

## THE IMPERATIVE OF EYEWITNESS IDENTIFICATION REFORM AND THE ROLE OF POLICE LEADERSHIP

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### I. INTRODUCTION

Kirk Bloodsworth, a former Marine, was accused of the brutal sexual assault and murder of a nine-year-old girl in Baltimore County, Maryland in 1985.<sup>1</sup> Despite his innocence, five eyewitnesses claimed to have observed Mr. Bloodsworth with the victim, Dawn Hamilton, on the day of her death.<sup>2</sup> Based in large part on the testimony of those five mistaken witnesses, Mr. Bloodsworth was convicted of Dawn's rape and murder, and sentenced to execution.<sup>3</sup> The Maryland Court of Appeals overturned his conviction, yet upon retrial, he was again wrongfully convicted based primarily on the same eyewitness evidence.<sup>4</sup>

Mr. Bloodsworth ultimately served more than eight years—including two on death row—in Maryland prisons before post-

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1. *Know the Cases: Browse Profiles: Kirk Bloodsworth*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Kirk\\_Bloodsworth.php](http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php) (last visited May 20, 2013).
2. *First DNA Death Row Exoneration: Kirk Bloodsworth*, NORTHWESTERN LAW BLUHM LEGAL CLINIC CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/md/kirk-bloodsworth.html> (last visited May 20, 2013).
3. *See Know the Cases*, *supra* note 1.
4. *See id.*

conviction DNA testing conclusively proved his innocence *and* that all five of the eyewitness identifications were mistaken.<sup>5</sup>

During the time Mr. Bloodsworth was erroneously investigated, prosecuted, convicted, and incarcerated, an area man named Kimberly Shay Ruffner attempted to rape and kill a woman.<sup>6</sup> At the time of Dawn Hamilton's vicious death, Mr. Ruffner had been charged with at least three sexual assaults within miles of where Dawn Hamilton's body had been found.<sup>7</sup> Ultimately, the same DNA evidence that proved Mr. Bloodsworth's wrongful conviction helped to prove that it was Kimberly Shay Ruffner—not Kirk Bloodsworth—who had committed the horrible crime against Dawn Hamilton.<sup>8</sup>

If not for those five eyewitness misidentifications, it likely would not have taken 19 years, two wrongful convictions, the exoneration of Mr. Bloodsworth, and at least one attempted rape and murder by Mr. Ruffner for Mr. Ruffner to finally be brought to justice for the rape and murder of nine-year-old Dawn Hamilton.<sup>9</sup>

The eyewitness misidentifications in Mr. Bloodsworth's wrongful conviction are not an isolated problem. They are instead representative of the fact that traditional eyewitness identification procedures have tremendous potential to create misleading eyewitness identification evidence. At the time of this writing, there have been 311 wrongful convictions proven by post-conviction DNA testing.<sup>10</sup> As that number continues to grow, eyewitness misidentification consistently remains a factor in roughly 75% of those wrongful convictions, making it by far the leading contributing cause.<sup>11</sup> In nearly 1 in 4 of those cases, it was not one but multiple eyewitnesses who had misidentified an innocent person as the real perpetrator of a heinous crime.<sup>12</sup>

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5. *Id.*

6. See Stephanie Hanes, '84 Investigation Quick to Overlook the Culprit, *BALT. SUN* (May 22, 2004), [http://articles.baltimoresun.com/2004-05-22/news/0405220166\\_1\\_ruffner-dawn-hamilton-bloodsworth](http://articles.baltimoresun.com/2004-05-22/news/0405220166_1_ruffner-dawn-hamilton-bloodsworth).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Fact Sheet on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited May 20, 2013).

11. INNOCENCE PROJECT, *REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION* (2009), available at [http://www.innocenceproject.org/docs/Eyewitness\\_ID\\_Report.pdf?phpMyAdmin=52c4ab7ea46t7da4197](http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf?phpMyAdmin=52c4ab7ea46t7da4197).

12. *Id.*

Given the indisputable role of eyewitness misidentification in creating wrongful convictions, the fact that over thirty years of research demonstrates how simple it is to minimize the possibility of eyewitness misidentification, and the fundamental importance of eyewitness evidence to our criminal justice system, one might assume that the various branches of our governments are moving swiftly to reduce the possibility of eyewitness error. That has not proven to be the case. While a small but growing number of law enforcement agencies, courts, and legislatures have addressed this problem, the vast majority of this nation's criminal justice system still regards "traditional" eyewitness identification procedures as presumptively acceptable—despite the proven propensity of those procedures to create misleading eyewitness identification evidence.<sup>13</sup> In light of the duty of courts to dispense justice; the mission of police to protect the public; and the responsibility of legislatures to serve the interests of the people, the relative lack of action on the issue from each branch of government is alarming.<sup>14</sup>

Because eyewitness evidence is critically important to our criminal justice system; traditional eyewitness identification procedures are proven to foster mistaken eyewitness evidence; and governments have been moving at a sclerotic pace to require improvements to eyewitness identification procedures; the Innocence Project has placed eyewitness identification reform at the top of its policy reform agenda.<sup>15</sup> From our work and experience exonerating the wrongfully convicted, we have seen that wrongful convictions devastate the lives of innocent people and their families, from whom they are grievously torn. Victims clearly have no interest in misidentifying innocent people. Indeed, the only beneficiaries of misidentifications are the real perpetrators of crime, who often elude detection as a result—and in many instances proceed to commit other serious crimes.<sup>16</sup> There are painfully real human consequences that flow from misleading eyewitness identification evidence. The Innocence Project advocates

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13. *Id.*

14. At the time of this writing only 12 states have statutes, many of which are limited in substance and scope, requiring eyewitness identification reform in some manner.

15. *Id.*

16. Of the nation's 311 wrongful convictions proven by post-conviction DNA testing, in 153 of those cases the real perpetrators were ultimately identified (133 people being the real perpetrator in those 153 wrongful conviction cases. Of the 133 real perpetrators identified, based on convictions it is clear that at least 49% of them (n=66) had committed additional crimes subsequent to exonerees' arrests/convictions. This included 76 rapes, 33 murders, and 30 other violent crimes. Fact Sheet, Innocence Project Research Department (Sept. 20, 2013) (on file with author).

for the reform of eyewitness identification procedures because it is simply wrong for our governments to permit unreliable eyewitness identification procedures to confound the very purpose of our criminal justice system.

Fortunately, progress is afoot. Police agencies,<sup>17</sup> executive agencies,<sup>18</sup> courts,<sup>19</sup> legislatures,<sup>20</sup> and attorneys general,<sup>21</sup> are increasingly addressing the causes of eyewitness misidentification, and national police organizations are declaring their support for the use of improved eyewitness identification procedures.<sup>22</sup> This article explains why it is appropriate for all branches of government to act to prevent unreliable eyewitness identifications and how progress is being made on each of those fronts. We will first explore the scientific basis for the reform package sought by the Innocence Project, the role each branch of government can play in achieving reform, the value of engaging law enforcement in the development and promotion of state-level eyewitness identification reform, and the responsibility of the courts in assuring the promise of reform is

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17. INNOCENCE PROJECT, *Jurisdictions That Use Double-Blind Sequential Presentation of Lineups* (Sept. 16, 2011), available at <http://www.cga.ct.gov/jud/eyewitness/docs/DB-Sequential%20Jurisdictions-FINAL%209%2016%2011.pdf>.
  18. VIRGINIA DEP'T OF CRIMINAL JUSTICE SERVS., *Model Policy on Lineups/Eyewitness Identification* (April 1, 2010), available at <http://www.dcjs.virginia.gov/cple/sampleDirectives/manual/2-39.docx>; see also LAW ENFORCEMENT MGMT. INST. OF TEXAS, *Eyewitness Identification Model Policy*, available at <http://www.lemtonline.org/publications/ewid.html> (last visited May 20, 2013).
  19. *State v. Henderson*, 27 A.3d 872, 894 (N.J. 2011); *State v. Lawson*, 244 P.3d 860, 866, 872–73 (Or. Ct. App. 2010).
  20. See CONN. GEN. STAT. § 54-1p (2012); MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011); NEV. REV. STAT. § 171.1237 (2011); N.C. GEN. STAT. § 15A-284.52 (2011); OHIO REV. CODE ANN. § 2933.83 (LexisNexis 2011); R.I. GEN. LAWS § 12-1-16 (2012); TEXAS CRIM. PROC. CODE ANN. art. 38.20 (West 2012); VA. CODE ANN. §§ 19.2-390.02, 9.1-102 (2010); W. VA. CODE ANN. § 62-1E-1 to -3 (LexisNexis 2010); WIS. STAT. ANN. § 175.50 (West 2012); H.R. 470, 2010 Leg., Reg. Sess. (Vt. 2010); H.R. 352, 149th Gen. Assemb., Reg. Sess. (Ga. 2007).
  21. See Letter from John Farmer, Attorney General, State of New Jersey, to all county prosecutors, all police chiefs, and all law enforcement chief executives (Apr. 18, 2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>; Letter from The Task Force to Identify & Recommend Policies & Procedures to Improve the Accuracy of Eyewitness Identification, to Governor Carcieri, Chief Justice Suttell, Governor-Elect Chafee, President Pavia Weed, Speaker Fox, Chairman McCaffrey, and Chairman Caprio (Dec. 27, 2010), available at <http://www.ripid.org/documents/FINALSubmittedTFReport.pdf>; OFFICE OF THE ATTORNEY GENERAL, STATE OF WISCONSIN, *Model Policy and Procedure For Eyewitness Identification* (Apr. 1, 2010), available at <http://doj.state.wi.us/dles/tns/eyewitnesspublic.pdf>.
  22. See *supra* notes 17–19.

realized. The article will then describe the reform effort in progress in Maryland as a means of exploring the intricacies of a reform effort in practice.

## II. SCIENTIFICALLY SUPPORTED BEST PRACTICES

It is beyond credible dispute that eyewitnesses are prone to error. Three decades worth of research has firmly established that eyewitness memory is malleable,<sup>23</sup> fallible,<sup>24</sup> and far less reliable than had previously been assumed.<sup>25</sup> This same body of research pinpoints those fundamental elements of traditional eyewitness identification procedures that contribute to misidentifications, including having an officer who knows the identity of the suspect administer the identification procedure;<sup>26</sup> populating the lineup with non-suspects chosen because they resemble the suspect;<sup>27</sup> failing to

23. See Steven J. Frenda et al., *Current Issues and Advances in Misinformation in Research*, 1 CURRENT DIRECTIONS IN PSYCHOL. SCI. 20, 20 (2011); Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560, 570 (1975); Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720 (1995). See generally Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 LEARNING AND MEMORY 361, 361–66 (2005).
24. See Ralph N. Haber & Lyn Haber, *Experiencing, Remembering, and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1097 (2000) (“At present neither the courts nor the person-on-the-street who may become a juror consider eyewitness identification as a fallible matching test with a substantial false-positive rate. Rather, human memory—the ability of the eyewitness to remember and then identify a stranger—is incorrectly treated as highly accurate and reliable.”); Matthew J. Sharps et al., *Eyewitness Memory in Context: Toward a Taxonomy of Eyewitness Error*, 24 J. POLICE CRIM. PSYCHOL. 36, 37 (2009); Elizabeth F. Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 NEUROSCIENCE 231, 232 (2003). See generally Neil Brewer & Gary L. Wells, *Eyewitness Identification*, 20 CURRENT DIRECTIONS PSYCHOL. 24 (2011).
25. See Haber, *supra* note 24, at 1057; Steven Penrod, *How Well are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (2003); Sharps, *supra* note 24, at 37.
26. See Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 63, 63 (2009); Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 70–71 (2009); Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAVIORAL & BRAIN SCI. 377, 377 (1978); Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553, 567–68 (1993).
27. See Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 839 (1993); Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, 155, 158–59 (Rod C. L. Lindsay et al. eds., 2007). See generally Gary L. Wells et al.,

provide specific instructions to the witness about the role of the identification procedure in the overall investigation;<sup>28</sup> giving the eyewitness post-identification feedback;<sup>29</sup> failing to document a statement of relative confidence from the eyewitness immediately after an identification;<sup>30</sup> and presenting lineup or array members simultaneously to the eyewitness, as opposed to one at a time.<sup>31</sup>

Research has proven that each of these police procedures—which are described by researchers as “system variables”—contributes to the likelihood of misidentifications. Fortunately, research has also identified how simple changes to each of these system variables can greatly minimize the possibility of misidentifications.<sup>32</sup> The primary reforms to system variables include:

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- Guidelines for Empirically Assessing the Fairness of a Lineup*, 3 *LAW & HUM. BEHAV.* 285 (1979) (discussing the difference between nominal and functional size lineups).
28. See generally Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 *LAW & HUM. BEHAV.* 575 (2005) (comparing biased and unbiased identification in eyewitness instruction); Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 *LAW & HUM. BEHAV.* 283 (1997) (discussing the ramifications of biased and unbiased identification in eyewitness instruction).
  29. See Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 *APPLIED COGNITIVE PSYCHOL.* 859, 863 (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 PSYCHOL.* 360, 362 (1998).
  30. Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 155, 159–60 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).
  31. *State v. Lawson*, 291 P.3d 673, 707 (Or. 2012); Curt A. Carlson et al., *Lineup Composition, Suspect Position, and the Sequential Lineup Advantage*, 14 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 118, 118 (2008); Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County’s Pilot Project in Blind Sequential Eyewitness Identification*, 32 *WM. MITCHELL L. REV.* 1, 13–14 (2005); Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 *CARDOZO PUB. L. POL’Y & ETHICS J.* 381, 388 (2006); R.C.L. Lindsay et al., *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 *J. APPLIED PSYCHOL.* 796, 800 (1991); Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *LAW & HUM. BEHAV.* 459, 459–60 (2001); Nancy K. Steblay et al., *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 *PSYCHOL. PUB. POL’Y & L.* 99, 100 (2011).
  32. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 *WIS. L. REV.* 615, 616 (2006). See generally Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1546 (1978) (discussing how changing “system variables” can reduce inaccuracies of eyewitnesses).

**1. The “Double-blind” Procedure:** A “double-blind” lineup is one in which neither the administrator nor the eyewitness knows who the suspect is.<sup>33</sup> This prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect.<sup>34</sup>

**2. Instructions:** “Instructions” are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection.<sup>35</sup> They also prevent the eyewitness from looking to the lineup administrator for feedback during the identification procedure.<sup>36</sup> One of the recommended instructions includes the directive that *the suspect may or may not be present in the lineup*.<sup>37</sup>

**3. Composing the Lineup:** Suspect photographs should be selected that do not bring unreasonable attention to him.<sup>38</sup> Non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the eyewitness*—as opposed to their resemblance to the police suspect.<sup>39</sup>

**4. Confidence Statements:** Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made prior to the receipt of any feedback.<sup>40</sup>

**5. Sequential Presentation of Lineup Members:** When combined with a “blind” administrator, presenting lineup members one-by-one (sequentially), rather than all at once (simultaneously), has been proven to significantly increase the overall accuracy of eyewitness identifications.<sup>41</sup> (It should be noted that when the sequential presentation of lineup members is accomplished with a non-blind administrator, the procedure has been shown to be even more suggestive than the traditional non-blind, simultaneous procedure, causing an increase in the possibility of misidentification; therefore,

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33. See Wells, *Eyewitness Identification*, *supra* note 32, at 629.

34. *Id.* at 629–30.

35. *Id.* at 625; see Nancy K. Mehrkens Steblay, *Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Show-Ups versus Lineups*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 341, 343–44 (2006).

36. Wells, *Eyewitness Identification*, *supra* note 32, at 630.

37. *Id.* at 625.

38. *Id.* at 624.

39. *Id.*

40. *Id.* at 631.

41. *Id.* at 625–26.

the sequential presentation must be combined with blind administration for its benefits to be realized.<sup>42</sup>)

**6. Documented Lineup Procedure:** Ideally, the lineup procedure should be video recorded.<sup>43</sup> If this is impracticable, an audio or written recording should be made. Properly documenting the details of the procedure is critical to ensuring its evidentiary value.<sup>44</sup>

More than a quarter century of peer-reviewed research has underscored how each of these small changes to the system variables employed in eyewitness identification procedures significantly minimizes the likelihood of misidentifications.<sup>45</sup> Field studies of the use of these reforms have tested their practical application by police, and demonstrated that they are workable and successful in the field.<sup>46</sup> The data from a recent landmark field study, which was conducted in four police departments in regions across the country, demonstrated the evidentiary value of the use of the improved system variables (use of the reforms reduced the selection of non-suspect line-up members by half, with no reduction in suspect selections).<sup>47</sup> Just as importantly, experience has shown that when police officers are provided with education about the value of the new procedures and trained in how to readily employ them, they appreciate the value of the enhanced procedures to their daily work.<sup>48</sup>

Because of the significant potential for eyewitness error presented by the traditional practices and the proven value of enhanced procedures, leading jurists and commentators<sup>49</sup>— as well as some of

42. *Id.* at 626–27; see Klobuchar & Caligiuri, *supra* note 31, at 14–15.

43. LAW ENFORCEMENT MGMT. INST. OF TEXAS, *supra* note 18, at 4.

44. *Id.* There are other important elements of eyewitness identification procedures, including show-ups, which have been proven to create eyewitness misidentifications. Wells, *Eyewitness Identification*, *supra* note 32, at 628. While different from standard eyewitness identification procedures, the Innocence Project also works for the use of evidence-based show-up practices whenever such a procedure is necessary.

45. Gary L. Wells et al., *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies*, American Judicature Society iv, viii–x (2011), available at [http://www.ajs.org/wc/pdfs/EWID\\_PrintFriendly.pdf](http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf).

46. *Id.* at 16; see also Klobuchar et al., *supra* note 31, at 404–05.

47. Wells et al., *supra* note 45, at ix–x.

48. Klobuchar et al., *supra* note 31, at 409–10.

49. *Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION (Aug. 2004), available at [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Identification.html](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am04111c.doc-27k-2012-10-01; Recommendations for Eyewitness Identification. North Carolina Actual Innocence Commission, NORTH CAROLINA ACTUAL INNOCENCE COMM'N, <a href=)



the nation's leading law enforcement leadership organizations<sup>50</sup>—urge that enhanced procedures be employed as a matter of regular police practice. In fact a small but significant number of police agencies,<sup>51</sup> courts,<sup>52</sup> and legislatures<sup>53</sup> across the country have already reformed (or required the reform of) their eyewitness identification procedures. Yet despite these hopeful developments, the vast majority of law enforcement agencies still do not employ the modifications proven to enhance the reliability of eyewitness identifications,<sup>54</sup> and neither their state courts nor their legislatures have moved to require them to do so.<sup>55</sup>

(last visited May 20, 2013); *Report to the Judiciary Committee of the Connecticut General Assembly*, EYEWITNESS IDENTIFICATION TASK FORCE (Feb. 2, 2012), <http://www.cga.ct.gov/jud/eyewitness/docs/Final%20Report.pdf>; *Report and Recommendations Regarding Eyewitness Identification Procedures*, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE (Apr. 13, 2006), <http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>; *Final Report to the Supreme Court of Florida*, FLORIDA INNOCENCE COMMISSION (Jun. 27, 2012), [http://www.flcourts.org/gen\\_public/finalreport2012.rtf](http://www.flcourts.org/gen_public/finalreport2012.rtf); *Final Report of the New York State Bar Association's Task Force on Wrongful Convictions*, NEW YORK STATE BAR ASS'N (Apr. 4, 2009), [http://www.nysba.org/AM/Template.cfm?Section=News\\_Center&CONTENTID=31576&TEMPLATE=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=News_Center&CONTENTID=31576&TEMPLATE=/CM/ContentDisplay.cfm); *Recommendations for Improving Eyewitness Identifications*, NEW YORK STATE JUSTICE TASK FORCE (Feb. 2011), [http://www.nyjusticetaskforce.com/2011\\_02\\_01\\_Report\\_ID\\_Reform.pdf](http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf) (last visited May 20, 2013).

50. See Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NAT'L INST. OF JUSTICE J., Oct. 2007, at 3, 4, available at <https://www.ncjrs.gov/pdffiles1/nij/219603a.pdf>; COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT 42.2.11, 42.2.12 (5th ed.); INT'L ASS'N OF CHIEFS OF POLICE, *National Law Enforcement Policy Center Eyewitness Identification Model Policy* (Sept. 2010); JAMES M. CRONIN ET AL., *PROMOTING EFFECTIVE HOMICIDE INVESTIGATIONS* 35 (Craig Fischer ed., 2007).
51. INNOCENCE PROJECT, *supra* note 11, at 22–23.
52. *State v. Lawson*, 291 P.3d 673, 698 (Or. 2012); *State v. Henderson*, 27 A.3d 872, 928 (N.J. 2011).
53. CONN. GEN. STAT. § 54-1p (2012); MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011); NEV. REV. STAT. § 171.1237 (2011); N.C. GEN. STAT. § 15A-284.52 (2011); OHIO REV. CODE ANN. § 2933.83 (LexisNexis 2010); R.I. GEN. LAWS 1956, § 12-1-16 (2010); TEXAS CRIM. PROC. CODE ANN. art. 38.20 (West 2005); VA. CODE ANN. § 9.1-102 (2013); VA. CODE ANN. § 19.2-390.02 (2005); W. VA. CODE ANN. § 62-1E-2 (LexisNexis 2007); WIS. STAT. ANN. § 175.50 (West 2006); H.R. 470, 2010 Leg., Reg. Sess. (Vt. 2010); VA. CODE ANN. §§ 19.2-390.02 (2005), 9.1-102 (2013); H.R. 352, 149th Gen. Assemb., Reg. Sess. (Ga. 2007).
54. *Jurisdictions that Use Double-Blind Sequential Presentation of Lineups*, INNOCENCE PROJECT (Sept. 16, 2011), available at <http://www.cga.ct.gov/jud/eyewitness/docs/DB-Sequential%20Jurisdictions-FINAL%209%2016%2011.pdf>.
55. At the time this article was published only 13 states implemented some combination of eyewitness identification reform procedures by statute or via Attorney General

Given the clear and strong support for the use of improved eyewitness identification procedures and the undisputed importance of eyewitness evidence to our systems of justice and safety, the need for reform is beyond question. The issue that legal policymakers must now squarely address is how to get the vast majority of law enforcement agencies still using unreliable eyewitness identification procedures to adopt the enhanced procedures. The next sections of this article explore the avenues available to make that so.

### III. THE ROLE OF THE DIFFERENT BRANCHES OF GOVERNMENT

Time is of the essence when police are trying to solve a crime,<sup>56</sup> and critical time is lost when mistaken eyewitnesses inadvertently lead police away from the real perpetrators of crime.<sup>57</sup> This is of crucial importance, as the distraction of a misidentification dilutes police focus on the real perpetrator,<sup>58</sup> thus awarding the real perpetrator time to elude detection.<sup>59</sup> Another terrible result of a misidentification is that it can cause police to believe that the innocent person committed the crime. This creates a Kafkaesque nightmare for the innocent person. The misguided suspicion alone is virtually guaranteed to create intense anxiety, for the accused, innocent person, who almost assuredly will face shame and distrust from community members; significant legal defense costs, and the real possibility of being wrongfully convicted and imprisoned.<sup>60</sup>

The fact that most police agencies persist in using procedures proven to contribute to eyewitness misidentification simply flies in the face of reason. But when one considers natural resistance to

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authority, although only six employ blind administration, generally considered the single most important reform by social scientists statewide.

56. Tom Joyce, *Closing the Case: Solving Violent Crimes Quickly and Efficiently with Public Records*, 79 POLICE CHIEF 50, 52, 54 (2012), available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2604&issue\\_id=22012](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2604&issue_id=22012).

57. As Elizabeth Loftus, one of the leading researchers on eyewitness evidence, put it, "When someone is accused of a crime he did not commit, two people are trapped on the dark side of justice, while the real perpetrator remains free." ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 10 (1996); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 235 (2001).

58. William G. Brooks, *Arresting the Right Person: The Role of the Police in Eyewitness Identification Reform*, <http://www.cga.ct.gov/jud/eyewitness/docs/Eyewitness%20Identification%20Reform.Brooks.pdf> (last visited May 20, 2013).

59. Joyce, *supra* note 56, at 52, 54.

60. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 49, at 3.

change,<sup>61</sup> and that change comes slowly to government<sup>62</sup>—perhaps even more so to police organizations<sup>63</sup>—one should not necessarily expect that police across the nation would have already adopted eyewitness identification reform. Given the importance of eyewitness evidence to our entire system of criminal justice, however, where police have refused to improve identification procedures on their own, it is in fact incumbent upon the judicial and legislative branches to seize the initiative and advance reform themselves.

61. Eric B. Dent & Susan Galloway Goldberg, *Challenging "Resistance to Change,"* 35 J. APPLIED BEHAV. SCI. 25, 25 (1999).
62. David Osbourne, White Paper for the 7th Global Forum on Reinventing Government: Building Trust in Government, Vienna, Austria, June 26-27, 2007: *Reinventing Government: What a Difference Strategy Makes* (Jan. 2007), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025253.pdf>.
63. Patrick Yoes, *Secretary's Message: Working Across Generations*, THE FOP JOURNAL, February 2010, at 3, available at [http://www.fop.net/publications/journal/Journal2010\\_02.pdf](http://www.fop.net/publications/journal/Journal2010_02.pdf).

Truth #6 - no one really likes change. The stereotype is that older people hate change and younger generations thrive off of it, but these are inaccurate assumptions. In general, people from all generations are uncomfortable with change. Resistance to change has nothing to do with age; it is all about how much one has to gain or lose with the change.

*Id.*; see also Kim Charrier, *Strategic Management in Policing: The Role of the Strategic Manager*, 71 POLICE CHIEF 60 (2004); Jimmy Purdue, *Lessons Learned: Advice for New Chiefs*, 75 POLICE CHIEF 176, 177 (2008); William Young, *Effecting Change: Avoiding the Pitfalls*, 73 POLICE CHIEF (2006); Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132, 133-34 (2004). Sullivan obtained statements from law enforcement officials detailing their experiences with implementing reform procedures and dealing with transition. *Id.* Officers from Savannah, Georgia reported, "Many detectives were skeptical when told that they must record, but after techniques were taught and positive results obtained, recordings became part of everyday station routine." *Id.* at 134. Officers from Stockton, California police department said, "When recordings were first put in place, some detectives were apprehensive and negative, just as when cameras were installed in patrol cars." *Id.* A 17-year detective from Broward County, Florida stated:

Initially I was very apprehensive, but after observing and being involved in interrogations I see how the use of video is much better than the old fashioned method . . . it has fostered new techniques. At the beginning it was somewhat intimidating, but once you become accustomed to the procedure it is second nature.

*Id.*

Legislatures are expected to express the will of the people, act in the best interests of the communities they serve, or both.<sup>64</sup> If police insist on using eyewitness identification procedures proven likely to mislead the criminal justice system, then it is entirely appropriate for the public—through the legislature—to require that they employ the readily available and effective procedures proven to provide far more accurate eyewitness identifications.<sup>65</sup>

Courts, too, have a responsibility to address the sufficiency of the eyewitness evidence upon which their decision-making depends.<sup>66</sup> This is true even if unreliable eyewitness evidence has not been deemed unconstitutional by the United States Supreme Court.<sup>67</sup> The Oregon Supreme Court, for example, in its recently released opinion in *Oregon v. Lawson*, explored the corruptibility of eyewitnesses' memories, and found that eyewitness identification evidence should be likened to—and treated as—other forms of physical trace evidence, writing that “it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as it would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination.”<sup>68</sup> For that reason, it found under the Oregon Code of Criminal Evidence that Oregon courts could not simply accept

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64. See *Barto v. Himrod*, 8 N.Y. 483, 494 (1853).

65. See S.C. JUR. CONST. LAW § 30 (2012).

The legislature has the power to delegate authority to the executive department by creating executive agencies or vesting existing agencies with specified duties. The General Assembly may limit and define the functions of the agencies it creates, but may properly exercise nonlegislative functions only to the extent that their performance is reasonably incidental to the full and effective exercise of the legislative powers.

*Id.*

66. See *State v. Outing*, 3 A.3d 1, 13 (Conn. 2010) (“We begin with the legal principles that guide our review. ‘Due process requires that [eyewitness] identifications [may be admitted at trial] only if they are reliable and are not the product of unnecessarily suggestive police procedures.’”).

67. See *id.* at 116.

68. *Oregon v. Lawson*, 291 P.3d 673, 689 (Or. 2012) (en banc). “The importance of trace evidence cannot be overemphasized. Awareness of this type of evidence can be critical to an investigation; training and experience are essential to maximize the value of this type of physical evidence.” *Trace Evidence*, NAT’L INST. JUST., [http://www.nij.gov/training/firearms-training/module06/fir\\_m06\\_t04\\_01\\_a.htm](http://www.nij.gov/training/firearms-training/module06/fir_m06_t04_01_a.htm) (last visited May 20, 2013); *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011) (“[W]e remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies.”).

eyewitness identification evidence that had resulted from eyewitness identification procedures proven to contaminate a witness's memory.<sup>69</sup> Where police and prosecutors—the agents of government in direct control of that eyewitness evidence upon which courts rely—insist on using practices proven to mislead fact finders, judges have a clear responsibility to demand that better evidence be presented for the court's consideration.

It is important to note that the need for reform is not driven by the need to adhere to existing law. If existing law works to the detriment of society, then each branch should strongly consider using its power to fix that law. The Innocence Project has focused its energies on the need to improve eyewitness identification procedures because the vast majority of existing law, court rules, and police procedures deem it sufficient for unreliable, often patently misleading eyewitness identification procedures to provide the critical evidence that will drive a fact finder's determination of an individual's innocence or guilt. The question, therefore, is not whether the law presently allows for the use of unreliable eyewitness identification procedures as the fundamental vehicle for eyewitness evidence; the question is whether our laws *should* allow unreliable eyewitness identification procedures to serve as the fundamental vehicle for eyewitness evidence.

Based on the robust body of peer-reviewed research indicating the need for reform;<sup>70</sup> the critical role of eyewitness identification in criminal investigations;<sup>71</sup> the simplicity of the adjustments in identification procedures that can greatly minimize the likelihood of misidentification;<sup>72</sup> the support of national police and legal organizations for improved procedures;<sup>73</sup> the positive experiences of the growing number of police departments that employ improved procedures;<sup>74</sup> the fact that eyewitness misidentification has proven a contributing factor to roughly 3 out of every 4 wrongful convictions proven by post-conviction DNA testing;<sup>75</sup> and basic issues of fairness, safety, and justice, there should be little disagreement that every branch of government should be closely examining the propriety of their jurisdictions' present handling of eyewitness identification evidence and directing that accessible improvements be

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69. State v. Lawson, 291 P.3d 673, 689 (Or. 2012) (en banc).

70. See *supra* notes 23–25 and accompanying text.

71. See *supra* note 14 and accompanying text.

72. See *supra* note 32 and accompanying text.

73. See *supra* note 15 and accompanying text.

74. See *supra* note 22 and accompanying text.

75. See *supra* note 11 and accompanying text.

made. Fortunately, it is within the power and appropriate province of the various branches of government to effect such change.<sup>76</sup>

#### IV. THE WISDOM OF SEEKING AND FOSTERING POLICE PARTICIPATION IN REFORM EFFORTS

In eyewitness identification reform efforts across the country, the police have consistently played a role. In some instances, they have led and enacted change.<sup>77</sup> In others, they have strenuously fought against it.<sup>78</sup> In yet others, there have been efforts within the police community to create change, yet those efforts fell short of uniformly implementing reform procedures.<sup>79</sup> In most cases, there has been a mix of all of the above.

In the Innocence Project's experience advocating for eyewitness identification reform, it is always optimal to be able to work with police toward its implementation. For despite the availability of different avenues through which to pursue reform, we recognize that police rely upon accurate identifications to assure high-quality criminal investigations; it will ultimately be police conducting the eyewitness identification procedures; and if 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.

Working with police to improve eyewitness identification procedures can take, and has taken, many forms, including (but not limited to) individual meetings with leaders in law enforcement agencies and heads of chiefs and sheriffs associations, and participation in task forces or commissions that include police representatives. Not only do these meetings allow stakeholders to better communicate about the substance of reforms and their relative value, they also help everyone to better understand and explore the practical concerns of law enforcement, which fundamentally include the opportunity to learn about and be trained in the proper use of the identification procedures proven to minimize the likelihood of misidentification.

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76. See *supra* notes 20–25 and accompanying text.

77. *Jurisdictions that Use Double-Blind Sequential Presentation of Lineups*, INNOCENCE PROJECT (Sept. 16, 2011), available at <http://www.cga.ct.gov/jud/eyewitness/docs/DB-Sequential%20Jurisdictions-FINAL%209%2016%2011.pdf>.

78. Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 38 (2008).

79. See *id.* at 39.

For these reasons, the Innocence Project's first action when considering reform in any state is to speak with police leadership. We want to hear their thoughts about system reforms, their sense of the propriety of their consistent use, and how best to engage line detectives and investigators to enable them to appreciate the value of the reform package being sought.

Another fundamental initial step in the adoption of reform is to assess existing eyewitness identification practice across the state. We have found that the only reliable way to answer that question is to survey law enforcement agencies statewide for their written policies for administering eyewitness identifications. After we have compiled the accumulated responses from across the state, we seek to continue our discussions with police about how, in light of that information, to implement reform across the state.

It is not uncommon for law enforcement leaders to state their preference for voluntary adoption and implementation of reform procedures.<sup>80</sup> When that is the case, the Innocence Project seeks to identify if there is a way we can support such an effort. Yet as anyone familiar with such an endeavor knows, figuring out how to enact changes in police procedures in all localities across a state can require different approaches in different parts of a given state. Beyond that, each state is itself different from the others having, for instance, different approaches to guiding police practice. While some states have a centralized training academy, others possess multiple regional academies. So there is no one way to best work with police on statewide reform. What is needed is the ability to listen, the desire to understand, and the willingness to work together. We therefore defer to interested police leadership about how they think it is best to enact evidence-based reform statewide within a given time period, and offer all of the support (typically education and training materials and presenters for police, etc.) that we can provide to that process. We also explain to them that while this is our favored method for working toward reform, given the critical importance of accurate and reliable eyewitness evidence, if after that time period there is still not

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80. Peter A. Modafferi et al., *Eyewitness Identification: Views From the Trenches*, POLICE CHIEF (Aug. 17, 2009), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1926&issue\\_id=102009](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 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.”).

substantial adoption of reform, we will have to expand the avenues through which we will pursue it.

At the conclusion of the time period established for adoption of reform, we then again survey police practices in jurisdictions across the state. If there has been substantial enactment of the reform package across the state, then we simply continue to support the articulated police needs and efforts in this regard. If we find that substantial implementation of reform has not occurred despite the concerted push toward reform by law enforcement leaders, we must then turn to the legislature for this needed change.

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. We seek to bring that collaborative approach to the legislature, so that neither legislators nor advocates need to start from scratch on the question of reform, and can instead delineate what is agreed upon, identify the sticking points, and seek legislators' help in ensuring that whatever the obstacles, the result will be that only reliable eyewitness identification procedures will be employed across the state.

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.

## V. THE ROLE OF LITIGATION

Whenever eyewitness identification evidence has been procured through methods proven to contribute to eyewitness misidentifications, it is incumbent upon that defendant's trial lawyer to challenge that identification as rigorously as possible.<sup>81</sup> Such challenges may be initiated as soon as a problematic lineup procedure has been conducted, and may continue all the way through the post-

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81. See Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. CIV. RTS. & CIV. LIBERTY L. REV. 175, 178 (2012).



conviction review process.<sup>82</sup> When appellate courts consider the appeals of convictions based on eyewitness identification evidence, appellate lawyers can articulate challenges based on scientific research,<sup>83</sup> make new claims rising from ineffective assistance because of the failure to challenge the unreliable identification secured from traditional procedures,<sup>84</sup> or file amicus briefs urging the court to focus on the scientific underpinnings of eyewitness memory and identifications.<sup>85</sup> These efforts are requisite to proper representation of such clients. They also serve to focus the judiciary on the deep body of peer-reviewed research that clearly shows the dangers of traditional eyewitness identification administration procedures and how the use of reform procedures provide the courts with eyewitness evidence that is far more reliable.<sup>86</sup>

The Innocence Project advocates for the use of reliable eyewitness identification evidence in the judicial branch as well. We work to educate defense lawyers, judges, and prosecutors<sup>87</sup> about the importance of the specific eyewitness identification procedures used in cases and, as a result, how courts should regard them. As part of the Innocence Network and at times on our own, we file amicus briefs in appeals across the country.<sup>88</sup> With the recent creation of a strategic litigation unit within the Innocence Project, we are also joining with lawyers at the pre-trial and trial levels where patently unreliable eyewitness identification procedures have been used to create eyewitness evidence.

Scientific studies pertaining to eyewitness evidence began to emerge when state courts were first crafting their own balancing tests to assess the reliability of eyewitness evidence.<sup>89</sup> In recent years, in light of some of the very measures described above, the Supreme Courts of both New Jersey and Oregon have issued unanimous

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82. *See id.*

83. *See id.* at 196.

84. *See id.* at 179.

85. *See id.*

86. Kenneth Patenaude, *Police Identification Procedures: A Time for Change*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 415, 416 (2006).

87. *About Us: Mission Statement*, INNOCENCE PROJECT, [http://www.innocenceproject.org/\\_about/Mission-Statement.php](http://www.innocenceproject.org/_about/Mission-Statement.php) (last visited May 20, 2013). Admittedly, the latter has proven less workable for all involved, but progress has slowly and steadily been made.

88. *News and Information: Legal Information*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/Amicus-Briefs.php> (last visited May 20, 2013).

89. *See State v. Wheaton*, 729 P.2d 1183 (Kan. 1986).

decisions that require major changes in the way their respective state courts will now evaluate eyewitness evidence.<sup>90</sup> Both of these landmark decisions—as well as additional decisions and other actions initiated by state high courts<sup>91</sup>—have relied heavily upon the ever-growing body of scientific research that clearly indicates that eyewitness identification evidence established through traditional procedures is needlessly unreliable.<sup>92</sup>

Of course, the purpose of all of this litigation work is to assure regard for the eyewitness evidence being ruled upon in specific cases. The importance of these efforts, however, transcends the immediate cases. It educates the judges, clerks, prosecutors, and defense attorneys involved, as well as the press that might be covering a given case, about how traditional eyewitness identification procedures foster eyewitness misidentifications, and how the readily available reforms can provide much better evidence.<sup>93</sup> Even when they fail, such litigation efforts typically succeed in signaling to all concerned that as long as law enforcement continues to use traditional eyewitness identification procedures, that identification evidence is going to be susceptible to strong arguments based on well-established facts.<sup>94</sup> When rulings do not suppress eyewitness evidence that flowed from unreliable procedures, or judges fail to instruct fact-finders about the vagaries of such evidence, these efforts still impress upon the actors and audience in the legal system that the system must begin to make the changes in eyewitness identification procedures necessary to provide both the justice and safety expected from the criminal justice system. When the rulings are as significant as those in *Lawson*<sup>95</sup> and *Henderson*,<sup>96</sup> as well as that of the

90. See *State v. Lawson*, 291 P.3d 673 (Or. 2012); *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

91. See *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005).

92. See *id.*

93. See, e.g., *The Eyewitness Identification Litigation Reform Network, About Us*, EYEID.ORG, <http://www.eyeid.org> (last visited May 20, 2013) (explaining that the Eyewitness Identification Litigation Reform Network website serves as a comprehensive defense resource for litigating eyewitness identification cases). The organization seeks to educate those dealing with eyewitness identification issues in legal practice how fallible these identifications can be and provide them with the proper tools to challenge them. See *id.*

94. See generally INNOCENCE PROJECT, *supra* note 11 (detailing the shortcomings of eyewitness identification techniques and citing specific cases in which faulty eyewitness identification led to a wrongful conviction).

95. *State v. Lawson*, 291 P.3d 673, 689–97 (Or. 2012) (holding that modern scientific research has shown that traditional eyewitness identification procedures consistently produce unreliable results and establishing a new procedure for determining the admissibility of eyewitness identification evidence).

Connecticut Supreme Court in *Connecticut v. Ledbetter*,<sup>97</sup> which preceded them by a number of years, they send a clear signal to every court in the country that justice cannot be reliably dispensed when verdicts rely on eyewitness evidence that is patently unreliable.

## VI. THE MARYLAND EXPERIENCE: A CASE STUDY OF REFORM IN ACTION

Eyewitness identification reform continues to unfold in Maryland and provides a rich example of the various approaches to reform described in this article. In 2007, our office partnered with the Maryland Innocence Project, then housed exclusively within the Office of the Public Defender, the Mid-Atlantic Innocence Project, and the Maryland ACLU to seek passage of a prescriptive eyewitness identification law. The original scope of the legislation contemplated a mandate for blind administration, the sequential presentation of lineup members, appropriate cautionary instructions to the eyewitness, proper filler (or non-suspect lineup member selection), the recording of confidence statements, and other core, evidence-based reforms.<sup>98</sup> At that time, numerous law enforcement agencies in the state had no written policies for conducting eyewitness identification procedures and many of the written policies that did exist had not been modified in decades. There was very little

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96. *State v. Henderson*, 27 A.3d 872, 916–22 (N.J. 2011) (holding that the previous test for the admissibility of witness identification “did not provide a sufficient measure for reliability, did not deter improper police practices, and overstated a jury’s innate ability to evaluate eyewitness testimony” and implementing a new and more procedurally fair test).
97. *State v. Ledbetter*, 881 A.2d 290, 306–319 (Conn. 2005) (marking one of the first times that a court recognized the growing supply of scientific evidence pointing out that eyewitness identifications were frequently unreliable; however, the court ultimately found that it lacked the authority to change the rule governing the admissibility of eyewitness identifications).
98. See LAUREL A. ALBIN, OFFICE OF THE PUB. DEFENDER, RE: SB 157/HB 103 PUBLIC SAFETY-EYEWITNESS IDENTIFICATION-WRITTEN POLICIES (2007) (indicating that the legislation actually was comprised of two identical bills, Senate Bill 157 and House Bill 103; both bills would require Maryland’s police departments to adopt best practices for eyewitness identifications); S. JUD. PROC. COMM., FLOOR REP. ON S. BILL 157 (2007) (stating that the adopted policies must comply with the United States Department of Justice standards on obtaining accurate eyewitness identification evidence); *The Mid-Atlantic Innocence Project in Support of House Bill 103*, 2007 Leg.420th Sess. 2–3 (Md. 2007) (testimony of Shawn M. Armbrust, Executive Director of the Mid-Atlantic Innocence Project) (clarifying the specific eyewitness identification procedures recommended by the Department of Justice referenced in House Bill 103).

consistency among the various written policies in terms of the procedures that were recommended or even with respect to what aspects of the process were addressed. While some agencies had better policies than others, no agency had adopted a written protocol that incorporated the core best practices that experts have identified as critical to reducing mistaken identifications. It having been early on in our eyewitness identification advocacy experience, we had not sought to speak with law enforcement prior to pursuing legislative action.

As the bill progressed through the legislative process, it became clear that a prescriptive mandate would not be enacted given the level of law enforcement opposition to that form of legislation.<sup>99</sup> Members of the legislature who were sensitive to police officials' argument that the legislature should not micromanage police procedures—and yet were also concerned about the increasing number of wrongful convictions based on eyewitness error—encouraged a legislative compromise.<sup>100</sup> Ultimately, a bill requiring all law enforcement agencies to adopt written policies that minimally comported with the recommendations issued by the National Institute of Justice's Technical Working Group on Eyewitness Evidence (TWGEE)<sup>101</sup> was

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99. See MD. CHIEFS OF POLICE ASS'N LEGISLATIVE COMM., PUBLIC SAFETY-EYEWITNESS IDENTIFICATION-WRITTEN POLICIES (2007) (officially opposing House Bill 103 on grounds that the bill would burden law enforcement agencies' budgets and man hours with the intensified eyewitness identification procedures); MD. SHERIFFS' ASS'N., SB 157 – PUBLIC SAFETY-EYEWITNESS IDENTIFICATION-WRITTEN POLICIES (2007) (opposing Senate Bill 157 on the grounds that there is already a satisfactory process in place for identification procedures rendering additional written requirements unnecessary).
100. SENATOR DELORES KELLEY, MONTGOMERY CNTY., OFFICE OF INTERGOVERNMENTAL RELATIONS, PUBLIC SAFETY-EYEWITNESS-WRITTEN POLICIES, POSITION: SUPPORT WITH AMENDMENT (2007) (supporting the bill as long as the mandatory standard operating procedures are implemented only as guidelines to account for the diversity among state law enforcement agencies).
101. See TECHNICAL WORKING GRP. FOR EYEWITNESS EVIDENCE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003), available at <https://www.ncjrs.gov/nij/eyewitness/188678.pdf>; INNOCENCE PROJECT, *supra* note 10, at 16. Originally published in 1999, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* was published based on recommendations from the Technical Working Group for Eyewitness Evidence (TWGEE). This group included professionals from many areas of law enforcement and legal practice as well as psychology professors and represented "a major effort to unite what psychologists had learned about memory with the practical needs of law enforcement to use eyewitness evidence as an investigative tool." *Id.* After meetings and investigations into faulty eyewitness identifications, this group of professionals concluded that eyewitness identification was actually the least reliable investigative tool used by law enforcement

enacted. The law went into effect on October 1, 2007, and required the Maryland State Police to compile all the written policies of each law enforcement agency by February 1, 2008.<sup>102</sup>

While the TWGEE's work was unprecedented and groundbreaking, its 2003 recommendations attempted to balance the scientific research that had emerged by that time with the practical concerns raised by its law enforcement members.<sup>103</sup> As a result, although blind administration and sequential presentation were acknowledged and cited as valuable reforms, the final set of recommendations did not include adoption of those reforms.<sup>104</sup> Regardless, the report encouraged law enforcement agencies to consider implementing such measures.<sup>105</sup>

Throughout 2011 and 2012, the Mid-Atlantic Innocence Project reviewed and analyzed the written eyewitness identification policies of all Maryland law enforcement agencies and concluded that none of them incorporated the blind-sequential package.<sup>106</sup> This review also revealed a complete lack of uniformity throughout the state in terms of what particular aspects of the eyewitness identification procedure were addressed by the policies.<sup>107</sup> Thus, an effort was undertaken to revise the 2007 legislation in order to require the uniform adoption of best practices throughout the state.<sup>108</sup> During the 2012 legislative

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and originated procedural recommendations in an effort to increase the accuracy of these identifications. *Id.* at 16–17.

102. MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011).

103. NAT'L INST. OF JUSTICE, *supra* note 101, at iii–vi; *see also* JAMES M. DOYLE, TRUE WITNESS COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 169–87 (2005) (providing a well-written account of the dynamics of the TWGEE).

104. DOYLE, *supra* note 103, at 172–73, 178–79, 183, 186–87.

105. NAT'L INST. OF JUSTICE, *supra* note 101, at iii–vi, 1; *see* DOYLE, *supra* note 103, at 186–190.

106. *See* DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); EYEWITNESS IDENTIFICATION REFORM IN MARYLAND: AN ANALYSIS OF LAW ENFORCEMENT COMPLIANCE WITH THE LAW, MID ATLANTIC INNOCENCE PROJECT'S OPEN RECORDS ACT (2011-12).

107. *See* DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); EYEWITNESS IDENTIFICATION REFORM IN MARYLAND, *supra* note 108; INNOCENCE PROJECT, *supra* note 10.

108. *See* DEP'T OF LEGIS. SERVS. FISCAL AND POLICY NOTE H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); DEP'T

session lawmakers heard testimony from advocates for the wrongfully accused and convicted, exonerees whose convictions had been predicated on misidentifications, as well as law enforcement officials employing reform procedures in other states, all of whom suggested that law enforcement agencies needed to embrace more robust and reliable protocols for administering eyewitness identifications.<sup>109</sup> Lawmakers also heard from law enforcement in their home state, the majority of whom voiced support for most elements of the reform package, but took issue with a legislative mandate.<sup>110</sup>

In the final hours of negotiations, a group of stakeholders met and agreed to work together to develop uniform enhanced identification

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OF LEGIS. SERVS. FISCAL AND POLICY NOTE S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Md. Gen. Assemb. 2012 Sess.); STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012).

109. See H. JUDICIARY COMM., WITNESS SIGN-UP SHEET H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); SEN. JUDICIAL PROCEEDINGS COMM., WITNESS SHEET, S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); Letter from Sheriff Timothy Cameron, President of the Maryland Sheriffs' Association & Chief William McMahon, President of Maryland Chiefs of Police Association, to the Honorable Lisa A Gladden, Member of the Maryland State Senate (Mar. 22, 2012) [hereinafter Letter from Sheriff Timothy Cameron]; Letter from Rhea L. Harris, Assistant Secretary & Chief of Staff, to the Honorable Curt Anderson, Member of the Maryland House of Delegates (Mar. 30, 2012) [hereinafter Letter from Rhea L. Harris]; Letter to Gary D. Maynard, Secretary of the Maryland Department of Public Safety and Correctional Services, Sheriff Timothy Cameron, President of the Maryland Sheriffs' Association, & Chief William McMahon, President of the Maryland Chiefs of Police Association (Apr. 5, 2012) [hereinafter Letter to Gary D. Maynard].

110. See H. JUDICIARY COMM., WITNESS SIGN-UP SHEET H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); SEN. JUDICIAL PROCEEDINGS COMM., WITNESS SHEET, S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. H.B. 1324 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012), STATE OF MD. DEP'T OF STATE POLICE, POSITION ON PROPOSED LEGIS. S.B. 986 PUB. SAFETY – EYEWITNESS IDENTIFICATION – PROCEDURES (Mar. 20, 2012); Letter from Sheriff Timothy Cameron, *supra* note 110; Letter from Rhea L. Harris, *supra* note 110; Letter to Gary D. Maynard, *supra* note 110.

protocols that could be adopted by law enforcement agencies.<sup>111</sup> The legislature required a status report on the results of this collaboration in advance of the next legislative session.<sup>112</sup> The participants in this stakeholder collaboration included representatives from the Maryland State Police, the Baltimore City Police Department, the Maryland Police and Correctional Training Commission (MPCTC), the Maryland Department of Public Safety & Correctional Services, the Maryland Association of State's Attorneys, the Office of the Public Defender, the University of Baltimore Innocence Project, and the Innocence Project.<sup>113</sup> It became apparent at a preliminary stakeholder meeting immediately after the legislative session that there was now a level of consensus regarding the value of the reform package that had not previously existed, and also a preference by law enforcement to institute reforms without the involvement of the legislature.<sup>114</sup> The MPCTC assumed responsibility for crafting an evidence-based model policy and developed a roadmap for its dissemination as well as a training program to facilitate its implementation.<sup>115</sup> The MPCTC's staff has drafted a policy whose content is similar to that of a highly regarded model policy of the International Association of Chiefs of Police (IACP).<sup>116</sup> This has been shared with both the Maryland Chiefs of Police Association (MCPA) and the Maryland Sheriffs' Association, and the respective memberships of both organizations that together include 156 police agencies and 24 sheriffs' offices.<sup>117</sup>

The MPCTC reported that there has been no negative feedback from law enforcement with respect to the substance of the guidelines.<sup>118</sup> Indeed, a handful of police agencies have already adopted the preliminary guidelines and the State Police generously agreed to collect future revised policies.<sup>119</sup> All law enforcement agencies had originally been asked to revise their policies to comply

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111. See Letter to Gary D. Maynard, *supra* note 110.

112. See *id.*

113. See *id.*

114. See Letter from Sheriff Timothy Cameron, *supra* note 110; Letter from Rhea L. Harris, *supra* note 110; Letter to Gary D. Maynard, *supra* note 110.

115. Letter to Gary D. Maynard, *supra* note 110.

116. See "Eyewitness Identification Model Policy" within "Eyewitness Identification Policies and Forms," available at <http://mdle.net/resources.htm>.

117. See MD. POLICE AND CORRECTIONAL TRAINING COMM'N, MODEL POLICIES FOR LAW ENFORCEMENT IN MARYLAND, 5 (February 26, 1999, Reissued: January 8, 2007), available at <http://mdle.net/pdf/mopoman07.pdf>.

118. See generally Letter from Sheriff Timothy Cameron, *supra* note 110.

119. See *id.*

with the anticipated model policy by January 31, 2013.<sup>120</sup> When the response rate was nominal, the deadline was extended to April 1, 2013.<sup>121</sup> A preliminary analysis conducted by the Innocence Project of the policies that were ultimately collected by the State Police by the second deadline indicated that only one-third of agencies responded to the dual requests.<sup>122</sup> Of those approximately 50 policies, only half required the use of a blind administrator, the single most important reform to eyewitness protocols.<sup>123</sup> Efforts will be made by MPCTC over the summer to encourage the submission of the remaining policies to better understand how many law enforcement agencies will implement MPCTC's Model Policy on the same.<sup>124</sup>

The Innocence Project along with its local partners also collaborated with MPCTC to facilitate a "train the trainers" forum for Maryland law enforcement on December 3, 2012.<sup>125</sup> The training was conducted by a police chief who is certified to train eyewitness reform procedures in his home state of Massachusetts.<sup>126</sup> Representatives from 28 agencies attended the training, which was also taped and will be edited to create a permanent training tool for use in Maryland.<sup>127</sup> MPCTC also intends to provide in-service training for all officers after all of the revised policies are collected.<sup>128</sup> As long as agencies uniformly comply with recommended amendments to their policies, no legislation should be required.<sup>129</sup> According to Charles Rapp, MPCTC's Executive Director, "Since police desire to apprehend only individuals responsible for violating laws, a change in procedures that has been well researched and proven to improve positive identifications of suspects should be

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120. Interview with Charles Rapp, Exec. Dir. Md. Police and Correctional Training Comm'n (Jan. 18, 2013).

121. Email between Charles Rapp, Exec. Dir., Maryland Police and Correctional Training Comm'n, and Rebecca Brown, Dir. Of State Policy Reform, Innocence Project (March 20, 2013) (on file with author).

122. EYEWITNESS IDENTIFICATION REFORM IN MARYLAND: AN ANALYSIS OF LAW ENFORCEMENT COMPLIANCE WITH DPCTC'S MODEL POLICY ON EYEWITNESS IDENTIFICATION; INNOCENCE PROJECT (2013).

123. *Id.*

124. Telephone conversation between Charles Rapp Exec. Dir., Maryland Police and Correctional Training Comm'n, and Rebecca Brown, Dir. Of State Policy Reform, Innocence Project (May 9, 2013).

125. The "Train the Trainer" was conducted by William Brooks, Chief of the Norwood, MA Police Dep't.

126. *Id.*

127. *Id.*

128. *See generally* Letter from Sheriff Timothy Cameron, *supra* note 110.

129. *See id.*



wholeheartedly embraced by the law enforcement community. This is our goal in Maryland.”<sup>130</sup>

## VII. CONCLUSION

As this article goes to press, the Maryland story remains unfinished. There is reason to believe that this collaborative effort, guided by police leadership, might still result in the near uniform adoption of reform procedures necessary to foster more reliable eyewitness identifications across the state. The chance remains, however, that it may not. Should that happen, the question of reform will be brought to the legislature, which has already expressed its desire for reform, but deferred action to give police a reasonable chance to adopt it on their own. Therefore, however Maryland arrives at reform, the end result has a much greater chance of actual success because the need for improvement has been recognized and understood across the legal policymaking community goal: improving eyewitness identification procedures in order to improve the justice and safety that their criminal justice system provides.

Maryland's example is but one of the many ways in which police have played a critical role in successfully improving eyewitness identification procedures statewide. Whether it comes as a result of police leadership, legislative enactment, high court action, or executive policy, the reform of traditional eyewitness identification procedures is essential for any state that is serious about the quality of justice and safety its criminal justice system provides.

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130. Email from Charles Rapp, Exec. Dir., Maryland Police and Correctional Training Comm'n, to Rebecca Brown, Dir. Of State Policy Reform, Innocence Project (Nov. 27, 2012) (on file with author).

