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Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies

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Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies

Keith A. Findley*

ABSTRACT

Learning about the flaws in the criminal justice system that have produced wrongful convictions has progressed at a dramatic pace since the first innocent individuals were exonerated by postconviction DNA testing in 1989. Application of that knowledge to improving the criminal justice system, however, has lagged far behind the growth in knowledge. Likewise, while considerable scholarship has been devoted to identifying the factors that produce wrongful convictions, very little scholarly attention has been devoted to the processes through which knowledge about causes is translated into reform.

Using eyewitness misidentification – one of the leading contributors to wrongful convictions and the most thoroughly and scientifically studied of those contributors – as the focus, this Article begins to fill that void by empirically analyzing a variety of approaches to eyewitness identification reform that have been attempted. This Article establishes a taxonomy of reform efforts that includes top-down, command-and-control legislation; entirely bottom-up, essentially laissez-faire approaches to identification practices; and a hybrid that builds on emerging notions of democratic experimentalism – a form of “new governance” – to foster bottom-up experimentation by imposing obligations on police while giving them the freedom to develop their own locally tailored responses to the problem of eyewitness error.

The bulk of the empirical analysis assesses the effects of the hybrid, experimentalist approaches to reform, as a contrast to command-and-control approaches. The analysis draws on previously collected national survey data as well as data from a few individual states, most prominently new data developed for this Article on the attempt to foster bottom-up eyewitness identification reform in Wisconsin. While more research is required before one can draw conclusions about which approach works best, the data suggest that the democratic experimentalist model shows promise for considerable, albeit

* Assistant Professor, University of Wisconsin Law School. J.D., Yale Law School, 1985. For helpful comments on this Article I am grateful to Rebecca Brown, Howie Erlanger, Todd Haugh, Andrew Kim, Kate Kruse, Kim Thomas, Vic Wahl, and participants at the University of Wisconsin Law School and Indiana University Mauer School of Law Junior Faculty Workshops, the 2015 AALS Clinical Conference Works-in-Progress Session, and the Sixth Annual CrimFest Conference (2015) at Cardozo Law School. For outstanding research assistance, I am indebted to Anita Boor, Laura Davis, Clara Graber, Amelia Maxfield, Alleia Pluymers, Catie White, and Matthew Wuest.

imperfect, implementation of social-science-based eyewitness identification reforms

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INTRODUCTION

DNA proved that Cody Davis was innocent of the West Palm Beach, Florida, robbery that landed him in prison.¹ What was remarkable about his case was not so much that DNA evidence proved his innocence – more than 300 individuals have been exonerated by DNA in recent years.² Nor was it that that he served many years in prison before exoneration – he did not; unlike most wrongly convicted individuals who spend years or decades in prison, the DNA exonerated Davis after just five months in prison. Nor was it unusual that the primary evidence used to convict him had been eyewitness identification testimony – eyewitness testimony is the most common evidentiary feature of wrongful convictions among those later exonerated by DNA.³ Rather, what was perhaps most noteworthy – aside from the fact that the DNA in his case was not tested before conviction – was that the eyewitness evidence was obtained in 2006 using traditional photo lineup methods, years after considerable social science research had shown that the procedures police used in his case were likely to create significant risks of misidentification. Despite abundant scientific research on better ways to conduct identification procedures and extensive research demonstrating the prevalence of eyewitness error in wrongful conviction cases, police were still using old, unreliable identification procedures.

Unfortunately, Davis's case is hardly alone; it is, to the contrary, representative of an alarming disconnect that has emerged between a growing body of knowledge about wrongful convictions and the steps that can be taken to reduce them, on the one hand, and efforts in the criminal justice system to implement those measures, on the other.

This Article marks a new turn in wrongful conviction scholarship by undertaking an analysis of the processes for translating learning into action to prevent wrongful convictions, particularly those based on eyewitness error. It is a first-of-its-kind empirical analysis of the efficacy of reform efforts that lie on a spectrum from top-down legislative directives to bottom-up approaches that rely, to various degrees, on local experimentation to reform police eyewitness identification practices.

Learning about the flaws in the criminal justice system that have produced wrongful convictions has progressed at a dramatic pace since 1989, when postconviction DNA testing exonerated the first innocent individuals.⁴

1. *Cody Davis*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/cody-davis> (last visited Feb. 21, 2016).

2. *Exonerating the Innocent*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/exonerating-the-innocent> (last visited Feb. 21, 2016).

3. *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited Feb. 21, 2016).

4. In 1989, Gary Dotson in Illinois and David Vasquez in Virginia became the first convicted individuals “to be exonerated by post-conviction DNA testing.” Keith

Research has focused primarily on specific recurring causes of wrongful convictions, including eyewitness identification errors,⁵ false confessions,⁶ flawed forensic sciences,⁷ false jailhouse informant testimony,⁸ prosecutorial and police misconduct,⁹ and a host of cognitive biases that can combine with these factors to lead the system to focus on the wrong person (i.e., tunnel vision).¹⁰ While the research has largely addressed these specific error points, it has also approached the problem from a systems perspective, viewing error not just as, or even primarily, the result of individual and isolated human errors, but as the product of systemic and institutional arrangements that permit or create conditions for error.¹¹ And while much remains to be learned even on these heavily studied matters, in many of these areas, the expansion of our knowledge has been nothing short of remarkable.

Application of that knowledge to improving the criminal justice system, however, has lagged far behind the growth in knowledge. For example, despite considerable research about the interrogation techniques that can induce

A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 3, 4 (Lucy Cooper ed., 2014).

5. See, e.g., Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 615–16 (2006) [hereinafter Wells, *Systemic Reforms*].

6. See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901–07 (2003).

7. See, e.g., NAT'L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009) [hereinafter *A PATH FORWARD*], <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

8. See, e.g., ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2011).

9. See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, *PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009* (2010), <http://digitalcommons.law.scu.edu/ncippubs/2>.

10. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

11. James M. Doyle, *NIJ's Sentinel Events Initiative: Looking Back to Look Forward*, NAT'L INST. JUST. (Nov. 2013), <http://nij.gov/journals/273/Pages/sentinel-events.aspx>; James M. Doyle, *The Paradigm Shift in Criminal Justice*, CRIME REP. (Mar. 4, 2014, 10:55 AM), <http://www.thecrimereport.org/viewpoints/2014-03-the-paradigm-shift-in-criminal-justice>. See James M. Doyle, *How the 'New Normal' Convicts the Innocent*, CRIME REP. (Feb. 4, 2015, 7:53 AM), <http://www.thecrime-report.org/news/articles/2015-02-how-the-new-normal-convicts-the-innocent>; Anthony W. Batts et al., *Perspectives in Policing: Policing and Wrongful Convictions*, NAT'L CRIM. JUST. REFERENCE SERV. 15 (Aug. 2014), <https://www.ncjrs.gov/pdffiles1/nij/246328.pdf> (“Implementing an organizational accident model allows police departments to review errors as systemwide weaknesses instead of single-cause mistakes.”); Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955, 955–56 (2014) (innocence “scholarship shows that errors of justice are not inevitable results of human fallibility but are produced by systems that are correctible”). For an example of a systems approach to studying police error in one case, see JOHN SHANE, *LEARNING FROM ERROR IN POLICING: A CASE STUDY IN ORGANIZATIONAL ACCIDENT THEORY* (2013).

false confessions, little has been done in the United States¹² to change the way police interrogate suspects, or the way courts approach admissibility of confession evidence.¹³ Moreover, although it is widely recognized that electronic recording of custodial interrogations is the single most important safeguard against false confessions, and that electronic recording is the future, most jurisdictions still do not require recording.¹⁴ Similarly, none of the National Academy of Sciences's ("NAS") recommendations from its groundbreaking 2009 report on forensic sciences have been adopted, although the recommendations are finally, slowly, beginning to receive serious consideration.¹⁵ Likewise, virtually nothing has been done in most jurisdictions to guard against false jailhouse informant testimony.¹⁶ And, in what is probably

12. Somewhat more has been done to reform police interrogation tactics in other places, notably the United Kingdom, where police use what they call the "investigative interview," rather than the accusatory interrogation that is typical in the United States. See, e.g., Brian L. Cutler et al., *Interrogations and False Confessions: A Psychological Perspective*, 18 CANADIAN CRIM. L. REV. 153, 167 (2014); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 415 (2013).

13. Sara C. Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCHOL., CRIME & L. 111, 113 (2013); Brian L. Cutler, Keith A. Findley & Danielle Loney, *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 597 (2014); Deborah Davis & Richard A. Leo, *To Walk in Their Shoes: The Problem of Missing, Misunderstood, and Misrepresented Context in Judging Criminal Confessions*, 46 NEW ENG. L. REV. 737, 751 (2012); Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Richard A. Leo & Kimberly D. Richman, *Mandate the Electronic Recording of Police Interrogations*, 6 CRIMINOLOGY & PUB. POL'Y 791, 791 (2007); Jennifer T. Perillo & Saul M. Kassir, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327 (2011).

14. See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1136 (2005).

15. A central recommendation of the NAS was that the federal government should create a National Institute for Forensic Sciences ("NIFS"). A PATH FORWARD, *supra* note 7. While Congress has balked at creating a new, independent federal agency, the Department of Justice and the National Institute of Standards and Technology have collaborated to create a National Commission on Forensic Sciences. See Nat'l Comm'n on Forensic Scis., *General Information, National Commission on Forensic Science*, U.S. DEP'T JUST., <http://www.justice.gov/ncfs> (last visited Feb. 22, 2016). That Commission is beginning to address many of the recommendations in the NAS Report. See Nat'l Comm'n on Forensic Scis., *Work Products*, DEP'T JUST., <http://www.justice.gov/ncfs/work-products> (last visited Feb. 22, 2016).

16. The exceptions are few and limited. Most notable is Los Angeles, which was rocked in 1989 after notorious jailhouse snitch Leslie Vernon White demonstrated on national television how easy it was for snitches to obtain and present convincing false evidence in return for leniency in their own cases. See, e.g., CAL. COMMISSION ON FAIR ADMIN. JUST., REPORT AND RECOMMENDATIONS REGARDING INFORMANT TESTIMONY 2 (Sept. 29, 2006), <http://www.ccfaj.org/documents/reports/jailhouse/>

the most rigorously and scientifically studied of all of these areas – eyewitness identifications – reform has been spotty at best, despite abundant and solid scientific research that has largely settled on a host of “best practices” that can minimize the risk of eyewitness error.¹⁷

This Article examines the problems with translating learning into reform, and thereby embarks on a new line of inquiry in wrongful convictions scholarship. The Article examines efforts at implementing the lessons from the wrongful convictions, focusing in particular on the example of eyewitness identification reforms. The Article focuses on eyewitness misidentification, both because misidentification is such a common feature of wrongful convictions, and because, as we shall see, the scientifically based “best practices” for minimizing eyewitness error are so widely recognized. Eyewitness identification, therefore, can be seen as a best-case scenario for reform. By undertaking this inquiry into eyewitness identification reform efforts, this Article joins a new wave of scholarship that moves beyond a focus “on the substantive content of policies (e.g., the ‘causes and cures’ paradigm) . . . [to] the *process* by which public policy actually advances.”¹⁸

In some respects, the slow pace of reform ought not be surprising. The legal system is notoriously resistant to change, even when the premises upon which it rests shift.¹⁹ Slow, uneven reform is also to be expected given that

official/official%20report.pdf. Following a Grand Jury inquiry, the District Attorney’s Office adopted policy guidelines strictly controlling the use of jailhouse informants. *See id.* at 3 (citing REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY (1990)). Thereafter, in 2006, the California Commission on the Fair Administration of Justice issued a report recommending that all prosecutors in the state adopt similar policies and that the legislature enact a statutory requirement of corroboration of in-custody informant testimony. *Id.* at 4–9. The legislature adopted a corroboration requirement in 2011. CAL. PEN. CODE § 1111.5 (West 2016).

17. *See* Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. BALT. L. REV. 535, 537, 539 (2013). Some questions about the accuracy of various eyewitness identification practices remain, however, and at least one scholar has argued that slow reform in this arena has helped to avoid requiring practices that may not be the most accurate. *See* Steven E. Clark, *Eyewitness Identification: California Reform Redux*, 7 POL’Y MATTERS 5 (2015), <http://policymatters.ucr.edu/wp-content/uploads/2015/12/pm-vol7-1-eyewitness-reform.pdf>.

18. Zalman & Carrano, *supra* note 11, at 965 (emphasis added). *See* Marvin Zalman & Nancy E. Marion, *The Public Policy Process and Innocence Reform*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 24 (Marvin Zalman & Julia Carrano eds., 2014).

19. *See* DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF INJUSTICE* (2014). Focusing on so-called “Shaken Baby Syndrome” prosecutions, for example, Deborah Tuerkheimer has recently written extensively about the slow and uneven way that science-dependent prosecutions have adapted to new understandings about the science they rely upon, leading to periods of entropy and an irrational distribution of justice. *Id.*; Deborah Tuerkheimer,

the criminal justice system is notably diffuse and fragmented and, hence, difficult to move as an entity. Others have long noted that to speak of a criminal justice “system” is itself misleading, given that the “system” is made up of countless, largely independent, institutions and actors – including police,²⁰ prosecutors, defense attorneys, probation and parole officers, courts, and legislatures. Moreover, the criminal justice “system” is marked by geographical and jurisdictional dispersion; it is composed of both federal and separate state institutional structures, along with innumerable federal, state, and local courts and thousands of local, largely independent, police agencies. Among other things, this diffusion means that adaptation to new knowledge can be slow and erratic.

To be sure, progress on reform has been made – even dramatic progress for a system not known for its agility in reshaping itself. Indeed, innocence-based understandings and policy initiatives have advanced at a significant enough pace that they have become part of what some have labeled the “innocence revolution.”²¹ But, as key observers of the innocence movement have acknowledged, the momentousness of these developments “should be balanced by evidence that reform is limited, partial, and spotty.”²²

While perhaps not surprising, the general unresponsiveness (or at least slowness) of the criminal justice system to lessons learned from the study of system error is nonetheless troubling. For a system that prides itself on its commitment to truth and fairness, failure to incorporate new knowledge that can both minimize the risks of convicting the innocent and enhance the ability to convict the guilty is deeply problematic.²³ The current sluggishness

Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome, 62 ALA. L. REV. 513 (2011); Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 7 (2009).

20. In almost every American jurisdiction, police are independent of any statewide or national governing structure. Accordingly, in the United States today there are more than 18,000 autonomous law enforcement agencies, each enjoying the prerogative to establish its own practices and procedures. See POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 12 (Mar. 8, 2013), http://www.policeforum.org/assets/docs/Free_Online_Documents/Eyewitness_Identification/a%20national%20survey%20of%20eyewitness%20identification%20procedures%20in%20law%20enforcement%20agencies%202013.pdf.

21. Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004); Findley, *supra* note 4, at 3.

22. Zalman & Carrano, *supra* note 11, at 963.

23. Along with others, I have previously argued that many of the innocence-based reforms come at no or little concomitant loss of conviction of the guilty, but rather, by enhancing the reliability of the system’s truth-seeking functions, can simultaneously protect the innocent and help convict the guilty. See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 167 (2008). That view is not free of all controversy, however. See Steven E. Clark, *Costs and Benefits of*

demands inquiry into what approaches (if any) can be and have been effective at translating the growing body of knowledge about wrongful convictions into criminal justice system reforms.

This Article examines these questions in several dimensions. First, in Part I, the Article provides a brief overview of the lessons learned about eyewitness error and its role in producing miscarriages of justice – both the conviction of the innocent and its mirror, the failure to convict the guilty. Most importantly, this Part identifies the various “best practices” for conducting identification procedures that have been recognized by the social psychological research and almost universally accepted by scholars and leading law enforcement organizations that have studied the research.

In Part II, the Article then briefly canvasses the current state of practice around the country. It identifies those jurisdictions where progress has been made implementing these “best practices” and those where reform has been slower, or virtually non-existent.

Part III continues the survey of the current landscape by assessing judicial doctrine and the role it plays in guiding eyewitness identification practice.

In Part IV, the Article considers the various approaches to reform that have been attempted in these assorted jurisdictions, and it compares the relative effectiveness of these approaches in these jurisdictions. It identifies several different approaches attempted variously by legislatures, courts, and law enforcement agencies themselves. First, some states employ “command and control” or “top down” directives. Top-down approaches typically involve legislation or judicial decisions demanding compliance with best practices and defining for police the content of those best practices. Second, some states have eschewed such direct control of police practices and have instead sought incremental reform premised on police buy-in and initiative. In these states, reform efforts have focused on training and persuasion, hoping to get individual law enforcement agencies to adopt the best practices by choice. Third, some states, to varying degrees, have attempted a middle path, which can be seen to some degree as modeling emerging theories of “new governance” and, in particular, “democratic experimentalism.”²⁴ In these jurisdictions, reform is not top down, but bottom up. But it is also not entirely laissez-faire, leaving police to reform or not at their unguided discretion. In-

Eyewitness Identification Reform: Psychological Science and Public Policy, 7 PERSP. ON PSYCHOL. SCI. 238 (2012) [hereinafter Clark, *Costs and Benefits of Eyewitness Identification Reform*]. The Clarkian critique, in turn, is itself subject to criticism. See Eryn J. Newman & Elizabeth F. Loftus, *Clarkian Logic on Trial*, 7 PERSP. ON PSYCHOL. SCI. 260 (2012); Gary L. Wells et al., *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 PERSP. ON PSYCHOL. SCI. 264 (2012).

24. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 648 (2006); see also Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 376 (2010).

stead, it imposes on police at the local level a responsibility to develop policies and procedures designed to minimize eyewitness error. Under this model, in its ideal form, those efforts at provisional and localized problem solving are then embedded within larger frameworks designed to encourage learning, compliance, and improvement.²⁵

The thickest analysis in this Article, in Part V, examines the data on the reform efforts, particularly the democratic experimentalist approach. It draws upon national data, existing data from a few specific states, and new empirical data I have collected to examine an attempt to foster bottom-up reform in Wisconsin, based in part on principles of democratic experimentalism. Part V describes the Wisconsin reform effort and its fit with experimentalist theory and compares the Wisconsin data I have collected with similar existing data from a few other jurisdictions, most notably Virginia, that have attempted similar or alternative reform models. The Article concludes that the democratic experimentalist model has achieved significant but incomplete success, and it highlights additional measures that need to be pursued to improve police responsiveness.

At the outset, it is important to note that the analysis in this Article is limited in scope in several ways. First, while it considers alternative approaches to effecting eyewitness identification reform, it analyzes the data *in depth* only with regard to one approach – the approach that loosely, but imperfectly, fits the democratic experimentalist paradigm – and in greatest depth in one jurisdiction – Wisconsin. A fuller assessment of the effectiveness of alternative reform models depends on additional research that thoroughly analyzes alternative approaches undertaken in other jurisdictions and under different circumstances. Second, this analysis examines only the response *on paper* to the demand for reform by examining the written policies and procedures adopted by law enforcement agencies. While current anecdotal evidence suggests that officers in the field in Wisconsin are indeed changing the way they conduct identification procedures in line with their written policies, it is not safe to assume that because police have reformed their practices on paper – the law on the books – they have fully changed them in practice – the law on the streets. Follow-up research is required, and planned, to assess the extent to which reform is permeating the rank-and-file work of investigators.

Finally, at the risk of stating the obvious, it should be noted explicitly that this analysis addresses reform of only one segment of the criminal justice system – the police – and the manner in which they conduct eyewitness identification procedures in particular. That narrow focus is not to suggest either that the lessons from wrongful convictions point only to the need for improving police practices, or that the model analyzed here might achieve similar levels of effectiveness or ineffectiveness with other types of problems or other segments of the system. The lessons from wrongful convictions do not just teach about the need for better police practices, but indeed about the need for improved practices throughout the system. Among other things, these other

25. Kruse, *supra* note 24, at 648.

lessons include the need for reform in the way the system produces and uses evidence beyond eyewitness testimony, including forensic science evidence, confessions, informant testimony – indeed, virtually all types of evidence. The lessons extend as well to the need for reform in the way that prosecutors and defense attorneys are funded and do their work, the rules that govern access to and admissibility of evidence and the proceedings at trial, and the procedures and standards for reviewing appeals and post-conviction claims of innocence.

But because eyewitness error is such a prominent feature of known wrongful convictions, and because the “best practices” for reducing misidentifications are, uniquely among the “causes” of wrongful convictions, thoroughly researched and in their general contours almost universally accepted, this problem is a good one with which to begin the discussion about how to move from learning about error to actually changing the system to minimize error.

I. THE SOCIAL-SCIENCE-BASED “BEST PRACTICES” FOR EYEWITNESS IDENTIFICATION

For more than a century, psychologists have studied human perception and memory and the ways they affect reliability of eyewitness identifications.²⁶ While that research lay fallow for decades,²⁷ the study of eyewitness identifications escalated dramatically in the 1970s and has proceeded at a rapid pace ever since.²⁸ While the legal system, for its part, has occasionally noted the data on the fallibility of eyewitness identification,²⁹ until recently courts have largely ignored the lessons from the psychological research.³⁰

26. See JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* xi (2005). Professor Hugo Munsterberg, the German-born chair of Harvard’s psychology laboratory, conducted groundbreaking psychological research on eyewitness error in the early days of the twentieth century. *Id.* at 9.

27. For an engaging and informative telling of the largely unsuccessful efforts of Professor Munsterberg to get the legal academy to take note of the psychological science, see *id.* at 9–34.

28. *Id.* at 98.

29. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967).

30. See Gary L. Wells et al., *Why Do Motions to Suppress Suggestive Eyewitness Identifications Fail?*, in *CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* 168 (Brian L. Cutler, ed., 2012) [hereinafter Wells et al., *Why Do Motions to Suppress Suggestive Eyewitness Identifications Fail?*]. Indeed, as numerous scholars have now noted, the well-known due process test adopted by the Supreme Court in *Manson v. Brathwaite* and *Neil v. Biggers* directs courts to assess reliability of confession evidence based upon factors that the empirical research shows are not correlated with accuracy. See *id.* at 167–84 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972)); Findley, *supra* note 4.

With the introduction of DNA evidence and its ability to determine guilt and innocence with near certainty – and hence, to prove the inaccuracy of some eyewitness identifications – the scope and magnitude of the problem of eyewitness error for the first time became unavoidably glaring. Quickly, researchers began to realize that eyewitness error was a leading contributor to the emerging phenomenon of wrongful convictions. Study after study suggested that, in upwards of seventy-five percent of the cases in which DNA had proved that a convicted individual was actually innocent, eyewitness error was a contributing factor in the wrongful conviction.³¹ Although reform remained slow, the legal system began to take notice.

The aftermath of this extensive research has resulted in development of a set of practices almost universally agreed upon in its broad outline as a set of “best practices” for minimizing the risks of contaminating eyewitness identification evidence. A “white paper” commissioned by the American Psychology and Law Society in 1998 was among the first official publications to note the growing consensus among researchers about a set of best practices.³² A year later, in 1999, the National Institute of Justice (“NIJ”) of the U.S. Department of Justice compiled the most up-to-date research and published a similar set of findings and recommendations in an official guide for law enforcement (the “NIJ guidelines”).³³ The American Bar Association followed a few years later with a published statement of best practices that incorporated similar findings and recommendations.³⁴ In the states, commission after commission created to examine the problem of eyewitness error in

31. See *Eyewitness Misidentification*, *supra* note 3; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 122–25 (2008) [hereinafter Garrett, *Judging Innocence*]; BUREAU OF TRAINING & STANDARDS FOR CRIMINAL JUSTICE, WIS. DEP’T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005) [hereinafter WIS. DOJ MODEL POLICY], <https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf>. Subsequent data collected by Sam Gross and his colleagues, which they maintain through the National Registry of Exonerations, suggests that, when one moves beyond the DNA exonerations to look at all exonerations, regardless of the nature of the evidence used to exonerate, eyewitness error remains a significant, but not quite so prevalent, contributor to the problem. Alexandra E. Gross, *Witness Recantation Study: Preliminary Findings*, U. MICH. L. SCH. (Samuel R. Gross ed., May 2013), http://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf.

32. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998).

33. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter EYEWITNESS EVIDENCE], www.ncjrs.gov/pdffiles1/nij/178240.pdf.

34. *American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*, A.B.A. (2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am04111c.authcheckdam.doc.

the aftermath of wrongful convictions recognized essentially the same list of reforms.³⁵ Several state attorneys general issued guidelines incorporating the research-based recommendations.³⁶ In 2010, the International Association of Chiefs of Police issued a model policy for eyewitness identifications embracing the reforms.³⁷ And, most recently, the NAS issued a report whose purpose was to settle the science of eyewitness identification, similarly agreeing upon many of these reforms.³⁸ As the NAS concluded, “A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures.”³⁹

While the reports and policies vary in their scope and specificity, the essence of their recommendations is generally consistent. My purpose in setting forth the basic recommendations below is not to fully discuss or analyze all of the reforms, or to suggest that all have been equally embraced by each of the organizations or reports referenced above (indeed, a few of the reform recommendations have undergone some scientific revision or controversy in recent years, and my purpose here is not to assess their individual scientific strengths). Rather, my objective is just to outline a set of recommended “best practices” – those that have typically been adopted by legislatures or governmental policy-makers – in order to provide a baseline for assessing the effectiveness of reform efforts at implementing those practices.

A. Only One Suspect Per Procedure

First, the research suggests that, in every case, no matter how many suspects there might be, each lineup procedure (whether live or photographic) should contain only one suspect.⁴⁰ A lineup is a test of an eyewitness’s abil-

35. See, e.g., N.C. ACTUAL INNOCENCE COMM’N, N.C. OFFICE OF INDIGENT DEF. SERVICES: RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION, <http://www.ncids.org/New%20Legal%20Resources/Eyewitness%20ID.pdf> (last visited Mar. 2, 2016); CAL. COMM’N ON FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS REGARDING EYE WITNESS IDENTIFICATION PROCEDURES (Apr. 13, 2006), <http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>.

36. See, e.g., OFFICE OF THE ATT’Y GEN., N.J. DEP’T OF LAW & PUB. SAFETY, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (Apr. 18, 2001) [hereinafter N.J. ATT’Y GEN. GUIDELINES], <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>; WIS. DOJ MODEL POLICY, *supra* note 31, at 7–12.

37. INT’L ASS’N OF CHIEFS OF POLICE, EYEWITNESS IDENTIFICATION MODEL POLICY (2010), <http://dpa.ky.gov/NR/rdonlyres/BE390C82-E7DD-4A1E-8A3A-4702C5110CD1/0/InternationalAssocofChiefsOfPolice.pdf>.

38. NAT’L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014) [hereinafter IDENTIFYING THE CULPRIT] http://www.innocenceproject.org/causes-wrongful-conviction/copy_of_IdentifyingtheCulpritAssessingEyewitnessIdentificationNAS10.02.2014.pdf.

39. *Id.* at 104.

40. Wells, *Systemic Reforms*, *supra* note 5, at 623; Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 PSYCHOL.

ity to accurately use recognition memory, not guesswork, to select a suspect.⁴¹ A lineup with more than one suspect (or worse, a lineup consisting entirely of suspects, like the now infamous Duke lacrosse team photo lineup) means the witness is given a multiple-choice test with more than one right answer (or even no wrong answers, as in the Duke case).⁴² Such a test is obviously less probative (or barely probative at all) than a test with only one suspect.⁴³ There is no real disagreement about this recommendation.

B. Proper Selection of “Fillers”

Second, in any lineup, the suspect should not stand out.⁴⁴ Generally, this means the perpetrator or his photograph should not exhibit any unique features that draw attention to him, and that both the innocent fillers and the suspect should generally fit the description of the perpetrator.⁴⁵ Among researchers and policy makers, there is again no disagreement about the need to avoid suggestiveness in filler selection,⁴⁶ although some newly adopted poli-

BULL. 320, 320–21, 328 (1986) (explaining research demonstrating that having more than one suspect in a lineup dramatically increases the chances of a mistaken identification).

41. Wells, *Systemic Reforms*, *supra* note 5, at 618–19.

42. See STUART TAYLOR, JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 38–39 (2007); Wells, *Systemic Reforms*, *supra* note 5, at 623. In the Duke lacrosse case, the complainant alleged she had been raped by several members of the lacrosse team. TAYLOR & JOHNSON, *supra*. Police presented the complainant with a photo of the entire lacrosse team and asked her to pick out the assailants. *Id.* at 38. Because everyone in the photo was equally likely to be a suspect, there was no way to assess whether she was making an error by picking someone who could not have been one of the perpetrators.

43. See Wells, *Systemic Reforms*, *supra* note 5, at 623.

44. *Id.* at 624; see also Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395, 422 (2005) (noting that innocent suspect identification would be significantly reduced if the innocent suspect does not stand out); R.C.L. Lindsay & Gary L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 LAW & HUM. BEHAV. 303, 313 (1980) (noting that courts can have more confidence in identifications from high-similarity lineups).

45. Wells, *Systemic Reforms*, *supra* note 5, at 624. There are exceptions to this principle, however, when the suspect himself does not fit the description of the perpetrator; in that case, the fillers should all deviate from the description of the perpetrator in the same way as the suspect so that the suspect does not stand out. *Id.*

46. One researcher has raised concerns about this recommendation, but even he does not disagree with the proposition that suggestiveness of this sort should generally be avoided. See Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 243. Steven Clark argues, instead, merely that the data suggests that avoiding suggestiveness in the composition of lineups and photo arrays may diminish the number of suspect “hits.” *Id.* Others have responded by noting that a reduction in the number of “hits” is to be expected – and desired – from a non-suggestive lineup or

cies continue to fail to embrace the “match-to-description” recommendation.⁴⁷

C. Unbiased Witness Instructions

Third, prior to showing the witness the lineup, the law enforcement officer should instruct the witness that the perpetrator may or may not be present in the lineup, that the detective does not know who the suspect is, that it is as important to clear the innocent as identify the guilty, and that if the witness identifies no one the investigation will continue.⁴⁸ Research shows that this instruction lowers rates of mistaken identifications in offender-absent lineups but has little effect on reducing identifications when the offender is present in the lineup.⁴⁹ Without this instruction, witnesses naturally surmise that police have caught the perpetrator and their task is to pick him out.⁵⁰ They therefore work hard to pick someone in the lineup, even if the real perpetrator is not present.⁵¹ This instruction is thus like a multiple choice test that includes a final option of “none of the above”; without that option, test-takers feel compelled to pick one of the answers presented, but with the instruction they are given license to say nothing fits.⁵² Again, the consensus on this recommendation is clear.⁵³

array, because the very purpose of designing the procedure so the suspect does not stand out is to prevent police from signaling to the witness which individual or photo to select. See Newman & Loftus, *supra* note 23, at 262; Wells et al., *supra* note 23, at 267. Clark, himself, does not necessarily disagree with that proposition, or is at most agnostic about it. See Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23.

47. The recent policy issued by New York State’s Municipal Police Training Council, for example, which was developed by a “Best Practices Committee” in collaboration with the District Attorneys Association of New York, recommends a filler selection process whereby no one member stands out. N.Y. STATE MUN. POLICE TRAINING COUNCIL, IDENTIFICATION PROCEDURES: PHOTO ARRAYS AND LINE-UPS MODEL POLICY 2 (Mar. 2015), <http://pceinc.org/wp-content/uploads/2015/06/Eyewitness-Identification-Model-Photo-Array-and-Lineup-ID-Procedures.pdf>.

48. Wells, *Systemic Reforms*, *supra* note 5, at 625.

49. Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 486–87 (1997).

50. *See id.*

51. *Id.* at 489.

52. *See id.*

53. Clark has cautioned that giving such “unbiased” witness instructions (his term) do, as one would expect, also have some small impact on reducing the number of correct identifications. See Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 243. The effect is expected because it should operate to reduce the rate at which witnesses will think they must pick someone or do not really have a memory of who it was and will by luck pick the perpetrator. *See id.* at 250. At

D. Double-Blind Administration

Fourth, one of the most important reforms, which a limited but growing number of jurisdictions are now employing, requires that identification procedures always use a double-blind testing protocol.⁵⁴ Although the 1999 NIJ Guide took no position on it, researchers almost universally agree that double-blind testing is the most fundamental of all of the reforms, and the recent report of NAS identified it as one of the core reforms that is scientifically valid and settled.⁵⁵ Essential to any type of objective testing, double-blind testing (often referred to in the eyewitness context as simply “blind” procedures) refers to the practice in which neither the subject of the test (here, the eyewitness) nor the test administrator (here, the police investigator) knows the “answer” (here, which person is the suspect).⁵⁶ The purpose is to prevent the tester from *unintentionally* influencing either the outcome of the procedure or the certainty of the eyewitness.⁵⁷ This recommendation is not based upon any doubts about police integrity; rather, it is based on the well-accepted understanding that people are influenced by their own beliefs, and that they can unknowingly leak information, which can influence the subject’s responses on the tests and the administrator’s interpretations of the results.⁵⁸ It is the same principle that demands that any scientific laboratory testing – such as testing of a new medication – be double blind, so that neither the patient nor the person dispensing the drug and evaluating the patient knows whether the patient received the real drug or a placebo.⁵⁹ While some

the same time, Clark does not argue against adopting this recommendation, but simply argues that policy-makers should be aware of this effect. *See id.* at 251.

54. Wells, *Systemic Reforms*, *supra* note 5, at 629; Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223, 236 (David Frank Ross et al. eds., 1994).

55. *See* IDENTIFYING THE CULPRIT, *supra* note 38, at 106–07.

56. Wells, *Systemic Reforms*, *supra* note 5, at 629.

57. *Id.* at 624, 630. The risk of influence in eyewitness identification procedures is real. *See* Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106–07 (2004); Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 941 (1999); Melissa B. Russano et al., “*Why Don’t You Take Another Look at Number Three?*”: *Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL. & ETHICS J. 355, 358–59 (2006); Gary L. Wells & Amy L. Bradfield, “*Good, You Identified the Suspect*”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED SCI. 360, 360 (1998).

58. Wells, *Systemic Reforms*, *supra* note 5, at 629.

59. *Id.*

cost may result from requiring a “blind” administrator, those costs can be minimized or virtually eliminated.⁶⁰

Significantly, researchers note, the blind procedure does not cost anything in terms of lost *valid* identifications of the guilty.⁶¹ Double-blind procedures lose no probative identification information at all; rather, they merely prevent lineup administrators from giving potentially suggestive cues that might lead eyewitnesses to pick out a suspect.⁶² Identifications in lineups that are not double blind may not be legitimate identification evidence⁶³ in the same sense that no one would accept the results of a lineup in which the police overtly told the witness that the suspect is number four and she should therefore pick number four.⁶⁴ Accordingly, this reform is almost universally viewed by researchers, including now the NAS, as among the most fundamental.⁶⁵

60. *Id.* at 632. Some smaller jurisdictions may find it difficult to find or assign an independent lineup administrator who knows nothing about the case. *See* WIS. DOJ MODEL POLICY, *supra* note 31, at 13. But that problem can be resolved. For example, when using photo arrays (which comprise the vast majority of identification procedures today), the administrator can be functionally blinded by having the witness look at the photos on a computer screen that is not visible to the administrator or by having the administrator put individual photographs in separate file folders that are shuffled before being presented to the witness so that the investigator does not know and cannot see which folder contains the suspect. *See id.* at 13.

61. Wells, *Systemic Reforms*, *supra* note 5, at 625.

62. *Id.* at 630; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 797 n.73 (2007).

63. *See* Risinger, *supra* note 62, at 798 n.74. Risinger argues that a blind testing protocol for eyewitness identification procedures (as well as for the forensic sciences) is one of the best examples of “cost-free proposals” for reform. *Id.* at 796–97.

64. *See* Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 250 (“One can imagine a correct conviction based in part on an identification procedure in which a police officer, convinced of the suspect’s guilt, simply tells the witness to circle and initial the suspect’s photograph in a photo lineup ‘or else.’”); Wells et al., *supra* note 23, at 265 (“If we say that all hits are legitimate, we would be asked to lament the lower hit rate that comes from not simply telling witnesses which lineup member they should pick.”).

65. Again, Clark cautions that, in laboratory studies, blind procedures cause some reduction in the rate at which witnesses make correct picks. Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 252. But as noted below, well-constructed field studies have subsequently challenged that conclusion. *See* note 78, *infra*, and accompanying text. And even Clark does not argue against double-blind procedures. Indeed, while noting what he perceives to be a trade-off in terms of lost identifications, he has written:

The principle behind blind lineup administration is intuitive, simple, and compelling: If one is concerned that police might deliberately or inadvertently leak their expectations regarding the lineup, a reasonable solution is to prevent the police from having expectations, a solution that would be achieved through

E. Prompt Recording of Confidence Statements

Fifth, police should take and record a verbatim confidence statement from the witness immediately after any identification.⁶⁶ Extensive research demonstrates that eyewitness confidence statements, at least those obtained at some interval after the identification itself, have little relation to accuracy, because eyewitness confidence is highly malleable and susceptible to taint from post-identification feedback.⁶⁷ Even fairly minimal confirmatory feedback can significantly inflate a witness's assessment of her own confidence.⁶⁸ To ensure that the eyewitness's expression of confidence in an identification is based solely on the eyewitness's independent recollection, not on any after-acquired information or feedback, police should record the witness's confidence statement before she has an opportunity to receive any feedback.⁶⁹ Among researchers, no disagreement has been raised with this recommendation, although in the policy setting, police and prosecutors often push back against proposals to require prompt recording of confidence statements.

F. Only One Procedure Per Suspect

Sixth, police should exhibit each suspect to any given witness only once.⁷⁰ Currently, police frequently utilize multiple identification procedures with a single suspect to confirm an initial identification, to ensure that the witness made an accurate pick, or to bolster the persuasiveness of the identi-

blind lineup administration. Simply put, one cannot leak what one does not know. The principle is good. Data would be better.

Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 282.

66. Wells, *Systemic Reforms*, *supra* note 5, at 631.

67. See Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 117 (2002); Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 342–43 (2004); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995); Wells, *Systemic Reforms*, *supra* note 5, at 620–21; Wells & Bradfield, *supra* note 57, at 372–73. More recently, some researchers have suggested that there is a significant correlation between confidence and accuracy, but only if the confidence statement is recorded promptly after the identification, before the witness has received confirming feedback. See, e.g., John T. Wixted et al., *Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, 70 AM. PSYCHOLOGIST 515 (2015). This latter research therefore continues to support the importance of this recommendation for prompt recording of confidence statements.

68. Wells, *Systemic Reforms*, *supra* note 5, at 620–21.

69. See Bradfield et al., *supra* note 67, at 119.

70. State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005).

fication.⁷¹ Police might, for example, first present the suspect to a witness in a showup (a one-on-one showup near the scene of the crime) and then follow that with a photo array, or they might initially display the suspect in a photo array and then follow up with a corporeal lineup.⁷² But research shows that multiple viewings of the same suspect are risky.⁷³ Each viewing of a suspect alters the memory of the witness and makes subsequent identification of that suspect more likely, not because the witness accurately remembers the person from the crime, but rather from the prior identification procedure.⁷⁴ Thus, police must understand that they should use the best, most reliable identification procedures the first time because they will only have one opportunity to conduct a valid identification procedure with each suspect and witness.⁷⁵

G. Sequential Presentation

Seventh, and somewhat more controversially, many reformers recommend presenting suspects and fillers to witnesses one at a time – sequentially – rather than simultaneously, as in the traditional photo array or corporeal lineup.⁷⁶ The theory behind this recommendation, which is supported by extensive laboratory research⁷⁷ and now also by field research,⁷⁸ but is chal-

71. See *id.* at 594–96.

72. See *id.* at 595–96.

73. See John C. Brigham & Donna L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. APPLIED SOC. PSYCHOL. 1394, 1394–95 (1988); Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 287–88 (2006); Gabriel W. Gorenstein & Phoebe C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. OF APPLIED PSYCHOL. 616, 620–21 (1980); Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 LAW & HUM. BEHAV. 185, 195–97 (2001).

74. See Brigham & Cairns, *supra* note 73, at 1394; Deffenbacher et al., *supra* note 73, at 288; Gorenstein & Ellsworth, *supra* note 73, at 620–21; Hinz & Pezdek, *supra* note 73, at 195–97.

75. See WIS. DOJ MODEL POLICY, *supra* note 31, at 6.

76. See R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 559 (1985); Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 460 (2001); Wells, *Systemic Reforms*, *supra* note 5, at 625–28.

77. See Lindsay & Wells, *supra* note 76, at 558; Steblay et al., *supra* note 76, at 459–60.

78. Gary L. Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, 39 LAW & HUM. BEHAV. 1 (2015) [hereinafter Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses*]; Amy Klobuchar et al., *Improving Eyewitness Identifica-*

lenged by some recent research,⁷⁹ is that eyewitnesses have a natural tendency to engage in what is known as the relative judgment process. When making selections, people naturally prefer to compare one item to the next, selecting the one that, when compared to the others, best fits their selection criteria.⁸⁰ In an eyewitness identification context, that selection method can be problematic if the true perpetrator is not included among the suspects and fillers in a lineup.⁸¹ The relative judgment process will lead the witness to compare all of the faces presented and pick the one that best matches her memory of the perpetrator.⁸² By definition, someone in every lineup will *best* match the perpetrator *when compared* to the others in the lineup. Hence, according to this theory, the relative judgment process tends to induce people to pick out that best match, even if the true perpetrator is not present and the best match is an innocent person.⁸³ Presenting images sequentially rather than simultaneously makes it more difficult for witnesses to engage in comparison shopping and pushes the witnesses instead to make absolute judgments based upon memory.⁸⁴

tions: *Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006).

79. E.g., Karen L. Amendola & John T. Wixted, *Comparing the Diagnostic Accuracy of Suspect Identifications Made by Actual Eyewitnesses From Simultaneous and Sequential Lineups in a Randomized Field Trial*, 11 J. EXPERIMENTAL CRIMINOLOGY 263 (2015); SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), <http://www.isp.state.il.us/docs/ILPilotonEyewitnessID.pdf>. These studies, in turn, are themselves subject to criticism and debate. See, e.g., Gary L. Wells et al., *The Flaw in Amendola and Wixted's Conclusion on Simultaneous Versus Sequential Lineups*, 11 J. EXPERIMENTAL CRIMINOLOGY 285 (2015) [hereinafter Wells et al., *The Flaw in Amendola and Wixted's Conclusion*] (arguing that Amendola and Wixted's conclusion was based on a sample of cases that was unrepresentative in a way that was heavily biased in favor of simultaneous lineups); Timothy P. O'Toole, *What's the Matter with Illinois? How an Opportunity Was Squandered To Conduct an Important Study on Eyewitness Identification Procedures*, 30 CHAMPION 18, 19–21 (2006) (contending that the Mecklenburg Report was so methodologically flawed as to be meaningless); Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008) (same); Steblay et al., *supra* note 76 (same); Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses*, *supra* note 78, at 12–13 (same). Some law enforcement agencies that adopted the double-blind sequential reform package also rejected the Mecklenburg Report as methodologically flawed. See BUREAU OF TRAINING & STANDARDS FOR CRIMINAL JUSTICE, WIS. DEP'T JUSTICE, RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES (July 21, 2006) [hereinafter RESPONSE TO CHICAGO REPORT], http://www.ripd.org/Documents/APPENDIX/3/Wisconsin_2.pdf.

80. Steblay et al., *supra* note 76, at 460.

81. Lindsay & Wells, *supra* note 76, at 558.

82. Steblay et al., *supra* note 76, at 460.

83. See Lindsay & Wells, *supra* note 76, at 558.

84. *Id.*

Laboratory research confirms that the sequential method produces fewer mistaken identifications.⁸⁵ Some evidence suggests, however, that the sequential method may also reduce the rate of accurate identifications.⁸⁶ A meta-analysis of the research suggests that, in laboratory studies, accurate identifications might be reduced from about fifty percent to about thirty-five percent.⁸⁷ But mistaken identifications of innocent suspects are reduced even more dramatically, from twenty-seven percent to nine percent.⁸⁸ Thus, the *ratio* of accurate to mistaken identifications – the “diagnosticity ratio” – is superior in the sequential method compared to the simultaneous procedure.⁸⁹ Although sequential procedures produce fewer picks overall, they improve the odds that any picks will be accurate.⁹⁰

A recent, well-constructed field study of 494 identification procedures in actual cases in four police jurisdictions provides support for the superiority

85. See Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281, 288 (1988); R.C.L. Lindsay et al., *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796, 800 (1991); Lindsay & Wells, *supra* note 76, at 562; R.C.L. Lindsay et al., *Sequential Lineup Presentation: Technique Matters*, 76 J. APPLIED PSYCHOL. 741, 744 (1991); Wells, *Systemic Reforms*, *supra* note 5, at 626.

86. See Steblay et al., *supra* note 76, at 468. Whether the laboratory studies accurately reflect what happens in the real world is debated. See, e.g., O’Toole, *supra* note 79, at 19–21; Schacter et al., *supra* note 79; Nancy Steblay, *Observations on the Illinois Lineup Data*, AUGSBURG C. (2006), <http://web.augsburg.edu/~steblay/observationsontheillinoisdata.pdf>; Gary L. Wells, *Comments on the Mecklenburg Report*, IOWA ST. U. (2006), https://public.psych.iastate.edu/glwells/Illinois_Project_Wells_comments.pdf (last visited Mar. 8, 2015). Most of this debate arises from a report on a field study in three Illinois police jurisdictions conducted primarily under the direction of the Chicago Police Department pursuant to a statutory mandate to compare double-blind sequential and non-blind simultaneous procedures. See MECKLENBURG, *supra* note 79, at 2–76. That report purports to indicate that the non-blind simultaneous procedure produced more suspect picks and fewer mistaken filler picks than the double-blind sequential procedure. See *id.* That study’s methodology was so flawed, however, and its results were so inconsistent, in some respects, with what is known from other laboratory and field studies, that most experts have concluded that it is essentially meaningless. See O’Toole, *supra* note 79, at 21; Schacter et al., *supra* note 79; Steblay et al., *supra* note 76, at 468; Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses*, *supra* note 78, at 12–13. Some law enforcement agencies that adopted the double-blind sequential reform package also rejected the Mecklenburg Report as methodologically flawed. See RESPONSE TO CHICAGO REPORT, *supra* note 79.

87. Steblay et al., *supra* note 76, at 463. Meta-analysis is a method of compiling and analyzing the data from multiple independent studies that purport to test the same phenomenon to obtain essentially aggregate data from those multiple studies. *Id.* at 460.

88. *Id.* at 463.

89. Wells, *Systemic Reforms*, *supra* note 5, at 626–27.

90. *Id.* at 627.

of the sequential procedure. That study found that, in real world settings as well as the laboratory, the sequential procedure improves the accuracy of witness picks.⁹¹ Importantly, the field study, unlike the laboratory studies, found no drop-off in suspect picks from using the sequential procedure. Thus, that field study suggests that the sequential procedure produces fewer errors, or known-innocent picks (eleven percent),⁹² than does the traditional simultaneous procedure (eighteen percent),⁹³ while both produce suspect picks of approximately twenty-five percent.⁹⁴ According to this analysis, therefore, the double-blind sequential procedure might indeed be a win-win proposition – producing fewer errors with no drop-off in suspect identifications.

The matter is not free from dispute, however. A reanalysis of a subset of the data from that field study by a separate team of researchers, utilizing a different analytical methodology, reached a contrary conclusion, suggesting superiority for the simultaneous procedure.⁹⁵ That conclusion in turn has been criticized by the original researchers who collected the field data.⁹⁶

Because the laboratory studies suggest that the sequential method might produce some drop-off in accurate identifications, and because some researchers now argue that the simultaneous procedure might be more accurate, the sequential procedure is not as universally recommended as the other reforms. The NIJ and the NAS, for example, in their 1999 and 2014 reports (both published prior to the field study reported above), respectively, noted the research on sequential procedures, but reserved making any recommendation one way or the other on them.⁹⁷ The 1999 NIJ guidelines observed that “scientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially—one at a time—rather than simultaneously.”⁹⁸ Concluding, however, that there was no consensus about the sequential procedure, the NIJ made no recommendation

91. Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses*, *supra* note 78. The research was funded in part by support from the Laura and John Arnold Foundation, the Open Society Foundations, the JEHT Foundation, and the National Institute of Justice. *Id.* at 1 n.1.

92. When considering only the witnesses who made an identification – that is, excluding those who did not pick anyone – the rate of selecting a filler was an alarming thirty-one percent. *Id.* at 8.

93. Again, when considering only the witness who made an identification, the rate of selecting a filler was an even more alarming forty-one percent. *Id.*

94. *Id.* at 1.

95. Amendola & Wixted, *supra* note 79.

96. See, e.g., Wells et al., *The Flaw in Amendola and Wixted’s Conclusion*, *supra* note 79 (arguing that Amendola and Wixted’s conclusion was based on a subset of the data that was unrepresentative in a way that was heavily biased in favor of simultaneous lineups).

97. EYEWITNESS EVIDENCE, *supra* note 33.

98. *Id.* at 9.

on the procedure. The 2014 NAS Report, for its part, concluded that, “in certain cases, the state of scientific research on eyewitness identification is unsettled. For example, the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved.”⁹⁹

Despite this lack of unanimity on the sequential procedure, I include it in the analysis in this Article because it has received a great deal of attention, and, more importantly, most jurisdictions that have adopted written policies or reform legislation have included it.¹⁰⁰ In particular, the Wisconsin Attorney General’s Office, which created a model policy and procedure that local jurisdictions throughout the state were encouraged to adopt, and which I analyze in detail in this Article, incorporated the sequential procedure.¹⁰¹ It is, therefore, part of the package of reforms adopted in Wisconsin, which I assess later in this Article.

H. Limit the Use of Showups

Eighth, although many police policy statements do not address the topic (focusing instead on photo arrays and live lineups), researchers agree that showups present special problems of suggestiveness, and that, accordingly, police should limit their use to only those circumstances in which they have no alternative.¹⁰² A showup is a procedure in which a single suspect is presented for identification within a short time after and in close proximity to the scene of the crime.¹⁰³ The rationale for using this inherently suggestive procedure is that police want to obtain an identification of the offender while the witness’s memory is fresh, or where, for logistical and legal reasons, they cannot construct a photo array or live lineup.¹⁰⁴ “Research indicates, however, that showups produce higher rates of mistaken identification than do simultaneous lineups or sequential lineups, even when the witness is tested soon

99. IDENTIFYING THE CULPRIT, *supra* note 38, at 104.

100. Jurisdictions that require or recommend sequential procedures include New Jersey, North Carolina, Ohio, and Wisconsin. N.J. ATT’Y GEN. GUIDELINES, *supra* note 36; N.C. GEN. STAT. ANN. § 15A-284.52 (West 2016); OHIO REV. CODE ANN. § 2933.83 (West 2016); WIS. DOJ MODEL POLICY, *supra* note 31, at 1. Numerous individual law enforcement agencies have also independently adopted the procedure, including police departments in Tucson, Arizona; Santa Clara, California; Monterey, California; Denver, Colorado; Palm Beach County, Florida; Norwood, Massachusetts; Baltimore, Maryland; Hyattsville, Maryland; Hennepin County, Minnesota; Ramsey County, Minnesota; Colstrip, Montana; Charlotte-Mecklenburg, North Carolina; North Charleston, South Carolina; Austin, Texas; and Virginia Beach, Virginia. Batts et al., *supra* note 11, at 9; POLICE EXEC. RESEARCH FORUM, *supra* note 20, at 9.

101. WIS. DOJ MODEL POLICY, *supra* note 31, at 1.

102. See Wells, *Systemic Reforms*, *supra* note 5, at 628.

103. See *id.*

104. See *id.*

after the witnessed event.”¹⁰⁵ For this reason, most courts generally view showups with disfavor, although they nonetheless tend to permit them.¹⁰⁶ Police tend to like showups, both because they are easy to conduct quickly, and because they can use them even where they lack probable cause to detain the person while they conduct a photo array or live lineup.¹⁰⁷ But the research shows that they indeed simultaneously increase the rate of misidentification and reduce the rate of accurate identification.¹⁰⁸ They appear to be a lose-lose proposition, except in those limited circumstances when police can conduct the procedure almost immediately after the crime, before there has been significant memory loss, *and* where, for logistical or legal reasons, it is

105. *Id.*; see also Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 244 (finding that, while other eyewitness identification reforms might cause some drop-off in correct identifications as well as a reduction in false identifications, lineups are superior to showups both in terms of reduced misidentifications and increased accurate identifications); Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1, 10 (1996) (discussing the risk of false positive identifications when showup procedures are used with children); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUMAN BEHAV. 391, 402 (1997) (discussing the increased danger of false identifications with showups); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUMAN BEHAV. 459, 475 (1996) (discussing the inferiority of showup procedures to successive lineups).

106. See, e.g., *Ford v. State*, 658 S.E.2d 428, 430 (Ga. Ct. App. 2008) (admitting showup identification despite acknowledging that “one-on-one showups have been sharply criticized” as being “inherently suggestive”); *State v. Wilson*, 827 A.2d 1143, 1147–48 (N.J. Super. Ct. App. Div. 2003) (acknowledging the suggestiveness of a showup, but concluding that it was nonetheless sufficiently reliable to be admissible); see also *United States v. McGrath*, 89 F. Supp. 2d 569, 571 (E.D. Pa. 2000) (concluding that identifications made during a showup were admissible); *State v. Santos*, 935 A.2d 212, 225 (Conn. App. Ct. 2007) (same). One state supreme court has held that under its state constitution, showups are so inherently suggestive, and hence unreliable, that showup identifications are not admissible unless police had no reasonable alternative. See *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005). The court elaborated that a showup will not be necessary whenever police have the time and ability to construct a proper, non-suggestive live or photo lineup. See *id.* at 595–96. Thus, in most cases showups will be impermissible unless police lack probable cause to detain the suspect for a proper lineup procedure and are faced with a choice of conducting a showup or releasing the suspect without any identification procedure at all.

107. See Clark, *Costs and Benefits of Eyewitness Identification Reform*, *supra* note 23, at 244.

108. Clark suggests that policy preferences for lineups over showups are supported by the research, because “lineups show lower false identification rates (.11) and slightly higher correct identification rates (.43) than showups (.18 and .41, respectively.” *Id.*

not possible to conduct a properly constructed photo array or lineup procedure.¹⁰⁹

In sum, the eyewitness identification reforms present what appears to be the best case for systemic reform – solid scientific footing, near universal acceptance, and something for everyone – better evidence for prosecutors and police and reduced risks to innocent suspects. Yet, as we shall see, reform has been neither swift nor even.

II. THE CURRENT STATE OF EYEWITNESS IDENTIFICATION POLICY REFORM

Despite general acceptance of most of these eyewitness identification “best practices,” they have not been adopted uniformly.¹¹⁰ In 2013, the Police Executive Research Forum (“PERF”) conducted a nationwide survey with support from the NIJ to assess the state of eyewitness identification practice. In summary, PERF found:

The results of this survey show that law enforcement agencies for the most part have not implemented the full range of the 1999 NIJ guidelines. Many agencies have adopted a few of the guidelines, but some guidelines have been adopted by less than half of the agencies. Many agencies do not have written eyewitness identification policies, do not provide training to lineup administrators, and do not provide all recommended instructions to witnesses.¹¹¹

More specifically, PERF found that the vast majority of law enforcement agencies have no written policies¹¹² on showups (76.9%), photo arrays (64.3%), live lineups (84%), composites (90.6%), or mugshot searches (92.1%), although larger agencies of 500 or more sworn officers, which presumably do a large proportion of all identification procedures, tend to be more likely to have them.¹¹³ Just over 40% of agencies reported using standardized written witness instructions for photo arrays, and 46% reported standardized written witness instructions for live lineups.¹¹⁴ Nearly 70% claimed they permit only one suspect per lineup.¹¹⁵ Significantly, however, most agencies do not require blind procedures – 69% percent permit non-blind

109. *Id.*

110. POLICE EXEC. RESEARCH FORUM, *supra* note 20, at 90.

111. *Id.* at xiv.

112. Scholars have long advocated the use of written policies to guide and improve police performance on a variety of policing tasks. *See, e.g.*, Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1126–27 (1967).

113. *Id.* POLICE EXEC. RESEARCH FORUM, *supra* note 20, at 79.

114. POLICE EXEC. RESEARCH FORUM, *supra* note 20, at ix.

115. *Id.* at x.

photo array procedures, and 92% permit non-blind live lineup procedures.¹¹⁶ Likewise, most agencies continue to use simultaneous rather than sequential procedures – 68% for photo arrays and 65% for live lineups.¹¹⁷ Together, “the majority of agencies use *non-blind simultaneous procedures*, which are considered the traditional approach to administering lineups.”¹¹⁸

As even these data suggest, however, this is not to say that no progress has been made. Some jurisdictions have incorporated many or all of the best practices.¹¹⁹ And interestingly, most of these best practices have been adopted since 2010, suggesting that they have been made in response to recent research-based reform efforts.¹²⁰ The point of this Article is to assess where the reforms have occurred and, more importantly, how they were achieved, in order to provide some insights about effective pathways for effecting change in police institutions to increase the reliability of the criminal justice system.

In most states, including prominent jurisdictions such as California and New York, no statewide mandate has materialized to address or consider any or all of these recommendations.¹²¹ Rather, in those states, reform, if it has occurred, has been ad hoc and local, department by department. Across the country there have been a few notable leaders in this respect, including police departments in Charlotte-Mecklenburg, North Carolina;¹²² Austin, Texas;¹²³ Hennepin County, Minnesota;¹²⁴ Ramsey County, Minnesota; Tucson, Arizona;¹²⁵ Suffolk County, Massachusetts;¹²⁶ Madison, Wisconsin;¹²⁷ Denver,

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at xi–ii.

120. *Id.*

121. In 2006, the California Commission on the Fair Administration of Justice, which was created by California State Senate Resolution No. 44, recommended a set of best practices based on the social science research and urged the legislature to require the Attorney General of California to convene a task force “to develop Guidelines for policies, procedures and training with respect to the collection and handling of eyewitness evidence in criminal investigations by all law enforcement agencies operating in the State of California.” CAL. COMM’N ON FAIR ADMIN. OF JUSTICE, *supra* note 35, at 5.

122. POLICE EXEC. RESEARCH FORUM, *supra* note 20, at 9.

123. *Id.* at 9, 94.

124. *Id.* at 9.

125. *Id.*

126. See SUFFOLK CTY. DIST. ATT’Y, MASS., THE REPORT OF THE TASK FORCE ON EYEWITNESS EVIDENCE, <http://www.suffolkdistrictattorney.com/the-report-of-the-task-force-on-eyewitness-evidence/> (last visited Feb. 22, 2016); Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91 MASS. L. REV. 52, 58 (2008).

127. Winn S. Collins, *Looks Can Be Deceiving: Safeguards for Eyewitness Identification*, 77 WIS. LAW., no. 3 (Mar. 2004), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=77&Issue=3&ArticleID=741>.

Colorado,¹²⁸ and Santa Clara County, California.¹²⁹ But those departments are noteworthy because they have distinguished themselves, not because they represent the norm.

Where reform has occurred on a broader basis, it has followed several distinct patterns, with varying degrees of success. The first state to adopt the reforms in a wide-scale manner was New Jersey.¹³⁰ That state, uniquely, has a vertically unified law enforcement system, in which the Attorney General has direct supervisory authority over all law enforcement agencies in the state.¹³¹ In 2001, then-Attorney General John Farmer directed all law enforcement agencies to adopt a package of “best practices” reforms, including double-blind sequential procedures “whenever practical” and “when possible.”¹³² No other state attorney general has similar authority to mandate these policies statewide.

Other states followed to varying degrees in other ways. As described in greater detail in the following section, several states, including Connecticut, Maryland, North Carolina, Ohio, Vermont and, most recently, Colorado, Georgia, and Illinois, have mandated some or all of the best practices by statutory directive.¹³³ Others have encouraged law enforcement to study the matter and produce their own policies and procedures designed to improve reliability. In states such as Nevada, Texas, Virginia, and Wisconsin, that has meant legislation requiring local law enforcement agencies to adopt policies and procedures of their own choosing to govern eyewitness identification procedures.¹³⁴

In other states, such as Rhode Island¹³⁵ and West Virginia,¹³⁶ legislatures have appointed task forces to recommend eyewitness identification re-

128. *Eyewitness Identification Reform*, INNOCENCE PROJECT (June 10, 2015, 4:57 PM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/eyewitness-identification-reform>.

129. CAL. COMM’N ON FAIR ADMIN. OF JUSTICE, *supra* note 35, at 3.

130. N.J. ATT’Y GEN. GUIDELINES, *supra* note 36.

131. *About the Division*, ST. N.J., <http://www.nj.gov/oag/dcj/aboutus.htm> (last visited Feb. 22, 2016).

132. N.J. ATT’Y GEN. GUIDELINES, *supra* note 36. In addition to mandating the new procedures, the New Jersey State Division of Criminal Justice worked with state and local agencies to train investigators. A survey in 2003 found that law enforcement agencies were largely, but imperfectly, complying: 84% estimated that they used sequential procedures “in every case,” and 62% reported that they used blind administrators “in every case.” POLICE EXEC. RESEARCH FORUM, *supra* note 20, at 24.

133. *See infra* notes 191–20 and accompanying text.

134. *See infra* notes 265–77 and accompanying text.

135. R.I. GEN. LAWS ANN. § 12-1-16 (West 2016).

136. In 2007, West Virginia passed the *Eyewitness Identification Act*, which created a task force to study and identify best practices for eyewitness identification. W. VA. CODE § 62-1E (West 2016). Part of this Act requires law enforcement agencies

forms. In Florida, a state Innocence Commission under the direction of the Florida Supreme Court issued standards recommending that each law enforcement agency file a written policy with the state that addresses the creation, composition, and use of lineups; the use of standardized witness instructions; steps to be taken to ensure that lineup administrators do not influence the witnesses (the standards stop short of requiring blind procedures); requirements for documenting the procedure; methods of presenting the lineup; and police training.¹³⁷ And in Massachusetts, the Supreme Judicial Court in 2011 convened a Study Group on Eyewitness Identification to “offer guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.”¹³⁸ As we shall see, these various approaches have produced varying degrees of success.

III. THE JUDICIAL LANDSCAPE

The traditional response to problems with the reliability of evidence has been to look to the courts to regulate the flow of such evidence. As an initial step in analyzing innocence-based reforms, it is important therefore to understand the legal landscape and the extent to which judicial oversight holds a promise for reform. Unfortunately, as with other types of innocence-based reform, judicial oversight of the production and use of eyewitness evidence has largely been a failure – with a few notable recent exceptions that might offer the promise of more effective judicial oversight.

A. Federal Constitutional Doctrine

Historically, the only oversight of police eyewitness identification practices above the local police agency level was general judicial oversight under the Constitution.¹³⁹ When the Supreme Court began to recognize the risks of eyewitness error in the 1960s, it first approached the problem in a classically

to follow specific procedures when conducting eyewitness identifications. *Id.* § 62-1E-3.

137. FLA. DEP’T OF LAW ENFORCEMENT, STANDARDS FOR FLORIDA STATE AND LOCAL LAW ENFORCEMENT AGENCIES IN DEALING WITH PHOTOGRAPHIC OR LIVE LINEUPS IN EYEWITNESS IDENTIFICATION (Mar. 1, 2011, rev. June 15, 2011), <http://www.fdle.state.fl.us/cms/Guidelines/Documents/Standards.aspx>.

138. SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 1 (July 25, 2013), <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf> (citing Letter from Roderick L. Ireland, Chief Justice, to Barbara J. Rouse, Superior Court Chief Justice (Oct. 17, 2011)).

139. The near-exclusive focus on judicial oversight under the Constitution reflects what Rachel Harmon calls the “conventional paradigm” of police supervision in the legal literature. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765 (2012).

lawyerly way, by recognizing, in *United States v. Wade*, a right to counsel at lineups under the Sixth Amendment.¹⁴⁰ Because the Court subsequently held that the right to counsel in eyewitness identification procedures applies only post-indictment,¹⁴¹ and then only to live lineups and not photo arrays,¹⁴² that right became inconsequential in most eyewitness identification cases. Most lineups are conducted before charging, and almost all use photos rather than live persons,¹⁴³ circumstances in which the *Wade* right to counsel is inapplicable.

Accordingly, to provide a more broadly applicable protection against mistaken identification, the Court also constructed a due process standard applicable to all types of identification procedures at all stages of the proceedings. In the 1970s, in *Neil v. Biggers*¹⁴⁴ and *Manson v. Brathwaite*,¹⁴⁵ the Court built off of its 1967 decision in *Stovall v. Denno*¹⁴⁶ and held that the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a “substantial likelihood of misidentification” and, thus, requires exclusion of eyewitness identification evidence.¹⁴⁷ Under *Biggers* and *Brathwaite*, the first step in the due process analysis is to consider whether police utilized an identification procedure that was unnecessarily or impermissibly suggestive.¹⁴⁸ Even if so, however, under the second step in the analysis, the identification might nonetheless be admissible if, despite the suggestiveness, the identification was, in the court’s estimation, sufficiently reliable.¹⁴⁹

Constitutionally based judicial oversight under this legal architecture generally has been a failure.¹⁵⁰ The Court has hesitated to wade too deeply into regulating police investigation practices, no doubt due to a sense that it lacks institutional competence in policing matters.¹⁵¹ In part, its reluctance also stems from recognition of its institutional limitations in another respect – the Court’s only real tool for regulating eyewitness evidence is to exclude eyewitness testimony. The Court is unwilling to use that tool too broadly,

140. 388 U.S. 218 (1967).

141. *Kirby v. Illinois*, 406 U.S. 682 (1972).

142. *United States v. Ash*, 413 U.S. 300 (1973).

143. IDENTIFYING THE CULPRIT, *supra* note 38, at 23.

144. 409 U.S. 188 (1972).

145. 432 U.S. 98, 116 (1977) (holding use of an unnecessarily suggestive photo array did not require exclusion of the resulting identification because “indicators of [the witness’] ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification”).

146. 388 U.S. 293 (1967).

147. *Brathwaite*, 432 U.S. at 98 (declaring that “[r]eliability [of the eyewitness identification] is the linchpin” of that evaluation).

148. *Id.* at 107.

149. *Id.* at 106–108.

150. See O’Toole, *supra* note 79.

151. For a thoughtful discussion of the Court’s institutional limitations as a regulator of police, see Harmon, *supra* note 139, at 772–76.

recognizing that, while excluding eyewitness testimony might protect against some false evidence, it will also inevitably prevent juries from hearing accurate evidence. Reflecting this disinclination to keep too much eyewitness evidence from the jury, the Court in 2012, in *Perry v. New Hampshire*, wrote, “[o]ur unwillingness to enlarge the domain of due process . . . rests, in part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence.”¹⁵²

Moreover, to the extent the Court has imposed due process standards, those standards have proven ineffectual because the criteria the Court adopted for assessing reliability are empirically invalid. The Court declared that, in assessing reliability, the factors to consider usually include: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness’s degree of attention at the time of the crime, (3) the accuracy of the witness’s prior description of the perpetrator, (4) the level of certainty demonstrated by the witness, and (5) the time between the crime and identification.¹⁵³ The social science research shows, however, that most of those factors are not good indicators of reliability and, because they are mostly self-reported by the witness, are in fact distorted by the very suggestiveness they are meant to assess and overcome.¹⁵⁴

The court revisited the *Biggers/Brathwaite* standard for the first time thirty-five years later, in 2012, in *Perry v. New Hampshire*.¹⁵⁵ While reformers hoped the Court would take this opportunity to update the due process standard to align it with the developments in social science research, the Court instead reiterated the flawed *Biggers/Brathwaite* five-part reliability test.¹⁵⁶ Indeed, rather than sharpen constitutional oversight of flawed eyewitness evidence based on the growing body of research, the Court carved out large segments of eyewitness evidence that are entirely exempt from constitutional regulation. The Court held that the due process inquiry is triggered *only* after improper police conduct.¹⁵⁷ Thus, the Due Process Clause offers no protection against inherently suggestive eyewitness identification circumstances so long as they were not directly created by law enforcement. Given all of these limitations, eyewitness evidence is almost never excluded, even when the procedures used are highly suggestive.

152. 132 S. Ct. 716, 728 (2012).

153. *Brathwaite*, 432 U.S. at 114 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)).

154. Wells et al., *Why Do Motions to Suppress Suggestive Eyewitness Identifications Fail?*, *supra* note 30, at 169–73.

155. 132 S. Ct. 716.

156. *Id.* at 725 n.5.

157. *Id.* at 726 (“The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct.”).

B. State Court Interventions

A few state courts have been more responsive to the social science research and have demanded more as a matter of state law. For example, in 2005, the same year that the Wisconsin legislature passed its eyewitness identification legislation and the State Attorney General issued a science-based model eyewitness identification policy, the Wisconsin Supreme Court considered whether the *Biggers/Brathwaite* test should continue to govern admissibility of one-on-one showup evidence.¹⁵⁸ Citing the social science research, the court in *State v. Dubose* declared that “[t]hese studies confirm that eyewitness testimony is often ‘hopelessly unreliable.’”¹⁵⁹ The court held that the *Biggers/Brathwaite* approach, which permits admission of identification evidence even if produced by impermissibly suggestive procedures “if the identification could be said to be reliable,” was untenable.¹⁶⁰ The court explained: “Studies have now shown that approach is unsound, since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable.”¹⁶¹ Accordingly, the court held that, under the state constitution, admissibility of showup evidence would be assessed simply on the basis of whether police employed unnecessary suggestiveness; no showing of purported “reliability” could compensate.¹⁶²

That approach suggested real potential to push law enforcement to adopt the social-science-based reforms. Under the new paradigm, after all, anything short of “best practices” could be deemed unnecessarily suggestive, rendering the evidence inadmissible. But the limits of judicial action as a reform tool quickly revealed themselves once again.¹⁶³ In subsequent cases, the Wisconsin courts limited *Dubose* to showup evidence, rendering it inapplicable to photo arrays, live lineups, or other identification procedures.¹⁶⁴ Although the rationale in *Dubose* was equally applicable to these other types of identification procedures, the courts proved once again unwilling to intrude too directly into police practices or to prescribe a rule that might result in excluding some potentially probative evidence.

Six years later, New Jersey’s Supreme Court even more thoroughly incorporated the social science research into legal doctrine under the state con-

158. *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

159. *Id.* at 592 (quoting *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995)).

160. *Id.*

161. *Id.*

162. *Id.* at 593–94.

163. The limits of courts as change-agents in the innocence context were noted by Marvin Zalman and Julia Carrano when they wrote that, “because of its constitutional foundation and institutional conservatism, the judiciary has made few substantial institutional changes as a result of the innocence movement.” Zalman & Carrano, *supra* note 11, at 980.

164. *See State v. Drew*, 740 N.W.2d 404 (Wis. Ct. App. 2007).

stitution.¹⁶⁵ In 2011, in *State v. Henderson*, the Supreme Court of New Jersey engaged in a deep analysis of the scientific evidence and determined that the framework then used by the state was inadequate for analyzing the reliability of eyewitness identification.¹⁶⁶ Drawing on the scientific research, the court listed a number of system variables¹⁶⁷ that courts should consider when deciding whether there is enough evidence of suggestiveness to trigger suppression of an eyewitness identification.¹⁶⁸ Then, on July 19, 2012, just six months after the U.S. Supreme Court demurred on its opportunity to reform constitutional standards in *Perry v. New Hampshire*,¹⁶⁹ the Supreme Court of New Jersey reaffirmed its commitment to eyewitness identification reform by releasing expanded jury instructions and court rules addressing eyewitness identification.¹⁷⁰ While the court did not mandate that police use any particular procedures, the court's heavy focus on the social science research as a basis for regulating admissibility suggested a new era of judicial enforcement of science-based best practices.

While the Supreme Court of New Jersey was the first state supreme court to reject the *Biggers/Brathwaite* test in all identification cases,¹⁷¹ it was not the last. Perhaps most dramatically, in 2012, the Supreme Court of Oregon revised eyewitness identification law in *State v. Lawson*.¹⁷² In *Lawson*, as in *Henderson* in New Jersey, the Supreme Court of Oregon extensively canvassed the social science research and concluded that the *Biggers/Brathwaite* test was inadequate.¹⁷³ The *Lawson* court went on to break

165. *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

166. *Id.* at 918–19.

167. In the taxonomy of eyewitness identification procedures, “system variables” are those conditions leading to an identification that the system (the police) can control, such as whether police use a photo array or live lineup, whether the procedure is blind, the nature of the instructions given to witnesses, whether the procedure is simultaneous or sequential, etc. By contrast, “estimator variables” are those variables that are beyond the control of law enforcement, such as the lighting conditions at the time of the crime, the witness’s viewing distance, whether the identification is cross-racial, etc. See Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCH. 1546 (1978).

168. The non-exhaustive list of system variables includes blind administration, pre-identifications, lineup construction, feedback, multiple viewings, showups, and private actors. *Henderson*, 27 A.3d at 920–21.

169. *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (decided on January 11, 2012).

170. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, N.J. COURTS (July 19, 2012), <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm>.

171. Karen Newirth, *New Jersey Leads the Way on Eyewitness Identification Reform*, INNOCENCE PROJECT (July 23, 2012, 5:40 PM), http://www.innocenceproject.org/Content/New_Jersey_Leads_the_Way_on_Eyewitness_Identification_Reform.php.

172. 291 P.3d 673 (Or. 2012).

173. *Id.* at 685–88.

new ground in several respects. First, unlike prior judicial analyses, the *Lawson* court relied not on constitutional principles, but on the Oregon Rules of Evidence to impose constraints on eyewitness evidence and thereby to regulate police practices.¹⁷⁴ Specifically, the court drew upon evidentiary rules limiting witnesses to testimony about matters on which they have personal knowledge (on the theory that a witness who cannot make a reliable identification might lack personal knowledge),¹⁷⁵ rules governing lay opinion testimony (on the theory that an eyewitness identification represents the witness's lay opinion),¹⁷⁶ and the rules requiring courts to balance the probative value of evidence against the risk it presents of unfair prejudice.¹⁷⁷ Under those

174. *Id.* at 691.

175. OR. EVID. CODE, R. 602, like its federal counterpart, FED. R. EVID. 602, provides that “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” OR. REV. STAT. ANN. § 40.315. The Court in *Lawson* held that

[w]hen a criminal defendant raises that kind of evidentiary challenge in a pre-trial motion to exclude eyewitness identification evidence, the proponent of the evidence (in that context, the state) must offer evidence showing both that the witness had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them, thereby gaining personal knowledge of the facts.

Lawson, 291 P.3d at 692.

176. *Lawson*, 291 P.3d at 692 (citing OR. REV. STAT. ANN. § 40.405 (West 2016)); see also FED. R. EVID. 701. The *Lawson* Court reasoned that “[t]he ultimate conclusion in an eyewitness identification—*i.e.*, that a defendant on trial is the same person that the witness saw at the scene—cannot itself be observed, but rather must be inferred by the witness.” *Id.* These rules generally require the proponent of lay opinion testimony to establish that the proposed testimony is both rationally based on the witness's perceptions and helpful to the trier of fact. On the former requirement, “To satisfy its burden, the proponent of the identification evidence (generally the state) must demonstrate by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions.” *Id.* at 693. On the latter requirement (helpfulness to the jury), the Court wrote:

Although we anticipate that that burden will be easily satisfied in nearly all cases, it is conceivable that some statements of identification might not be particularly helpful to a jury. Consider, for example, the witness who observes a masked perpetrator with prominently scarred or tattooed hands. Although those features could be distinctive enough to provide a rational basis for an inference of identification, a jury may be equally capable of making the same inference by comparing the witness's description of those markings to objective evidence of the actual markings on the defendant.

Id. at 693–94.

177. *Id.* at 694 (citing OR. REV. STAT. ANN. § 40.160); see also FED. R. EVID. 403. Other courts have similarly held that the balancing test of Rule 403 can and should be

rules, the court held, eyewitness evidence is only admissible – as based on personal knowledge, constituting valid lay opinions, and possessing sufficient probity – if it is sufficiently reliable as measured by social-science-based standards. Significantly, the court held that this obligation arises whether the suggestiveness and unreliability was produced by factors the police could control (system variables) or factors entirely beyond control of the government (estimator variables).¹⁷⁸ The standard thus governs all eyewitness identification evidence, regardless of its source.

A few other state supreme courts have also recognized the problem and inadequacy of the *Biggers/Brathwaite* test, but have moved toward reform more tentatively. As noted, both the Supreme Court of Florida¹⁷⁹ and the Massachusetts Supreme Judicial Court¹⁸⁰ appointed study groups or task forces to study the problem of eyewitness identification error and make recommendations for, as the Massachusetts Supreme Judicial Court put it, how the courts can “most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.”¹⁸¹

The Massachusetts Study Group examined whether the Supreme Judicial Court should require some of the best practices, including providing proper witness instructions, recording witness confidence statements, and utilizing a minimum of five fillers and only one suspect per procedure.¹⁸² The Massachusetts Study Group released its report on July 25, 2013, and recommended that the court:

- (1) take judicial notice as legislative facts of certain generally established modern psychological principles regarding eyewitness memory;
- (2) support uniform statewide procedures to ensure that all Massachusetts police departments employ best practices;
- (3) provide the basis for an expanded pretrial judicial inquiry into the reliability of eyewitness evidence and an expanded array of remedies beyond those available for identifications involving suggestive police practices;

used to weigh the admissibility of unreliable eyewitness identification evidence. *See, e.g., State v. Hibl*, 714 N.W.2d 194, 204 (Wis. 2006).

178. *Lawson*, 291 P.3d at 694.

179. FLA. DEP’T OF LAW ENFORCEMENT, *supra* note 137, at 2.

180. SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, *supra* note 138.

181. *Id.* (quoting Letter from Roderick L. Ireland, Chief Justice, to Barbara J. Rouse, Superior Court Chief Justice (Oct. 17, 2011)).

182. The Court had previously urged police to employ those practices. *See Commonwealth v. Silva-Santiago*, 906 N.E.2d 299, 312 (Mass. 2009); *Commonwealth v. Walker*, 953 N.E.2d 195, 208 (Mass. 2011).

(4) adopt new and expanded jury instructions on eyewitness evidence;
and

(5) establish a committees for educating and training judges and the bar about the new procedures and for monitoring the evolving science of eyewitness evidence.¹⁸³

The following year, the Massachusetts Supreme Judicial Court decided two cases in which it advanced the eyewitness identification reform agenda. First, in *Commonwealth v. Crayton*, the court established a heightened admissibility standard for in-court eyewitness identification evidence where the eyewitness had not participated before trial in an identification procedure.¹⁸⁴ In that situation, the court held that the eyewitness's in-court identification shall be treated as an in-court showup and, thus, only admitted for "good reason."¹⁸⁵ Then in *Commonwealth v. Gomes*, the court updated jury instructions on eyewitness identification to incorporate "generally accepted" scientific principles such as:

(1) human memory does not function like a video recording;

(2) an eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification;

(3) high levels of stress can reduce an eyewitness's ability to make an accurate identification;

(4) information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making an identification, can influence the witness's later recollection of the memory or of the identification; and

(5) a prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown.¹⁸⁶

The Massachusetts Supreme Judicial Court issued finalized model jury instructions based on *Gomes*'s provisional instructions in 2015.¹⁸⁷

183. SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, *supra* note 138, at 2–5.

184. 21 N.E.3d 157, 169–70 (Mass. 2014).

185. *Id.* at 169.

186. *Commonwealth v. Gomez*, 22 N.E.3d 897, 911–16 (Mass.), *modified*, *Commonwealth v. Bastaldo*, 32 N.E.3d 873 (Mass. 2015).

187. Statement, Mass. Supreme Judicial Court, Model Jury Instructions on Eyewitness Identification (Nov. 16, 2015), <http://www.mass.gov/courts/docs/sjc/docs/model-jury-instructions-on-eyewitness-identification-november-2015.pdf>.

As this brief description of recent eyewitness identification case law reveals, a few jurisdictions have demonstrated the potential for courts to demand significant reform. But the vast majority of courts, led by the U.S. Supreme Court, remain largely unresponsive to the lessons from social science. Whether that inactivity reflects enduring institutional limitations on the courts as regulators of police practices, or merely the conservative nature of courts, which will eventually give way under the weight of scientific evidence, is still an open question. Likewise, whether courts in New Jersey and Oregon will vigorously enforce science-based “best practices” under *Henderson* and *Lawson* remains to be seen. As the Wisconsin experience demonstrates (the swift retreat from the broad promise of *Dubose* by limiting it to showups), the courts are quite sensitive to pressures against moving too quickly in the area of police reform.¹⁸⁸

IV. BEYOND THE COURTS: LEGISLATIVE AND ADMINISTRATIVE STRATEGIES FOR IMPLEMENTING REFORM

At least thirteen state legislatures have enacted some form of eyewitness identification reform.¹⁸⁹ These reforms range from strict, top-down, “command and control” legislation that mandates one uniform statewide policy to more flexible, bottom-up legislation that mandates that each agency have a policy, but allows each agency to adopt the specific procedures it sees fit. This Article analyzes in greatest depth the latter approach, especially as attempted in Wisconsin and a few other states, which might be characterized as an experiment in “new governance” or “democratic experimentalism.” But before analyzing that approach, it is important to outline the alternatives that have been tried in other states.

A. Top-Down Prescriptive Legislation

1. The Mandates

At least nine states – Colorado, Connecticut, Georgia, Illinois, Maryland, New Jersey, North Carolina, Ohio, and Vermont¹⁹⁰ – have experimented with governmental mandates that spell out – at least to some degree – the specific procedures that police must employ when obtaining eyewitness iden-

188. See, e.g., *State v. Drew*, 740 N.W.3d 404, 408–09 (Wis. Ct. App. 2007).

189. These states include Colorado, Connecticut, Georgia, Illinois, Maryland, Nevada, North Carolina, Ohio, Texas, Vermont, Virginia, West Virginia, and Wisconsin. See *infra* notes 191–92 and accompanying text.

190. Arguably, Texas could be added to this list because of its legislative provision that, essentially, agencies that choose not to adopt their own written policies will be bound by the policy created by the Law Enforcement Management Institute of Texas (“LEMITE”). See *infra* notes 273–75 and accompanying text.

tifications.¹⁹¹ Under this “command and control” model, police are directed specifically on how to conduct their identification procedures – typically including specific requirements that police employ “best practices,” such as blind sequential procedures.¹⁹² While in eight of these states the command-and-control model has been implemented by legislatures, in one, New Jersey, the Attorney General had the authority, which he exercised in 2001, to mandate a set of best practices procedures.¹⁹³ The others – the legislative mandates – are described below.

North Carolina. Spurred in part by one of the nation’s most high-profile misidentification cases involving Jennifer Thompson and Ronald Cotton,¹⁹⁴ and by the leadership of Supreme Court Chief Justice I. Beverly Lake, whose conservative ideals led him to recoil at the notion of the government depriving an innocent person of his liberty,¹⁹⁵ North Carolina became the first state to mandate these procedures by legislation. After the North Carolina Department of Justice, in 2005, experimented with non-mandatory model policies,¹⁹⁶ the North Carolina legislature enacted the *Eyewitness Identification Reform Act* in 2007, which made mandatory many of the previously recommended procedures, including requirements that identification procedures be blind and sequential, that witnesses should be given the instructions recommended by the 1999 NIJ guide, that fillers should fit the description of the perpetrator, that a confidence statement should be documented at the time of the identification, and that the identification procedure should be videotaped whenever practical.¹⁹⁷

191. See, e.g., CONN. GEN. STAT. ANN. § 54-1p (West 2016) (“Not later than May 1, 2013, each municipal police department and the Department of Emergency Services and Public Protection shall adopt procedures for the conducting of photo lineups and live lineups that are in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services”); N.C. GEN. STAT. ANN. § 15A-284.52 (West 2016) (“Lineups conducted by State, county, and other local law enforcement officers shall . . . be conducted by an independent administrator [and] be presented to witnesses sequentially.”); OHIO REV. CODE ANN. § 2933.83 (West 2016); W. VA. CODE ANN. § 62-1E-2 (West 2016) (imposing mandatory procedures for eyewitness identifications); 2015 Ga. Laws 173.

192. *Supra* note 191.

193. See N.J. ATT’Y GEN. GUIDELINES, *supra* note 36.

194. Jennifer Thompson’s misidentification of Ronald Cotton was featured in numerous national media stories and ultimately in a best-selling book the two co-authored. JENNIFER THOMPSON-CANINO, RONALD COTTON & ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009).

195. See Keith A. Findley & Larry Golden, *The Innocence Movement, the Innocence Network, and Policy Reform*, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE, *supra* note 18, at 93, 100.

196. See N.C. ACTUAL INNOCENCE COMM’N, *supra* note 35.

197. Eyewitness Identification Reform Act, N.C. GEN. STAT. ANN. § 15A-284.50–.53 (West 2016).

Ohio. Thereafter, Ohio similarly adopted mandatory language requiring that police comply with a set of specific procedures.¹⁹⁸ Ohio's statute demands that "any law enforcement agency or criminal justice entity in this state that conducts live lineups or photo lineups shall adopt specific procedures for conducting the lineups."¹⁹⁹ The statute then requires that "[t]he procedures, at a minimum, shall impose the following requirements Unless impracticable, a blind or blinded administrator."²⁰⁰ The statute does not list sequential administration as a "specific procedure" but does define the "folder system" as "a system for conducting a photo line-up" that employs double-blind, sequential administration.²⁰¹

Connecticut. A few other states have now adopted legislative mandates as well. In 2012, the Connecticut Eyewitness Task Force issued a report recommending that the blind sequential procedure be made mandatory, at least when practical.²⁰² Subsequent legislation watered down the recommendation and adopted the mandate for blind administration where practical, but not the sequential procedure, pending further research.²⁰³ The statute requires law enforcement agencies to adopt procedures for photo and live lineups that comply with minimum standard best practices, including proper filler selection.²⁰⁴

Georgia. After several years of wrangling, Georgia also adopted a prescriptive law.²⁰⁵ The process began in 2008 when the Georgia House of Representatives passed a resolution urging all law enforcement agencies to either revisit or develop policies and procedures for eyewitness identification.²⁰⁶ At that point, one review of the state's law enforcement agencies reported that less than ten percent had written policies in place.²⁰⁷ When that approach failed to produce sufficient results, and after a protracted period of negotia-

198. OHIO REV. CODE ANN. § 2933.83 (West 2016) (mandating double-blind and sequential procedures).

199. *Id.* § 2933.83(B).

200. *Id.* § 2933.83(B)(1).

201. *Id.* § 2933.83(A)(6).

202. EYEWITNESS IDENTIFICATION TASK FORCE, REPORT TO THE JUDICIARY COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY (Feb. 8, 2012), http://www.innocenceproject.org/how-is-your-state-doing/CT_Eyewitness_Identification_Task_Force_Report_February_2012.pdf.

203. CONN. GEN. STAT. ANN. § 54-1p (West 2016).

204. *Id.*

205. *Eyewitness ID Powerpoint*, GA. POLICE OFFICER STANDARDS & TRAINING COUNCIL, https://www.gapost.org/eyewitness_training.html (select "Eyewitness ID Powerpoint") (last visited Feb. 21, 2016).

206. *Id.*

207. *Id.*; see also *Georgia Improves Identification Training*, INNOCENCE PROJECT (Jan. 21, 2009, 1:49 PM), http://www.innocenceproject.org/Content/Georgia_Improves_Identification_Training.php (noting that a 2007 study by the Georgia Innocence Project reported eighty-two percent of Georgia law enforcement agencies had no eyewitness identification procedures in place).

tion and debate,²⁰⁸ the legislature adopted a statute that required law enforcement agencies to have written eyewitness identification policies by July 2016.²⁰⁹ The new statute, which went into effect July 1, 2015, requires these policies to contain best practices, including blind administration, proper filler selection, witness instructions, and confidence statements.²¹⁰

Maryland. Following what was perhaps an even more arduous journey, Maryland similarly adopted a prescriptive law after it became clear that law enforcement, left to its own devices, was not responding to encouragement to develop best practices policies.²¹¹ Ultimately, the Maryland legislature amended its statute in 2014 to read in part:

On or before January 1, 2016, each law enforcement agency in the State shall . . . adopt the Police Training Commission’s Eyewitness Identification Model Policy; or . . . adopt and implement a written pol-

208. Georgia adopted its training program directly in response to impending legislation. To help facilitate law enforcement action, the Georgia Public Safety Training Center developed an eight-hour course on eyewitness identification. *Georgia Improves Identification Training*, *supra* note 207. “The goal of [this] increased focus on the eyewitness identification training is to reduce the potential of error in our identification processes.” *Eyewitness ID Powerpoint*, *supra* note 205.

209. GA. CODE ANN. § 17-20-2 (West 2016).

210. *Id.*

211. Reformers in Maryland first tried, in 2007, to enact a prescriptive eyewitness identification law that would have mandated double-blind-sequential procedures with appropriate witness instructions and fillers, along with recording of confidence statements and other elements of the typical reform packages. MD. CODE ANN., PUB. SAFETY § 3-506 (West 2016); Brown & Saloom, *supra* note, 17, at 553. At that time, many police departments in the state had no written eyewitness identification policies “and many of the written policies that did exist had not been modified in decades.” *Id.* Remarkably, “[N]o agency had adopted a written protocol that incorporated the core best practices that experts have identified as critical to reducing mistaken identifications.” *Id.* at 554. When it became clear that the supporters would not be able to overcome opposition from law enforcement, reformers regrouped and succeeded in passing a bill in 2007 requiring all law enforcement agencies to adopt written policies that minimally comport with the recommendations issued by the National Institute of Justice’s Technical Working Group on Eyewitness Evidence. *Id.* Despite this legislation, a 2011–2012 review of law enforcement policies in Maryland revealed that no agency had adopted the double-blind-sequential protocol, and that there was “a complete lack of uniformity throughout the state in terms of what particular aspects of the eyewitness identification procedure were addressed by the policies.” *Id.* at 555. Negotiations resumed, producing a collaboration between stakeholders designed to promote uniform best practices, and a directive from the legislature for a status report on the results of this collaboration in advance of the next legislative session. *Id.* at 557. Although the Maryland Police and Correctional Training Commission drafted a policy incorporating the best practices, a preliminary analysis conducted by the Innocence Project in 2013 found that only one-third of agencies responded to the directive to submit policies, and of those, “only half required the use of a blind administrator, the single most important reform to eyewitness protocols.” *Id.* at 558.

icy relating to identification procedures that complies with § 3-506.1 of this subtitle; and . . . file a copy of the written policy with the Department of State Police.²¹²

At minimum, these policies must include blind administration, witness instructions, proper filler procedure, and written confidence statements.²¹³

Illinois. Illinois enacted a similar statute, effective January 1, 2015, requiring law enforcement agencies to adopt best practices, including: blind administration, witness instructions, proper filler selection, and recording of the procedures.²¹⁴ The law also provides a remedy from failure to comply with identification procedures, including suppression of eyewitness identification evidence and a curative jury instruction.²¹⁵

Colorado. Colorado adopted a law effective July 1, 2015, that requires all Colorado law enforcement agencies to implement eyewitness identification best practices such as confidence statements, blind administration, and witness instructions.²¹⁶

Vermont. Taking a slightly different approach, Vermont adopted legislation that constitutes somewhat of a hybrid approach between the “command and control” approach and the “new governance” approach discussed below. In 2014, Vermont adopted a statute related to “law enforcement policies on eyewitness identification and bias-free policing.”²¹⁷ The law requires all state and county law enforcement agencies to adopt an eyewitness identification policy.²¹⁸ The bill does not mandate any particular policy, but does require that the policy contain, at minimum, certain “essential elements,” including protocols for showups, blind administration of photo and live lineups, witness instructions that inform the witness the perpetrator may not be present, at least five fillers for photo lineups and four fillers for live lineups, a requirement that all fillers must match the description of the perpetrator, and documentation of the witness’s confidence “in the eyewitness’s own words.”²¹⁹ I characterize this as a hybrid approach because it requires agencies to adopt a policy based on best practices, but also leaves room for agencies to craft modification and adjustments according to their needs. Senate Bill 184 also dictates that the model policy developed by the Law Enforcement Advisory

212. MD. CODE ANN., PUB. SAFETY § 3-506.

213. *Id.* § 3-506.1.

214. 725 ILL. COMP. STAT. ANN. 5/107A-2 (West 2016).

215. *Id.* 5/107A-2(j).

216. COLO. REV. STAT. ANN. § 16-1-109 (West 2016).

217. *Vermont Senate Bill 184*, LEGISCAN, <http://legiscan.com/VT/text/S0184/2013> (last visited Feb. 21, 2015); see also *VT Governor to Sign into Law New Wrongful Conviction Reforms*, INNOCENCE PROJECT (June 16, 2014, 12:00 AM), <http://www.innocenceproject.org/vt-governor-to-sign-into-law-new-wrongful-conviction-reforms/> (last visited Feb. 21, 2016).

218. VT. STAT. ANN. tit. 13, § 5581(a) (West 2016).

219. *Id.* § 5581(b).

Board, which includes the core best practices, will be an agency's default if the agency does not adopt its own policy by January 1, 2015.²²⁰

2. Assessing the Top-Down Approach

The advantage of the top-down, command-and-control model is, obviously, that it can dictate best practices and can put the force of law behind those dictates. As policy advocates with the Innocence Project explain:

There are obvious benefits to legislating police practice reform. A clear advantage of a statute is that it assures uniformity and consistency in expectations of practice across a given state and accomplishes this goal promptly, rather than uneven implementation over a protracted period of time. Another benefit legislation can offer is its ability to provide clear direction to the courts about how to consider eyewitness evidence that has been gathered in violation of best practices. Finally, legislation can provide law enforcement with both the resources and direction for necessary training for improved eyewitness identification protocols.²²¹

Given police resistance to nudges toward reform, exhibited for example by the Georgia and Maryland experiences with voluntary policies, the heavy hand of top-down mandates might be required, at least in some instances. The Innocence Project, for its part, prefers to work with local law enforcement in a collaborative effort to reform practices, but when that fails, it views mandatory legislation as a necessary alternative.²²²

But there are drawbacks to the top-down model. First, because it requires engagement of the political process, and because police and prosecutors often resist and have political clout, adopting such legislation is not politically feasible in many jurisdictions. One reason states like Wisconsin have gone the route of directing police to develop their own policies, rather than mandating that they follow legislatively prescribed policies, is that there was little political will in the legislature to impose heavy-handed or intrusive mandates on police.²²³

220. *Id.* § 5581(d).

221. Brown & Saloom, *supra* note 17, at 550.

222. *Id.* (“Having first sought to arrive at eyewitness identification reform by supporting law enforcement in their efforts to implement it themselves, when we must turn to legislation we are able to do so with a measure of understanding, and hopefully respect, from the law enforcement leaders with whom we had engaged.”).

223. Kruse, *supra* note 24, at 713 (citing Interview with Mark Gundrum, Wis. State Assembly Representative (Feb. 6, 2006)). The Wisconsin statute was the product of compromise and a delicate political strategy engineered by then-Representative Mark Gundrum, chairperson of a legislative task force created to recommend reforms to prevent wrongful convictions. *Id.* Gundrum, a self-proclaimed conservative, law-

Second, because the best practices are based on social science research, and that research is continually evolving and developing, there is some concern that writing any particular procedures into a statute freezes the current state of the science and makes future research-based reform more difficult.²²⁴

Third, because legislation is typically drafted at a fairly general level, legislative mandates tend to be less specific, and hence to some degree less helpful, than agency-developed policies and procedures.²²⁵ In this sense, rules for conducting eyewitness identification procedures share the characteristics of other administrative agency rules and rule-making processes. Administrative rules are typically relied upon where the requirements for expertise, flexibility, and specificity exceed what can be expected to emerge from the political legislative process.²²⁶

Despite these limitations, a number of states have adopted top-down legislation that is quite remarkable in its specificity. Several statutes mandate the use of blind sequential procedures; provide detailed instructions on “blinding” the process by use of such things as the folder shuffle system;²²⁷ require specified, unbiased witness instructions; provide specific directions that fillers should be selected to fit the description of the perpetrator and chosen so they do not make the suspect stand out; prescribe the number of fillers to be utilized; require prompt recording of witnesses responses and confidence statements; and permit no more than one suspect per lineup.²²⁸ The statutes are far more specific than many policies adopted by law enforcement agencies on their own.

But statutes can only go so far; there is inevitably a limit to the specificity and depth of legislation. Written agency policies have no such inherent constraints. The Wisconsin Department of Justice Model Policy and Procedure, for example, in its longest form (it was promulgated in several forms), consumes twenty-eight pages, and is broader and deeper than any legisla-

and-order Republican, “knew that gaining the buy-in of hard-line law enforcement was going to be the key to political success for any proposed legislative reforms.” *Id.*

224. *Id.* at 719.

225. *Id.* at 676–77.

226. *Id.* at 673.

227. In the folder shuffle system, each of the suspect and filler photographs is placed in a separate manila folder. “*The Folder System*”: *A Recommended Practice for the ‘Blind’ Administration of Eyewitness Procedures For Small Police Departments With Limited Resources*, INNOCENCE PROJECT, <http://goo.gl/iscfEr> (last visited Feb. 21, 2016). The folders are then shuffled, two or more empty folders are placed at the bottom, and the stack is presented to the witness, who opens and examines the photographs one at a time in such a way that the police administrator cannot see which photograph the witness is observing. *Id.* In this way, even if the detective knows who the suspect is, the detective cannot unintentionally cue the witnesses when the witness looks at the suspect’s photo. *Id.*

228. See, e.g., N.C. GEN. STAT. ANN. § 15A-284.52 (West 2016); OHIO REV. CODE ANN. § 2933.83 (West 2016) (although Ohio does not mandate sequential procedures).

tion.²²⁹ It provides recommendations on all of the major best practices outlined above, plus others, including specific instructions on topics such as the use of composite sketches and showups.²³⁰ And, significantly, it lays out the rationale and underlying science for each of the recommendations to help police better understand and accept the procedures set forth.²³¹

This last point suggests a fourth limitation on top-down legislative approaches. Police culture is notoriously resistant to criticism and change from outside. Police tend to be insular organizations, whose members value solidarity and a shared identity, exemplified by such things as the “code of silence,” the unwritten rule that prevents one officer from testifying against or exposing another officer’s wrongdoing.²³² As one police scholar has put it, “[t]he insularity of police institutions and the solidarity of rank-and-file police officers create an impervious shield around these institutions.”²³³ Policing tends to engender an “us vs. them” mentality in the relationship between police and the communities they serve, as well as between the police and those in governance above them. “The embattled police--the ‘insiders’--view ‘outsiders’ as ‘the enemies who are assaulting . . . the ‘brothers’ on the force.’”²³⁴ Hence, “The rank-and-file officers abhor being second-guessed by inexperienced bureaucrats unfamiliar with the challenges that the officers face on a daily basis.”²³⁵

This culture might help explain why, as discussed below, in jurisdictions like Wisconsin and Virginia, where police are free to determine their own written policies, they are more likely to adopt sequential procedures than blind administration, even though the science on the latter is more settled.²³⁶ Adopting sequential procedures requires some willingness by police to accept that there is a better way to achieve their goals than they have employed in the past. While that might be an unwelcome message to some, it pales in comparison to what many perceive as the insult of requiring blind procedures. Anecdotally, the response of many police to the requirement for blind procedures is to take offense, misunderstanding the requirement as a reflection of distrust in the detectives who administer lineups rather than a response to the

229. WIS. DOJ MODEL POLICY, *supra* note 31.

230. *Id.* at 28.

231. *Id.* at 3–6.

232. See David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481 & n.60 (1992) (discussing the unwritten “code of silence”).

233. Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 378 (2010).

234. *Id.* at 383 (footnotes omitted) (quoting Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 555 (2006)).

235. *Id.* at 410.

236. See *infra* note 318, and accompanying text.

human condition, and a fundamental tenet of any type of sound testing protocol.

Given this culture – and the basic human tendencies it reflects – reforms might be more readily accepted if the rank-and-file can be brought on board, either through training or by being given a voice in creating the policies. As Herman Goldstein, one of the pioneers of modern policing scholarship, wrote more than thirty-five years ago about police reform in general:

Traditional programs to improve the police—labeled as efforts to “change,” “upgrade,” or “reform” the police or to “achieve minimum standards”—require that police officers openly acknowledge their own deficiencies. Rank-and-file officers are much more likely to support an innovation that is cast in the form of a new response to an old problem—a problem with which they have struggled for many years and which they would like to see handled more effectively.²³⁷

No one has yet studied police compliance with legislative top-down eyewitness identification mandates. It may be that police are implementing the mandates fully and effectively. But we know from other contexts – such as the *Miranda* requirements – that police can become facile at circumventing mandates they do not like, either overtly or through more subtle manipulations.²³⁸ It is therefore possible that, while the legislative mandates make good “law on the books,” they are not as effective as “law on the streets.” Indeed, initial anecdotal evidence suggests that, in some places at least, police may not be complying widely with the requirements of such eyewitness identification statutes.²³⁹

The Ohio experience with mandates illustrates this point. The Ohio statute, which was adopted in a context that did not involve the kind of law

237. Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236, 258 (1979).

238. See DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 195, 196 (1991) (describing ploys used by police to get suspects to waive their *Miranda* rights); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL’Y 395, 424 (2013) (describing tactics police use “to waive *Miranda* without alerting them to its significance or consequences”); Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 259 (1996) (after *Miranda*, “American police have become skilled at the practice of manipulation and deception during interrogation”); Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239 (2007); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 154–62 (1998) (describing the police practice of interrogating “outside *Miranda*”).

239. E-mail from Mark Godsey, Daniel P. and Judith L. Carmichael Professor of Law, Univ. of Cincinnati Coll. of Law & Dir., Rosenthal Instit. for Justice/Ohio Innocence Project, to author (Jan. 21, 2015) (on file with author).

enforcement collaboration that has existed in other states,²⁴⁰ does not explicitly require sequential procedures, but does include provisions on how to conduct photo lineups using the folder shuffle system – a system whose only purpose is to make identification procedures both functionally blinded and sequential. Nonetheless, some Ohio law enforcement agencies have interpreted the sequential “folder system” portion of the statute as a suggestion, not a “preferred method.”²⁴¹ This decision is bolstered by a statement from Ohio Attorney General Mike DeWine that “[t]he state legislature did not say that the ‘folder method is preferred.’ There is nowhere in the statute does it say that.”²⁴² However, at least one Ohio Court of Appeals has found that the legislature has expressed a “clear preference” for the folder system.²⁴³ Despite this opinion, at least some of Ohio’s law enforcement agencies still use the “six-pack” (simultaneous) method.²⁴⁴

The point is obvious: one possible drawback to legislatively mandated eyewitness identification practices is that they may lack police buy-in, which can undermine their effectiveness.²⁴⁵ It is partly for this reason that some jurisdictions have attempted reform through less directive processes.

B. *Ad Hoc Bottom-Up Reform*

One response is to encourage police to sort this all out for themselves. Indeed, in most jurisdictions, there simply is no organized statewide effort to implement “best practices.” That is not to say no reform is happening in those states. Rather, that is to say that if reform is occurring, it is ad hoc and

240. Since the Ohio experience, trainings and symposia have been conducted with and for law enforcement in states as diverse as California, Georgia, Idaho, Maryland, Nebraska, Nevada, Utah, Washington, and others. Email from Rebecca Brown, Policy Dir., the Innocence Project, to author (July 18, 2015).

241. See *Not All Ohio Police Photo Line-Ups Follow New ‘Preferred’ Method*, WBNS-10TV (Oct. 22, 2013, 10:44 AM), <http://www.10tv.com/content/stories/2013/10/22/columbus-photo-arrays.html>.

242. *Id.*

243. *Id.*; *State v. Humberto*, 963 N.E.2d 162, 176 (Ohio Ct. App. 2011).

244. *Not All Ohio Police Photo Line-Ups Follow New ‘Preferred’ Method*, *supra* note 241.

245. Brown & Saloom, *supra* note 17, at 548. It is indeed for this reason that the Policy Unit at the Innocence Project prefers to work with law enforcement to develop best practices policies, reserving legislative mandates for a last resort. As Innocence Project policy personnel have written:

[I]f police are using reform procedures because they actually embrace them, they will likely be employed properly and consistently. We similarly recognize that if eyewitness identification reform is imposed without law enforcement participation and regardless of their legitimate concerns, the reality is that they will not likely be implemented either well or consistently.

Id.

sporadic and almost entirely initiated by police in response to urging by reformers. Indeed, an important paper from the Executive Sessions on Policing and Public Safety sponsored by the Harvard Kennedy School and the NIJ argues, “for strong leadership from police agencies to lead reviews of wrongful convictions that can be learning experiences for all components of the criminal justice system.”²⁴⁶ Specifically included in that recommendation is a call for police to adopt the range of eyewitness identification best practices outlined above.²⁴⁷ That approach obviously solves the police buy-in problem. Unfortunately, to date, it has also meant that in most places not much has happened.

The recent experience in California reveals the opportunities and challenges of this approach. Work on eyewitness identification reform began in earnest in California after the California Commission on the Fair Administration of Justice took up the issue and produced a set of recommendations.²⁴⁸ The Commission was created in 2004 by Senate Resolution 44, with a charge to study the criminal justice system in California and “determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons,” to examine potential “safeguards” and “improvements in the way the criminal justice system functions” and to make recommendations and proposals designed to “ensure that the application and administration of criminal justice in California is just, fair, and accurate.”²⁴⁹ Commission members were appointed by the Senate Committee on Rules and included stakeholders from all parts of the criminal justice system.²⁵⁰ In April 2006, the Commission issued its Report and Recommendations Regarding Eye Witness Identification Procedures, which included the full panoply of social-science-based recommended “best practices.”²⁵¹ The Commission also recommended legislation requiring the Attorney General to convene a task force to develop guidelines for policies, procedures, and training regarding eyewitness identification procedures, consistent with the Commission’s recommendations.²⁵²

The legislature did indeed pass such legislation, but Governor Arnold Schwarzenegger vetoed it twice.²⁵³ In his veto message, Schwarzenegger asserted that even voluntary state guidelines would interfere with police de-

246. Batts et al., *supra* note 11, at 2; *see also id.* at 5 (“We firmly believe that police departments are the best advocates to catalyze this kind of change . . .”).

247. *Id.* at 8–13.

248. CAL. COMM’N ON FAIR ADMIN. OF JUSTICE, *supra* note 35.

249. *Id.*; S. Res. 44, Reg. Session. (Cal. 2004).

250. *See Membership*, CAL. COMMISSION ON FAIR ADMIN. JUST., <http://www.ccfaj.org/membership.html> (last visited Feb. 21, 2016).

251. CAL. COMM’N ON FAIR ADMIN. OF JUSTICE, *supra* note 35, at 5–6.

252. *Id.* at 6–7.

253. Radley Balko, *Schwarzenegger Vetoes Justice*, FOXNEWS (Nov. 5, 2007), <http://www.foxnews.com/story/2007/11/05/schwarzenegger-vetoes-justice/>.

partments establishing their own lineup policies based on their “unique local conditions.”²⁵⁴

That left eyewitness identification reform entirely up to local control and initiative, where it remains in California. The results have been spotty. A few counties have led the way, but most have adopted no reforms.²⁵⁵ In 2003, Santa Clara County became the first to adopt the double-blind-sequential protocol, after the Santa Clara County District Attorney’s Office approached police with a proposal to adopt the new “best practices.”²⁵⁶ According to former San Jose Police Captain Scott Seaman (now Police Chief in Los Gatos, California), the Assistant District Attorney who presented the idea had credibility with police and told them that the double-blind-sequential protocol was one of the reforms recommended by the California Commission on Fair Administration of Justice that he thought made sense.²⁵⁷ After a brief study, police in Santa Clara County agreed.²⁵⁸

Nine years later, in 2012, Seaman became president of the California Association of Chiefs of Police (“CACP”).²⁵⁹ He arranged for representatives of the Northern California Innocence Project and the Innocence Project, along with law enforcement and social scientists, to present at a workshop for the state’s police chiefs, at which they explained the science behind the new procedures. Seaman then made eyewitness identification reform part of his agenda. Every time he spoke around the state, he talked about eyewitness reform, and he asked each police chief to work with his or her DA to consider making the reforms. He told the chiefs, “[W]e’re either going to be asked to do it, or the legislature is going to tell us to do it.”²⁶⁰ Echoing a sentiment reflected by police elsewhere as well, Seaman said he would be prouder if police made the changes before they were forced to: “We take it as a badge of honor if we can get there without legislation.”²⁶¹ He also talked to the

254. *Id.*

255. See Maurice Possley, *Southern CA Exonerations Don’t Lead to Eyewitness ID Reforms*, CAL. INNOCENCE PROJECT, <http://californiainnocenceproject.org/2013/01/southern-ca-exonerations-dont-lead-to-eyewitness-id-reforms/> (last visited Feb. 21, 2016).

256. Telephone Interview with Scott Seaman, Police Chief, Los Gatos/Monte Sereno, Cal., Police Dep’t, former Police Officer, San Jose, Cal., Police Dep’t (Feb. 20, 2014).

257. *Id.*

258. See *San Jose Mercury News: Santa Clara County DA Program Aims to Boost Reliability of Eyewitness Identifications*, ALBERT COBARRUBIAS JUST. PROJECT (Feb. 9, 2012), <http://acjusticeproject.org/2012/02/09/san-jose-mercury-news-santa-clara-county-da-program-aims-to-boost-reliability-of-eyewitness-identifications/>.

259. *Chief Scott R. Seaman*, POLICE FOUND., http://www.policefoundation.org/team_detail/chief-scott-r-seaman/ (last visited Feb. 21, 2016).

260. Telephone Interview with Scott Seaman, *supra* note 256.

261. *Id.*; see also Peter A. Modafferi et al., *Eyewitness Identification: Views From the Trenches*, POLICE CHIEF MAG. (Aug. 17, 2009), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1926&issue_id=102009 (“The consequences for inaction are not acceptable; decisions and

CACP's Executive Board about the reforms, but he says the Board usually avoids setting "best practices" until there is really clear agreement on what the "best practices" are. The Board asked him not to promote the reforms yet as "best practices," so they would not have to vote on them; instead, the Board encouraged him to promote the reforms as "a promising practice."²⁶²

Seaman finished his term as president of the CACP in 2013, and since then, there has not been much movement in California. As of 2014, only five of California's fifty-eight counties had adopted the new procedures, and all five had done so within the preceding year or two, and all in Northern California.²⁶³ Los Angeles County, in particular, has been resistant to the changes because the District Attorney is adamantly opposed. Seaman predicts nonetheless that all California counties will come around eventually, including Los Angeles County, when enough DAs begin to pressure their colleagues. But even Seaman agrees the process will take time. As he put it, "We're taking a longer and more organic . . . approach [in California]."²⁶⁴

C. "Experimentalist" Bottom-up Approaches

1. The Statutes

A few other states take a middle path, in which they mandate policies on eyewitness identification procedures, but refrain from prescribing to any significant degree the specifics of those policies. Wisconsin was among the first to take this approach.

Wisconsin. In 2005, the Wisconsin Legislature passed legislation, by unanimous vote, mandating that every law enforcement agency in the state adopt written policies and procedures governing eyewitness identifications.²⁶⁵ More specifically, the law requires each agency to "adopt written policies for using an eyewitness to identify a suspect," and it explicitly ties those policies to preventing wrongful convictions; the law requires that "[t]he policies shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases."²⁶⁶ Beyond that, the law permits local law enforcement agencies to come up with their own policies, with whatever content they

protocols will be decided for us by state or federal legislators and private interest groups. The worst thing that we can do as leaders is stick our heads in the sand and hope that the problem will go away. It won't. As leaders, we need to confront this issue head on.").

262. Phone Interview with Scott Seaman, *supra* note 256.

263. The reform counties include Santa Clara, Alameda, San Francisco, San Mateo, and Placer. *Id.* Why those counties in particular have moved toward reform, and not others in California, is a question that itself deserves scholarly inquiry.

264. *Id.*

265. Assemb. B. 648, 97th Reg. Sess. (Wis. 2005). The reform bill is now codified in several sections of the Wisconsin Statutes. WIS. STAT. ANN. § 175.50 (West 2016) (relating to eyewitness identification reform).

266. § 175.50(2).

choose, as long as they at least consider the social-science-based “best practices.”²⁶⁷ At the same time, then-Attorney General Peg Lautenschlager, through the Wisconsin Department of Justice’s Division of Law Enforcement Services, Training and Standards Bureau, issued a model policy and procedure that incorporated the full complement of “best practices” recommendations.²⁶⁸

Virginia. That same year, 2005, Virginia adopted a more pared-down version of a similar law. The Virginia legislation provides in its entirety: “The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups.”²⁶⁹ The statute provides no further guidance. In 2010, the Virginia Crime Commission proposed an amendment, H.B. 207, that would have required agencies to adopt written policies consistent with best practices.²⁷⁰ The amendment failed to make it past the House Committee on Courts of Justice.²⁷¹

267. *Id.* §§ 175.50(3)–(4). The law provides:

(4) In developing and revising policies under this section, a law enforcement agency shall consider model policies and policies adopted by other jurisdictions.

(5) A law enforcement agency shall consider including in policies adopted under this section practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications, including the following:

(a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness’ viewing of individuals or representations.

(b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness.

(c) Minimizing factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the person administering the eyewitness’ viewing of individuals or representations.

(d) Documenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure.

Id. §§ 175.50(4)–(5).

268. Wis. DOJ MODEL POLICY, *supra* note 31.

269. VA. CODE ANN. § 19.2-390.02 (West 2016).

270. H.B. 207, 2010 Reg. Sess. (Va. 2010); *see also Virginia Hopeful for Eyewitness Identification Reform*, INNOCENCE PROJECT (Nov. 30, 2010, 5:50 PM), http://www.innocenceproject.org/Content/Virginia_Hopeful_for_Eyewitness_Identification_Reform.php.

271. Div. of Legislative Automated Sys., *2010 Session: HB 207 Police Lineups; Establishes a Uniform Procedure to be Used by All Law-Enforcement Agencies*, VA.’S LEGIS. INFORMATIONAL SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=101&typ=bil&val=hb207> (last visited Feb. 21, 2016).

Texas. Texas has also attempted a legislative approach requiring law enforcement to develop and adopt written identification policies. In 2011, the Texas legislature amended the Code of Criminal Procedure to include “Photograph and Live Lineup Identification Procedures.”²⁷² The amendment requires that “[e]ach law enforcement agency shall adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures.”²⁷³ The amendment further provides that law enforcement agencies may *choose* between adopting a model policy developed by the Law Enforcement Management Institute of Texas (“LEMIT”) or adopting an agency’s own policy that conforms to certain requirements.²⁷⁴ The model policy created by LEMIT offers “sample standard operating procedures,” including guidelines on sequential and blind photo arrays and live lineups.²⁷⁵

Nevada & West Virginia. Finally, Nevada and West Virginia have enacted laws requiring law enforcement agencies to adopt some type of written policy for live and photo lineups and showups.²⁷⁶ West Virginia’s statute mandates that law enforcement agencies provide written instructions to witnesses, obtain confidence statements from witnesses, and create a written record of the entire procedure.²⁷⁷ Other permissive language of West Virginia’s statute, however, places it in a hybrid category between “top down” and “bottom up.”

272. *History: HB 215*, TEX. LEGISLATURE ONLINE HIST., <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB215> (last visited Jan. 28, 2016); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2016).

273. H.R. 215, 84th Leg., Reg. Sess. (Tex. 2011).

274. *Id.* Policies that Texas agencies adopt on their own must be based on “credible field, academic, or laboratory research on eyewitness memory” and must address the selection of filler photographs, witness instructions, preservation of evidence, and administration procedures. *Id.* The Maryland legislature enacted a similar statute that states, “On or before December 1, 2007, each law enforcement agency in the State shall adopt written policies relating to eyewitness identification that comply with the United States Department of Justice standards on obtaining accurate eyewitness identification.” MD. CODE ANN., PUB. SAFETY § 3-506(a) (West 2016). Maryland requires each law enforcement agency to file its policy with the Department of State Police. *Id.* § 3-506(b).

275. *Model Policy on Eyewitness Identification: Frequently Asked Questions*, LAW ENFORCEMENT MGMT. INST. TEX. 1, 4–5, http://www.lemitonline.org/publications/documents/ewid_faq.pdf (last visited Jan. 29, 2016) (“The LEMIT model policy was drafted in response to § 3(b) of the Texas Code of Criminal Procedure, which required LEMIT to ‘develop, adopt, and disseminate to all law enforcement agencies in this state a model policy . . . regarding the administration of photograph and live lineup identification procedures.’”).

276. NEV. REV. STAT. ANN. § 171.1237.1 (West 2016); W. VA. CODE ANN. § 62-1E-3 (West 2016).

277. W. VA. CODE ANN. § 62-1E-2 & 62-1E-3.

2. Assessing the Experimentalist Model

Like any approach to reform, the experimentalist model has its advantages and disadvantages. The risk of this approach, of course, is that local police agencies might ignore the scientific research and adopt policies that merely codify old, ineffective practices. But the advantage is that police might examine the scientific research and find ways to implement it in procedures that local police fully buy into and that accommodate local circumstances and needs. Moreover, this approach offers the potential for retaining the flexibility to adapt practices to changes in the science and to allow creativity and experimentation in ways for implementing the scientific principles, fulfilling essentially the promise of the states (or even local agencies) to serve as laboratories of experimentation.²⁷⁸

In this sense, this hybrid approach reflects some of the values and principles underlying theories of “New Governance” and, in particular, the variant known as “Democratic Experimentalism.”²⁷⁹ As Katherine Kruse, who has analyzed the Wisconsin reforms under the democratic experimentalist paradigm, has explained:

Democratic experimentalism eschews top-down “command-and-control” regulation in favor of allowing practices to be developed from the bottom-up through provisional and localized problem solving, and embeds these local problem-solving efforts within larger structures of transparency that promote accountability and cross-jurisdictional learning.²⁸⁰

New Governance in general is viewed as a move away from processes of regulation in which experts formulate and impose rules upon those whom

278. The reference to states as laboratories of experimentation is attributed to Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann*. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

279. “Democratic experimentalism,” as a part of a larger body of “new governance” scholarship, has been theorized broadly as a new or emerging paradigm in administrative agency regulation. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

280. Kruse, *supra* note 24, at 648; see also Karkkainen, *supra* note 279, at 473–74.

they regulate toward more “decentralized, flexible, and pragmatic approaches that seek participation from regulated industries or agencies in formulating the rules that govern them.”²⁸¹ While police have not traditionally been viewed as administrative agencies, increasingly, scholars are recognizing that police operate like administrative agencies and are applying the democratic experimentalist paradigm to them.²⁸² Indeed, nearly fifty years ago the influential police scholar Herman Goldstein recommended recognizing the police as an administrative agency with important policy-making responsibilities;²⁸³ applying New Governance and Democratic Experimentalist theories of agency regulation to the police builds on that early prescription for improving policing in a complex world.

The experimentalist model is premised on the belief that the old, expert-based, top-down regulatory model resulted in static, “one-size-fits-all rules” instead of nuanced responses to policy problems.²⁸⁴ The theory is that the flexibility and openness of decentralized experimentation will lead to more democratic legitimacy accompanied by an expansion of knowledge and hence more effective responses to problems, which are amenable to constant revision and improvement.

Several features of this paradigm are of particular salience in the eyewitness identification context. The experimentalist model is dependent for improved policymaking on information sharing, benchmarking to best practices, citizen engagement, and transparency and accountability.²⁸⁵

Benchmarking refers to the practice of surveying reform models in other jurisdictions to identify those procedures that are superior to those the agency might otherwise use and that can be borrowed or adapted for use in the local jurisdiction.²⁸⁶ Benchmarking can occur through informal sharing of information, or more formally through cross-jurisdictional or national coordinating agencies that gather information about and evaluate local problem-solving approaches.²⁸⁷ In the eyewitness identification context, benchmarking is a prominent feature of the reform efforts, as the social science research has

281. Kruse, *supra* note 24, at 673.

282. *E.g., id.*; Garrett, *Judging Innocence*, *supra* note 31; Simmons, *supra* note 233, at 376 (“Modern police departments function like administrative agencies, and as such, they are susceptible to the same deficiencies that traditional agencies experience in other administrative contexts.”); *id.* at 400 (citing Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. C.L. & C.R. 43, 44 (2006)) (“Although rarely viewed through the lens of administrative law, police departments operate in a manner similar to traditional regulatory agencies.”); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC’Y 73 (2001).

283. Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1130 (1967).

284. Simmons, *supra* note 233, at 405.

285. Kruse, *supra* note 24, at 677; Simmons, *supra* note 233, at 406.

286. Kruse, *supra* note 24, at 680; Simmons, *supra* note 233, at 406.

287. Kruse, *supra* note 24, at 680.

spawned numerous model policies and procedures, from which local jurisdictions can borrow.²⁸⁸

Indeed, to some extent, the prominence of accepted science-based best practices in this field is in tension with the democratic experimentalism ideal. The best practices are so well developed, based on expertise generated and recognized at high levels of academia and government, that the goal of the reform efforts is to a large extent trying to find ways to get local actors to simply adopt and apply them. In that sense, the reform efforts do not much resemble local experimentation at all, and they have the familiar feel of the old, top-down, command-and-control governance models. Reformers know what they want the local rules and practice to look like; they are just looking for ways to get police to adopt them and accept them.

While there is considerable truth to this, the reality is that there remains room for localized experimentation. For example, while the best practices call for blind protocols, there is plenty of room for experimenting about how best to make the procedures blind. The most straightforward way to create blind procedures is to use a lineup administrator who does not know who the suspect is. But many jurisdictions, especially smaller ones, find this method beyond their means, as they do not have the resources to find or use an extra individual who does not know about the case. To solve this problem, many jurisdictions have adopted alternatives such as the folder shuffle method described above,²⁸⁹ which permits a detective who knows everything about the case to conduct the procedure, because the folders effectively blind her from knowing which image the witness is observing when he makes his identifications.²⁹⁰ Still, others have developed procedures utilizing laptop computers that use self-guiding software to conduct the procedures, effectively eliminating any police personnel from the process.²⁹¹ Another advantage of the laptops is that the software is then capable of recording in minute detail important data about the identification procedure – from the sequence of the photos viewed to the witness's response times on each photograph, the ex-

288. See *supra* notes 286–87 and accompanying text.

289. See *supra* note 228 and accompanying text.

290. While the folder shuffle method can be viewed as a local adaptation to nationally set best practices, it was itself to a large extent the brainchild of a group of experts working at the national level. Gary Wells explains:

The origins [of the folder shuffle method] go back to the Technical Working Group that wrote the DOJ [NIJ] Guide that was published in 1999. It was a late night brainstorm by the psychologists in the group. Our idea was to counter the claim of the other members of the group that there was no way to do a blind process in smaller departments.

E-mail from Gary Wells, Distinguished Professor of Psychology and the Wendy and Mark Stavish Chair in Soc. Scis. at Iowa State Univ., to author (Jan. 21, 2015) (on file with author).

291. See generally Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses*, *supra* note 78.

pressions on the witness's face, and the exact words used by the witness in the process.²⁹² As we shall see, local jurisdictions are experimenting with alternative packages of reforms as well as various sequences for implementing them and unique ways of defining them and training their officers to use them. Considerable experimentation and adaptation is possible.

The experimentalist paradigm fits only loosely in other respects as well. Citizen engagement, for example, is an ideal that is generally realized only in modified form in this context. In other related contexts, such as efforts to reform police misconduct (e.g., excessive use of force), citizen involvement is often seen as a critical part of the democratic experimentalist model. Citizen engagement not only adds political legitimacy to policy reforms, but it is helpful in minimizing the “us vs. them” mentality that can mark the police-citizen relationship.²⁹³ In the eyewitness identification context, however, there is very little direct citizen involvement in the rule-making process itself. The procedures just are not visible enough or salient enough to most people to activate much citizen engagement. But the procedures do matter to police investigators on the streets, so the bottom-up process does produce local police engagement, which can help minimize the “us vs. them” attitude that fosters resistance to meddling from outside “experts.”

Perhaps the biggest obstacle to realizing the experimentalist ideal in the eyewitness identification context, however, is that, in their current iterations, the eyewitness identification reforms lack effective mechanisms for ensuring accountability or “continuous change and improvement.”²⁹⁴ Democratic experimentalism is premised to a large degree on the notion that systems of transparency and accountability will operate to ensure that the experimenting continues, that knowledge continues to grow as local jurisdictions continually monitor the landscape and adopt evolving best practices. It depends on “an interactive *process* in which higher-level authorities give lower-level ones autonomy, and the lower-level ones give the higher ones information that can then be used in a process of continuous monitoring and improvement through bench-marking and emulation of best practices.”²⁹⁵

The bottom-up eyewitness identification reform efforts to date generally have weak or nonexistent mechanisms for ensuring accountability and shar-

292. For an illustration of the laptop computer model in field work, see *id.* at 4–6.

293. Simmons, *supra* note 233, at 409.

294. *Id.* at 410.

295. Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357, 358 (2003) (emphasis added). As Karkkainen has put it,

What is required . . . , democratic experimentalists argue, is a centrally coordinated and monitored system of parallel local experiments, networked and disciplined through structured information disclosures and monitoring requirements, subject to rolling minimum performance benchmarks but otherwise free to experiment in a continuous and ceaseless effort to improve, learn, and revise.

Karkkainen, *supra* note 279, at 485.

ing of information, which democratic experimentalists deem essential to ensuring continual change and advancement of knowledge.²⁹⁶ Many states simply mandate that local law enforcement agencies adopt “best practices,” sometimes referencing other model policies as benchmarks.²⁹⁷ But in some, no one has any responsibility for oversight or for evaluating the policies or their effectiveness, or often even for collecting them. While some states include a provision for centralized collection, in others, one has to file an Open Records or Freedom of Information Act request in each local jurisdiction – and there are nearly 600 independent police jurisdictions in Wisconsin alone – to obtain a copy of each written policy. Wisconsin’s statute does require that agencies revisit and reissue their policies every two years,²⁹⁸ but there is no mechanism to ensure that police actually rescan the environment to ensure that their policies are really state of the art. It is doubtful that busy police departments, once having adopted a written policy, do much to assess its efficacy and compliance with evolving scientific research.

The only real accountability mechanism under most eyewitness identification reform plans – beyond centralized collection of the policies in some states – is case-by-case litigation. The courts become the default oversight institution. That mechanism, however, is a weak one. It depends in most jurisdictions on the ineffectual federal due process standards under *Biggers* and *Brathwaite*. In jurisdictions that have adopted written identification policies, it largely remains to be seen whether or to what extent courts will incorporate those written policies into their due process analyses. Absent that, in most jurisdictions it is unclear if courts will separately enforce compliance with the policies through suppression. And it remains to be seen whether courts will rigorously (or at all) evaluate the adequacy of the written policies in light of the social science research. It is, for example, unclear whether courts in jurisdictions such as Oregon or New Jersey, where the supreme courts have demanded attention to the social science research, will continue to adapt to evolving social science standards. And case-by-case litigation by its nature suffers the deficiency of relying upon the skill, knowledge, and assertiveness of defense lawyers, prosecutors, and judges on matters that lie well outside their formal legal training and expertise.

There was some hope that courts in Wisconsin might take an active role in the democratic experimentalist approach when the Wisconsin Supreme Court decided *State v. Dubose*.²⁹⁹ As discussed, *Dubose* jettisoned the ineffectual *Biggers/Brathwaite* due process test for admissibility of eyewitness evidence and instead created a test that promised to demand police use of best practices.³⁰⁰ The court held that identification evidence would be inadmissible, regardless of what a court thought about its ultimate reliability, if police

296. Karkkainen, *supra* note 279, at 485.

297. Kruse, *supra* note 24, at 680.

298. WIS. STAT. ANN. § 175.50(3) (West 2016).

299. 699 N.W.2d 582 (Wis. 2005).

300. *Id.* at 594–97.

used “unnecessarily suggestive” procedures.³⁰¹ Because the local identification policies adopted pursuant to the state statute would be a logical starting point for assessing unnecessary suggestiveness, judicial review could have become an effective enforcement tool. Moreover, to the extent that a local agency were to adopt identification policies that conflict with the Wisconsin Department of Justice Model policies and with accepted best practices, review for “unnecessary suggestiveness” might even have provided an opportunity for compelling local jurisdictions to either defend their use of their procedures or find ways to incorporate more science-based best practices. Thus, as Katherine Kruse observed shortly after the new eyewitness identification regime went into place, “[t]he new state constitutional due process standard announced in *Dubose* can be seen as reinforcing the experimentalist structure of the legislation.”³⁰²

Kruse, however, was skeptical of the efficacy of this accountability mechanism,³⁰³ and her skepticism now appears prescient. As noted, despite the promise and the apparent applicability of the logic of *Dubose*, Wisconsin courts subsequently backed away from any role they might have played in generally holding police accountable for adopting and implementing best practices by limiting *Dubose* to showup identifications. And while Wisconsin courts have looked at the Wisconsin Department of Justice Model Policies and Procedures, and some of the policies adopted at the local level, they have not found non-compliance with those policies to provide an independent basis for suppression of the eyewitness evidence.³⁰⁴ There does not appear to be an effective mechanism for systematic oversight, accountability, and information sharing under the Wisconsin regime.

The existing eyewitness identification reform models are thus imperfect fits within the democratic experimentalist paradigm. But that is hardly unusual, as scholars have observed that there probably is no system that perfectly embodies the new governance model.³⁰⁵ And despite some of the tensions, democratic experimentalism theory provides some useful guidance for policy-makers attempting to implement bottom-up approaches to eyewitness identification reform. Most fundamentally, the bottom-up approach captures at least one of the key features of democratic experimentalism: the notion that

301. *Id.* at 594–95.

302. Kruse, *supra* note 24, at 689.

303. *Id.* at 650 (“[A]lthough Wisconsin’s innocence reforms are promising, they lack an adequate institutional structure to sustain a process of continuous reform. The only mechanism that the reforms provide for holding local law enforcement agencies accountable to the experimentalist goals of cross-jurisdictional learning and public accountability is the exclusionary rule in individual cases.”).

304. *E.g.*, *State v. Drew*, 740 N.W.2d 404, 406, (Wis. Ct. App. 2007) (affirming trial court ruling rejecting the “argument that suppression was required because the photo array procedure did not conform to the ‘Model Policy and Procedure for Eyewitness Identification’ issued by the Office of the Attorney General (OAG)”).

305. Kruse, *supra* note 24, at 674; Simmons, *supra* note 233, at 419; Tushnet, *supra* note 295, at 358.

participatory policy-making enhances the chances for buy-in and hence effective reform in practice. As Kruse put it, “The experimentalist governance paradigm promises that by being more closely involved in a collaborative and ongoing process of creating and revising the rules that govern their behavior, local actors will be more invested in complying with them.”³⁰⁶

All of this suggests reasons to be both optimistic and pessimistic about the effectiveness of the reform efforts. In the next Part, I engage more directly the key question circulating around all of this: How well has the democratic experimentalist experiment (and the other reform efforts) worked in practice? To address this question, I compare data from several states, most prominently Wisconsin, to the national data collected by PERF and similar data collected in several other specific states.

V. PRELIMINARY DATA ON THE REFORM EFFORTS

Because no one has yet systematically examined actual police practices under these various reform regimes, data do not yet exist to assess whether top-down or bottom-up approaches, or something in between, is most effective at reforming actual police conduct. That research needs to be done and is forthcoming. In the meantime, preliminary conclusions about reform efforts can be reached by analyzing what law enforcement agencies say, in writing, as a matter of policy their officers *should* do. For top-down approaches, that analysis requires little more than reading the legislative (or in the case of New Jersey, the Attorney General’s) directives. Those directives (laws) are discussed above. For bottom-up or democratic experimentalist approaches, the task is a bit more complicated, because it requires collecting and analyzing each agency’s policies. In this Part, I present and analyze that data.

A. National Comparisons

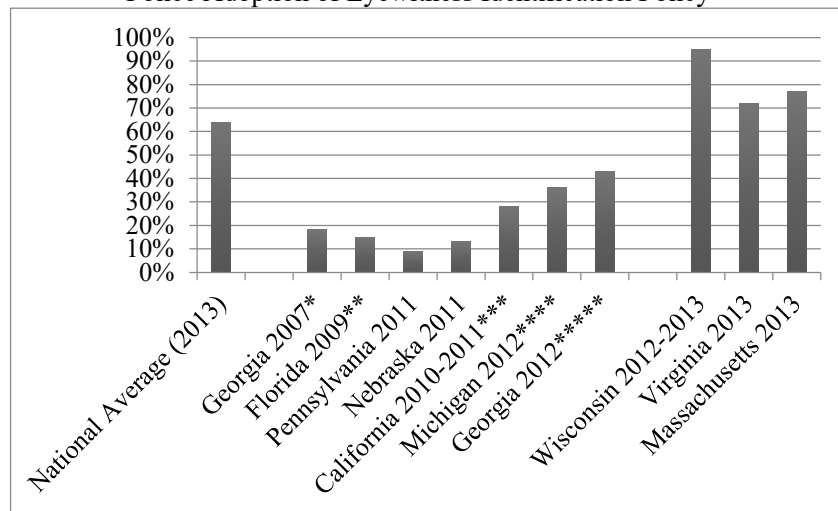
The first goal of the democratic experimentalist model is to engage local actors in the problem-solving enterprise. As a starting point for assessing the model’s impact, it is useful first to understand the level of police-agency policy engagement on eyewitness identification across all jurisdictions.

Figure 1 shows that, nationwide, 64% of all law enforcement agencies have adopted some form of written eyewitness identification policy; this is a national average across top-down, bottom-up, and no reform jurisdictions.³⁰⁷ Figure 1 also presents comparative data on rates of adopting identification policies for those individual states where such data has been collected, ranging from a low of 9% in Pennsylvania in 2011, to a high of 95% in Wisconsin in 2012-13.

306. Kruse, *supra* note 24, at 683 (citing Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 23–24 (1997)); see Simmons, *supra* note 233, at 410.

307. POLICE EXEC. RESEARCH FORUM, *supra* note 20, at vii.

FIGURE 1:
Police Adoption of Eyewitness Identification Policy³⁰⁸



* Data collected before Georgia began serious reform efforts.

** Data were collected before the Florida Innocence Commission and the Florida Department of Law Enforcement issued suggested guidelines.

*** Data collected prior to several local efforts to encourage California police to voluntarily adopt best practices.

**** Data collected before the Michigan Council on Law Enforcement Standards voluntarily adopted standards requiring departments to implement new policies for eyewitness identification procedures.

***** Georgia data reflects large jump in rate after Georgia pursued a voluntary training program for law enforcement. The data precedes a 2015 statute that requires agencies to adopt written policies that contain scientifically supported best practices.

These data show that the trend, over time, is toward greater adoption of eyewitness identification policies. That suggests that reform efforts are working, at least to some extent. Time alone does not entirely capture what is happening though, as significant disparities remain between states sampled at the same time.

308. Sources: GA. INNOCENCE PROJECT, LAW ENFORCEMENT SURVEY (2007) (on file with author); INNOCENCE PROJECT OF FLORIDA, LAW ENFORCEMENT AGENCY POLICE SURVEY (2010); TEMPLE UNIVERSITY LAW, EYEWITNESS IDENTIFICATION POLICY SURVEY (2010); NEBRASKA INNOCENCE PROJECT, EYEWITNESS IDENTIFICATION POLICY SURVEY; NORTHERN CALIFORNIA INNOCENCE PROJECT, FOIA EYEWITNESS IDENTIFICATION POLICY SURVEY (2010–2011); NEW ENGLAND INNOCENCE PROJECT, EYEWITNESS IDENTIFICATION POLICY SURVEY (2011–2013); STATE BAR OF MICH., EYEWITNESS IDENTIFICATION TASK FORCE (2012) (on file with author); Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1, 9 (2014) [hereinafter Garrett, *Eyewitness Identifications and Police Practices*].

It is of course impossible to know from this data with any certainty what else accounts for these disparities. Part of it may be regional and cultural differences. Part may be political. But at least some of the differences appear to reflect the impact of the statutes.

Those jurisdictions that mandate written policies do indeed have higher rates of agency-adopted policies. Of these states, the three with the highest agency-adopted policy rates are Wisconsin, Massachusetts, and Virginia (set forth as a separate cluster to the right in Figure 1). These are the three states that mandate policies.³⁰⁹ Wisconsin and Virginia do it by laws that require police to adopt policies of their choosing;³¹⁰ Massachusetts does it by judicial action. At the time the data were collected, none of the other states had any policy mandates. To the extent Wisconsin, Massachusetts, and Virginia represent experiments in democratic experimentalism, the data suggest that at its most basic level, the experiment is working – it does indeed generate greater local engagement with policy development. A deeper dive into the policies in the next Part of this Article reveals that, in other respects, the experiment is indeed advancing the reform agenda, albeit imperfectly.

B. Democratic Experimentalism: The Wisconsin Data

Because Wisconsin was a pioneer in the democratic experimentalist approach to eyewitness identification reform, I collected data on police policies in Wisconsin so that I could begin to assess its effectiveness. I submitted Open Records Law³¹¹ requests to all 562 law enforcement agencies in the state,³¹² asking that they send me their written eyewitness identification policies and procedures. I sent the first request in September 2007, nine months after the eyewitness identification law went into effect. To increase the response rate, I submitted follow-up requests for copies of the written policies to all the agencies again in 2012. This time, in an attempt to get greater cooperation, Captain Victor Wahl of the Madison Police Department joined me in making the request.³¹³ I followed this up with another letter in 2013 to agencies that had not yet responded, and then my research assistant followed that up with phone calls to target non-responders to encourage them to submit

309. See *supra* notes 184–87, 266–72 and accompanying text.

310. See WIS. STAT. ANN. § 175.50(4)–(5) (West 2016); VA. CODE ANN. § 19.2-390.02 (West 2016).

311. WIS. STAT. ANN. §§ 19.31–.39 (West 2016).

312. The Wisconsin Department of Justice provides contact information for 72 sheriff's offices, 476 police departments, 13 university police departments, and 1 municipal police department. WIS. DEP'T OF JUSTICE, WISCONSIN LAW ENFORCEMENT DIRECTORY (Feb. 28, 2014), <https://wilenet.org/html/directory/Law-Enforcement-Directory-2014-02-28.pdf>.

313. Captain Wahl is a member of the Advisory Board of the Wisconsin Innocence Project (“WIP”) at the University of Wisconsin Law School. *WIP's New Advisory Board*, U. WIS. L. SCH. (July 25, 2011), http://www.law.wisc.edu/fjr/whats_new/news/ipnewboard2011.html. I am faculty co-director of WIP.

their policies. In total, we received responses from 366 police agencies (65.1%), which included the vast majority of the larger city police departments and 94.4% of the county sheriff's departments. Of those agencies that responded, 349 (95.4%) indicated that they had a written policy and provided a copy of that policy.

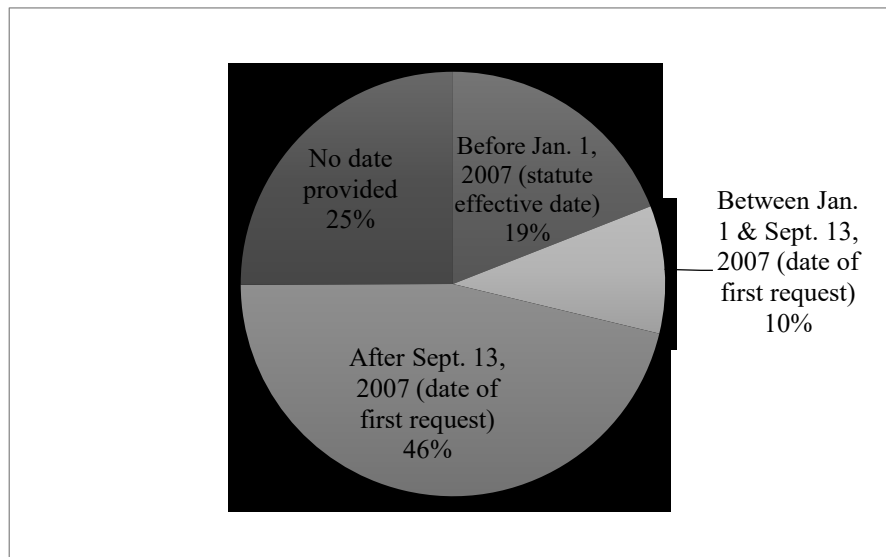
1. Policy Dates

As an initial matter, while imperfect, the Wisconsin data add weight to the conclusion that the high adoption rates are at least in part the product of the legislative demand. Many of the written policies note the date they were adopted. Figure 2 shows that, of all of the written policies, 81.1% (293 of 349) of the policies (or at least their most recent iterations) either bore no date or were adopted after January 1, 2007, when the legislative requirement went into effect, suggesting that many were adopted (or revised) directly in response to the legislation.³¹⁴ Of those, 9.7% (34 of 349) bore a date between January 1, 2007, and September 13, 2007 – that is, after the law went into effect but before I submitted my first Open Records request. Another 46.1% (161 of 349) adopted policies dated after September 13, 2007, *after* the agencies received that first Open Records request. These dates suggest that many of these agencies first adopted their policies only after they were asked to produce a copy. Indeed, a number of agencies candidly admitted that they were unaware of the statutory requirement until my request alerted them to it. Were it not for this research, many likely would not have adopted policies, at least not as soon as they did.

This experience also confirms the importance of providing oversight responsibility to someone other than the law enforcement agencies themselves to ensure that they know about and comply with the policy requirement. These data support Kruse's observation that the experimentalist approach in Wisconsin, while promising, is incomplete because it lacks adequate mechanisms for oversight, feedback, and accountability. While filing Open Records requests can play a role in ensuring accountability, it is a haphazard mechanism at best.

314. See 2005 Wis. Legis. Serv. 528 (setting effective date of the statute at January 1, 2007).

FIGURE 2:
Dates of Wisconsin Police Agency Written Policies

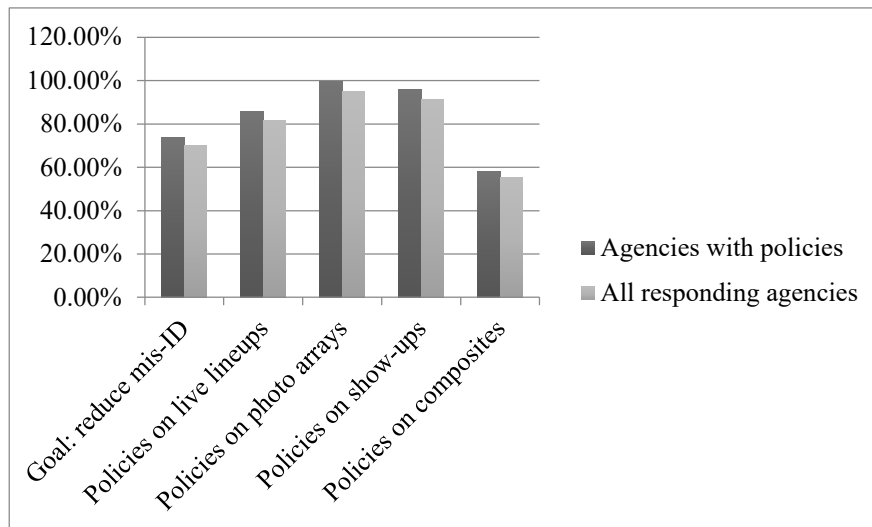


2. Policy Adoption Rates

Looking in more detail at Wisconsin, the data in Figure 3 show widespread but incomplete compliance with the law and with the social-science-based model policies. Of the 349 Wisconsin police agencies that have a written policy, 257 (73.6%) explicitly reference the statutory objective of reducing misidentifications. Two hundred and ninety-nine of the written policies cover live lineup procedures, representing 81.7% of all (366) responding agencies, and 85.7% of all (349) responding agencies that have any sort of policy.³¹⁵ All but one – 348 out of 349 – of the policies address photo array procedures – representing 99.7% of all Wisconsin agencies that have any policies, and 95.1% of all (366) responding agencies. A surprisingly large number of agencies (334) include policies on showup procedures, representing 95.7% of agencies that have any policies and 91.3% of all responding agencies. A much smaller number (202) have written policies on the use of composite sketches, representing 57.9% of agencies with any policies and 55.2% of all responding agencies.

315. Fifty of the 349 agencies that responded with policies did not include procedures for live lineups. Eleven agencies specifically stated that they do not use live lineups. Nine stated that live lineups are only allowed with the approval or assistance of a supervisor or the District Attorney's office. Two police departments use the county sheriff's department's facilities and procedures for live lineups. Finally, 28 written policies did not provide procedures for live lineups and did not explain why.

FIGURE 3:
Wisconsin Police Agencies with Written Policies



3. Policy Source

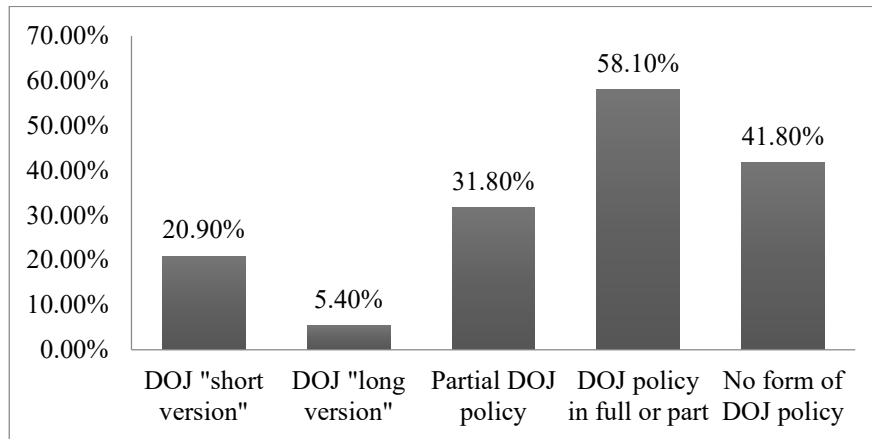
Other data from the Wisconsin policies reveal that, consistent with the democratic experimentalist ideal, local agencies have engaged in at least some localized experimenting. The Wisconsin Attorney General actually promulgated not one, but two model policies. One, the “long version,” spanning twenty-eight pages, provided an in-depth analysis of the social science research and a list of six critical recommendations.³¹⁶ The other, the “short version,” at a mere three pages, was meant to be a short-hand reference for busy law enforcement agencies.³¹⁷ It provided a condensed, shorter alternative that the law enforcement agencies could adopt and modify for their own departments’ policies. The “short version” addressed photo arrays, live lineups, showups, and composites and recommended double-blind and sequential procedures. It did not, however, explicitly endorse the “folder system” if an independent administrator was unavailable. Figure 4 shows that, of those agencies that adopted any sort of policy, 73 (20.9%) adopted the “short version” of the model policy, 19 (5.4 percent) adopted the entire “long version,” 111 (31.8%) adopted a policy that incorporated part of either the long or short version, and 146 (41.8%) adopted no form of the model policy. Thus, while a majority of local departments borrowed either partially or fully from the DOJ-sanctioned model policy, a significant minority declined to

316. WIS. DOJ MODEL POLICY, *supra* note 31.

317. WIS. DEP’T OF JUSTICE, MODEL POLICY DRAFT 1 (2005) [hereinafter WIS. DOJ MODEL POLICY DRAFT].

adopt the DOJ policies either in full or at all, but created something else of their own choosing.

FIGURE 4:
Source of Wisconsin Police Eyewitness ID Policies



4. Double-Blind & Sequential Procedures

Despite this apparent experimentation, in the end, most – but not all – police departments settled on policies that incorporate much of the social science research and the “best practices.” In particular, as summarized in Figure 5, a large majority of agencies adopted double-blind procedures for photo arrays and a smaller majority chose double-blind procedures for live lineups, indicating that even many agencies that declined to adopt the DOJ model policy in whole or in part nonetheless incorporated double-blind procedures. For photo arrays, 229 agencies, or 65.8% of the 348 agencies with any photo array policies, mandate double-blind procedures in every case and another 69, or 19.8%, require double-blind “when possible.” Thus, in total, 298, or 85.6%, of all agencies with photo array policies require double-blind procedures either in every case or whenever possible. For live lineups, 174 agencies, or 58.2% of the 299 agencies with a policy on lineups, mandate double-blind procedures in every case, and another 53 agencies, or 17.7%, call for double-blind lineups “when possible.” Thus, combined, 227 agencies, or 75.9%, of all agencies with live lineup policies require double-blind procedures either in every case or whenever possible.

FIGURE 5:
Wisconsin Policies on Double-Blinding

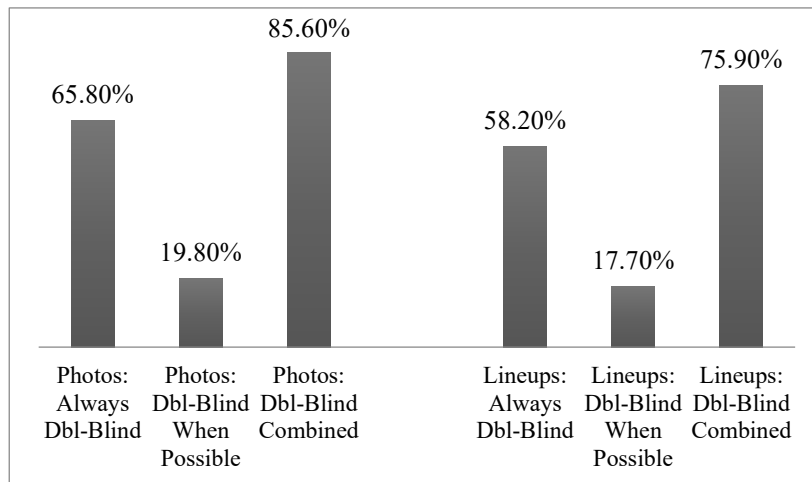
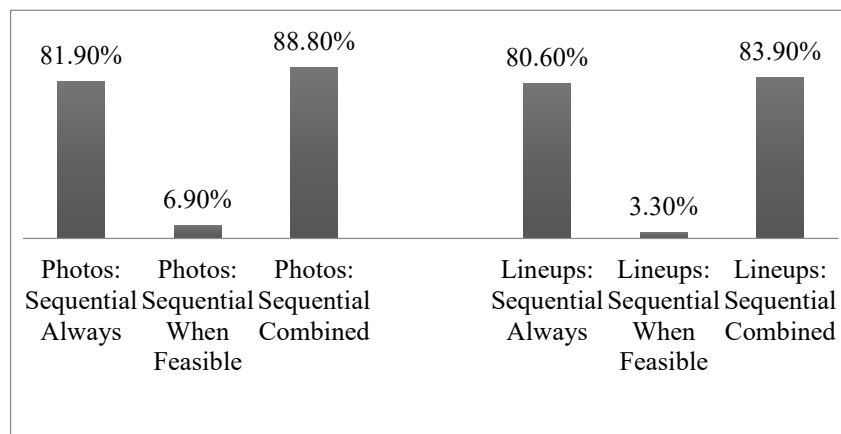


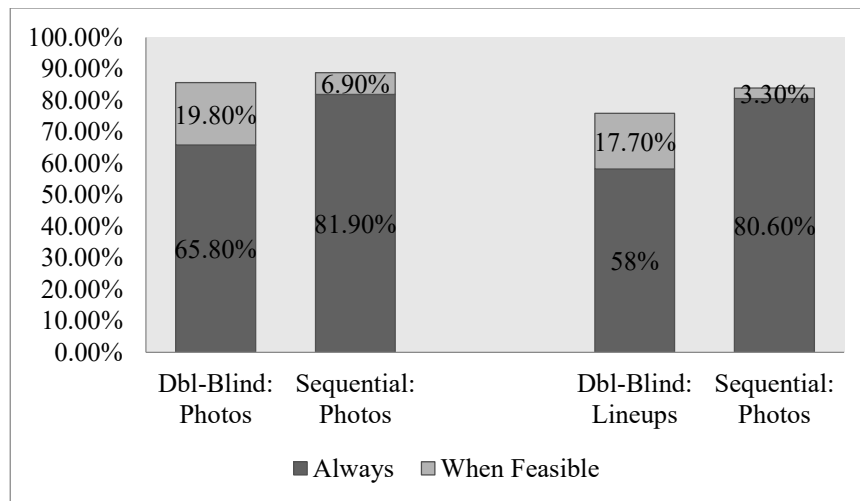
Figure 6 reveals that even more agencies adopted sequential than double-blind procedures. For photo arrays, 285 agencies, representing 81.9% of the 348 agencies with photo array policies, require sequential procedures in every case. Another 24 agencies, or 6.9%, call for sequential procedures “when feasible.” Combined, 309 agencies, or 88.8% of agencies with photo array policies, require sequential procedures in every case or whenever feasible. For live lineups, 241 agencies, or 80.6% of the 299 agencies with a live lineup policy, require sequential procedures in every case, and another 10 agencies, or 3.3%, require sequential procedures when feasible. Combined, 83.9% of Wisconsin police agencies with written policies on lineup procedures require sequential procedures either in every case or when feasible.

FIGURE 6:
Wisconsin Policies on Sequential Presentation



While the experimentalist approach in Wisconsin has led a majority of agencies to adopt double-blind and sequential procedures, the results are not perfect. First, a significant number of agencies still have not adopted either double-blind or sequential procedures. Second, and more troublingly, as shown in Figure 7, more agencies have adopted sequential procedures than blind procedures. According to the research, however, blind procedures are more important than the sequential procedures. Yet police appear more enamored with the sequential procedure than the double-blind procedure. Indeed, in the social science literature, sequential procedures are recommended *only* if conducted in a double-blind manner. Without blinding, the sequential procedure, which permits a witness to spend more time focused on a single photo or individual while engaged with a detective who knows whether that individual or photo is the suspect, is especially vulnerable to the kinds of even unintentional cuing that the blind procedure is designed to minimize.³¹⁸ Left to their own devices, some police agencies have thus inadvertently adopted policies that include the worst possible combination – non-blind sequential procedures.

FIGURE 7:
Policies on Double-Blind and Sequential Procedures



A deeper examination of the way Wisconsin agencies approach double-blind procedures reveals additional agency-level experimentation and varying degrees of concordance with best practices. Table 1 shows again that, while most agencies have adopted double-blind protocols to one degree or another, nearly fifteen percent do not for photo arrays, and a full quarter do not for live

318. See Garrett, *Eyewitness Identifications and Police Practices*, *supra* note 308, at 9–10.

lineups. Additionally, Table 1 reveals that a majority of agencies – 58% for live lineups and 63% for photos – instruct lineup administrators not to be in a position in which they could influence the witness (in addition to or instead of running the procedures in a double-blind manner). And a slightly smaller majority – 57% for both live lineups and photo arrays – instruct lineup administrators somewhat ambiguously to “minimize suggestiveness.”

TABLE 1:
Policies on Blind Procedures

	Photo Policies (N=348)	Lineup Policies (N=299)
Double-blind—always	65.8% (229)	65.0% (174)
Double-blind—when possible	19.8% (69)	17.7% (53)
No mention of double-blind	14.4% (50)	24.1% (72)
Administrator should not be in position to influence the witness	63.2% (220)	58.2% (174)
Administrator must “minimize suggestiveness”	56.9% (193)	57.2% (171)

When agency policies call for sequential procedures, they are even more likely to make them mandatory than when they call for making blind procedures mandatory. Table 2 shows that 82% of all agencies require sequential display of photos “always,” and only 7% call for sequential “when feasible.” Only 11% make no mention of the sequential procedure.

Table 2 also shows that a minority of agencies address what happens when a witness asks to see the sequential display a second time. Researchers caution that a second “lap” through the sequential process should never be offered, but leave it to the discretion of local agencies to permit the second lap if a witness requests it, with the understanding that the second lap reduces or eliminates the advantages of the sequential procedure because repeated viewings permits the witness to engage in the relative judgment process.³¹⁹ Among Wisconsin’s agencies, 40% permit a second lap for photo arrays, and 26% permit it for live lineups.

Finally, Table 2 also shows that some agencies, but again a minority, provide additional research-supported guidance on how to conduct the folder shuffle method as a way to achieve blinded testing. Research and Wisconsin’s Model Policy instruct that the suspect should not be placed in the first position because witnesses are often reluctant to pick the first photo or person they see.³²⁰ Additionally, the Model Policy recommends putting two blank or empty folders at the bottom of the sequential stack so that the witness will not know when she has viewed the last photo and therefore will not feel com-

319. See generally N.K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262 (2011).

320. WIS. DOJ MODEL POLICY, *supra* note 31, at 9.

pelled to pick someone too soon.³²¹ Of Wisconsin's agencies, 44% instruct officers not to put the suspect in the first position for photo arrays (and relatedly, 30% offer that guidance for live lineups). Additionally, 40% of policies call for two blank or empty folders at the end of the sequential procedure (that recommendation has no application to live lineups).

TABLE 2:
Policies on Sequential Procedures

	Photo Policies (N=348)	Lineup Policies (N=299)
Sequential – always	81.9% (285)	80.6% (241)
Sequential – when feasible	6.9% (24)	3.3% (10)
Sequential not prescribed	11.2% (39)	16.1% (48)
Allow repeat showings (“laps”) if witness requests	40.5% (141)	26.4% (79)
Suspect should never be in first position	44% (153)	30.4% (91)
Blank folders should be put at the end	39.9% (139)	N/A

5. Constructing & Conducting the Lineup or Array

Table 3 shows that some but not all agencies provide additional guidance on essential components of constructing a lineup or photo array. A small majority, for example, provides directions on how many fillers (known innocents) to include. There is no social-science-based gold standard for the optimal number of fillers to include in a procedure. The general rule is that, up to a point, the more fillers the better. The Wisconsin Attorney General's Model Procedure recommends a *minimum* of five fillers.³²² Despite the fundamental nature of this component of any identification procedure, more than a third of Wisconsin agency policies on photo arrays (36%), and almost half of the policies on live lineups (47%) provide no guidance on the recommended number of fillers. On the other hand, those that do specify a minimum number of fillers almost uniformly meet or exceed the Wisconsin Attorney General's recommendation of at least five fillers. For photo arrays, only 3% recommend fewer than five fillers, while for live lineups, nearly 38% recommend a minimum of fewer than five. The difference almost certainly reflects the greater difficulty of finding appropriate fillers for live lineups than for photo arrays.

Table 3 also shows that most agencies provide at least some guidance on how to select fillers so as to minimize suggestiveness, although many agency policies do not comport fully with best practices. For photo arrays, more than

321. *Id.*

322. *Id.* at 8.

95% of agencies provide guidance on selecting fillers, and for live lineups, 80% provide such guidance. But a large majority of agencies continue to recommend outdated means of doing so, rather than the method recommended by the Attorney General's Office. The Attorney General's Model Policy explicitly recommends matching the fillers to the *description of the perpetrator*, rather than to the suspect, when possible.³²³ Only a minority of agencies recommend the match-to-description method (23% for photo arrays and a mere 16% for live lineups); the majority (73% for photo arrays and 64% for lineups), continue to recommend the traditional method of matching the fillers to the suspect.

TABLE 3:
Guidance on Use of Fillers

	Photo Policies (N=348)	Lineup Policies (N=299)
Minimum of 4 fillers	3.2% (11)	37.8% (113)
Minimum of 5 fillers	47.4% (165)	10.7% (32)
Minimum of 6 fillers	10.1% (35)	3.3% (10)
Minimum of 7 fillers	2.9% (10)	10% (3)
No prescribed number of fillers	36.5% (127)	47.2% (141)
Fillers should match the suspect	22.7% (79)	16.4% (49)
Fillers should match description of perpetrator provided by the witness	72.7% (253)	63.5% (190)
No guidance provided on selecting fillers	4.6% (16)	20% (60)

An important component of the social-science-based best practices, also reflected in the Wisconsin Attorney General's Model Policy, is proper witness instructions.³²⁴ Table 4 shows that most, but again not all, Wisconsin police department policies require specific witness instructions. Nearly three-quarters of photo array policies include the most important instruction: that the real perpetrator might or might not be present in the photo array or lineup. Smaller percentages of agencies specify additional important instructions beyond that.

323. *Id.* at 8–9.

324. *See supra* notes 48–53 and accompanying text; *see also* WIS. DOJ MODEL POLICY, *supra* note 31, at 10.

TABLE 4:
Policies on Witness Instructions

	Photo Policies (N=348)	Lineup Policies (N=299)
Witness should be instructed the perpetrator might not be present	74.4% (259)	72.6% (217)
Witness should be instructed that the administrator does not know who the suspect is	62.1% (216)	64.5% (193)
Witness should be instructed that it as important to clear the innocent as identify the guilty	31.9% (111)	31.4% (94)
Witness should be instructed s/he does not need to identify anyone	35.6% (124)	31.1% (91)
Witness should be instructed that facial hair and clothes can change one's appearance	38.2% (133)	33.1% (99)

To guard against confidence malleability, the research and the Wisconsin Attorney General's Model Policy also strongly recommend taking verbatim confidence statements immediately after an identification, before the witness has received any feedback.³²⁵ Table 5 shows that, while a majority of Wisconsin agencies require prompt recording of witness statements (62% for both photo arrays and live lineups), more than one-third of the policies do not. Moreover, even fewer agency policies – less than one-third for both photo arrays and live lineups – explicitly require that confidence statements be taken verbatim.

TABLE 5:
Policies on Confidence Statements

	Photo Policies (N=348)	Lineup Policies (N=299)
Witness confidence must be assessed and recorded immediately	61.8% (215)	62.2% (186)
Witness's confidence statement should be recorded verbatim	31.9% (111)	28.8% (86)
Avoid multiple procedures with the same witness	63.8% (222)	63.5% (190)
Include only one suspect per procedure	39.9% (139)	29.8% (89)

325. See *supra* notes 66–69 and accompanying text; see also WIS. DOJ MODEL POLICY DRAFT, *supra* note 317, at 10.

Finally, key components of best-practices recommendations and the Attorney General's Model Policy include directives to avoid presenting the suspect to any witness or witnesses in more than one procedure and to include only one suspect per photo array or lineup.³²⁶ Table 6 reveals that nearly two-thirds of the photo array and live lineup policies include this directive, while only 40% of the policies specifically provide for only one suspect per photo array, and only 30% the live lineup policies include that provision.

TABLE 6:
Policies on Multiple Procedures & Multiple Suspects

	Photo Policies (N=348)	Lineup Policies (N=299)
Avoid multiple procedures with the same witness	63.8% (222)	63.8% (190)
Include only one suspect per photo array	39.9% (139)	29.8% (89)

6. Policies on Showups

Wisconsin data on one-on-one showups also provide some support for the democratic experimentalist approach – but again with caveats. The data reveal an area of agency involvement in policy development that top-down regulators (legislators) have largely overlooked. Few, if any, legislative directives address showups. But left to create their own identification policies, most Wisconsin police departments did; indeed, more agencies adopted policies on showups than on live lineups. That almost certainly reflects the fact that showups are much more relevant to most police agencies than are live lineups. Showups are easy to conduct, and almost all police agencies have used them historically. They require no set-up and simply entail the expediency of presenting a suspect to a witness on the scene shortly after the offense. And they can be employed even where police lack probable cause to arrest a suspect. Live lineups, however, are difficult to arrange. They require access to a large pool of individuals from which police can select a sufficient number of appropriate fillers (fillers who fit the description of the perpetrator or who match the suspect). Most agencies simply do not have access to that many bodies. And they usually require a suspect who is in custody. Consequently, most police agencies do not do many, if any, live lineups. The comparatively lower number of live lineup policies, therefore, likely reflects the reality that the agencies do not do live lineups (and hence have no need for a

326. See *supra* notes 70–101 and accompanying text; see also WIS. DOJ MODEL POLICY DRAFT, *supra* note 317, at 8.

policy), rather than a failure to comply fully with the legislative directive to develop relevant eyewitness identification policies.

Showups also suggest significant local experimentation and creativity because, while the Wisconsin Attorney General's Model Policy addressed showups, it did not include them in the list of six key recommendations. The Attorney General's Office, instead, addressed showups only deep in the body of its long-form report and not at all in its short-form policy.³²⁷ Accordingly, to the extent that agencies were borrowing from the Attorney General's model policy, they had to dig deeper and work harder to come up with a policy. Nonetheless, nearly 96% of agencies with any eyewitness identification policies included policies on showups.

Two reasons likely account for this. First, because virtually all law enforcement agencies use showups to one extent or another, they likely deemed this an important issue to include in their policies. Nothing in the legislation required them to address showups, but given that they were bound to develop eyewitness identification policies in general, they identified showups as an important procedure to address.

Second, in 2005, the year the legislature passed the law requiring law enforcement policies, the Wisconsin Supreme Court decided *State v. Dubose*.³²⁸ Recall that in *Dubose* the court changed the law on showups, holding that showup evidence is inadmissible unless police can demonstrate exigent circumstances requiring them to use this inherently suggestive procedure.³²⁹ Constructing a photo array or live lineup typically requires time and prolonged access to the suspect, making an arrest a precondition in most cases. By contrast, showups can be conducted without probable cause because police can legally detain a suspect long enough to present the suspect to the witness at the scene based upon mere reasonable suspicion.³³⁰ According to the *Dubose* court, showup evidence is ordinarily inadmissible unless police lacked probable cause to arrest; if police had probable cause, then a showup was not necessary (hence, there were no exigent circumstances).³³¹ Police could have, and should have, arrested the suspect and taken the time to construct a proper photo array or live lineup.³³²

While this latter rationale might help explain why showups are deemed an important topic for inclusion in police policies, it also raises an anomaly. If, indeed, the limitations imposed on police by *Dubose* were the animating factor, then one would expect police to adopt policies on showups that comport with the demands of *Dubose*. But to a surprising degree, they do not. Of the 334 responding agencies with written policies on showups, 258 (77.2%) specified, as demanded by *Dubose*, that showups should only be used in “ex-

327. See WIS. DOJ MODEL POLICY DRAFT, *supra* note 317, at 17, 23–26.

328. 699 N.W.2d 582, 582 (Wis. 2005).

329. *Id.* at 593.

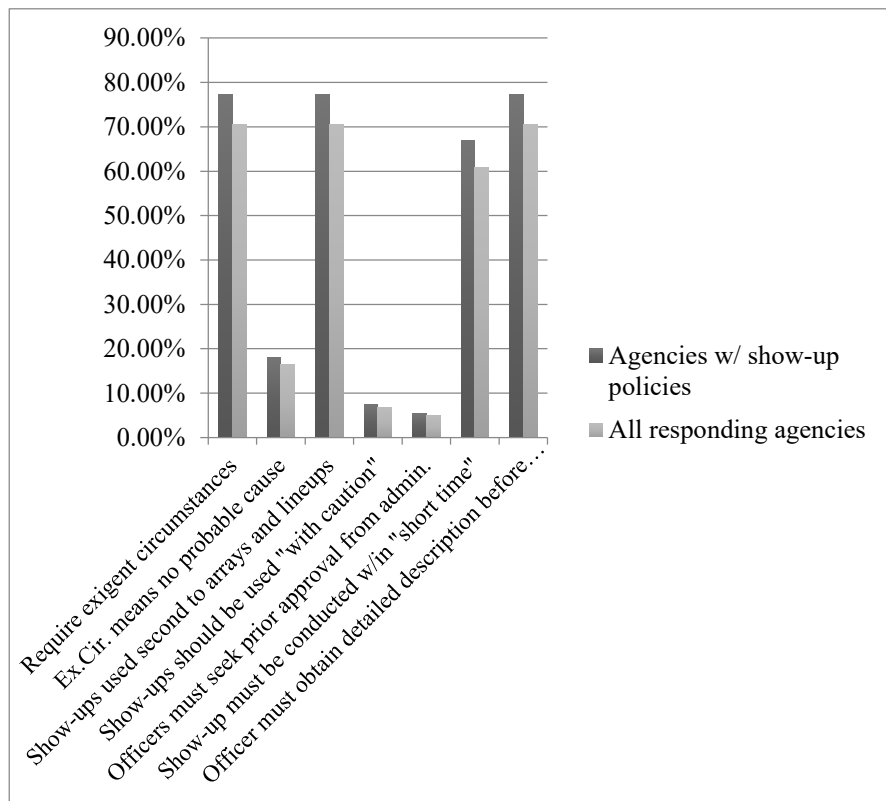
330. See *Terry v. Ohio*, 392 U.S. 1, 33 (1968).

331. *Dubose*, 699 N.W.2d at 594.

332. *Id.*

igent circumstances” – but that means that nearly a quarter of the agencies that adopted a showup policy failed to adopt a policy that comports with this clear legal requirement. Moreover, only 60 agencies (18% of agencies with a showup policy) defined exigent circumstances in this context as circumstances in which police lacked probable cause to arrest, as the Wisconsin Supreme Court held in *Dubose*. As depicted in Figure 8, agencies adopted a variety of constraints on their use of showups, which comport with *Dubose* to varying degrees. The failure to achieve higher levels of compliance with *Dubose*, even on paper let alone in practice, suggests at least some limits to the effectiveness of command-and-control reform strategies reflected by the *Dubose* mandate. This is not, of course, to argue that mandates such as *Dubose* are of no value, but rather to point out that full effectiveness will depend upon strategies that inform and enforce once the mandate is in place.

FIGURE 8:
Wisconsin Police Policies on Showups



In sum, the Wisconsin data show that the bottom-up experimentalist approach has produced real advancements in local policies, but has permitted significant minorities – and on some issues even significant majorities – to

continue utilizing outdated and problematic procedures. Wisconsin police, on paper at least, are far ahead of the national norms for eyewitness identification policies, but there remains plenty of room for continued reform.

C. *The Virginia Comparison*

Fuller insights into the experimentalist approach can be gleaned from a comparison of Wisconsin's experience to that in Virginia, as analyzed by Brandon Garrett.³³³ Virginia's short statutory directive – requiring police to adopt written eyewitness identification policies – arose in a police culture in which there had been scant previous attention paid to identification procedures. Prior to enactment of its eyewitness identification statute, from 1993-2005, the Virginia Department of Criminal Justice Services (“DCJS”) had just a short, “barebones” model policy – just a few lines long – that “offered no instructions and almost no guidance at all on how to conduct . . . different types of [identification] procedures.”³³⁴ Following enactment of Virginia's statute in 2005, requiring every agency to adopt eyewitness identification policies, the DCJS revised and updated its recommended model policy.³³⁵ The revised policy added for the first time an introduction to concepts such as the use of blind and sequential identification procedures and the description of detailed, clear instructions to be provided to eyewitnesses, including an instruction that the suspect “may or may not be present.”³³⁶ But the 2005 model policy provided no instructions on how to use the folder system, which many smaller jurisdictions elsewhere have found essential to their ability to blind their processes.³³⁷ And most problematically, the 2005 model policy made the same mistake that some Wisconsin police agencies have made of making sequential procedures mandatory, but blind procedures only optional.³³⁸

In 2010, the DCJS surveyed law enforcement in Virginia and found that, despite the legislative directive to adopt written policies, at least 25% of the agencies that responded still had no policy at all.³³⁹ Of the agency policies reviewed in that survey, 66% adopted the sequential method, but only 6% required blind procedures.³⁴⁰ As noted above, police apparently unwittingly adopted the worst-case combination of recommended reforms. A follow-up

333. Garrett, *Eyewitness Identifications and Police Practices*, *supra* note 308, at 5–6.

334. *Id.* at 9.

335. *Id.* at 10.

336. *Id.* at 11.

337. *Id.*

338. *Id.* at 9.

339. *Id.* at 12.

340. *Id.*

survey of 267 law enforcement agencies found that most Virginia police departments still had not adopted best practices.³⁴¹

In November 2011, the DCJS again revised its model policies, this time issuing a comprehensive set of recommendations fully based on the social science research.³⁴² The model policy recommends a number of best practices, including the “Folder Shuffle Method” that “was devised to address concerns surrounding limited personnel resources while allowing for blind administration.”³⁴³ The model policy also recommends double-blind administration and sequential viewing for both photo and live Lineup Procedures.³⁴⁴ The model is purely advisory.³⁴⁵ Despite this new, comprehensive, and well-drafted policy, reform has still been slow to come.³⁴⁶ Nearly two years after the model policy was adopted, Garrett found that even then, “the vast majority of agencies across Virginia have failed to implement the best practices.”³⁴⁷

A comparison of Virginia’s agency policies to Wisconsin’s agency policies on some of the key variables is presented in Figure 9. Garrett requested the written policies from the 300-plus police agencies in the state.³⁴⁸ Of those, 201 responded and 145 provided written policies; one-fifth of the agencies still lacked any policy at all, in violation of the Virginia statute.³⁴⁹ Of the 144 reviewed policies, only 6% had implemented the 2011 model policy; only 40% required blind lineup procedures or even made them optional; only 9 agencies described the folder shuffle method as an option; 43 out of 144 had no provisions regarding the need to minimize suggestion; only 88 of 144 included standard witness instructions; and most (84/144) had no policies

341. *Id.* at 13.

342. VA. DEP’T OF CRIMINAL JUSTICE SERVS., MODEL POLICY ON EYEWITNESS IDENTIFICATION (Nov. 16, 2011), <http://www.dcjs.virginia.gov/cple/sampleDirectives/manual/2-39.pdf>. This model policy was developed with the help of University of Virginia law professor Brandon Garrett and has since been revised twice in July 2012 and September 2013. *Id.*

343. *Id.* at 5.

344. *Id.* The policy notes that even if blind administration is not feasible,

a ‘blinded’ administrator may be used, namely an individual who knows the suspect’s identity but is not in a position to see which members of the line-up are being viewed by the eyewitness. This can be accomplished, for instance, through the use of the folder shuffle method or via laptop technology.

Id. at 6–7.

345. *Id.* at 1–2.

346. *Va. Law Enforcement Agencies Fail to Improve Eyewitness ID Policies, UVA Law Professor Finds*, U. VA. SCH. L. (Aug. 26, 2013), http://www.law.virginia.edu/html/news/2013_fall/garrett_eyewitness_study.htm.

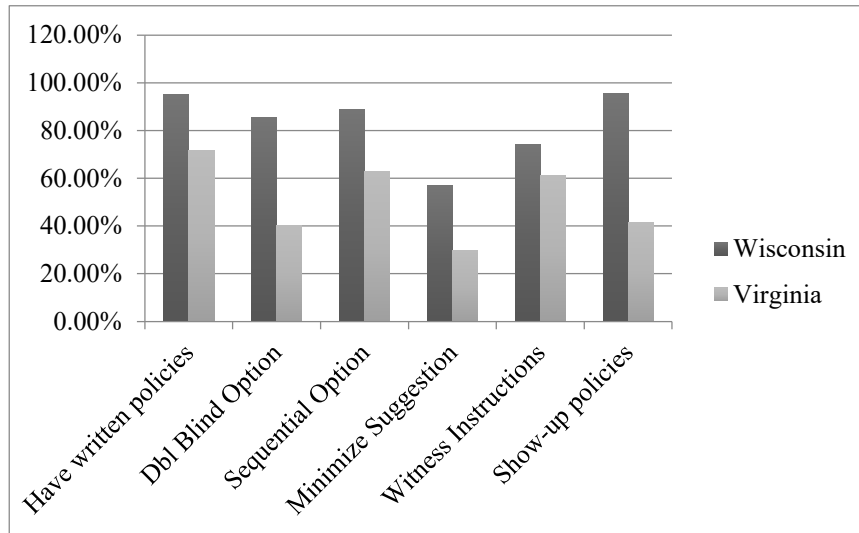
347. *Id.*

348. *Id.*

349. *Id.*

at all on showups.³⁵⁰ Problematically, far more policies required sequential than blind procedures; 63% required or suggested sequential procedures, but only 40% required or suggested blind procedures.³⁵¹

FIGURE 9:
Wisconsin and Virginia Photo Identification Policies



While the data cannot be used to draw firm conclusions about causation, the Virginia story suggests some possible explanations for the underperformance of Virginia police compared to Wisconsin police. The experience suggests that simply directing police to do something is not enough. The Virginia law did little to guide law enforcement about what was expected of them, the reasons they should adopt policies, or even the existence of model policies and the body of social science research. When the state finally updated its model policies, they were inadequate and confused. Little was done to create a culture of shared participation and responsibility.

350. *Id.*; Garrett, *Eyewitness Identifications and Police Practices*, *supra* note 308, at 6–20.

351. Garrett, *Eyewitness Identifications and Police Practices*, *supra* note 308, at 15, 17. Subsequent to Brandon Garrett’s survey of Virginia police, the Virginia Association of Chiefs of Police (“VACP”) in the spring of 2014 conducted another survey of the 135 Virginia police agencies with “primary law enforcement responsibilities” (those that investigate crimes). E-mail from Rebecca Brown, Innocence Project Policy Dir., to author (July 21, 2015) (on file with author). According to the VACP, their data showed substantially improved compliance with best practices, although they have not released the actual policies yet for outside assessment. *Id.*

Together, given the much higher rates of policy engagement in Wisconsin and Virginia compared to national norms, and the sure but incomplete movement toward best practices, the Wisconsin and Virginia experiences suggest that the Democratic Experimentalist model has real potential to work from the bottom up to improve law enforcement practices. But those experiences also reinforce the notion that real experimentalist reform requires not only the freedom for local experimentation and an obligation to address a problem, but also systems for benchmarking “best practices,” setting standards, measuring outcomes, sharing learning, and ensuring accountability. In the end, Kate Kruse was likely correct when she observed that “if the experimentalist potential of the Wisconsin reforms is to come to fruition, administrative agencies--specifically the Wisconsin Department of Justice--will need to take a more active role in creating structures of information coordination.”³⁵²

CONCLUSION

Translating learning about wrongful convictions into reform of the criminal justice system has proven to be a challenge. Even with eyewitness identification evidence – on which there is near-unanimous agreement about what needs to be done to improve police practices – reform has been slow and uneven. The diffusion of the criminal justice system across fifty states and 18,000 independent law enforcement agencies poses particular challenges and demands locally tailored responses. The states have experimented with alternative methods of effecting reform, from top-down, command-and-control legislation or judicial mandates, to hands-off education and persuasion approaches, to a middle path involving systems for imposing reform obligations on police, without dictating the nature of the reforms, in a manner that loosely fits within “new government” and “democratic experimentalism” models of agency regulation.

While the results have been mixed, it does appear that the democratic experimentalist model has real potential for engaging police constructively in solving the problem of eyewitness error. The data also suggest, however, that careful attention must be paid to essential components of a new governance model and, in particular, the necessity for appropriate benchmarking, accountability, and feedback. To date, no existing legislation has fully addressed those essential components, and the reforms have suffered as a consequence. None of this is to say that the experimentalist model is necessarily superior to the command-and-control model, as that conclusion requires additional research examining actual police practices on the streets. But it does at least suggest that, done properly and in the right circumstances, the new governance approach can be part of the solution to the problem of eyewitness misidentification.

352. Kruse, *supra* note 24, at 650.

