

Order in the courtroom: Let us hear what the experts have to say

Review of: **How Can So Many Be Wrong?: Making the Due Process Case for an Eyewitness Expert** by [Margaret A. Hagen](#) (Author), [Sou Hee \(Sophie\) Yang](#) (Author) (Lexington Books, 201).

The prospect of ending up behind bars for something you did not commit is perhaps not at the forefront of most people's worries, at least not in western countries. Where I live, in Norway, people seem to have a high faith in the courts' ability to make fair, impartial decisions based on available evidence, combined with a fairly strong belief that guilty people generally do not get off the hook. On top of that, Norwegians are not very worried about corruption playing a part in legal decisions (Jackson et al., 2011). That is our ideal of a perfect justice system. However, although not fearing overt misconduct of justice, there is no reason why we should be too relaxed. When examining the evidence of a case, does the court really possess the knowledge and means to carry out justice properly? What about the quality of the evidence coming from eyewitnesses, relying on their perceptual, attentional and mnemonic resources? Herein lies the importance of utilizing psychological competence, in applying cognitive and social psychology of eyewitness testimonies.

The last 40 years has seen a massive increase in our understanding of how processes of perception, attention, and memory may impact on eyewitness evidence (National Research Council, 2014). Still, if this research is to make an impact on actual court cases, it has to make its way past the structural barriers of the legal system. In their new book, *How can so many be wrong? Making the due process case for an eyewitness expert*, Margaret A. Hagen and Sou Hee Yang not only explain how eyewitness memory may be distorted by various internal and external factors, but more importantly, how the courts have dealt with eyewitness

psychological issues in the past and up to recent years (Hagen & Yang, 2019). And there is no need to refrain from spoilers regarding the book's conclusion: Courts are way better off when experts are allowed into the proceedings of a case, commenting on the actual eyewitness evidence.

The main problem, both in the U.S. and elsewhere, is that people, including jurors and judges, often underestimate the power of cognitive processes in distorting perception and memory (Simons & Chabris, 2011). When this is combined with the courts' blindness towards its own lack of knowledge, the result is alarming, and may cause damage beyond repair both for the individuals who risk wrongful conviction, and for victims who will not receive justice until the true perpetrator is placed before the court. Throughout legal history, the reason for not allowing experts to comment on eyewitness evidence has been the erroneous assumption that judges and jurors hold the knowledge needed, and that this knowledge overlaps with common sense.

This problem is at the heart of Hagen and Yang's book, where they present evidence in the form of a psychological science that is often contrary to common sense regarding perception, attention, memory and social influences, and by examples from actual court cases of how expert knowledge was utilized, or importantly, not utilized. This latter part is the main focus of the book. The first part is given relatively short space in the beginning of the book, but is then incorporated throughout the rest of the book. Thus, the title of the book: *How can so many be wrong?*, is not simply referring to how so many witnesses can be wrong, but to how so many criminal courts can be wrong. The book does an excellent job at pointing our attention towards this aspect of eyewitness psychology.

It is not easy for anyone to be the judge of their own memory capacities, as an excerpt from an interview made in the context of a private lawsuit against Donald Trump, regarding his Trump University in 2015, illustrates:

Forge (The plaintiffs' attorney): "Do you remember saying that you have one of the all-time great memories?" Trump: "Yes, I said that." Forge: "And do you believe that's true? Do you have one of the all-time great memories?" Trump: "I have a very good memory, yes." Forge: "Do you believe you have one of the best memories in the world?" Trump: "That I can't tell you. I can't tell for other people, but I have a good memory." Forge: "You've stated, though, that you have one of the best memories in the world?" Trump: "I don't know. Did I use that expression?" (Transcript from United States District Court Southern District of California, 2016).

President Bill Clinton was no better off, when questioned about a whole lot of things he didn't remember, before the grand jury in the impeachment hearings against him. Asked by Mr Wisenberg: "If Vernon Jordan has told us that you have an extraordinary memory, one of the greatest memories he has ever seen in a politician, would that be something you would care to dispute?", he did not dispute this, but after some thought added: "It's also -- if I could say one thing about my memory -- I have been blessed and advantaged in my life with a good memory. I have been shocked and so have members of my family and friends of mine at how many things that I have forgotten in the last six years -- I think because of the pressure and the pace and the volume of events in a president's life, compounded by the pressure of your four-year inquiry, and all the other things that have happened. I'm amazed -- there are lots of times when I literally can't remember last week." (Text of President Clinton's Testimony, 1998, also cited in Schacter, 1999).

Clinton is not alone in not remembering all that well in everyday life. In a study by Strange, Dysart and Loftus from 2014, ordinary people who were asked to remember what they did three weeks ago, as if to provide an alibi, were generally less than 50 % consistent when asked about it on two occasions one week apart (Strange, Dysart, & Loftus, 2014). A more recent study of how much people remember from a short walk through town, as

documented by a GoPro-camera, demonstrated the sad state of affairs that pertains to our everyday forgetting: participants were barely better than chance at selecting short clips from their own walk, as compared to other participants' walks (Misra, Marconi, Peterson, & Kreiman, 2018). Contrast this then, with the lack of concordance between what people actually remember (as measured by objective memory tests), and the esteem they have in their own memory capacity (Saraiva et al., 2020). The important point here is not whether Trump and Clinton have extraordinary memory; rather, that their inflated trust in their mental faculties, although perhaps extreme, is not all that uncommon.

When we are that poor at judging our own memory, how can we be expected to be good judges of other people's memory? In their book, Hagen and Yang make the case that lay people, such as jurors, need help from experts in order to make sound judgments about eyewitness memory. Contrary to what some courts have claimed, e.g. "Seventh United States v Daniels, 1995: "Expert testimony regarding the potential hazards of eyewitness identifications ... will not aid the jury because it addresses an issue of which the jury already generally is aware, and will not contribute to their understanding of the particular factual issues posed." (as cited in Hagen & Yang, 2019, p. 167), people generally are not aware of the counter-intuitive pitfalls of attention and memory which may lead to erroneous eyewitness identifications and accounts.

Surveys of people's beliefs regarding memory generally reveal that lay assumptions are often wrong. For example, a survey in Norway which compared jurors knowledge of eyewitness psychology with members of the general public (Magnussen, Melinder, Stridbeck, & Raja, 2010), showed that each of seven questions regarding important eyewitness psychology issues were answered correctly by, on average, only just over 50% of the general public and jurors alike. This is in accordance with studies from the United States (McAuliff & Kovera, 2007; Simons & Chabris, 2011).

Hagen and Yang have structured their book as a due process case for the eyewitness expert, by presenting evidence from psychological science as well as from actual court cases. They analyze how the courts have treated eyewitness identification issues, in terms of what assumptions the courts have made and what kind of knowledge they have based their decisions on. For instance, they ask whether the court has taken into consideration factors such as weapon focus, time lapsed since the observation, duration of exposure during the initial observation, and perceptual factors such as lighting and the use of disguise, all well-known from the psychological research into eyewitness memory.

In chapter 3, they ask how apt the judges of the Supreme court have been at considering eyewitness psychological factors, starting with *United States v. Wade* from 1967: A bank was robbed by a man wearing a small strip of tape on each side of his face, who then drove off in a waiting car, driven by his accomplice. Three men were arrested approximately six months later, and were shown to witnesses in a lineup at the courthouse. The witnesses were waiting in a room facing the hallway, where they could see the defendant, Wade, arrive for the lineup, accompanied by an FBI agent. The court did not rely on an expert witness to comment on the many possible confounding factors related to the identification of Wade, but did highlight some factors for the lower courts to take into consideration when reevaluating the evidence in a new trial: “identification prior to the tainted lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification” (cited in Hagen and Yang, 2019, p. 53). The court also made a note of the sighting of the defendant together with the FBI agent.

Hagen and Yang then make their own analysis of the factors that could be of relevance for the judgment of the reliability of the eyewitness identification of Wade by the witnesses. They go through a list of factors, such as what was known about scene

illumination, duration of observation, attention to the perpetrator, the effect of the disguise (noting that even simple disguises such as the tape on each side of the face may negatively affect recognition memory), attention to weapon, accuracy and consistency of the pre-lineup description, speed of identification (no note of this was taken during the lineup), the certainty/confidence judgement (again, no measure of this was given), extraneous confidence inflation, time between observation and identification, stress, cross-racial identification (not relevant in this case), and source confusion. An important point they make is not to make a final judgement on the case, but to make the reader (as a stand-in for the jurors) aware of the eyewitness psychological factors' bearing on each of the facts known in the case. This step-by-step evaluation of psychological factors is pedagogical for anyone wanting to serve as an expert witness, as well as serving Hagen and Yang's higher purpose of arguing for the use of eye witness experts.

Later chapters then go through cases where attorneys have been given the role of assessing the reliability of eyewitness testimonies, the use of jurors to make those assessments (with or without the help of jury instructions), and cases where experts have been allowed into the court. These chapters contain several examples from court cases, such as the example with Wade above, which I must admit makes for an entertaining read, but most importantly illustrate the points being made. It is not surprising that the cases where experts have been utilized, such as in *Tennessee State v. Copeland*, 2007, show a more optimistic outlook, although an example of a case where the expert did not offer all that much help, is also given. They end with a chapter on how to make expert testimony most effective.

Hagen and Yang suggest that experts can help jurors understand the facts of the case, by engaging the attention of the jury, and connecting specific facts of the case to "factors identified as illuminating those facts".

“The principal challenge in producing effective expert testimony lies in the expert’s need for thorough knowledge of the facts of the case so she can produce, on targeted questioning, the research – wedded to case facts – most relevant to the jurors’ ability to construct a coherent narrative and evaluate the reliability of each aspect of a witnesses’ testimony.” (Hagen and Yang, 2019, p.199).

This book is a treasure trove of concrete examples from court cases where the issue of eyewitness identification is at the heart of the case. In addition to illustrating how psychological science is actually useful in serving justice, it also highlights the interplay between psychological science and the societal structures that make up the legal system. It reminds us, as psychologists, to take a step back, so that we may see how our own quest for scientific truth is intertwined with the legal system’s quest for truth. Psychology has a long tradition of being hesitant to committing to its own facts, which is generally a good thing, considering the so-called “replication crisis” (Open Science Collaboration, 2015), but when it meets the legal system, certainty is suddenly demanded. However, truth is fragile in court, and Hagen and Yang remind us that it is ultimately the court that decides. As stated by the Texas court in *Bladsdell v. Texas* in 2012: “No expert could testify with significantly greater certainty that an eyewitness’s perception was in fact impaired by the threatening presence of a gun, but it is no less valuable to educate a jury of the realistic potential, if that has been empirically shown to exist.” (as cited in Hagen and Yang, p. 159.).

The courts are going through changes that may still take some time to show its full effect. Looking at federal circuits, Hagen and Yang are a bit pessimistic, as several courts are “back where they were thirty years ago, holding that under Rules 403 and 702, the admission of an expert would not help the jury understand the case.” (p. 180). Only about half of the circuits recognize the usefulness of expert testimony on eyewitness reliability. More optimism is to be found when looking to the state courts, where more and more courts are

explicitly or implicitly recognizing the use of expert testimonies to prevent the violation of the defendant's right to a due process case. Yet, there is still reason for concern that judges may refrain from allowing eye witness experts, out of fear that they may bias the case, cost too much time and money, and because they wrongfully believe that lay people's conceptions of how perception, attention and memory work are adequate.

On the other hand, there has been a tremendous increase in the interest in eyewitness psychology among the general public. True crime series like "Making a murderer", and popularized books like Julia Shaw's "The memory illusion" (Shaw, 2017), and admittedly also mine and my sister's book (Østby & Østby, 2018), may have raised awareness of the malleability and unreliability of eyewitness testimonies. Perhaps the attention of prospective jurors to the possible unreliability of eyewitness identifications and testimonies is improving?

The downside is that the pendulum may swing too much the other way. That fear was indeed expressed by Wixted, Mickes and Fisher in a review article from 2018, where they argue that eyewitness testimonies have been wrongfully convicted, so to speak, by the scientific community as well as by members of the public, of being inherently unreliable. Eyewitness identifications are most likely to be accurate, as long as they are not contaminated, they argue (Wixted, Mickes, & Fisher, 2018). For instance, the low correlation between accuracy and confidence may be remediated by ensuring optimal lineup procedures, and recording the initial confidence judgement of the witnesses, as their own research, as well as their review of several other datasets (Wixted & Wells, 2017), have revealed a high correspondence between initial confidence ratings and recognition accuracy. They also state that eyewitness recall, as given in police interviews, is likely to be highly reliable as long as certain criteria are met (e.g. no evidence of contamination, the witness is guided by his/her metacognitive monitoring, etc.). "These considerations indicate how the message from experimental psychology – namely, that eyewitness memory is inherently unreliable and that

eyewitness confidence should be disregarded – is incomplete, to say the least.” (Wixted et al., 2018, p. 333)

Perhaps a bad reputation for eyewitness testimonies abounds in parts of the general public who have listened to too many podcasts – we don’t know. When considering the possibility that all your memories may be distorted to some degree, it is sometimes tempting to stop believing in anything. That may be an equally dangerous bias for jurors to have. Wixted, Mickes and Fisher’s (2018) criticism points to an important issue: that eyewitness psychology may equally contribute to the reliability of eyewitness evidence, by supplying information on how to optimize conditions for eyewitness identifications (although, as Loftus and Greenspan caution: It may never be possible to provide “pristine conditions”; “There will be all sorts of shades of gray.” (Loftus & Greenspan, 2017)). However, even though the point that eyewitness testimonies may be reliable enough for use in court is valid, the critique may be missing its target, since eyewitness psychologists historically have assisted the legal system in optimizing identification procedures, interview techniques and the like (National Research Council, 2014). For a striking example of how eyewitness psychologists have assisted with scientific methods in the preparations of a lineup, see Rachlew, Brøste, Melinder, and Magnussen (2020).

Although this particular discussion is not part of Hagen and Yang’s book, I must emphasize that they under no circumstances claim that eyewitness evidence should never be used in court. That eyewitness experts may serve to strengthen the court’s trust in an eyewitness identification, is a point that also was recognized by the state court of Utah (State v. Clopten, 2009), who, according to the book (p. 158) wrote:

“Importantly, expert testimony does not unfairly favor the defendant by making the jury skeptical of all eyewitnesses. In fact, when a witness sees the perpetrator under favorable

conditions, expert testimony actually makes jurors more likely to convict. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision”.

This simply underscores the need for eyewitness psychologists in court, to assist the jury in untangling the specific conditions that may lessen *or* strengthen the reliability of the eyewitness identification at hand. Wixted and colleagues may be right in claiming that confidence in some cases may be indicative of a reliable identification, but the court will still need help from experts to spot the difference between an optimal case and a suboptimal one.

Hagen and Yang’s book offers a hands-on, practical as well as theoretical account of how we should treat eyewitness identifications in court. They do not go into the topic of how the eyewitness expert may be of assistance to the court in cases where manipulative interviewing techniques, therapeutic interventions or group processes should be considered of having caused false memories in witnesses and victims. I know that this would be beyond the scope of this book, but it may still be interesting to read similar excerpts and analyses on this topic as well, perhaps in another book.

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REFERENCES

Hagen, M. A., & Yang, S. H. (2019). *How can so many be wrong? A due process case for an eyewitness expert*. Lanham: Lexington Books.

- Jackson, J., Hough, M., Bradford, B., Pooler, T., Hohl, K., & Kuha, J. (2011). *Trust in justice: Topline results from round 5 of the European Social Survey*. Retrieved from <http://www.europeansocialsurvey.org/>
- Loftus, E. F., & Greenspan, R. L. (2017). If I'm Certain, Is It True? Accuracy and Confidence in Eyewitness Memory. *Psychological Science in the Public Interest*, 18(1), 1-2. doi:10.1177/1529100617699241
- Magnussen, S., Melinder, A., Stridbeck, U., & Raja, A. Q. (2010). Beliefs About Factors Affecting the Reliability of Eyewitness Testimony: A Comparison of Judges, Jurors and the General Public. *Applied Cognitive Psychology*, 24(1), 122-133. doi:10.1002/acp.1550
- McAuliff, B. D., & Kovera, M. B. (2007). Estimating the effects of misleading information on witness accuracy: Can experts tell jurors something they don't already know? *Applied Cognitive Psychology*, 21(7), 849-870. doi:10.1002/acp.1301
- Misra, P., Marconi, A., Peterson, M., & Kreiman, G. (2018). Minimal memory for details in real life events. *Sci Rep*, 8(1), 16701. doi:10.1038/s41598-018-33792-2
- National Research Council (2014). *Identifying the Culprit: Assessing Eyewitness Identification*. Washington, DC: The National Academic Press.
- Open Science Collaboration (2015). PSYCHOLOGY. Estimating the reproducibility of psychological science. *Science (New York, N.Y.)*, 349(6251), aac4716-aac4716. doi:10.1126/science.aac4716
- Rachlew, A., Brøste, I. L., Melinder, A., & Magnussen, S. (2020). Recruiting Eyewitness Science in Criminal Investigations: The Pocket Man Case. *Journal of Forensic Psychology Research and Practice*. doi:10.1080/24732850.2020.1714407
- Saraiva, R. B., Hope, L., Horselenberg, R., Ost, J., Sauer, J. D., & van Koppen, P. J. (2020). Using metamemory measures and memory tests to estimate eyewitness free recall performance. *Memory*, 28(1), 94-106. doi:10.1080/09658211.2019.1688835
- Schacter, D. L. (1999). The seven sins of memory. Insights from psychology and cognitive neuroscience. *Am Psychol*, 54(3), 182-203. doi:10.1037//0003-066x.54.3.182
- Shaw, J. (2017). *The memory illusion. Remembering, forgetting, and the science of false memory*. London: Random House.
- Simons, D. J., & Chabris, C. F. (2011). What people believe about how memory works: A representative survey of the U.S. population. *PLoS ONE*, 6(8). doi:10.1371/journal.pone.0022757
- Strange, D., Dysart, J., & Loftus, E. F. (2014). Why errors in alibis are not necessarily evidence of guilt. *Zeitschrift fur Psychologie / Journal of Psychology*, 222(2), 82-89. doi:10.1027/2151-2604/a000169
- Text of President Clinton's Testimony. (1998). Retrieved from https://archive.nytimes.com/www.nytimes.com/specials/starr/testimony/clinton_7.html
- Transcript from United States District Court Southern District of California. (2016). Retrieved from <https://www.documentcloud.org/documents/2895623-Declaration-of-Jason-Forge-With-Exhibits.html>
- Wixted, J. T., Mickes, L., & Fisher, R. P. (2018). Rethinking the Reliability of Eyewitness Memory. *Perspect Psychol Sci*, 13(3), 324-335. doi:10.1177/1745691617734878
- Wixted, J. T., & Wells, G. L. (2017). The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis. *Psychol Sci Public Interest*, 18(1), 10-65. doi:10.1177/1529100616686966
- Østby, H., & Østby, Y. (2018). *Adventures in memory. The science and secrets of remembering and forgetting*. Vancouver: Greystone Books.