and a video identification procedure was 15 minutes.

Where the *culprit* appeared both in a confrontation and a subsequent video identification procedure, 93.5% of participants who identified her in a live confrontation, identified her again in a video identification - 6.5% identified a foil. All witnesses who identified the culprit in a confrontation chose someone - either the culprit or a foil - in the subsequent video identification. Of those participants who *did not* identify the culprit in a confrontation, 12.1% identified her in the subsequent video identification, 12.1% identified a foil, and 75.8% made no identification. Among those who only participated in a video identification procedure, 72.3% identified the culprit, 10.7% identified a foil, and 17% made no identification. It seems therefore that the outcome of a street confrontation is a strong indicator of the outcome of a subsequent video identification procedure involving the same witness and suspect. Where the witness does not identify the culprit in a street confrontation, the rate of identification of that person in a subsequent video identification is much lower than in video identification procedures that are not preceded by a street identification (12.1% v 72.3%). Similarly, the rate of identification of the culprit is much higher in video identification procedures that follow identification of the suspect in a street confrontation, than in video identification procedures that are not foreshadowed in this way (93.5% v 72.3%).

A similar 'carry-over' or 'commitment effect' was evident where an *innocent suspect* appeared in a confrontation and subsequent video identification procedure. Only 2 of the 47 participants who took part in a live confrontation wrongly identified the innocent suspect, but both identified her again when she appeared in a subsequent video identification procedure. Of the 46 participants who did not identify the innocent suspect in a live confrontation, 7 went on to identify her in a subsequent video identification procedure. Combining data from live and video confrontations revealed that the proportion of those who wrongly identified the innocent suspect in a video identification procedure was higher among those identified her in a prior confrontation than in those who made no identification in a confrontation (80% v 12.4%), and those who only took part in a video identification procedure (4.3%).

Experiment 2

The purpose of the second experiment was to establish whether the lower rate at which

participants made identifications in live confrontations in Experiment 1 would be replicated in procedures involving a different culprit. For this experiment the culprit was played by a white European, male, Scottish, aged 21 years. The participants were 153 first year undergraduate psychology students at the University of Aberdeen (34 male; 119 female) who were aged between 17 and 54 years ($M = 20.8$ years). Participants observed a staged event, which closely replicated that used in Experiment 1, and then took part in either a live confrontation, a video confrontation, or a video identification procedure, in which the culprit appeared. All procedures were conducted 15 minutes after the event. None of the procedures conducted in Experiment 2 involved the presentation of an innocent suspect - the culprit appeared in each procedure.

There were no significant differences in the identification rate across the 3 procedures (video confrontation = 65.5%, live confrontation = 79.6%, video identification procedure = 80.5%). In this experiment, any identification made during a confrontation will necessarily have been an identification of the culprit. However, in the video identification procedures, some of the identifications were of foils. If identifications of foils are excluded from the analysis, then the proportion of participants who accurately identified the culprit in a live confrontation (79.6%) was significantly higher than the corresponding proportion of correct identifications of the culprit in a video identification procedure (52.2%, with 28.3% identifying a foil). There was no significant difference in the proportion of participants who made no identification in live confrontations and video identification procedures respectively (10% v 9%).

Experiment 3

The question explored in the final experiment was whether variation in the period between a street identification and subsequent video identification procedure would have any effect on identification decisions in the later procedure. We know that a witness's memory will deteriorate over time, and accuracy might, therefore, be expected to drop off as the period between a street identification and subsequent video identification procedure lengthens. The data collected in the field study described above revealed that a video identification procedure may be conducted as soon as the day on which a crime is committed, or some days or weeks later. This experiment examined the effect on a witness's identification decisions of a delay between street identification and subsequent video identification procedure of either 1-6 days or 9-30 days.

Data was collected from 406 participants (122 male, 284 female, age 18-56 years, $M = 24.0$ years). Two undergraduate students played the part of the culprit and the innocent suspect. They were recruited from approximately 30 people who responded to a poster advertisement. The two actresses (figure 2) were selected on the basis of their similarity to one another.



Figure 2. Innocent suspect (left) and culprit (right) actresses in Experiment 3.

The staged plagiarism scenario used in the previous two experiments was employed in this experiment. Later, half of the participants were asked to take part in a live confrontation in which either the culprit or the innocent suspect was presented. The other half only participated in the second phase of the experiment in which video identification procedures were conducted. Participants were asked to make an appointment to view such a procedure either 1-6 days (*i.e. less than 1 week*), or 9-30 days (*more than 1 week*) later. The mean delay for video identification procedures conducted within a week was 3.3 days, and for those who took part in a procedure more than 1 week later it was 15.4 days. The video identification procedures in which the two actresses appeared were again composed using police image databases and software, by police officers who administer such procedures as part of their regular duties, and the street identifications and video identification procedures were conducted in accordance with the procedures prescribed in Code D.

(i) Accuracy of Confrontation (Street Identification) v Video Identification Procedure

Consistent with findings in Experiment 1, a significantly smaller proportion of participants in live confrontations made identifications than those who *only* participated in video identification procedures. When the *culprit* was presented in a street confrontation, 45.6% of participants made an identification, compared with 82% and 79.1% of those who participated respectively in a video identification procedure conducted within a week, and in one conducted more than 1 week later. In the procedures in which the *innocent suspect* appeared, 35.9% of participants who took part in a live confrontation made an identification, compared with 60.8% of those who took

part in a video identification procedure conducted less than a week later, and 66.6% of those who took part in one conducted over a week later.

Removing the data relating to the identification of foils in the video identification procedures revealed that the rate of accurate of identification of the *culprit* was lower in a live confrontation (45.6%) than in a video identification procedure conducted less than a week after the staged event (62%), and similar to that in video identification procedures conducted more than a week after the event (46.5%). Where the *innocent suspect* appeared in the procedures, the *rate of mistaken identification* was lower (35.9%) in confrontations than in video identification procedures irrespective of when the latter form of procedure was conducted (video identification procedure conducted <1 week = 43.1%; conducted > 1 week = 42.2%). The difference was not statistically significant, however.

(ii) Effect of Delay between Confrontation (Street Identification) and Subsequent Video Identification

All of the participants who took part in a confrontation participated in a subsequent video identification procedure involving the same person (either the culprit or the innocent suspect). The video identification procedure was conducted either less than a week after the staged event (and confrontation), or after a delay of more than one week. The aim was to establish whether, as might be expected, the likelihood of a participant identifying the same person in a second identification procedure diminishes as the period between the two procedures increases.

In cases in which the *culprit* was presented in both procedures, almost all of those who identified the culprit in a confrontation identified her again when she was presented in a video identification procedure. Delay had no significant effect on identification decisions. In the video procedures conducted less than a week after the street identification procedure, 22 of the 25 participants identified the culprit (88%), 2 identified a foil (8%), and 1 participant made no identification (4%). The culprit was identified by all 20 participants who took part in a video identification procedure more than one week after identifying her in a street identification. Where participants who had *not* identified the culprit in a confrontation were presented with her in a subsequent video identification, she was identified by 73.1% of participants in video identification procedures conducted less than a week later, and by 52% of those who took part in a procedure conducted over a week after the staged event.

When the *innocent suspect* was presented in a confrontation and subsequent video identification, a high proportion of those who identified her in the confrontation identified her again in a video identification procedure, whether it was conducted less

than a week after the street identification (83.3%) or after a delay of more than a week (87.5%). In video identification procedures that followed a confrontation in which the innocent suspect had *not* been identified, around two-thirds of the participants who took part in a video identification procedure within a week identified her (68%), as did around half of the participants where this procedure was conducted over a week later (53.3%).

III. Should We Be Concerned About Street Identifications?

The field studies and experiments provide us with empirical data concerning the use of street identifications in England and Wales, the reliability of these procedures compared to PACE video identification procedures, and the effect of street identifications on subsequent video identification procedures, that have not previously been available. But what should we make of these findings? Should we be concerned about the use of street identification procedures?

The first of the field studies – the survey of cases dealt with robbery squads in three police areas over a period of 3 months – suggest that it is likely that large numbers street identifications are attempted. Of the 696 cases that were included in the study, a street identification was attempted in 158 (23%). Video identification procedures were conducted in only 4% of cases. Street identification procedures were used far more frequently than formal procedures. In 2011/12, almost 75,000 robberies were recorded by the police in England and Wales.¹⁵ If the proportion of street identifications that were attempted in the robbery cases included in the study were to hold across robberies reported nationally, we might expect something in the region of 17,000 street identifications to be attempted. Of course, this is not a reliable estimate. Not all police areas in which robberies are reported will be met with the fast response that could be expected of the robbery squad whose activities generated the data in our study. Where robberies are dealt with by officers who are also required to deal with the general run of reported crime and other calls on police time, response times are likely to be longer and there may be significantly fewer opportunities to attempt street identifications. However, it must be borne in mind that the survey undertaken in this study examines just one offence – street robbery. It is not a comprehensive attempt to examine the use of street identification procedures generally, that is, across all types of offence. Whatever the actual number of street identifications conducted in respect of robbery offences it will be augmented by some, presumably substantial, number of procedures conducted in respect of other offences.¹⁶ While the estimate offered above may not be a

¹⁵ Office for National Statistics, Crime in England and Wales, Year Ending September 2012, <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-287894> (accessed 8th January 2014).

¹⁶ Street identifications are likely to be commonplace in investigation of allegations of assault associated with late night drinking in town and city centres across England and Wales.

reliable one, the suggestion that the number of street identifications conducted annually in England and Wales runs into the thousands - and possibly tens of thousands - is not implausible. It seems the numbers of street identifications conducted in England and Wales may be sufficiently large, that if they do expose suspects to a greater risk of mistaken identification, their use ought to be considered a pressing concern.

(i) The Reliability of Confrontations in the Street

Those who drafted the provisions of Code D of the PACE Codes of Practice appear to have done so on the assumption that a video identification procedure is an inherently less suggestive, and therefore more reliable, procedure than the kind of street identification (confrontation) with which the research described here is concerned. The Code prohibits the use of street identifications where there is 'sufficient information known to the police to justify the arrest of a particular person for involvement in the offence' that is being investigated.¹⁷ In cases of disputed identification, or where such a dispute could be reasonably anticipated, the course prescribed in Code D is that, where possible, the suspect should be arrested and the witness be provided with an opportunity to identify him or her in a video identification procedure. Whether the police are under a duty to conduct this kind of procedure will depend on evaluation of whether the suspect could reasonably be suspected of committing the offence in the absence of some identification of him by a witness of complainant.

Some commentators have suggested that claims that a street identification was required to establish the grounds for arrest are often accepted on the basis of insufficient critical scrutiny. David Wolchover and Anthony Heaton-Armstrong have argued that the fact that a suspect has been detained close to the scene of a recent offence and matches the description of the offender provided by a witness or complainant, will often constitute grounds for reasonable suspicion. Such stops, they suggest, 'are rarely based on description alone but are usually driven by a combination of circumstances, which in themselves will almost certainly raise reasonable grounds for arrest, even without a positive identification.'¹⁸ Underlying this critique seems to be an assumption that an identification made during a confrontation in the street will generally be less reliable than one made in a video identification procedure. This assumption appears to be fairly widespread, shared not only by those who drafted the Code and those who have been critical of the manner in which the courts have approached the question of whether there ought to have been a confrontation in the street, but also by those who have considered the use of identification procedures as an aspect of a suspect's procedural rights. It has been suggested that, for example, that Article 6 of the European Convention of Human Rights requires the use of identification

¹⁷ Code D, 2011, para 3.4.

¹⁸ D. Wolchover and A. Heaton-Armstrong, 'Ending the Farce of Staged Street Identifications', [2004] 3 Arch News, 5-7, 6.

procedures that offer an adequate guarantee of accuracy, and that the identification of the accused in the dock or in a confrontation conducted in the street might be incompatible with a suspect's Convention rights.¹⁹

The findings of the experiments described above do not, however, support the claim that a confrontation conducted in the street exposes a suspect to a greater risk of mistaken identification than he or she would be exposed were a video identification procedure to be used. When lawyers speak about the 'reliability' of identification procedures, it is this risk that they are likely to have in mind – unreliable procedures are those in which there is a significant risk that an innocent suspect will be identified as the culprit. Psychologists on the other hand will tend to think that reliable procedures are those that consistently result in the identification of a suspect who is the offender and do not result in the identification of an innocent suspect. If we think about reliability in this broad sense, the results in the experiments described above provide no warrant for concluding that street identifications are less reliable than video identification procedures. Indeed it might be said on the basis of some of the findings (that many might find quite surprising), that in one particularly significant respect, they are *more* reliable than video identification procedures.

If we consider the rate of accurate identification of the *culprit* across the three experiments, findings are mixed. In Experiment 1, the proportion of participants who identified the culprit in a live confrontation was significantly lower than those who attempted identification for the first time in a video identification procedure (51.1% v 72.3%). In contradistinction, the rate of accurate identification of the culprit in Experiment 2 was higher in a confrontation than in a video identification procedure (79.6% v 52.2%). In Experiment 3 there was little difference in the rates of accurate identification in a confrontation and a video identification conducted over a week after the event (45.6% v 46.5%), though a video identification procedure conducted within a week of the event yielded a higher rate of accurate identification (62%). **It cannot be said on the basis of these results, that video identification procedures are any more, or any less accurate, than street identifications when it comes to identification of offenders.**

However, when one turns to the rate of inaccurate identification of *innocent suspects* in the respective procedures, the findings are more consistent. Experiment 2 did not involve the use of an innocent suspect. In Experiments 1 and 3, the rate of mistaken identification of an innocent suspect was higher in video identification procedures than in confrontations (Experiment 1 – confrontation 5.3% v video identification 12.1%; Experiment 2 – confrontation 35.9% v video identification <1

¹⁹ A. Roberts, 'Pre-trial Defence Rights and the Fair Use of Eyewitness Identification Procedures', (2008) 71 Modern Law Review 331; A. Roberts, 'Eyewitness Identification Evidence: Procedural Developments and the Ends of Adjudicative Accuracy', (2008) International Commentary on Evidence, Vol.6 Issue 2 Art.3. See also, J. Jackson and S. Summers, The Internationalisation of Criminal Evidence: Beyond Common Law and Civil Law Traditions, (2012: CUP), chapter 7, for discussion of procedural accuracy and the presumption of innocence.

week 43.1% and video identification > 1 week 42.2%). Although these results appear to suggest that innocent suspects are more likely to be mistakenly identified in a video identification procedure than in a street identification, the disparity in the rate of mistaken identification across the various procedures is not statistically significant. However, we can say on the basis of these findings, that **innocent suspects appear no more likely to be mistakenly identified in street identification than in a video identification procedure.**

In this respect, the results in our experiments diverge from the general pattern found in previous research comparing single person procedures with those in which a suspect is presented with a number of foils. In the meta-analysis of 12 similar studies referred to earlier, the proportion of mistaken identifications in single person procedures was 15%, and 10% in multiple person procedures.²⁰ However, as we pointed out in the introduction, many of those studies do not closely reflect the circumstances in which street identifications are conducted in England and Wales. Furthermore, the multiple person procedures that researchers have used in previous studies differ significantly from the PACE video identification procedures used in our experiments. Many previous experiments used photographs for both forms of procedure (a 'mugshot' and 'photo-array'). Our experiments suggest that the medium used in a single suspect procedure can influence participants' decisions. Participants in a video confrontation were more likely to identify the person who appeared in the procedure than those who were asked to take part in a live confrontation.²¹

The one finding that was consistent across all of the experiments described above is that a higher proportion of witnesses made identifications (of suspect or foil) in video identification procedures than of those who took part in confrontations.²² Our findings suggest that if too few foils bear a sufficient resemblance to the suspect, the risk of mistaken identification in a video identification procedure might be substantially greater than in a street identification. Where a witness is invited to take part in a video identification procedure he or she is likely to be aware that a suspect has been arrested, and that the police must therefore already have evidence or information that incriminates that person. This and a witness's awareness that the use of foils mitigates the risk that an innocent suspect will be mistakenly identified might encourage a degree of speculation in which witnesses who participate in confrontations in the street are reluctant to engage. Whatever the reason for the lower rate of identification in

²⁰ Steblay, *et al.*, *op. cit.* n.5.

²¹ For discussion of this finding and effect on confidence in identification decisions in live and video identification procedures, see Valentine *et al.*, *op. cit.* n.11.

²² One reason for this might be that presentation of a single suspect requires the witness to make an *absolute judgment* – 'does the suspect resemble the culprit' – while a procedure in which more than one person appears enables the witness to make a *relative judgment* and choose the person who bears the closest resemblance to the culprit; see R. Lindsay and G. Wells, 'Improving Eyewitness Identifications from Lineups: Simultaneous versus Sequential Lineup Presentation', (1985) 70 *Journal of Applied Psychology* 556. For a summary of the relevant research and the procedural implications of this see R. Wilcock, R. Bull and R. Milne, *Witness Identification in Criminal Cases: Psychology and Practice*, (2008: OUP), p.128-131.

confrontations, its effect is to mitigate the risk of mistaken identification in that form of procedure.

(ii) *The Effect of a Street Identification on a Subsequent Video Identification Procedure.*

The results of the experiments that investigate the effect of a street identification on a subsequent video identification procedure appear to us to be a cause for greater concern than the reliability of street identifications *per se*. The law currently imposes a duty to conduct a subsequent formal identification procedure where a suspect has been identified in a confrontation conducted in the street. This duty is subject to a general exception, which provides that a formal procedure need not be conducted if it would 'serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence.'²³ The current wording of the relevant paragraph of Code D was adopted in the wake of conflicting decisions of the Court of Appeal in *Forbes*²⁴ and *Popat*.²⁵ The issue in both of these appeals was whether, in circumstances in which a suspect had been identified in a street identification, there was a duty to conduct a formal procedure involving the same suspect and witness. In *Popat*,²⁶ it was suggested where a street identification resulted in reliable evidence, the ends that are served by the requirement to conduct the formal procedures prescribed in Code D (an identification parade) had already have been achieved, and there would be no duty to conduct a formal procedure. When the issue arose again in *Forbes*,²⁷ a differently constituted Court of Appeal concluded that Code D imposed a mandatory duty to conduct a formal procedure notwithstanding that the suspect had already been identified by the witness in a street identification. The issue went to the House of Lords, where the Court of Appeal's approach in *Forbes* appeared to have been endorsed on the grounds that the reliability of a street identification is a matter that cannot easily be determined.²⁸ It is clear on the basis of observations made in subsequent cases that there is a duty to conduct a formal (video identification) procedure where the witness who will take part in that procedure has already identified the suspect in a confrontation conducted in the street. In *R v Anastasiou*,²⁹ it was claimed that conducting a formal identification procedure following an identification of the suspect

²³ Code D3.12.

²⁴ [1999] 2 Cr App R 501, CA.

²⁵ [1998] 2 Cr App R 208, CA.

²⁶ [1998] 2 Cr App R 208.

²⁷ [1999] 2 Cr App 501.

²⁸ *R v Forbes* [2001] All ER 686, HL, Lord Bingham, at [26]: '[the approach of the CA in Popat] replaces an apparently hard-edged mandatory obligation by an obviously judgmental decision... An identification parade, if held, may of course strengthen the prosecution, but it may also protect the suspect against the risk of mistaken identification, and a suspect should not save in circumstances that are specified or exceptional be denied this prima facie right to protection on the decision of a police officer. [The approach in Popat] overlooks the important fact that grave miscarriages of justice have in the past resulted from identifications which were 'fully satisfactory, 'actual or complete' and 'unequivocal' but proved to be wholly wrong.'

²⁹ [1998] Crim LR 67, CA.

in a prior street identification would have been a farce, achieving nothing more than the identification of the man who had been arrested. However, in *Harris*, the Court of Appeal observed that denying a suspect such a video identification procedure in such circumstances ‘ignores the possibility of a change of mind and/or failure to identify the appellant at the identification parade’.³⁰ In *R v Callie*³¹ it was said more generally of the exception to the duty to conduct a video identification procedure where a procedure would serve no useful purpose, that ‘the words “no useful purpose” are strong and the Code is mandatory. They do not allow a proportionality exercise so that the Code, as a matter of construction, would not apply if some, but very limited purpose would be served.’³² If the reality is that a witness will always identify a suspect who appears in a video identification procedure who she has seen in a prior street identification, then the rationale for conducting a formal procedure identified in *Harris* is flawed. Circumstances in which the suspect has already been identified in a street identification could properly be said to fall within the scope of the no useful purpose exception to the duty to conduct a formal procedure. If, on the other hand, the theoretical possibility identified in *Harris* – that a witness might fail to identify the suspect in subsequent video identification procedure – is shown to have some empirical foundation, then according to *Callie*, even if the possibility of a witness failing to identify the suspect again is a remote possibility, there ought to be a duty to conduct a formal procedure.

The data collected in the field studies and the results obtained in experiments demonstrate that it is not inevitable that a witness will identify the suspect in a video identification procedure where he or she has previously identified that person in a confrontation in the street. In the first of the field studies (Study 1), all 5 of the witnesses who identified a suspect in street identification identified that person in a subsequent video identification procedure. But in Study 2, which involved a larger sample, 18.7% of witnesses who made a street identification failed to identify the person when he or she was presented again in a video identification procedure. These findings are broadly consistent with the results of our experiments. In Experiment 3, for example, 16.7% of participants who picked out the innocent suspect in a confrontation conducted shortly after the staged event, failed to identify that person when she appeared in a later video identification procedure. **Our findings suggest that in the great majority of cases a witness who has identified an innocent suspect in a street identification will identify that person again if they are presented in a video identification procedure.** But as some commentators have already observed,³³ these findings demonstrate that this is by no means an inevitable outcome. There is now an empirical foundation for the claim that where a suspect is identified in street identification there ought to be a duty to conduct a formal identification procedure.

³⁰ *R v Harris* [2003] EWCA Crim 174, at [15].

³¹ [2009] EWCA Crim 283.

³² *R v Callie* [2009] EWCA Crim 283, at [22].

³³ D. Wolchover and A. Heaton-Armstrong, ‘Street Identification’, (2014) 178 Criminal Law and Justice Weekly 135.

However, while it is possible that a witness having identified an innocent suspect in a street identification will fail to pick him or her out in a later video identification our findings suggest that in the great majority of cases the suspect *will* be identified again. In our field study, all of the suspects who were identified by the same witness in a street identification and a subsequent video identification were charged. Conversely, none of the suspects who were identified in a street identification but not in a subsequent video identification procedure was charged. For an *innocent suspect* who has been identified in a street identification, the benefit of not being identified on a video identification procedure would appear to be considerable – it seems that he or she is unlikely to be charged. However, the most likely outcome of a second procedure is that the suspect will be identified again, and subsequently charged. In our experiments the rate of identification of the *innocent suspect* in video identification procedures was much lower where it was the first procedure used (i.e. there was no prior street identification), than was the case where those taking part in a video identification procedure had already identified the innocent suspect in a street identification. **It is highly likely that an innocent suspect who takes part in a video identification procedure after being identified in a street identification will be identified for a second time, and subsequently charged.** Of course it is always open to the suspect to argue at trial that the witness picked the suspect out in the video identification procedure because he or she recognised him as the person who was presented in the street identification. The second act of identification is not independent of the first – quite the contrary. But there is a significant risk that the tribunal of fact will treat it as an independent act of identification that corroborates and supports evidence of the initial identification, and to attach significant weight to it that our research suggests it does not warrant.

The decision as to whether a video identification should be conducted following an identification of the suspect in a confrontation in the street is fraught. In most cases, a second procedure will not be in an innocent suspect's interests. In light of this, it might be thought that the person best placed to determine whether one will be conducted is the suspect. Unfortunately, the drafters of Code D have taken a paternalistic approach to this issue. If a suspect has been identified in a street identification and disputes identity (or such a dispute can reasonably be anticipated), and there are no exceptional circumstances, a duty to conduct a video identification arises. The first version of the Code, published in 1986, required an identification parade to be conducted in cases involving 'disputed identification evidence' only if the suspect asked for one and it was practicable to hold one.³⁴ During subsequent revision of the Code, this evolved into a requirement that 'whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents'.³⁵ Consent as a condition of the duty to conduct a formal procedure is omitted from the corresponding provision of the current

³⁴ Paragraph D2.3 of the version of the Code published in 1991 read 'In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one.'

³⁵ Paragraph D2.3 (1995).

version of the Code.³⁶ Of course, a suspect can refuse to participate in a procedure, in which case he will become 'unavailable', and paragraph D3.21 provides that an 'identification officer *may* make arrangements for a video identification.' Presumably, if neither the suspect nor investigating officer seeks an identification procedure, it is unlikely that one will be held. But this state of affairs is unsatisfactory.

The provisions of the Code are currently drafted in a way that establishes a presumption that a video identification procedure is to be conducted following identification of a suspect in a confrontation conducted in the street. It seems to us that it would be preferable for the duty to conduct a formal procedure to be triggered by a suspect's request for one. Where the police do not seek a video identification procedure - presumably this would be the case where a suspect has already been identified in a street identification - the Code ought to reflect the idea that the suspect has a *right* to an identification procedure, which can either be claimed or waived. As things stand, if an innocent suspect who has been identified in a confrontation in the street takes the view that appearing in a subsequent video identification procedure is not in his interests, in order to avoid a procedure being conducted he must make himself 'unavailable' by refusing to co-operate with a formal procedure. He will be given a notice stating that if he does not consent and refuses to take part in a formal procedure, the fact of that refusal may be given in evidence.³⁷ The outcome of a refusal to take part in a formal procedure might be that the suspect gets his way, but at the cost of appearing, in the eyes of a jury, to be obstructive. There might be some justification for the current paternalistic approach in the absence of empirical knowledge, but the findings reported here support the case for revising Code D so that it acknowledges the autonomy of the suspect and his or her status as the holder of a procedural right to participate in a formal identification procedure.

IV. Conclusion

Our research suggests that innocent suspects do not have as much to fear from the use of confrontations conducted in the street as might commonly be thought. Witnesses appear to be generally less inclined to make an identification in this kind of procedure than in procedures in which they are presented with multiple persons. Consequently, a confrontation might afford such suspects with greater protection against the risk of misidentification and wrongful conviction than video identification procedures in which too few individuals sufficiently resemble the suspect. However, further research is required that explores the extent to which the way in which a suspect might be presented in a street confrontation affects identification decisions - the presentation of

³⁶ Paragraph D3.21 (2011)

³⁷ Paragraph D 3.17(v) (2011).

a suspect who appears to be under the apparent control of someone in authority, for example.

The greater cause for concern is the influence that street identifications appear to have on subsequent identification procedures involving the same witness and suspect. Our findings are consistent with previous research that addresses this issue - a witness is much more likely to identify a suspect in a video identification procedure where he or she has seen the suspect in a prior identification procedure. This generalisation holds whether the suspect is an innocent suspect or the culprit. It has been pointed out that conducting a formal procedure following the identification of a suspect in a confrontation provides a witness with an opportunity to resile from his or her original decision, and that identification of a suspect in a second procedure is not an inevitable outcome. But our findings suggest that in the great majority of cases the suspect will be identified in the second procedure, and exposed to the subsequent risk that a jury will treat the two procedures as independent events and attach to evidence of his identification in the second procedure, weight that it does not warrant.