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### A Miscarriage of Justice in Massachusetts: Eyewitness Identification Procedures, Unrecorded Admissions, and a Comparison with English Law

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## **A MISCARRIAGE OF JUSTICE IN MASSACHUSETTS: EYEWITNESS IDENTIFICATION PROCEDURES, UNRECORDED ADMISSIONS, AND A COMPARISON WITH ENGLISH LAW**

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## ARTICLES

### A MISCARRIAGE OF JUSTICE IN MASSACHUSETTS: EYEWITNESS IDENTIFICATION PROCEDURES, UNRECORDED ADMISSIONS, AND A COMPARISON WITH ENGLISH LAW

Stanley Z. Fisher\* and Ian K. McKenzie\*\*

#### Introduction

In Massachusetts, as elsewhere, innocent people have been convicted of crimes, imprisoned for long periods, and later exonerated. We know this from cases in which DNA or other evidence has indisputably shown the innocence of Massachusetts prisoners.<sup>1</sup>[1] Study of these cases offers a unique opportunity to discover systemic weaknesses in our justice system that call for reform. This article discusses one case, that of Marvin Mitchell, who, in 1997, after a 1990 conviction for child rape, became the first Massachusetts prisoner to be exonerated by DNA testing.<sup>2</sup>[2] After describing Mitchell's

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<sup>1</sup>[1]The most recent of these exonerations, in which the prosecution has explicitly conceded the prisoner's factual innocence, involves Shawn Drumgold, who was exonerated of murder in November, 2003, after serving 12 years in prison. *See* Douglas Belkin, *Some ask for Mass. innocence panel*, BOSTON GLOBE, Nov. 11, 2003 at XX. By Douglas Belkin, Globe Staff, 11/11/2003 at XX. *See also* the case of Dennis Maher, freed on DNA evidence after serving 19 years of a life sentence for multiple rapes *See* Richard Lehr, *After 19 Years, DNA Set To Free Rape Convict*, BOSTON GLOBE, Apr. 2, 2003, at B1. Other recent undisputed exonerations, described in Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002), involved Angel Hernandez, at 16, Donnell Johnson, at 17, Marvin Mitchell, at 20, Marlon Passley, at 21, and Eric Sarsfield, at 23.

<sup>2</sup>[2]On April 20, 2002, a conference panel entitled *A Wrongful Conviction in Massachusetts: What Went Wrong?* discussed Mitchell's case. A videotaped recording of the discussion [hereinafter "Panel Discussion"] is in the possession of the authors. The panel was part of the national conference "Wrongful Convictions: A Call to Action", sponsored by the Harvard Law School's Institute of Criminal Justice and the New

case, we focus particularly on two factors that contributed to his wrongful conviction: erroneous eyewitness identification and the admission into evidence of a questionable unrecorded admission to the police. With an eye toward possible needed reforms of the procedures followed in Mitchell's case, we then discuss how the Mitchell case would have been treated under English law. We do so in the hope that knowledge of another system's approach to common problems might usefully inform our response to the miscarriage suffered by Marvin Mitchell and by other innocent victims of the criminal justice process.

### Factual Background<sup>3</sup>[3]

On September 22, 1988, an eleven-year-old Roxbury girl was raped on her way to school. She described the rapist to her mother in detail, including the facts that he was clean-shaven, cross-eyed, and wore "pinkish" pants.<sup>4</sup>[4] The victim's mother reported the crime to the police and took the victim to the hospital, where a rape kit was prepared. The next day, the victim's mother drove around the neighborhood, spotted Mitchell, and, based on her daughter's description, reported to police her belief that he was the rapist. In fact, Mitchell's appearance differed from the victim's description of her attacker in important respects: he was not "clean shaven," but had a moustache; he was not cross-eyed; and his pants were not pink, but grey. The police arrested Mitchell for "public drinking."<sup>5</sup>[5] At the police station, after the victim selected Mitchell's photograph from two photographic arrays, the police charged him with four counts of forcible rape. In

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England Innocence Project. Panel participants included: the authors; Suffolk University Law Professor Michael Avery; Associate Justice Isaac Borenstein of the Massachusetts Superior Court; San Diego County (Calif.) Deputy District Attorney George "Woody" Clarke; and attorneys Margaret Burnham and Noah Rosmarin.

<sup>3</sup>[3]This factual summary draws, with modifications, from Fisher, *supra* note 1, at 20. *See also* Mitchell v. City of Boston, 130 F. Supp. 2d 201, 205-07 (D. Mass. 2001) [hereinafter "*Mitchell II*"].

<sup>4</sup>[4]"[The victim] described her assailant as a slim, tall, light-skinned black man in his early twenties or late teens with short hair, and a long, narrow, clean-shaven face. She also described the assailant as being cross-eyed and wearing pinkish pants and a red and white shirt with some sort of emblem on it." *Mitchell II*, 130 F. Supp. 2d at 205. The victim also reported that her attacker had a mole or freckle on the head of his penis. The Commonwealth entered photographs of Mitchell's penis into evidence, but the parties disagreed about whether they showed any mole or freckle. *Id.* at 206 n.4.

<sup>5</sup>[5]Mitchell was carrying a partially filled whiskey bottle. The police claimed that he was drunk, which he denied. *Id.* at 205 n.2.

January 1990, a jury convicted Mitchell.<sup>6[6]</sup> He was sentenced to nine to twenty-five years in state prison.

Many factors probably contributed to Mitchell's wrongful conviction. These include factors we do not discuss, such as misleading serological testimony by the Commonwealth's expert witness, contradictory testimony by defense witnesses, and errors by defense counsel, by the prosecutor, and by the appellate court.<sup>7[7]</sup> We do discuss two critically damaging pieces of evidence: the victim's testimony identifying Mitchell as her attacker and testimony by Officer DeMarco,<sup>8[8]</sup> one of the arresting police officers, describing Mitchell's purported admission during booking at the police station. We will address these in turn.

#### Eyewitness Identification Procedures

The prevalence of mistaken eyewitness identifications and their contribution to wrongful convictions is well known.<sup>9[9]</sup> So too are the suggestive and distorting effects of certain law enforcement identification procedures.<sup>10[10]</sup> The identification procedures used in *Mitchell* included some known to jeopardize reliability.

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<sup>6[6]</sup>In a seemingly compromise verdict (because of doubts about Mitchell's guilt), the jury convicted on one count of forced sexual intercourse and one count of forced unnatural sexual intercourse and acquitted on two identical charges. *See Commonwealth v. Mitchell*, 35 Mass. App. Ct. 909, 910 n.1 (1993) [hereinafter "*Mitchell I*"].

<sup>7[7]</sup>*See* Panel Discussion, *supra* note 2.

<sup>8[8]</sup>Although both the trial transcript and the Appeals Court opinion refer to Officer "DiMarco," we adopt the spelling "DeMarco," which was used in the police report and in the civil case pleadings and judicial opinion.

<sup>9[9]</sup>*See, e.g.*, Steven Penrod, *How Well Are Witnesses and Police Performing?*, CRIM. JUST., Spring 2003, at 37; Gary Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 603-609 (1998) [hereinafter "*Eyewitness ID*"].

<sup>10[10]</sup>Contrary to popular belief, the idea that a person, once seen, is never forgotten, is erroneous. Not only is witness recognition ability adversely affected by the conditions (both environmental and physical) in which the initial observation occurs, but also by the way in which investigators carry out the procedures intended to provide admissible evidence that a suspect (the person in custody) is the same person as the culprit (the person who committed the offense). These adverse effects emanate principally from inadequate or improper use of 'fillers' (the alternative choices of people or photographs presented to eyewitnesses) but also include inadequate or improper advice to witnesses before they undertake such an identification and practices which 'bolster' the witness's belief that she has identified the right person, even though she may be mistaken. *See* Ian

The victim identified Mitchell as her attacker at four different points in the proceedings:

-*“Mug book” identification:* Following Mitchell’s arrest for “public drinking” on the day after the crime, the victim selected Mitchell’s photograph from a “mug book” containing 100 photographs.

-*Photographic array:* Later on the same day, police showed the victim a collection of eight Polaroid photographs, including one just taken of Mitchell. She selected his photograph.

-*Probable cause hearing:* Two weeks later, while testifying at a judicial probable cause hearing, the victim pointed out the defendant as her attacker.<sup>11</sup>[11]

*Trial:* Fifteen months later, in January 1990, the trial took place. The victim again identified Mitchell from the witness stand.<sup>12</sup>[12]

The *Mitchell* identification procedures were potentially suggestive in several respects:

*I. Mother’s presence at photographic identification procedures.* Despite the fact that the victim’s mother had already decided that Mitchell matched her daughter’s description of the rapist, she was permitted to be with her daughter during the two photographic

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McKenzie, *Psychology and Legal Practice: Fairness and Accuracy in Identification Parades*, 1995 CRIM. L. REV. 200, 200-208.

<sup>11</sup>[11]In response to a motion, the court closed the courtroom during the victim’s testimony. It follows, therefore, that when identified by the victim, Mitchell was seated at the defense counsel’s table rather than amongst a group of spectators. See Transcript of Probable Cause Hearing at 1-2, Commonwealth v. Mitchell, No. 88-9521 (Mass. Dist. Ct. Oct. 8, 1988) [hereinafter “PCH transcript”].

<sup>12</sup>[12]Transcript of Trial at 1:55, Commonwealth v. Mitchell, No. 072574 (Mass. Super. Ct. Mar. 6, 1989) [hereinafter “Trial transcript”].

identification procedures conducted at the police station.<sup>13</sup>[13] Although the mother's presence could provide needed emotional support to the victim, it also posed a risk that the mother would wittingly or unwittingly influence her daughter's selection of Mitchell's photograph. Furthermore, having been the person to whom the victim's 'first description' of the culprit had been made and having herself identified Mitchell, she became a witness and should have been disqualified from being present at her daughter's identification procedures. Investigators should have dealt with her in isolation from her child. In order to deal with the sensitivities of a potentially vulnerable witness, a suitable, independent person, preferably of the same sex, should have accompanied the victim.

2. *Implication that the photographic arrays contained the rapist's photograph.* The police apparently indicated to the victim that the 100-photo mug book contained a picture of her attacker, which she was to pick out.<sup>14</sup>[14] This practice can encourage a witness to select the photograph which most resembles her mental reconstruction of the memory of the perpetrator. This process, called "relative judgment," increases the risk of mistaken identification.<sup>15</sup>[15]

3. *Simultaneous presentation of photographs.* In showing the eight-photo array to the victim, the police presented the photographs simultaneously, rather than sequentially. The

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<sup>13</sup>[13]Others present included sexual assault unit detectives and a police captain. Testimony of Detective Flynn, *Id.* at 2:46.

<sup>14</sup>[14]According to the victim, "[t]hey told [me] that they were going to give me a book with a bunch of pictures and I was to pick out the guy who raped me." *Id.* at 1:69.

<sup>15</sup>[15]See Wells, *Eyewitness ID*, *supra* note 9, at 613-617. The victim's testimony suggests a classic resort to "relative judgment." "I think it was the second page [of the mug book], I stopped and I paused and I looked at his picture and I said I'll go on for a while just to see if I see anything else And I didn't see anyone and I came back and told them it was him." PCH transcript, *supra* note 11, at 17. The victim viewed every picture in the mug book, in which pictures ~~which~~ were presented eight to a page. This is a strange hybrid of the simultaneous/sequential dichotomy. Each page of the book contained a group of photos that could be compared to each other. Thus, the method of presentation of each page allows the witness to view multiple photos at the same time and compare them with each other, and seems to invite the "relative judgment" discussed above. Between groups, however, (as the pages are turned), the process becomes more, although not completely, sequential. We are aware of no research that addresses this problematic situation.

simultaneous method also encourages an identification witness to make unreliable “relative judgments.”<sup>16</sup>[16]

4. *Reinforcement of the victim’s identification of Mitchell.* When the victim selected Mitchell’s photograph from the mug book, the police responded by saying “good.”<sup>17</sup>[17] Such post-identification feedback has been shown to increase a witness’s confidence in his or her erroneous identification, and to distort her memory of the event.<sup>18</sup>[18] In *Mitchell*, it appears the victim later recalled being more confident of her mug-book identification than she indicated at the time she made it.<sup>19</sup>[19]

5. *Repeated showing of Mitchell’s photograph in successive arrays.* Following the victim’s selection of Mitchell’s photograph from the mug book, she was asked to view a second group of eight Polaroid photographs, which included a new photograph of Mitchell. This second showing of Mitchell’s photograph might be viewed as suggestive.<sup>20</sup>[20]

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<sup>16</sup>[16] See Wells, *Eyewitness ID*, *supra* note 9, at 613-617.

<sup>17</sup>[17] Testimony of victim, Trial transcript, *supra* note 12, at 1:70.

<sup>18</sup>[18] See Gary L. Wells, et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. EXPERIMENTAL PSYCHOL. APPLIED 42, 42 (2003) (showing that feedback distorts “eyewitnesses’ recalled confidence, amount of attention paid during witnessing, goodness of view, ability to make out facial details, length of time to identification, and other measures related to the witnessing experience.”). Giving confirmatory feedback is known in psychological texts as “bolstering.” To eliminate the risk of such feedback, the Massachusetts Supreme Judicial Court approved procedures in which “police officers conducting the identification procedure do not possess information about the defendant and make ‘no gestures or comments concerning any set of photographs.’” See *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307, 312 (2001). In the psychological literature, this is known as a ‘double blind’ procedure. However, the Court’s “approval” does not seem to create a binding requirement on the police.

<sup>19</sup>[19] According to her trial testimony, the victim told police “this [is] the man who raped me.” Trial transcript, *supra* note 12, at 1:70. But the police detective who administered the mug book procedure testified that she said “That looks like the man that assaulted me.” Trial transcript, *supra* note 12, at 2:47. This latter verbalization is, of course, not evidence of an identification, but evidence of a qualified opinion.

<sup>20</sup>[20] *But see* ERIC BLUMENSON ET AL., MASSACHUSETTS CRIMINAL PRACTICE § 18.3c n.67 (3d. ed. 2003) (no due process violation to show defendant’s photograph a second time in



6. *Identifications made by the victim in court.* Despite the apparent legitimacy of in-court identifications by a victim, in Massachusetts such identifications may be considered low quality at best. In the courtroom, the victim has an obvious choice in the defendant. A line-up or group identification would be more effective. At worst, such identifications unduly affect jurors,<sup>21[22]</sup> who are impressed by a theatrical device that has little legitimacy in the context of providing evidence that a suspect is the culprit.<sup>22[23]</sup> This will be discussed further below.

The trial court denied a pretrial defense motion to suppress the victim's identification of Mitchell. This ruling was not attacked on appeal.<sup>23[21]</sup>

#### Treatment of the Identification Evidence Under English Law

Following Supreme Court precedents from the Warren era, Massachusetts courts exclude eyewitness identification evidence on due process grounds if the identification stems from a procedure that was "unnecessarily suggestive."<sup>24[24]</sup> Even though the Massachusetts highest court recently "approved" specific enlightened procedures for

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a subsequent array after having been selected, *citing cases*). The defense in *Mitchell* also claimed that "the dissimilarity of the other photos [in the photo array] likely influenced the [victim's] selection of Mitchell." *Mitchell II*, 130 F. Supp. 2d at 206 n.3.

<sup>21[22]</sup>See Elizabeth Loftus, *What Jennifer Saw*, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html>.

<sup>22[23]</sup>In fact, the notion that identification procedures are intended to provide evidence that a suspect is *the culprit* is at the core of psychological debate and discussion. Far too often, identification procedures are seen and used by the police to demonstrate that they have or appear to have the right person. This is not the same thing at all.

<sup>23[21]</sup>On appeal, the defense claimed error only regarding admission of Mitchell's purported statement at the police station. *Mitchell I*, 35 Mass. App. Ct. at 909.

<sup>24[24]</sup>*Stovall v. Denno*, 388 U.S. 293 (1967); *Commonwealth v. Botelho*, 369 Mass. 860, 866-868 (1976). The Massachusetts Supreme Judicial Court refused to follow the Supreme Court's narrowing decision in *Manson v. Braithwaite*, 432 U.S. 98 (1977). See *Commonwealth v. Johnson*, 420 Mass. 458 (1995); see generally, BLUMENSON, *supra* note 20, at § 18.3A.

conducting eyewitness identification procedures,<sup>25[25]</sup> trial courts enjoy wide discretion in deciding the admissibility of identification evidence produced by procedures such as those employed by the police in *Mitchell*.

English law takes a different approach. At the heart of what is usually defined as a crime control model of criminal justice,<sup>26[26]</sup> is a due process core of singular rigidity, affecting most aspects of custodial investigation including, but not limited to identification procedures.

For ease of presentation the issues noted at points 1-6 above will be dealt with in two sections: a) Custodial/investigative identification procedures (points 1-5) and b) Courtroom identification procedures (point 6).

a. Custodial identification procedures

Since as long ago as 1969,<sup>27[27]</sup> identification procedures, both using ‘line-ups’<sup>28[28]</sup> and photographs, have been the subject of judicial guidance, case law (requiring compliance), and, since 1984,<sup>29[29]</sup> of codes of practice. These codes carry with them an expectation that breaches will almost certainly result in cases being lost *and* may result in disciplinary action against officers who breach them.<sup>30[30]</sup> The latest edition of

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<sup>25[25]</sup>See *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307, 312 (2001), (endorsing, *inter alia*, double-blind procedures and citing with approval NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (Oct. 1999)).

<sup>26[26]</sup>HERBERT L. PACKARD, *THE LIMITS OF THE CRIMINAL SANCTION*, 149-246 (Stanford University Press 1968).

<sup>27[27]</sup>In fact, although the commonly cited starting point for examination of these procedural documents is HOME OFFICE, *CIRCULAR ON ID PARADES* (1969), it is possible to trace the source of that document to Home Office circulars issued in 1905, 1925 and 1926. *See id.* at preamble.

<sup>28[28]</sup>Commonly referred to as identification (or ID) parades in England. The expression line-up is rarely used.

<sup>29[29]</sup>The codes of practice are made under the aegis of the Police and Criminal Evidence Act Police and Criminal Evidence Act. 1984 (Eng.) The relevant code for the purposes of this article is HOME OFFICE, *Code D*, in *CODE OF PRACTICE FOR THE IDENTIFICATION OF PERSONS BY POLICE OFFICERS* (2003) [hereinafter “*Code D*”].

<sup>30[30]</sup>See Ian McKenzie, *Eyewitness Evidence: Will the United States Guide for Law Enforcement Make Any Difference?*, 7 INT’L J. EVID. & PROOF, 237, 237-263 (2003) (regarding the power of such sanctions and likely efficacy of the Guidelines in the United States)

the Code of Practice on Identification<sup>31</sup>[31] came into force in April 2003. Apart from minor changes in the wording of the requirements, the directions contained in the new edition echo those that have existed for many years.<sup>32</sup>[32]

Importantly, in the context of comparison with *Mitchell*, in England and Wales photographs may only be used when there is, as yet, no identified suspect. Code D paragraph 3.3, reads in part:

A witness must not be shown photographs, computerised or artist's composite likenesses or similar likenesses or pictures (including 'E-fit' images) if the identity of the suspect is known to the police and the suspect is available to take part in a video identification, an identification parade or a group identification.<sup>33</sup>[33]

Although it is not mandatory when using photographs, it is anticipated that an independent person not involved with the investigation, normally a police officer, but possibly a civilian employee of the police, will conduct identification procedures. In identification parades (line-ups), this person *must* be an Inspector (equivalent to the rank of Lieutenant in American policing), but when conducting IDs using photographs, may be an officer of 'sergeant rank or above.'<sup>34</sup>[34] In theory, this allows any sergeant to undertake photo identification procedures; however, in practice, most police stations in England and Wales would have one or more specially trained sergeants, working within the auspices of a specially designed and managed identification suite, to undertake such work.

This supervisory officer must confirm that the first description of the suspect given by the witness has been recorded before that person is shown photographs. A first description appears to have been received by the police in *Mitchell*'s case but it is unclear how it was actually recorded.<sup>35</sup>[35] Sufficient importance is given to the need for accurate recording of the first description that the Codes of Practice says, "[i]f the supervisory officer is unable to confirm [that] the description has been recorded they [sic] shall postpone showing the photographs."<sup>36</sup>[36]

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<sup>31</sup>[31] *Code D*, *supra* note 29.

<sup>32</sup>[32] *See* PACKARD, *supra* note 26.

<sup>33</sup>[33] *Code D*, *supra* note 29, at ¶ 3.3.

<sup>34</sup>[34] *Code D*, *supra* note 29, at Annex E ¶ 1.

<sup>35</sup>[35] *See Mitchell I*, 130 F. Supp. 2d at 205.

<sup>36</sup>[36] *Code D*, *supra* note 29, at Annex E ¶ 2.

The rules require that only one witness shall be shown photographs at any one time. Each witness shall be given as much privacy as practicable and shall not be allowed to communicate with any other witness in the case.<sup>37</sup>[37]

Instructions require that the witness shall be shown *no fewer* than twelve photographs at a time, which shall as far as possible be of a similar type. The loose wording of this paragraph is unusual and unfortunate. Although witnesses are generally shown twelve photographs, the leeway for showing dozens, perhaps even hundreds, is clear.<sup>38</sup>[38]

In addition, the system in England is, categorically, one of simultaneous presentation: the expression ‘at one time’ is taken to mean just that—all twelve photographs appear on one page of the book or in one frame. As noted above, psychologists have repeatedly shown through experimental studies that greater identification accuracy is achieved where a sequential methodology is used, in contrast to a simultaneous methodology. In this case, it is easy to argue that English Codes of Practice should be adjusted to reflect psychological realities.

The English Codes of Practice do require that “as far as possible,” all photographs shall be of a similar type. Experimental studies by psychologists have repeatedly suggested that the fairest way to conduct such photo IDs is to present photographs which are all of the same size, the same kind of visual image, and feature similar, if not identical backgrounds.<sup>39</sup>[39] In England and Wales, photo books are constructed in such a manner.

#### The *Turnbull* rules

In 1977, following a string of miscarriages of justice based on erroneous identification, a judicial inquiry was established under the chairmanship of Lord Devlin, one of England’s senior judges.<sup>40</sup>[40] As a consequence, Lord Devlin was much concerned about the

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<sup>37</sup>[37] *Code D, supra* note 29, at Annex E ¶ 3. In Mitchell’s case, privacy seems to have been in short supply at the victim’s first photo ID session. Trial transcript, *supra* note 12, at 2:46.

<sup>38</sup>[38] Such a course of action might easily be deliberately used to confuse a witness if, for example, a police officer or other public figure were accused of a crime. That is, the void of insufficient specificity might be occupied by corruption. Indeed, in the Mitchell case, for these and other reasons, the use of the 100-photograph mug book was unfortunate. See Trial transcript, *supra* note 12, at 1:69; PCH transcript, *supra* note 11, at 17.

<sup>39</sup>[39] See ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 88-109 (1979).

<sup>40</sup>[40] See LORD DEVLIN, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES (1979).

possibility of relative judgments being made during identification procedures, and among many other recommendations, noted that:

We have been impressed with the evidence from psychologists which suggests that witnesses may tend . . . to make an identification on parade because they feel that is what is expected of them We have considered various ways of relieving the pressure on witnesses of this type and conclude that the best way is to tell the witness expressly that the person he saw may not be on the parade We recommend that this should be done when the officer addresses the witness just before he inspects the parade.<sup>41</sup>[41]

There was some delay in implementing Devlin's recommendations, but in 1977 a specially constituted court of appeal<sup>42</sup>[42] of exceptional strength endorsed the recommendations in *Regina v. Turnbull*,<sup>43</sup>[43] ensuring that the relative judgment problem was addressed The court also reiterated, in substantial measure, the content of Devlin's recommendation requiring that the officer running the parade should tell each witness that "the person he saw may or may not be in the parade and [that] if he cannot make a positive identification he should say so."<sup>44</sup>[44] Although this recommendation seems to relate specifically to identification parades (line-ups), the same requirement was inserted in the first edition of the Codes of Practice in relation to the use of photographs.

The current requirement reads as follows:

When the witness is shown the photographs, they [sic] shall be told [that] the photograph of a person they saw may, or may not, be amongst them and if they [sic] cannot make a positive identification, they [sic] should say so The witness shall also be told [that] they [sic] should not make a decision until they [sic] have viewed at least 12 photographs. The witness shall not be prompted or guided in any way, but shall be left to make any selection without help. <sup>45</sup>[45]

Finally, it is important to point out that although 'bolstering' is currently not prohibited in England and Wales, the existence of the problem has been identified and might well become a key subject in cross examination of witnesses to the identification processes. Comprehensive records are required to be kept of "anything said by the witness about any

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<sup>41</sup>[41]*Id.* at 154 ¶ 8.16. A similar recommendation, made for similar reasons, is embedded in the new federal guidelines [IS THIS THE US GUIDELINES OR CODE D?]

<sup>42</sup>[42]Court of Appeal decisions are binding on all subsidiary courts under English law.

<sup>43</sup>[43]*Regina v. Turnbull*, [1977] 1 Q.B. 224 (Eng. C.A.).

<sup>44</sup>[44]*Code D*, *supra* note 29, at Annex A ¶14.

<sup>45</sup>[45]*Code D*, *supra* note 29, at Annex A ¶14.

identification, or the conduct of the procedure”<sup>46</sup>[46] and “[n]one of the photographs shall be destroyed, whether or not an identification is made, since they may be required for production in court The photographs shall be numbered and a separate photograph taken of the frame or part of the album from which the witness made the identification. . .”<sup>47</sup>[47]

After the identification procedure

If a witness makes a positive identification from photographs, unless the person identified has already been eliminated from inquiries or is not available, i.e. has not been arrested, the requirement is specific and unequivocal: *other witnesses shall not be shown photographs*. -Both other witnesses, and the witness who has made the identification, shall be asked to attend a video identification, an identification parade, or group identification, unless there is no dispute about the suspect’s identity.<sup>48</sup>[48]

If a witness makes a selection from photographs but is unable to confirm the identification (e.g. by saying something like “I think that’s the person,” or “that looks like him”<sup>49</sup>[49]), the officer conducting the process shall ask that person how sure he or she is that the photograph identified is that of the person seen in the commission of a crime or other incident.<sup>50</sup>[50]

It is beyond dispute that a second showing of photographs to a witness, however much the photographs differ from those previously used, would be considered a breach of the Code of Practice, for the expectation clearly is that once an identification using photographs<sup>51</sup>[51] has taken place, both the identifying witness and any other eyewitnesses capable of making such an identification *must* be exposed to one of the other available processes of identification.<sup>52</sup>[52]

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<sup>46</sup>[46]*Code D, supra* note 29, at Annex A ¶ 11.

<sup>47</sup>[47]*Code D, supra* note 29, at Annex A ¶ 10.

<sup>48</sup>[48]*Code D, supra* note 29, at Annex A ¶ 6.

<sup>49</sup>[49]*See supra* note 19.

<sup>50</sup>[50]*Code D, supra* note 29, at Annex E ¶ 7.

<sup>51</sup>[51]Or computerized images, artist’s composite drawings, or other similar likenesses, which, as with photographs, may not be shown to other witnesses. *Code D, supra* note 29, at Annex E ¶ 8.

<sup>52</sup>[52]It may be that this practice is not considered a breach of due process in Massachusetts, *see* BLUMENSON, *supra* note 20, but it is surely unsound from a psychological standpoint. In addition, the defense claim that the dissimilarity in the

Thus, in the Mitchell case, there are a number of circumstances which, if the investigation had been conducted in England or Wales, would have run afoul of the requirements of the Code of Practice. These are: the presence of the victim's mother at the initial identification; the showing of a second set of pictures to the victim; and the failure adequately to ensure that the witness was properly advised that a picture of the culprit might not be among the photographs shown to her. It is entirely possible that such serious improprieties would, in England and Wales, result in a decision by the Crown Prosecution Service<sup>53</sup>[53] to discontinue the case. How such breaches might be dealt with in the unlikely event that a prosecution had followed is considered below

#### b) Courtroom identification procedures

Until recently, the law in England and Wales on what are known as "dock identifications" was clearly defined. In a passage based upon the cases of *Regina v. Cartwright*<sup>54</sup>[54] and *Regina v. Fergus*,<sup>55</sup>[55] *Archbold* states that dock identifications have "long been regarded as undesirable," and that "[it] is now difficult to conceive of circumstances in which a trial judge would permit either a dock identification or evidence of a dock identification to be adduced."<sup>56</sup>[56]

However, in the case of *Barnes*,<sup>57</sup>[57] an appeal against conviction was made on the grounds that a dock identification, which had taken place in a Magistrate's Court,<sup>58</sup>[58]

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Polaroid images had an adverse effect is supported by the psychological literature and would, in itself, have been a breach of the English Code of Practice.

<sup>53</sup>[53]In role, the approximate equivalent of the District Attorney's office. The Crown Prosecution Service is national in its jurisdiction. All legal staff are appointed by the Director of Public Prosecutions (DPP), who is in turn appointed by the Attorney-General, and in whose name most criminal prosecutions are brought. None of these posts depend on electoral approval.

<sup>54</sup>[54]10 Crim. App. R. 219 (1914) (Eng. Crim. App.).

<sup>55</sup>[55]98 Crim. App. R. 313 (1994) (Eng. C.A.).

<sup>56</sup>[56]ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE ¶ 14-42 (2002 ed.) (a key work of judicial commentary).

<sup>57</sup>[57]*Barnes v. Chief Constable of Durham*, 2 Crim. App. R. 505 (1997).

<sup>58</sup>[58]The court of first instance and of summary jurisdiction; any trial in this court is before a bench of magistrates. In most cases, there are three magistrates who are "lay" persons - in other words, they are neither professional judges nor lawyers, but, like a jury, are persons from the local community. However, there are now an increasing number of

was improper and should be excluded. In giving his judgment upholding the conviction, Judge Popplewell referred to the above passage and, clearly seizing on the words “trial judge,” made a distinction between the Crown Court and the Magistrate’s Court.<sup>59</sup>[59]

The passage in *Archbold* may properly represent the law as it applies to the Crown Court but has singularly little application to the everyday activities of the magistrate’s court. . . there is no logic in making a distinction in regard to dock identifications between the Crown Court and the magistrate’s court. However it has to be recognised that every day in a magistrate’s court those charged for instance with careless driving, who made no statement to the police, are entitled to sit back and in the absence of identification to submit that it has not been proven that they were the driver. . . if in every case where the defendant does not distinctly admit driving there has to be a identification parade, the whole process of justice in a magistrate’s court would be severely impaired.<sup>60</sup>[60]

Thus, it seems, that dock identifications are disapproved of as a legitimate form of evidence when they take place in the Crown Court, but may be permitted at the magistrate’s court. However, it has recently been strongly argued that there is neither logical nor legal justification for drawing a distinction as to the standard of admissible identification evidence between summary (minor) and indictable (serious) offences.<sup>61</sup>[61] Furthermore, a close reading of existing case law suggests that, in either of the courts, dock identification would be held inadmissible if the police had undertaken previous identification efforts, i.e., that admissible evidence already exists that the defendant may legitimately be considered the culprit.

The import for Mitchell is clear. Were the case in England, the dock identification on the occasion of the formal trial would have been improper. It is also very likely that, in view of the circumstances surrounding the investigation of the case (i.e. prior evidence of

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“stipendiary” magistrates - paid magistrates who are qualified lawyers, now known as District Judges. All cases, however serious, are first heard in or processed through the Magistrate’s Court. In serious cases, which will be heard on indictment in the Crown Court (*see infra* note 60), the purpose of the hearing (called a committal) is to establish whether there is a *prima facie* case to answer. Although the analogy is wanting in some respects, there is sufficient justification for considering a Magistrates Court as analogous to a court in the United States conducting a probable cause hearing.

<sup>59</sup>[59]If, following committal proceedings, the case proceeds, it is heard in a Crown Court. The trial is before a judge and jury. The judge presides over the trial process by attempting to ensure clarity and fairness.

<sup>60</sup>[60]Barnes, 2 Crim. App. R., at 510

<sup>61</sup>[61]See Tony Watkin, *In the Dock - An Overview of the Decisions of the High Court on Identifications in the Magistrate’s Court*, 2003 CRIM. L. REV. 463, 463-467. The matter may be more confusing with the introduction of District Judges. *See supra* note 59.



identification), impropriety would exist with regard to the identification at the probable cause hearing.

The issue here is one of fairness, a notion firmly embedded in the ethos and requirements of the Police and Criminal Evidence Act of 1984, which, as we shall see, is central to the issue of the ‘interview’ allegedly adducing the “pink pants” testimony.

#### Admissibility Of “Pink Pants” Testimony

Police testified at trial that during the booking process, Mitchell said he had worn pink pants on the day of the crime. In a civil suit brought after Mitchell was released from prison, he claimed that this testimony was false.<sup>62</sup>[62]

The victim’s original description of her assailant included the fact that he had been wearing “pinkish jeans.” On the day after the crime, when Mitchell was arrested and booked by Officers Trent Holland and Robin DeMarco, he was wearing grey pants. Although the officers later claimed that Mitchell had admitted to wearing “pink pants” on the previous day, “[n]either officer noted Mitchell’s supposed incriminating statement in an incident report, as would be required by police procedures, [nor] reported the alleged statement to the Sexual Assault Unit, as required by police policy. Indeed, no mention of Mitchell’s alleged statement was made by either officer for well over a year.”<sup>63</sup>[63]

Ignorant of any statement to police by the defendant, the prosecutor failed to disclose any when so requested in pretrial discovery.<sup>64</sup>[64] Mitchell’s purported statement first came to light in December 1989, fifteen months after the crime, and only one month before trial. In a letter to Mitchell’s lawyer, the prosecutor wrote:

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<sup>62</sup>[62] *Mitchell II*, 130 F.Supp. 2d at 205.

<sup>63</sup>[63] *Id.* Ignorant of Mitchell’s alleged admission, the Sexual Assault Unit detectives never applied for a warrant to search Mitchell’s home for the pink pants. Although Massachusetts courts treat police failure to record a defendant’s admission or confession as relevant to whether any statement was made, the law does not require recording of either interrogation of suspects or their confessions. *See* BLUMENSON, *supra* note 20, at § 19.3A n.8. *But see* H.B. 749, 183d Gen. Ct. (Mass. 2003) and S.B. 988, 183d Gen. Ct. (Mass. 2003) (requiring, if enacted, the electronic recording of custodial interrogations of suspects).

<sup>64</sup>[64] Although defense counsel’s discovery request asked only for “written or recorded statements made by the defendant in the possession, custody or control of the prosecutor,” the prosecution was bound by case law to turn over any oral statements by the defendant as well. *See* ERIC BLUMENSON, *supra* note 20, at § 16.6C n.247.

I should . . . inform you that on December 18 I spoke with Trent Holland, the officer who arrested your client. The officer recalled asking Mitchell at the booking desk what clothing Mitchell had worn on the previous day. Mitchell responded that he had been wearing “pinkish” pants. The officer recalls that other statements were made as well and feels that seeing the defendant will refresh his recollection.<sup>65</sup>[65]

When Holland took the stand at trial to testify to Mitchell’s admission, the court granted a defense motion to hold a *voir dire* on the statement’s admissibility. At its conclusion, the judge indicated his likely intention to exclude Holland’s testimony regarding the statement. By questioning Mitchell about his dress on the previous day, Holland had subjected Mitchell to “custodial interrogation” under *Miranda*, but failed to obtain Mitchell’s express waiver of *Miranda* rights.<sup>66</sup>[66] The prosecutor argued that the law did not require an express waiver. To ~~to~~ give the prosecutor time to find authority for her position,<sup>67</sup>[67] the court granted her request to adjourn the proceedings until the next morning.

The next day, however, the prosecutor withdrew Holland’s testimony and presented a new witness to Mitchell’s purported statement: Holland’s partner, DeMarco. DeMarco, who had not been subpoenaed or listed as a prosecution witness, testified to hearing Mitchell’s “pink pants” statement at the booking desk. DeMarco’s version of the event differed from Holland’s. According to DeMarco, Mitchell spontaneously injected himself into a conversation between DeMarco and one Lieutenant Cunningham during Mitchell’s booking. In discussing a description of a wanted person given out in the morning roll call, DeMarco stated at trial that she told the Lieutenant that “usually . . . people wear the same clothes every day.” DeMarco claimed that the defendant then spontaneously interjected, “I didn’t have these clothes on yesterday . . . I had pink pants on.”<sup>68</sup>[68]

DeMarco’s eleventh hour revelation (which, like Holland’s, had not previously been recorded or communicated to anyone) contradicted the prosecutor’s letter to defense counsel reporting Holland’s version of the same event.<sup>69</sup>[69] But it solved two problems

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<sup>65</sup>[65]Letter from Assistant Suffolk County (Mass.) District Attorney Leslie W. O’Brien to Attorney Jonathan Brant, Dec. 22, 1989 [hereinafter “O’Brien Letter”] (on file with B.U. Public Interest Law Journal). Holland never testified to any other purported statements by Mitchell.

<sup>66</sup>[66]See *Miranda v. Arizona*, 396 U.S. 868 (1969).

<sup>67</sup>[67]The prosecutor was apparently right. A suspect in custody who speaks after being given *Miranda* warnings, and affirming that he understands them is considered to have implicitly waived his rights. See BLUMENSON, *supra* note 20, at § 19.4D(2)(c).

<sup>68</sup>[68]Trial transcript, *supra* note 12, at 2:8.

<sup>69</sup>[69]See *supra* text accompanying note 65. In his *voir dire* testimony at trial, Holland claimed that he did not ask Mitchell about his clothing on the previous day, and that

for the prosecution First, because in DeMarco's version of events, Mitchell's statement was a "spontaneous declaration" rather than a "response to interrogation," it was exempt from the strictures of *Miranda* Second, the prosecution avoided having to put Holland on the witness stand on the very day when "two local newspapers published articles reporting that Holland . . . was cited in a recent Massachusetts Appeals Court decision for having possibly committed perjury."<sup>70</sup>[70]

Over defense objection, DeMarco was permitted to testify to hearing Mitchell's "pink pants" statement Defense counsel argued to the jury that DeMarco's testimony was not credible;<sup>71</sup>[71] the judge instructed the jury that they could not consider the statement unless they found beyond a reasonable doubt that it had been made.<sup>72</sup>[72] The jury convicted Mitchell on two of the four charges brought against him Endorsing the trial court's finding that Mitchell's "pink pants" statement was "spontaneous" rather than the "product of interrogation," the Massachusetts Appeals Court affirmed.<sup>73</sup>[73] The Court also rejected defense arguments for reversal based on late notice of Mitchell's alleged statement and the surprise substitution of DeMarco for Holland as a witness

After Mitchell's DNA exoneration in 1997, he filed civil rights claims against the City of Boston and against Holland and DeMarco individually The second count of his complaint, alleging that Holland conspired with DeMarco to convict him by giving

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Mitchell had volunteered the "pink pants" statement in the course of routine booking questions. Trial transcript, *supra* note 12, at 1:143. Questioned by the court about the contradiction between DeMarco's testimony and the prosecutor's letter to defense counsel, *see* O'Brien Letter, *supra* note 67, the prosecutor explained that in her letter, she had wrongly assumed that Holland had questioned Mitchell about his clothing. In fact, she did not recall Holland saying so. Trial transcript, *supra* note 12, at 2:16-2:17 The trial judge, however, assumed at the conclusion of Holland's *voir dire* that "somebody" had asked Mitchell what he was wearing. Trial transcript, *supra* note 12, at 1:146-1:147.

<sup>70</sup>[70]*Mitchell* II, 130 F. Supp. 2d at 207. Holland's reputation for dishonesty was apparently widely known to the trial bar and bench in Suffolk County. Panel Discussion, remarks of attorney Burnham and Judge Borenstein; Complaint and Jury Demand at ¶ 42, *Mitchell* II (No. 98-3693) (claiming, on information and belief, that Holland "had been accused of misconduct on eighteen occasions in connection with his duties as a police officer, but had not been disciplined for the this misconduct.")

<sup>71</sup>[71]Trial transcript, *supra* note 12, at 2:126.

<sup>72</sup>[72]Trial transcript, *supra* note 12, at 2:155-2:156.

<sup>73</sup>[73]*Mitchell* I, 35 Mass. App. Ct. at 910.

perjured testimony, survived Holland's motion for summary judgment.<sup>74</sup>[74] The City paid Mitchell \$450,000 to settle the suit.<sup>75</sup>[75]

#### Treatment of the "Pink Pants" Statement Under English Law

Under Massachusetts law, neither the fact that Mitchell's purported statement was unrecorded, nor its late disclosure, required the trial court to treat the statement any differently than it did. Failure to record the statement was relevant only to the officer's credibility, and credibility is a matter for the jury. The prosecution's failure to make timely disclosure to the defense entitles a defendant only to a continuance, if necessary, to prepare for trial in light of the newly disclosed evidence.<sup>76</sup>[76]

English law takes a different approach, for, as with issues in connection with identification, a Code of Practice (Code C), made under the provisions of the Police and Criminal Evidence Act 1984, governs a wide range of matters associated with the detention, treatment and interviewing of persons in custody.<sup>77</sup>[77] As with Code D, discussed above, Code C was structured and developed to deal with many aspects of police practice and procedure that have been shown to lead to miscarriages of justice. Although not exclusively so, many of these practices relate to aspects of police interviewing (interrogation) of suspects.<sup>78</sup>[78] The Code of Practice is designed to inhibit improper and coercive interviewing and to ensure that a suspect is dealt with in an ethical and principled manner.

#### Detention, unsolicited remarks, and interviews

In England and Wales, any person in custody and taken into a police station under arrest immediately falls under the general supervision of the custody officer.<sup>79</sup>[79] He or she is an authorized and specially trained police officer of sergeant rank (or a civilian employee of the police of similar standing and training) charged with general supervision of the

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<sup>74</sup>[74] *Mitchell II*, 130 F.Supp. 2d at 201.

<sup>75</sup>[75] Fisher, *supra* note 1, at 20.

<sup>76</sup>[76] See BLUMENSON, *supra* note 20, at § 16.4B.

<sup>77</sup>[77] HOME OFFICE, *Code C, in CODE OF PRACTICE FOR THE IDENTIFICATION OF PERSONS BY POLICE OFFICERS* (2003) [hereinafter "*Code C*"].

<sup>78</sup>[78] See Ian McKenzie, *Forensic Investigative Interviewing, in HANDBOOK OF INTERVIEW RESEARCH: CONTEXT AND METHOD* (Jaber Gubrium & James Holstein eds., 2003)

<sup>79</sup>[79] *Code C, supra* note 77, at ¶ 1.11.

propriety of the detention and with the maintenance of a Custody Record.<sup>80[80]</sup> The Custody Record is an official document and its completion is mandatory. It is used for recording all matters in connection with the management of each detained person; these include arrival, circumstances of arrest, periods out of the cells including periods of interview (which are themselves closely controlled),<sup>81[81]</sup> meal times, visits, and a range of other matters. The detained person is required to sign the custody record to acknowledge certain events, such as being told of the right to legal assistance, the right to have someone informed of her arrest, the right to consult the Code of Practice.<sup>82[82]</sup> Detained persons are given documents outlining all of the above and reiterating the 'caution,' a form of words loosely approximating the Miranda warning

The custody officer must decide whether or not to authorize detention and will do so after hearing a brief account of the circumstances given by the arresting officer. The custody officer must record any response by the detained person and may not ask any questions. However, the codes require that any officer present (including the Custody Officer) must record any unsolicited remarks made by the detained person. Paragraph 11.13 of Code C reads:

A written record shall be made of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but might be relevant to the offense. Any such record must be timed and signed by the maker. When practicable, the suspect shall be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate. <sup>83[83]</sup>

Furthermore, *Code C* requires that:

At the beginning of an interview the interviewer, after cautioning the suspect, shall put to them any significant statement or silence which occurred in the presence and hearing of a police officer or civilian interviewer before the start of the interview and which have not been put to the suspect in the course of a previous interview. The interviewer shall ask the suspect whether they confirm or deny that earlier statement or silence and if they want to add anything.

A significant statement is one which appears capable of being used in evidence against the suspect, in particular a direct admission of guilt. <sup>84[84]</sup>

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<sup>80[80]</sup>*Code C, supra* note 77, at ¶ 2.1.

<sup>81[81]</sup>*See McKenzie, supra* note 78.

<sup>82[82]</sup>*Code C, supra* note 77, at ¶ 3.1.

<sup>83[83]</sup>*Code C, supra* note 77.

<sup>84[84]</sup>*Code C, supra* note 77, at ¶¶ 11.4, 11.4A.

It is not clear whether Mitchell was ever formally interviewed, but even if he was not, in English law, the ‘spontaneous’ pink pants statement would have been required to be recorded.

In addition to the foregoing, English case law has defined an “interview” as any discussion between a suspect and a prisoner about an alleged crime, whether instigated by the suspect or a police officer.<sup>85[85]</sup> Despite the apparent clarity of this definition, the case law in England in this respect is complex.<sup>86[86]</sup> Regardless of whether the pink pants statements were part of what could be defined as an interview or were unsolicited comments relevant to the offence, they should have been recorded for formal presentation in evidence. This conclusion is based on a close examination of English cases as they might apply to the circumstances of *Mitchell*. In either case, failure to record the statements would have been a breach of the Code of Practice, the effect of which is discussed below.

What would have happened in Court?

On the assumption that the problematic identification(s) did not lead to the case being discontinued by the Crown Prosecution Service, what would have happened when the case came to trial?

Admissibility issues.

If evidence in a criminal or civil court has been obtained in circumstances that amount to a breach of the codes, what is the result? Does English law provide some sanction? Although in English law there is no equivalent of the American doctrine of “due process,” by which any evidence not obtained by proper procedures may be rendered inadmissible, the courts in England and Wales can exclude evidence under certain circumstances.

First, Article 6 of the European Convention on Human Rights specifies that those taken into custody and charged with offences have the right to a fair trial.<sup>87[87]</sup> The contents of the European Convention are embedded in domestic law through the provisions of the Human Rights Act of 1998. This legislation requires that such matters be considered in all courts, including the magistrates’ courts. This forms the underpinning of a number of imperatives existing in English common and statute law.

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<sup>85[85]</sup>Regina v. Matthews, 91 Cr. App. R. 43 (1990).

<sup>86[86]</sup>See Rolo Jerrard, *Interview? Police Question to Publican Amounted to Interview*, <http://ourworld.cs.com/RJer340036/law/cases/batley.htm>.

<sup>87[87]</sup>European Convention on Human Rights, in COUNCIL OF EUROPE, EUROPEAN CONVENTION OF HUMAN RIGHTS: COLLECTED TEXTS 6-7 (Martinus Nijhoff 1997).

Second, English common law provides that a judge has discretion as to whether presented evidence is admissible. Under this common law provision, the issue is what effect the evidence will have at trial. The court can exclude evidence at common law where the prejudicial effect of the evidence on the defendant greatly outweighs its probative value.<sup>88[88]</sup>

Third, section 76 of the Police and Criminal Evidence Act of 1984 provides that in any case where the prosecution proposes to give in evidence a confession and where such a confession may be said to have been made as a consequence of anything said or done which was likely, in the circumstances existing at the time, to render it unreliable, the court *shall not* allow the confession to be given in evidence, unless the prosecution is able to prove beyond a reasonable doubt that the circumstances of the confession would not render it unreliable. A successful submission under section 76 does not require a breach of a Code of Practice.<sup>89[89]</sup> However, if a Code of Practice is breached, any argument seeking to exclude confession evidence is necessarily strengthened.

Finally, the most powerful sanction under the codes concerned with the handling of suspects is contained in Section 78 of the Police and Criminal Evidence Act. Under Section 78, a judge can rule evidence inadmissible on the grounds of unfairness. Under this provision, the court may refuse to allow evidence if, under the totality of the circumstances, the admission of the evidence would have such a prejudicial effect as to result in an injustice.

Section 78 is broader than section 76 and applies to all evidence that the prosecution intends to produce in court. Case law has repeatedly suggested that compliance with the Codes of Practice is vital. Such cases have suggested that where steps required by the codes were not observed and where such material was entered into evidence without those checks there was a real risk to the fairness of the proceedings.<sup>90[90]</sup> In addition, case law has suggested that it is undesirable to attempt any general guidance as to the way in which a judge's discretion under section 78 should be exercised. It is a question of fact in each case.<sup>91[91]</sup> While section 76 requires specific links between the treatment of a person in custody and the making of the unreliable confession, the only issue under section 78 is the question of whether it would be unfair to admit the evidence in court.

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<sup>88[88]</sup>See *Regina. v. Sang*, [1980] A.C. 402 (1979).

<sup>89[89]</sup>*Regina. v. Walker*, [1998] Crim L.R. 211 (Eng. C.A. 1997).

<sup>90[90]</sup>*Batley v. DPP*, *The Times*, Mar. 5, 1998 (Q.B. 1998). In addition, *Batley* confirms the need for records to be kept of such interviews and indicates that even if circumstances at the time preclude it, the witness should be asked to endorse the accuracy of the record, "the following day or at any stage after the event had taken place." See also *supra* text accompanying note 83.

<sup>91[91]</sup>*Regina v. Samuel*, [1988] 1 Q.B. 615 (Eng. C.A.).

## Outcome

On the facts of *Mitchell* it seems inevitable that in England and Wales the pink pants testimony would have been excluded. The police's behavior would likely have been the subject of adverse comment by an English judge who may also have seen fit to question the propriety and ethics of the prosecution on the grounds of serious breaches of Code C of the Codes of Practice. Similarly, on the grounds of unfairness, the identification evidence would likely have been excluded. Breaches of Code D of the Codes of Practice play a large part in that decision. In short, it is unlikely that Marvin Mitchell would even have been prosecuted in England, let alone convicted, for the crime for which he spent seven years in a Massachusetts prison.

## Conclusion

Some jurisdictions have instituted reforms in light of the heightened awareness in the United States of the tragic results of unreliable eyewitness identification procedures.<sup>92[92]</sup> States are also considering reforms in police interrogation procedures. These procedures have come under scrutiny<sup>93[93]</sup> as a result of well-publicized exonerations of prisoners convicted on dubious "confession" testimony.<sup>94[94]</sup> Massachusetts has also known wrongful convictions influenced by faulty identification procedures—mistaken eyewitness testimony has been a factor in over half of the known wrongful convictions in the state.<sup>95[95]</sup> Finally, eleventh hour revelations of defendants' incriminating statements or conduct have appeared in Massachusetts' wrongful convictions with disturbing frequency.<sup>96[96]</sup> In light of these developments, Massachusetts should consider adopting

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<sup>92[92]</sup>See INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, *MISTAKEN EYEWITNESS IDENTIFICATIONS: A RESOURCE GUIDE* 185-203 (2003) (running list of jurisdictions practicing sequential line-ups and double blind procedures).

<sup>93[93]</sup>Illinois recently adopted a requirement that the police tape interrogations and confessions in murder cases. Associated Press, *Part of Death Penalty Reform is Vetoed*, July 29, 2003. In the first half of 2003, bills requiring the police to record interrogations were introduced in fourteen other states. Communication to author from Mary Schmid, National Affairs Assistant, National Ass'n of Criminal Defense Lawyers, July 15, 2003.

<sup>94[94]</sup>See, e.g., Susan Saulny, *Why Confess to What You Didn't Do?*, N.Y. TIMES, Dec. 8, 2002, Sec. 4, at 5 (discussing exoneration of five youths convicted in the "Central Park Jogger" attack of 1989).

<sup>95[95]</sup>Fisher, *supra* note 1, at 64-65.

<sup>96[96]</sup>We are aware of three such cases: Eric Sarsfield was convicted of a rape committed by a man with a tattoo of a cross on his arm. Sarsfield was not tattooed, but police were permitted to impeach his trial testimony with a purported admission to police interrogators that he sometimes drew tattoos on himself with washable ink. Despite a pretrial court order to prosecutors to disclose to the defense all oral statements of the



stronger remedies to protect the innocent from police error or abuse. In doing so, the English experience offers plausible models.

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defendant, police did not submit a report of this alleged statement to the prosecutor until the week before trial, ten months after the statement was allegedly made. *See* Brief for the Defendant-Appellant at 2, 12-13, 44-46, *Commonwealth v. Sarsfield*, 406 Mass. 1103 (1990) (No. 88-P-844). There were similar, eleventh-hour police disclosures in the cases of Ella Mae Ellison and Bartolomeo Vanzetti, discussed in Fisher, *supra* note 1, at 30-31, 53-56, and 67 nn. 301-303.