

# Modern Policing, Reform Efforts, and Implementation of Evidence-Based Practices for Eyewitness Identification Procedures

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## Introduction

In the recent hyper-partisan political era, policy arenas where even modest agreements exist are becoming increasingly rare. However, both ends of the political spectrum have joined a consistent refrain during the first quarter of this century to reform various parts of the criminal justice system. Often, these calls for reform are sparked by a highly publicized event or an eventual acceptance of decades-old trends that scholars and advocates have taken pains to evidence. Contrary to many recent cries forewarning the crumbling of the American democratic tradition, the proposal outlined herein suggests actions that can be taken by conservatives and liberals collectively to alter the ways in which crime and criminality are addressed in our society. This need for action is particularly true during these divisive times, even if the exact nature of the reforms is debatable.

Most recently, local, state, and federal officials have sought to address shortcomings in the policing and legal systems that undermine the legitimacy of the policing system. In particular, policymakers have attempted to respond to cries for social justice, racial equity, and procedural justice through a variety of executive and legislative methods, such as the creation of oversight committees, passing new legislation, increasing accountability controls, and reallocating public funding. Although insufficient data exist to evaluate the effectiveness of some of these new measures, the decentralized nature of the systems that these reforms are attempting to impact and the ambiguous goals they set to achieve stymies the furtherance of evidence-based practice (EBP) that has come to be expected in modern human service agencies. By doing so, reform efforts take on a political character that does not lend itself to data-driven evaluation and is more commonly driven by the differing political climates of loosely connected jurisdictions.

In an effort to encourage a greater degree of centralized oversight and evaluation in the formation and implementation of policy, this article will begin by examining the inherent political influences affecting policing and identify how this relationship can impede the EBP approach. Despite several states' attempts to impose multiple accountability measures that law enforcement agencies demonstrate "just" and "equitable" treatment of citizens, the evaluation of such policies is undermined by the politically interpretable nature of these terms. Furthermore, organizational elements, administrative factors, and the nature of police work further complicate such evaluations.

Second, this article will examine recent legislative activity surrounding wrongful convictions in Missouri to provide an example of how changes to law enforcement policy could be more evidence-based and protect perhaps the most sacrosanct element of the justice system, justice. Specifically, we suggest changes that can be made to the eyewitness identification process that have been attempted in other jurisdictions and can lead to more accurate eyewitness identification. This can, in turn, not only lower the risk of wrongful convictions, but can also help ensure that the actual perpetrators of crimes are brought to justice.

Despite proposed legislation in recent years, Missouri has yet to pass bills that seek to mandate evidence-based practices in regard to eyewitness identification protocols. We argue herein that statewide legislation, encompassing a series of reforms in regard to eyewitness identifications is an important and necessary step to police reform. These changes are very low risk, with minimal cost and consequences. They are fairly straightforward and simple to implement, and do not require extensive training nor major policy overhauls within the respective departments. Importantly, they are not controversial and are therefore far more politically feasible than other reforms proposed.

Given that there appears to be agreement across the political spectrum that the policing system needs reform, and the recent catapulting of this policy arena to a position of prominence, we advocate for policy that is well defined, able to be evaluated, and replicable rather than submission to political rhetoric. Without such evidence-based policy, the likelihood of exacerbating disparities, further damaging criminal justice system legitimacy, and undermining core legal tenets within the criminal justice system increases as political climates and narratives will be the ultimate judge of which policies are “effective.”

### **Historical Foundations of Political Controversy Involving the Police**

Since the time of their founding, the police have been mired in political controversy. Prior to the establishment of the world’s first modern police force in London in 1829, opponents decried the presence of an armed, militaristic governmental force that could be used to suppress the will of the people and undermine democracy.<sup>1</sup> The American policing tradition has been no less controversial in light of practices such as the much-derided slave patrols prior to the Civil War, oppression of labor movements, and the appointment of law enforcement officers to further the objectives of political leaders during the spoils system of the early 20<sup>th</sup> century.

During the professionalization era, improvements in hiring and conduct standards won acclaim in some jurisdictions, but would not be institutionalized nationally for nearly fifty more years. Nonetheless, consistent examples of abuse of power, discrimination, and brutality continued to capture the public’s interest, and generated wide-scale political action from citizens and elected officials. Simultaneously, the innovations of automobiles and communications technology distanced officers from the communities.

In response to criticism and public outcry, community policing was developed out of the findings of President Johnson’s 1967 Commission on Law Enforcement and the Administration of Justice to reconnect the police and the community and enhance legitimacy. Although this approach continues to be advocated by national and field leaders, numerous challenges exist with respect to implementing community policing. Notably, defining the parameters of a community can be difficult and the many ways in which community policing is implemented stymie evaluation and, therefore, creation of “best practices.” As a result, critics contend that the implementation of this approach is better characterized as a public relations tool rather than a crime-fighting strategy.

Consequently, the evidence-based policing era arrived and advocates began lobbying for the logical allocation of police resources to address crime and criminality based upon data analytics and the best available research. Unfortunately, the wealth of controversy surrounding the goals of the police, racial unrest, and level of authority granted to police in recent years suggest that implementation of this approach may be lacking in many jurisdictions. To better understand the impediments to improved police practice, it is essential to review the political nature of policing perspectives and how organizational and administrative processes perpetuate politically driven responses to crime as opposed to research-driven responses.

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<sup>1</sup> “Crime and Punishment,” The National Archives (Department for Digital, Culture, Media and Sport of the United Kingdom of Great Britain and Northern Ireland), accessed July 22, 2021, <https://www.nationalarchives.gov.uk/education/candp/prevention/g08/g08cs2.htm>.

## Perspectives on Policing

Although many perspectives exist on how and why police agencies operate, the crime control perspective and the due process perspective are the two primary viewpoints juxtaposed in this analysis. These normative viewpoints represent the polar ends of a scale that contain numerous, often coexisting, perspectives of how police agencies should operate.

In short, the crime control perspective prioritizes the suppression of crime and maintaining the safety of the community. Closely aligned with a conservative, “law and order” approach that suggests crime is the result of individual choice, this perspective emphasizes a utilitarian ideology that police action is taken with “noble cause” to punish criminal offenders and enhance the quality of life for citizens.<sup>2</sup> Agencies aligning themselves with this mentality may offer the classic, well-known motto of, *To Protect and Serve*. Not surprisingly, the crime control perspective holds that public safety goals supersede certain violations of civil liberties and minimizes the importance of procedural safeguards in the interest of achieving the paradigm’s overarching goals.

In contrast, the due process model of policing is more aligned with a liberal mentality that denotes crime is a result of negative environmental influences and emphasizes the protection of individual rights and liberties. In doing so, the discretionary authority of the police is restricted by civil liberties and procedural safeguards to ensure individualized, fair, and equitable treatment for justice-involved individuals.<sup>3</sup> Agencies operating under this mentality may offer the modern derivation motto of *To Serve and Protect*. Consequently, this perspective recognizes that some level of crime and criminality will go unaddressed in the interest of protecting certain civil liberties by limiting the power of governmental agents to investigate and prosecute criminal acts.

However, given that dichotomous thinking can often create overly simplified understandings, a need exists to clarify the ways in which the crime control and due process perspectives arise. To be clear, virtually every police agency will exhibit characteristics of both perspectives at different times. However, as a result of political climate, organizational factors, and administrative priorities, agencies often emphasize one of these perspectives more commonly than the other.

## Goal Ambiguity

Complicating the influence of historical factors and clashing normative concerns, goal ambiguity is often cited as a politically-driven factor that diminishes the success of public organizations<sup>4</sup> In the context of the current analysis and as part of the national push for reform, it is worthwhile to consider the question: what are desirable outcomes for police agencies and how are these influenced? Moreover, if we accept the police mottos emphasizing protection and service or *vice versa*, other questions arise, such as: what does each look like in practice; How is each completed; Do some people/areas warrant more than others?

Of course, the wide range of possible answers to such a question are heavily dependent on an individual’s political leanings. Often, purportedly objective metrics of policing outcomes have been conceptualized as measurements of crime rates, response times, clearance rates, and types of work conducted (e.g., number of arrests/citations issued). More recently, citizen satisfaction has gained prominence as an important measure of police success.<sup>5</sup>

<sup>2</sup> Kent Roach, “Four Models of the Criminal Process,” *The Journal of Criminal Law and Criminology* (1973-) 89, no. 2 (1999): pp. 671-717, accessed July 1, 2021, <https://doi.org/10.2307/1144140>.

<sup>3</sup> Ibid.

<sup>4</sup> Antonio Botti and Antonella Monda, “Goal Ambiguity in Public Organizations: A Systematic Literature Review,” *International Journal of Business and Management* 14, no. 7 (2019): 137, accessed at <https://doi.org/10.5539/ijbm.v14n7p137>.

<sup>5</sup> Malcolm K. Sparrow, “Measuring Performance in a Modern Police Organization,” *New Perspectives in Policing Bulletin* (US Department of Justice, National Institute of Justice, 2015), accessed June 8, 2021, <https://www.ojp.gov/pdffiles1/nij/248476.pdf>.

However, these agencies' abilities to achieve these core outcomes are often impacted by the many supplemental activities carried out by the police. As the most visible and most accessible part of the criminal justice system, police are often tasked with a myriad of responsibilities for which they have limited training or resources to address. Historically, officers have been asked to resolve issues such as poor parenting practices, neighbor disputes, truancy, and homelessness. Given the finite nature of resources available to public agencies, every effort directed toward resolving these more far-reaching social issues that are only tangentially related to criminal offending reduces the ability of agencies to achieve the core metrics on which they are judged.

Nonetheless, policymakers continue to provide politically influenced mandates that police agencies be responsible for ever-expanding roles. Coupled with increased mandates that police agencies become more accountable in documenting and measuring their practices, this mission creep extends police resources further. In doing so, the complexity of these positions is extended to a point that cannot be achieved and damages the popular legitimacy of police efficacy.

This negative reinforcing loop further damages the ability of police agencies to achieve their core objectives in that ensuring legitimacy is fundamental to the public's willingness to contact the police when crime occurs as well as cooperating with police in the investigation of criminal activity. Going a step further, the report of the President's Commission on 21<sup>st</sup> Century Policing<sup>6</sup> suggests legitimacy as essential to maintaining stable communities and ensuring democracy. Policymakers would do well to assess how police legitimacy may be impacted in the varied roles in which officers are expected to act as well as the impossibility of adequately resolving all of the social ills that they are asked to address when proposing far-reaching reforms.

### **Police Organization and Administration**

The existing organization and administration of police organizations further politicizes these agencies and complicates the implementation of EBP reforms. Overwhelmingly, policing is conducted at the local level of government. As a result, each agency has a relatively high degree of autonomy and can choose what level of cooperation to grant to neighboring agencies or ones with co-occurring jurisdiction. As criminal activity is generally unimpeded by jurisdictional boundaries, the level of cooperation granted between agencies can be a significant factor in impacting policing outcomes. However, as each agency is held accountable only for the outcomes in its own jurisdiction, little incentive exists to cooperate unless a direct benefit can be displayed to each agency. In practice, the nature of this administration results in multiple loosely connected organizations engaging in fluctuating practices under varying policy directives and political agendas that are geared toward achieving self-interested goals. Such decentralized organization is inherently antithetical to EBP implementation.

The ongoing "defund the police" movement provides another indication of the political nature of police organizations. This commonly misrepresented movement most often seeks to reallocate portions of policing budgets to other social organizations who are dedicated to addressing known variables correlated with criminal activity such as mental health services, substance abuse treatment, and unemployment. The targeting of police resources implies participation in a highly political budgetary process where public agencies must compete for funding based upon the political ideologies of those in power. As would be the case for any organization, drastic changes to funding will necessitate the alteration of organizational functioning that may not be grounded in empirical evidence and may produce negative outcomes.

Further frustrating efforts to become more evidence-based can be found by examining police officer recruitment, training, and turnover. As of this writing, a significant national decline has occurred in applicants for policing

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<sup>6</sup> "Final Report of the President's Task Force on 21st Century Policing" (US Department of Justice, Office of Community Oriented Policing Services, 2015), accessed July 14, 2021, [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

positions.<sup>7</sup> This may in part be attributed to negative public perceptions of police in the wake of scandals such as the 2020 murder of George Floyd in Minneapolis. Similarly, while the professionalization era of policing institutionalized a specialized education component for policing in the form of academy training, police agencies overwhelmingly require no more than a high school education to qualify for employment. Additionally, curricula for academies rarely present empirical research on which policing practices have been evidenced to be most effective in achieving outcomes. Third, above-average rates of turnover are routinely noted in policing literature and a recent increase in retirements in the wake of highly publicized negative police events has contributed to a personnel shortage. Collectively, the political and structural impact of these personnel elements to the implementation of EBP is easily understood.

With respect to the structure of individual agencies, their paramilitary nature ideally provides for a chain-of-command that extends from a chief officer and a span on control that provides authority to lower-level leaders for oversight for a set number of officers, along with other responsibilities. Although this traditional top-down structure has been criticized and some organizations have attempted to flatten it, doing so further decentralizes decision making and provides for less oversight by chief officers. Irrespective of a top-down or flatter organizational structure, the chief executive positions of these agencies are often highly politicized appointees whose national average tenure is estimated to be between four and six years,<sup>8</sup> with the Police Executive Research Forum (PERF) providing estimates as low as two-and-a-half years for chiefs in major metropolitan areas.<sup>9</sup> Thus, leadership and policy initiative changes occur frequently. Again, such a dynamic and unpredictable environment is not conducive to evaluation and implementation of “best practices” on a wide scale. Thus, this article argues that state-wide mandates represent the most likely course of action for effecting reform in the use of eyewitness identification that are based on established empirical findings.

The variables that constitute this organizational and administrative structure contribute to the conclusion offered by one seminal scholar who notes, the work of the police is “impossible to do in ideal terms.”<sup>10</sup> This conclusion is based on observations that demand for police services will always outpace the supply, the circumstances of interactions with the police are generally neither voluntarily sought nor desirable, there is an absence of “perfect” solutions to the many problems police are asked to address, and organizational decision making is often driven down the organizational chart to the officers delivering service on the front lines. These officers effectively then have the power to create new organizational policy by the routine ways in which they interact with the public which may or may not align with organizational policy. Thus, it is essential to keep in mind how historical, political, economic, and organizational variables within and across jurisdictions may impact reform efforts as we turn our analysis to examining modern calls for change.

### **The Politics of Recent Reform Proposals**

Despite these many impediments, widespread public and political support exists for reform. Within recent years, legislatures, executive agencies, advocates, and accrediting bodies have sought to implement numerous reforms that can be broadly categorized (see Table 1).

<sup>7</sup> “Workforce Survey June 2021,” Police Executive Research Forum, June 11, 2021, accessed July 19, 2021, <https://www.policeforum.org/workforcesurveyjune2021>.

<sup>8</sup> Yudu Li and Ben Brown, “Police Chief Turnover in Texas: An Exploratory Analysis Of Peer-Evaluation Survey Data Pertinent to Police Performance and Turnover,” *Police Quarterly* 22, no. 4 (August 2019): 391-415, accessed July 16, 2021, <https://doi.org/10.1177/1098611119845664>.

<sup>9</sup> Ben Klayman and Tim Reid, “U.S. Police Chiefs Vulnerable as Crime Rates, Media Pressures RISE,” Reuters, December 15, 2015, accessed July 20, 2021, <https://mobile.reuters.com/article/amp/idUKKBN0TY0GJ20151215>.

<sup>10</sup> Michael Lipksy, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (New York, NY: Russell Sage Foundation, 1980).

<b>Table 1</b>	
<b>Categories and Examples of Recent Police Reform Proposals and Implementations</b>	
Categories of Reforms Proposed/Implemented	Examples
Improve Accountability	Creating Oversight Boards/Commissions Use of Body Cameras Increasing Data Collection
Limit Use of Force	Instituting Chokehold Bans Requiring De-Escalation Training Eliminating Access to Military-Style Equipment
Improve Diversity	Implementing Implicit Bias Training Requiring Cultural Competency Training Enhancing Recruitment of Minority Populations
Reallocate Police Resources	“Defunding” the Police Removing School Resource Officers from Schools Limiting/Altering Opportunities for Grant Funding
Enhance Partnerships	Incorporating Social Workers/Mental Health Professionals Enhancing Collaboration with Community Agencies
Legal Reforms	Eliminating Qualified Immunity for Police Officers Enhancing Authority and Penalties of Civil Rights Statutes Eliminating “No-Knock” Warrants

While this list is not comprehensive, it reflects significant themes that have been the subject of intense political debate. The mere existence of these political debates have the ability to significantly impact police practices and outcomes in an attempt to respond to public demands. Often, these measures were implemented in response to a single or series of odious events where police officers acted horrendously. In other cases, these measures are in response to systemic challenges that have endured throughout the nation’s history. Collectively, however, these measures drastically alter the environment of policing and further inhibit the evaluation of policing under traditional metrics.

Moreover, while legitimate outrage exists over instances of police misconduct, racial injustice, and the excessive use of force, evidence is still insufficient or mixed in regard to many of the reforms proposed to improve police outcomes. For instance, while logic dictates that a reallocation of police funding to community agencies that are dedicated to addressing social issues may lower the crime rate, this proposal has not been validated empirically on a wide scale and is largely based upon the aforementioned politically minded, liberal-leaning, due process perspective of policing. Such an observation is not to argue that the method should not be attempted, but rather emphasize the fact that the policy is more politically based than evidence-based. Similar observations could be made for nearly all of the proposed reforms listed.

To be clear, the overwhelming calls for reform from various sectors of society suggest that change is needed. However, our argument does not advocate that liberal or conservative approaches hold supremacy and that one or the other will produce the best outcomes. We see value in various approaches offered by both political perspectives. Instead, our position is that reforms must account for the multiple variables that impact the work of the police and be based in evidence rather than political rhetoric. To that end, our analysis now turns to a specific policy reform pertaining to eyewitness identification.

## Eyewitness Identification

Eyewitnesses to crimes or events before or after crimes often provide crucial evidence to law enforcement and in court trials and play a key role in how cases are processed through the criminal justice system. It is not uncommon for convictions to hinge heavily or even solely on the testimony of one or more eyewitnesses who identify an accused person as the perpetrator. Yet there is an extensive body of literature, most of which emerged in the later part of the 20<sup>th</sup> century, regarding the fallibility of memory and accuracy of eyewitness accounts of events.<sup>11</sup> Hundreds of field studies and controlled experiments have repeatedly confirmed that eyewitness identification is fraught with problems. Factors such as how lineups or photos of suspects are presented to eyewitnesses, whether the eyewitness and suspect are of different races or age groups, age of the eyewitness, varying facial recognition skills, and amount of stress the witness experienced at the time of the crime/event as well as at the point of identification all have been found to influence accuracy. Conditions such as lighting/visibility at the crime scene and presence of a weapon, as well as other incidental crime scene variables might distract a witness's attention and further diminish identification accuracy.

Garrett analyzed data from the first 250 cases in which someone was ultimately exonerated using DNA evidence.<sup>12</sup> He found that the most prevalent factor contributing to wrongful conviction in these cases was eyewitness misidentification, with this factor present in 76 percent (190) of the cases in this sample. And according to the most recent data reported by the Innocence Project, misidentification played a role in 69 percent of the more than 375 wrongful convictions that were overturned due to newly introduced DNA evidence.<sup>13</sup> This percentage of cases with tainted eyewitness identification is sometime thought to be higher in the DNA exonerations because these are frequently sexual assault cases that involved witnesses identifying a suspect. Thus, eyewitness misidentification may be disproportionately linked to this type of case because they were more likely to have relied on eyewitness testimony. However, when the National Registry of Exonerations examined the first 1,365 exonerations that they had compiled for this registry through April 2014, they reported that 75 percent of the cases involved some type of misidentification.<sup>14</sup> This sample includes the DNA exonerations as well as cases in which exoneration resulted from other reasons. It is troubling that some cases involved deliberate manipulation by law enforcement. Forms of manipulation included ordering a suspect to participate in the lineup wearing the clothing very similar to what the victim reported the perpetrator wore, bringing out a suspect in a jail uniform, and in nearly half of the cases (43/90), directly telling the victim who to pick.

Many of the cases that resulted in eventual exoneration of a defendant involved cross-race identification, with a white eyewitness identifying a black suspect. Yet most people's facial recognition skills for someone of a different race or ethnic group are far inferior to facial recognition skills when they are asked to recognize faces of their

<sup>11</sup> E. F. Loftus, D. G. Miller, and H. J. Burns, "Semantic Integration of Verbal Information into a Visual Memory," *Journal of Experimental Psychology: Human Learning and Memory* 4, no. 1 (1978): 19–31, accessed June 30, 2021, <https://doi.org/10.1037/0278-7393.4.1.19>; and G. L. Wells, "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables," *Journal of Personality and Social Psychology*, 36, no. 12 (1978): 1546–1557, accessed June 15, 2021, <https://doi.org/10.1037/0022-3514.36.12.1546>; and Gary L. Wells and Elizabeth A. Olson, "Eyewitness Testimony," *Annual Review of Psychology* 54 (February 2003): 277–295, accessed August 12, 2021, <https://www.annualreviews.org/doi/abs/10.1146/annurev.psych.54.101601.145028>; and Gary L. Wells et al., "Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence," *Law and Human Behavior* 44, no. 1 (February 2020), accessed June 30, 2021, <https://psycnet.apa.org/fulltext/2020-06220-002.html>; and G. L. Wells and S. D. Penrod, "Eyewitness Identification Research: Strengths and Weaknesses of Alternative Methods," in *Research Methods in Forensic Psychology*, eds. B. Rosenfeld and S. D. Penrod (Hoboken, NJ: John Wiley and Sons, 2011).

<sup>12</sup> B. L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, Mass.: Harvard University Press, 2011).

<sup>13</sup> Innocence Project, *Eyewitness Identification Reform*, accessed July 21, 2021, <https://innocenceproject.org/eyewitness-identification-reform/>.

<sup>14</sup> Kaitlin Jackson and Samuel Gross, "Tainted Identifications," *The National Registry of Exonerations*, September 22, 2016, accessed July 31, 2021, <https://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx>.

own race or ethnic group.<sup>15</sup> In their 2001 meta-analysis, Meissner and Brigham reviewed thirty-five research studies that had examined this phenomenon, which collectively included ninety-one independent samples. They concluded that both false positives (subjects thought they recognized a face that they had previously *not* seen, and false negatives (subjects believed a face they had seen was *unfamiliar*), were significantly lower when the faces viewed were of people who were the same race as the subject. This is true across different cultures and races. Subsequent work has confirmed the prevalence of “own race bias,”<sup>16</sup> though some evidence suggests that people can be trained to get better at facial recognition.<sup>17</sup> There is also research suggesting that increased exposure to people of different races can improve accuracy of cross-race identification, but findings in this regard are mixed.<sup>18</sup> A similar effect to the “race bias,” termed “own age bias,” holds true for facial recognition across age groups, with people faring better at recognizing faces when they were of people of the same age or close to their age than faces of people from other age groups.<sup>19</sup>

Research has further honed in on specific protocols and practices that law enforcement agencies can implement to improve the accuracy of eyewitness identification.<sup>20</sup> In the following section, we review these protocols and practices, and discuss some of the empirical research supporting each.

### Best practices for reforming use of eyewitness evidence

A 1998 white paper, commissioned by the American Psychology and Law Society that summarized the research findings, was one of the earlier efforts to promulgate the best practices for which there was expert consensus.<sup>21</sup> The following year, the National Institute of Justice published these same findings and recommendations in a law

<sup>15</sup> C. A. Meissner and J. C. Brigham, “Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review,” *Psychology, Public Policy, and Law* 7 (2001): 3–35.

<sup>16</sup> P. M. Walker and M. Hewstone, “A Perceptual Discrimination Investigation of the Own-Race Effect and Intergroup Experience,” *Applied Cognitive Psychology* 20, no. 4 (2006): 461–475, accessed June 30, 2021, <https://doi.org/10.1002/acp.1191>; and G. Anzures, D. Kelly, and O. Pascalis, “Own-and Other-Race Face Identity Recognition in Children: The Effects of Pose and Feature Composition,” *Developmental Psychology* 50, no. 2 (2014): 469–481, accessed at <https://doi.org/10.1037/a0033166>.

<sup>17</sup> J. W. Tanaka and L. J. Pierce, “The Neural Plasticity of Other-Race Face Recognition,” *Cognitive, Affective, & Behavioral Neuroscience* 9 (2009): 122–131, accessed October 21, 2021, [https://www.researchgate.net/publication/24043586\\_The\\_Neural\\_Plasticity\\_of\\_Other-Race\\_Face\\_Recognition](https://www.researchgate.net/publication/24043586_The_Neural_Plasticity_of_Other-Race_Face_Recognition)

<sup>18</sup> Steven G. Young et al., “Perception and Motivation in Face Recognition: A Critical Review of Theories of the Cross-Race Effect,” *Personality and Social Psychology Review* 16, no. 2 (2011): 116–42, accessed June 30, 2021, <https://doi.org/10.1177/1088868311418987>; and G. S. Goodman et al., “The Development of Memory for Own- and Other-Race Faces,” *Journal of Experimental Child Psychology* 98, no. 4 (December 2007): 233–242, accessed July 15, 2021, <https://doi.org/10.1016/j.jecp.2007.08.004>; and D. B. Wright, C. E. Boyd, and C. G. Tredoux, “Inter-Racial Contact and the Own-Race Bias for Face Recognition in South Africa and England,” *Applied Cognitive Psychology* 17, no. 3 (March 2003): 365–373, accessed July 16, 2021, <https://doi.org/10.1002/acp.898>.

<sup>19</sup> J. S. Anastasi, M. G. Rhodes, “An Own-Age Bias in Face Recognition for Children and Older Adults,” *Psychonomic Bulletin & Review* 12 (2005): 1043–1047, accessed May 19, 2021, <https://doi.org/10.3758/BF03206441>.

<sup>20</sup> G. L. Wells et al., “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” *Law and Human Behavior* 22, no. 6 (1998): 603–647, accessed July 15, 2021, <http://dx.doi.org/10.1023/A:1025750605807>; and Tim Valentine, Alan Pickering and Stephen Darling, “Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups,” *Applied Cognitive Psychology* 17, no. 8 (2003): 969, accessed October 21, 2021, <https://doi.org/10.1002/acp.939>; and Daniel B. Wright and Elin M. Skagerberg, “Post-Identification Feedback Affects Real Eyewitnesses,” *Psychological Science* 18, no. 2 (February 2007): 172, accessed June 30, 2021, <https://doi.org/10.1111/j.1467-9280.2007.01868.x>; and Keith A. Findley, “Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies,” 81 *Missouri Law Review* 377 (2016), University of Wisconsin Legal Studies Research Paper No. 1372, accessed June 2, 2021, <https://ssrn.com/abstract=2713963>; G. L. Wells, “Eyewitness identification,” In *Reforming Criminal Justice. Volume 2: Policing*, ed. Erik Luna (Phoenix: Arizona State University, 2017), 259–278, August 20, 2021, <https://www-media.floridabar.org/uploads/2018/06/ADA-Reforming-Criminal-Justice-Vol-II.pdf>.

<sup>21</sup> Gary L. Wells et al., “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” *Law and Human Behavior* 22, no. 6 (1998): 603, June 15, 2021, <http://dx.doi.org/10.1023/A:1025750605807>.



enforcement manual titled, *Eyewitness Evidence: A Guide for Law Enforcement*<sup>22</sup> and produced an updated version, the *Eyewitness Manual: A Trainer's Manual for Law Enforcement*, in 2003. In 2016, the International Association of Chiefs of Police issued *Eyewitness Identification: A Model Policy*.<sup>23</sup> These documents, along with many other readily available resources, offer comprehensive, straightforward guides for implementing evidence-based protocols ranging from proper procedures to interviewing witnesses to methods for conducting photo and in-person lineups.<sup>24</sup> In 2014, the National Research Council of the National Academy of Sciences released one of the most thorough reports to date on the status of eyewitness identification in criminal investigations and convictions. This report, titled *Identifying the Culprit: Assessing Eyewitness Identification*,<sup>25</sup> included a series of recommendations for law enforcement agencies collecting evidence via eyewitness identification, as well as recommendations for introducing and challenging eyewitness testimony in the courtroom. The law enforcement recommendations, listed below, reflect the most frequently recommended practices, and provide a useful, albeit partial, template for crafting policy and legislation that can minimize error in eyewitness identification.

- Train all law enforcement officers in eyewitness identification, focusing specifically on factors that affect vision and memory, and on procedures to prevent contamination.
- Document witness's level of confidence in their judgments at the time of the identifications.
- Implement "double-blind" identification procedure in which the officer who administers an in-person or photographic lineup does not know which of the people is the suspect, and thus cannot deliberately or unintentionally influence the witness.
- Develop and use standardized witness instructions at identification procedures.
- Videotape all identification procedures.

There is a good deal of empirical evidence backing these recommendations. We do note, however, this evidence is stronger for some measures than others. There are also studies that do not support their use, though these are outnumbered by those that do. Moreover, critics point to methodological limitations in some of this non-supportive research.

For example, one frequently recommended measure for ensuring the integrity of eyewitness evidence is requiring that witnesses provide a rating signifying how confident they are that they have correctly identified a suspect at the time of identification. A number of studies have revealed that witnesses' confidence at the time of identification was a strong predictor of accuracy in real-life and laboratory settings.<sup>26</sup> Yet other research has indicated it should not be given significant weight.<sup>27</sup> High confidence ratings are seen as more fallible than low confidence ones. Furthermore, encouragement from law enforcement officers present at the time identification is made, or statements from the officers regarding certainty that the actual perpetrator is in a lineup or photo display

<sup>22</sup> National Institute of Justice, US Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (Washington, DC: US Department of Justice, October 1999), accessed July 31, 2021, [www.ncjrs.gov/pdffiles1/nij/178240.pdf](http://www.ncjrs.gov/pdffiles1/nij/178240.pdf).

<sup>23</sup> IACP Law Enforcement Policy Center, *Model Policy: Eyewitness Identification* (Alexandria, VA: IACP Law Enforcement Policy Center, September 2016), accessed August 11, 2021, <https://www.theiacp.org/sites/default/files/2018-08/EyewitnessIDPolicy2016.pdf>.

<sup>24</sup> National Institute of Justice, US Department of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (Washington, DC: US Department of Justice, September 2003), June 15, 2021, <https://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

<sup>25</sup> National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (Washington, DC: The National Academies Press, 2014), accessed date, October 21, 2021, <https://doi.org/10.17226/18891>.

<sup>26</sup> C. R. Brewin, B. Andrews, and L. Mickes, "Regaining Consensus on the Reliability of Memory," *Current Directions in Psychological Science* 29, no. 2 (2020); and J. T. Wixted, and G. L. Wells, "The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis," *Psychological Science in the Public Interest* 18, no. 1 (March 2017): 10–65.

<sup>27</sup> J. Sauer et al., "The Effect of Retention Interval on the Confidence-Accuracy Relationship for Eyewitness Identification," *Law and Human Behavior* 34 (2010): 337–347; and B. L. Garrett et al., "Factoring the Role of Eyewitness Confidence in the Courtroom," *Journal of Empirical Legal Studies* 17, no. 3 (September 2020): 556–579; and N. Brewer and K. Day, "The Confidence-Accuracy and Decision Latency-Accuracy Relationships in Children's Eyewitness Identification," *Psychiatry, Psychology and Law* 12, no. 1 (2005): 119-128.

tends to result in inflated confidence ratings. Law enforcement officer or other staff present when a witness views a photograph or in-person lineup may give verbal or non-verbal cues when the witness selects the person law enforcement believes to be the perpetrator, which also may boost confidence ratings. Also, unsurprisingly, when police inform a witness that another witness chose the same suspect as they had from the lineup, confidence ratings tend to increase.<sup>28</sup> As we will discuss later in this article, this problem can be ameliorated through use of “double-blind lineups” in which no one can be with the witness who knows who police believe is the perpetrator. Low confidence ratings may be more accurate than high ratings, in that they reflect true hesitancy to make a positive identification. Wixted and Wells have gone as far as to state that “value of a low-confidence ID is never open to question.”<sup>29</sup>

Garrett’s aforementioned 2011 analysis of the DNA exonerations found that in 21 percent of the cases the eyewitnesses had testified during the trial that they were initially uncertain regarding the identification.<sup>30</sup> He also noted that the true status of witnesses’ confidence at initial identification was generally unknown, and often could be assumed only if it was raised at trial. This is one of the challenges to research regarding the significance of confidence ratings, and in part accounts for the mixed findings. Berkowitz, Garrett, Fenn, and Loftus<sup>31</sup> reviewed the body of research examining relationship between eyewitnesses’ confidence in their identification of a suspect and the accuracy of the identification age of the eyewitness, lineups where the suspect was likely innocent. They argued that previous studies hyping the value of the confidence ratings were flawed in that the true initial confidence was simply not able to be determined in many of the cases in the samples used. They concluded that: “We are far from understanding the value of an eyewitness’s initial high confidence statement in real-world cases where conditions are not pristine.”<sup>32</sup> However, this does not mean that requiring witnesses to assign an initial confidence rating is inherently bad practice or not useful. Rather, if ratings are provided within the context in which conditions are as close to pristine as possible (i.e., no pressure, prompting, or encouragement from law enforcement or others present; not using witness identification if a suspect’s picture has been featured in the media), and if jurors are apprised of the role of age and other factors in affecting the confidence-accuracy relationship, the ratings may still have utility at the time of trial. Moreover, there are indications that low confidence ratings may represent an important red flag of which jurors should take note. Finally, if law enforcement agencies routinely and faithfully document witnesses’ confidence ratings at the initial identification, researchers will have more valid data for further examination of their value.

Though it seems common sense that “fillers” used in lineups should look reasonably similar to the suspect, closely align with the victim’s description of the perpetrator, and that the suspect should not stand out in any way, anecdotal evidence shows that this is not always the case. Missouri exoneree Johnny Briscoe was convicted of rape after being selected from a lineup by the victim in which Briscoe was the only person wearing a jail-issued jumpsuit; the fillers wore street clothes.<sup>33</sup> The victim selected him from the lineup, he was subsequently convicted of sexual assault and other crimes, and went on to serve twenty-three years in prison before a DNA test proved he was not the culprit. The Innocence Project reports cases in which the suspect was the only person in the lineup of the same race as the person the witness described. Clearly, law enforcement should include persons in lineups who bear at least a superficial description to the perpetrator based on the witness’s report, in terms of race,

<sup>28</sup> C. A. Elizabeth Luus and Gary L. Wells, “The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects,” *Journal of Applied Psychology* 79, no. 5 (October 1994): 714-723.

<sup>29</sup> John T. Wixted and Gary L. Wells, “The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis,” *Psychological Science in the Public Interest* 18, no. 1 (2017): 20, accessed October 22, 2021, <https://journals.sagepub.com/doi/full/10.1177/1529100616686966>.

<sup>30</sup> This is a percent of the 161 of the 190 cases for which the researcher was able to access the trial records.

<sup>31</sup> Shari R. Berkowitz et al., “Convicting with Confidence? Why We Should Not Over-Rely on Eyewitness Confidence,” *Memory* (November 2020), accessed July 25, 2021, <https://www.tandfonline.com/doi/full/10.1080/09658211.2020.1849308>.

<sup>32</sup> *Ibid.*, 5.

<sup>33</sup> The National Registry of Exonerations, *Johnny Briscoe*, accessed July 12, 2021, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3052>.

ethnicity, size, general body type, and to an extent, with similar features.<sup>34</sup> However, it has also been found that when people view faces that are highly similar to one another, this can confound accuracy of identification. Therefore, some heterogeneity in the fillers' features is recommended.<sup>35</sup>

The most compelling evidence for methods to improve accuracy of eyewitness identification is in regard to the “double-blind” procedure, in which not only is the witness naïve as to which person in a photo array or an in-person lineup is the suspect, but so is the police officer or other staff person conducting the lineup. When the lineup administrator knows who the suspect is, the chances of a false positive identification are higher.<sup>36</sup> In his review of the state of empirical evidence for best eyewitness practices, Findley asserts that this double-blind procedure is one in which there is the strongest consensus.<sup>37</sup> Risinger points to this practice as one with no cost, in that it lowers the risk of falsely identifying an innocent person and does nothing to reduce the chances that someone will choose the correct person as the perpetrator.<sup>38</sup> This can reduce intentional manipulation, hinting and coaching the witness. We note that introducing this practice in itself does not impugn the integrity of law enforcement, because the more likely scenario does not involve intentional signaling, but rather unintentional verbal and non-verbal cues.

Research also indicates that witnesses should not be shown the same suspect in multiple presentations, such as viewing the suspect in a photographic array and then again in an in-person lineup. When this occurs, the false positive rate tends to be high, with witnesses recalling a face not from the actual crime scene, but from the previous viewing.<sup>39</sup> This is especially likely to diminish the accuracy of the identification when there is only one person who is featured in multiple methods.

Yet another practice, though less often included in standard eyewitness recommendations for reform, involves presenting photos or live suspects to the witness sequentially, rather than simultaneously. The logic behind this practice derives from findings that when someone views a simultaneous presentation of photos or live suspects, s/he makes a *relative* judgement, treating the process like a multiple-choice test and selecting the photo or person most similar to his or her recollection of the perpetrator. On the other hand, a sequential selection (even if the witness is permitted to return to a picture or ask to see a live suspect again), results in an *absolute* judgement, meaning that the witness makes a “yes” or “no” decision upon viewing each person. This has been found to lead to fewer false identifications.<sup>40</sup> However, the merits of sequential processing are not entirely confirmed in the

<sup>34</sup> Alameda County District Attorney's Office, “Lineups and Showups,” *Point of View* (Fall 2011), accessed July 12, 2021, [https://le.alcoda.org/publications/point\\_of\\_view/files/F11\\_LINEUPS.pdf](https://le.alcoda.org/publications/point_of_view/files/F11_LINEUPS.pdf)

<sup>35</sup> C. A. Carlson et al., “Lineup Fairness: Propitious Heterogeneity and the Diagnostic Feature-Detection Hypothesis,” *Cognitive Research: Principles and Implications* 4, 20 (2019), accessed August 4, 2021, <https://doi.org/10.1186/s41235-019-0172-5>.

<sup>36</sup> R. M. Haw and R. P. Fisher, “Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy,” *Journal of Applied Psychology*, 89, no. 6 (2004): 1106–1112; and M. R. Phillips et al., “Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias,” *Journal of Applied Psychology*, 84, no. 6 (December 1999): 940–951.

<sup>37</sup> Findley, “Implementing the Lessons from Wrongful Convictions.”

<sup>38</sup> Michael Risinger, “Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate,” *97 Journal of Criminal Law and Criminology* 97, no. 3 (Spring 2007): 761, 797, accessed July 12, 2021, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7269&context=jclc>.

<sup>39</sup> Tiffany Hinz and Kathy Pezdek, “The Effect of Exposure to Multiple Lineups on Face Identification Accuracy,” *Law and Human Behavior* 25, no. 2 (2001): 185, 195–97; and R. D. Godfrey and S. E. Clark, “Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value,” *Law and Human Behavior* 34, no. 3 (2010): 241–258; and N. K. Steblay, R. W. Tix, and S. L. Benson, “Double exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy,” *Applied Cognitive Psychology* 27, no. 5 (August 2013): 644–654, August 15, 2021, <https://doi.org/10.1002/acp.2944>; and N. K. Steblay and J. E. Dysart, “Repeated Eyewitness Identification Procedures with the Same Suspect,” *Journal of Applied Research in Memory and Cognition* 5, no. 3 (September 2016): 284–289, accessed August 15, 2021, <https://doi.org/10.1016/j.jarmac.2016.06.010>; and W. Lin, M. J. Strube, and H. L. Roediger, “The Effects of Repeated Lineups and Delay on Eyewitness Identification,” *Cognitive Research: Principles and Implications* 4, no. 16 (2019), accessed August 12, 2021, <https://doi.org/10.1186/s41235-019-0168-1>.

<sup>40</sup> Brian L. Cutler and Steven D. Penrod, “Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation,” *Journal of Applied Psychology* 73, no. 2 (1988): 281, 288.

research, and some studies suggest this method is not tremendously beneficial, potentially leading to higher false negatives, with a witness failing to recognize the actual perpetrator.<sup>41</sup> Yet other research has concluded that the simultaneous presentation method may improve accuracy by reducing both false negatives *and* false positives.<sup>42</sup>

Finally, all of these practices can be enhanced by providing full information regarding the lineup and clear instructions to the witnesses.<sup>43</sup> One very important piece of information that should be conveyed to the witness is that the actual perpetrator may not be present in the lineup. Thus, the witness is less likely to perceive the lineup as a “multiple choice test” and feel pressured to make a selection when there is some uncertainty.

We acknowledge the proposed and existing reforms discussed in this section are not without their limitations. Clark is among a handful of scholars who caution that while these practices can be successful in reducing false positives, the consequence may be that they can raise the likelihood of false negatives, resulting in a true perpetrator escaping justice and remaining free to commit more crimes.<sup>44</sup> Clark cautions the probative value and social costs should be carefully weighed when such practices are under consideration. While we do not deny that there is risk and cost to a guilty person going free, this is most likely to occur in cases in which the case hinges entirely or heavily on a witness making a proper identification, in the absence of other compelling evidence. Wixted, et al. responded to Clark’s concerns by arguing that the standard for determining best practice should not be the probative value, but rather the same standard that is considered the gold standard in medical diagnostics, the “receiver operator characteristics,” which take into account the proportion of false negatives and false positives. There are two types of situations in which a “true” suspect is not chosen. The first is when a witness does not select anyone from the lineup because he or she cannot be certain that someone in the lineup is the person they saw commit a crime. The second is when a witness is adamant the suspect was not in the lineup; there is no uncertainty. The latter scenario is the less likely to occur, since police do not typically require witnesses to declare a firm denial regarding the suspects and fillers presented. While jurors may be swayed by testimony from a witness who appears confident that s/he *did* identify the perpetrator from the lineup, we suggest that testimony from a witness who cannot be certain that the perpetrator was in the lineup may not carry enough weight to produce an acquittal, particularly if other evidence points to a defendant’s guilt. Moreover, in cases in which the wrong person is identified as the perpetrator, not only is there a risk of an innocent person being punished, *the risk of the guilty person going unapprehended is also present.*<sup>45</sup>

Of the various practices, the research involving simultaneous v. sequential presentation of fillers and suspects appears to have the least consistent empirical support. In their report on recommended best practices, the National

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accessed July 15, 2021, <https://doi.org/10.1037/0021-9010.73.2.281>; and R. C. L. Lindsay et al. “Biased Lineups: Sequential Presentation Reduces the Problem,” *Journal of Applied Psychology* 76, no. 6 (1991): 796–802, accessed July 15, 2021, <https://psycnet.apa.org/doiLanding?doi=10.1037%2F0021-9010.76.6.796>; and A. Klobuchar, N. Steblay, and H. Caligiuri, “Improving Eyewitness identifications: Hennepin County’s Blind Sequential Lineup Project,” *Cardozo Public Law, Policy, and Ethics Journal* (2006), accessed August 12, 2021, [https://www.researchgate.net/publication/285715067\\_Improving\\_eyewitness\\_identifications\\_Hennepin\\_County's\\_blind\\_sequential\\_lineup\\_pilot\\_project](https://www.researchgate.net/publication/285715067_Improving_eyewitness_identifications_Hennepin_County's_blind_sequential_lineup_pilot_project).

<sup>41</sup> N. M. Steblay et al., “Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison,” *Law and Human Behavior* 25 (2001): 459–474; and C. A. Meissner et al., “Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual Process Signal Detection Theory Analysis,” *Memory and Cognition* 33 (2005): 783–792, accessed October 22, 2021, <https://link.springer.com/article/10.3758%2F03193074>; and S. M. Andersen et al., “Individual Differences Predict Eyewitness Identification Performance,” *Personality and Individual Differences* 60 (April 2014): 36–40, accessed July 11, 2021, <https://www.sciencedirect.com/science/article/abs/pii/S0191886913013883?via%3Dihub>.

<sup>42</sup> Andersen et al., “Individual differences predict eyewitness identification performance,” accessed August 8, 2021.

<sup>43</sup> Wells et al., “Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence.”

<sup>44</sup> S. E. Clark, “Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy,” *Perspectives on Psychological Science* 7, no. 3 (2012): 238–259, accessed June 1, 2021, <https://doi.org/10.1177/1745691612439584>.

<sup>45</sup> J. T. Wixted and L. Mickes, “The Field of Eyewitness Memory Should Abandon Probative Value and Embrace Receiver Operating Characteristic Analysis,” *Perspectives on Psychological Science* 7, no. 3 (May 2012): 275–8, accessed Jun 24, 2010, <https://doi.org/10.1177/1745691612442906>.

Research Council noted that the evidence is too inconclusive in this regard, and decided to not include sequential presentation among their recommended best practices.<sup>46</sup> Additional research, both in laboratory settings and based on data gathered in resolved cases involving eyewitness identification is needed before this practice be among those mandated by legislatures or other authoritative bodies. Law enforcement agencies that voluntarily adopt the practice of conducting sequential lineups should carefully monitor the outcomes.

### Summary of nationwide changes

Despite the abundant evidence pointing to the utility of most of these measures for improving eyewitness identification, many agencies have not implemented them.<sup>47</sup> The failure of law enforcement agencies to recognize the value of these reforms is baffling. Similarly, courts have been slow to adopt rules that require jurors be informed of the limits of eyewitness identification.<sup>48</sup> There is also scant information regarding why eyewitness reform legislative bills are unsuccessful. There are ample resources available to these agencies and the units of government that oversee them regarding the fallibility of eyewitness identification and how to improve its inaccuracy and reduce the chances of misidentification.

As of February 2021, twenty-four states had passed laws that regulated some aspects of eyewitness identification procedures and use as evidence. These laws pertain to either court or law enforcement practices, or both. Other states have voluntarily adopted model policies in this regard, in some places bolstered by support from attorneys general.<sup>49</sup> Just sixteen states, with Missouri among them, have neither legislation nor model policies in place.

Obviously, such laws are weakened when there are no sanctions for compliance. In his article “The Promise and Pitfalls of State Identification Reforms,” Kahn-Fogel noted some states that have mandated that law enforcement use best practices with regard to eyewitness evidence have failed to include penalties for agencies that do not adhere to the law.<sup>50</sup>

### Missouri situation

Missouri is divided into 115 counties, most of which have multiple local law enforcement agencies in addition to a county-wide sheriff’s department, with a total of 656 law enforcement agencies statewide.<sup>51</sup> This count includes the county and city/municipal departments, campus police departments, and the following statewide agencies, which are classified as law enforcement agencies: Missouri Capitol Police, Missouri Department of Revenue, Missouri Natural Resources -Park Rangers, Missouri Department of Conservation, Missouri Division of Fire Safety, Missouri Department of Social Services State Technical Assistance Team, and Missouri State Highway Patrol. The Missouri State Highway Patrol and all of the county and city/municipal agencies investigate crimes, resulting in hundreds of Missouri law enforcement entities that may, at one time or another, rely on eyewitness identification to solve crimes. County department sheriffs typically report to a county executive, while city/municipal police chiefs are supervised by mayors, city councils, or a combination of these. Barring statewide

<sup>46</sup> National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*. Ibid.

<sup>47</sup> Gary L. Wells, “Eyewitness Identification,” *Reforming Criminal Justice* (2018): 259-278, accessed August 17, 2021, [http://works.bepress.com/gary\\_wells/7/](http://works.bepress.com/gary_wells/7/).

<sup>48</sup> Ibid.

<sup>49</sup> Thomas Albright and Brandon L. Garrett, “The Law and Science of Eyewitness Evidence,” *Boston University Law Review*, February 1, 2021, Duke Law School Public Law & Legal Theory Series No. 2020-62, accessed July 2, 2021, <https://poseidon01.ssrn.com/delivery.php?ID=086103007084118099092017007099127069000031020044032070010081079112002006077007094100034041051001058005046075111082126117002068009054033038035011024091080000031095003085092011075109071018026007089121094123097120106005007125114087084121008089084121093029&EXT=pdf&INDEX=TRUE>.

<sup>50</sup> Nicholas Alden Kahn-Fogel, “The Promises and Pitfalls of State Eyewitness Identification Reforms,” *Kentucky Law Journal* 104, No. 1 (2015), accessed July 20, 2021, <https://ssrn.com/abstract=2754795>.

<sup>51</sup> Data.mo.gov, *Missouri Law Enforcement Agencies*, accessed July 20, 2021, <https://data.mo.gov/Public-Safety/Missouri-Law-Enforcement-Agencies/cgbu-k38b>.

mandates, they have tremendous discretion in crafting and implementing policies and procedures, including investigative procedures and use of eyewitnesses to identify suspects.

Missouri Senate Bill 162, introduced in 2013, was intended to mandate law enforcement agencies adopt a set of policies to be used during eyewitness procedures. This bill included other measures designed to reduce chances of a wrongful conviction, such as post-conviction DNA testing and procedures for using “jailhouse informants.” A similar bill, House Bill 1840, was proposed the following year, followed by SB 303 in 2015, and yet another in SB 842 in 2016. All failed to pass. The bills contained a list of procedures that reflected empirically-based best practices for improving the accuracy of eyewitness identification in criminal investigations. These included (a) using “double blind” lineups, in which the police officer or other law enforcement representative conducting the lineup does not know who the actual suspect is; (b) verbatim documentation of the witnesses’ confidence in identification of the suspect; (c) providing the witness with a set of instructions that, among other things, notifies him/her that it is not known if the actual perpetrator is in the lineup; (d) requiring a minimum of four “fillers” in a live lineup and five fillers in a photo lineup, and further, ensuring such fillers should resemble the witness’s description of the perpetrator; (e) restricting witness from viewing multiple lineups with the same suspect and varying fillers used; and (f) videotaping the lineup and identification process, or, if not possible, taking still photographs and a detailed record of the process with a requirement to record specific details. SB 162 was the only one of these bills that stipulated use of sequential presentation in lineups, as opposed to simultaneous ones. Given the mixed findings about the value of this practice noted previously, it may be best not to stipulate it in future legislative proposals, unless future research offers stronger support.

Arguably, the 2013 Missouri Senate bill, SB 162, and House version, HB 1840, represented the stronger bills in that the following text was included:

- (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification;
- (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible; and
- (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification.<sup>52</sup>

Thus, the bill would help ensure that non-compliant agencies were warned that the evidence they submit from eyewitness identifications may not carry much weight in court if they had failed to use best practices when obtaining identifications.

Former Missouri Representative Jay Swearingen, who co-sponsored House Bill 1840 in 2014, could not recall any specific resistance to the content nor concept of the bill. Rather, as best he could recollect, the bill failed because it originated “on the wrong side of the aisle.” Swearingen and his co-sponsor, former Representative J. T. Berry, were both Democrats serving in a heavily Republican-dominated legislature.<sup>53</sup>

In a 2018 article by the Pew Foundation,<sup>54</sup> it was noted that the California Police Chiefs Association opposed a legislative bill for reforming eyewitness procedures for three reasons: the challenges when applying these

<sup>52</sup> Missouri General Assembly, Senate Bill 162, 97<sup>th</sup> General Assembly, 1<sup>st</sup> sess. (January 17, 2013), accessed August 13, 2021, <https://www.senate.mo.gov/13info/pdf-bill/intro/SB162.pdf>; and Missouri General Assembly, House Bill 1840, 97<sup>th</sup> General Assembly, 2<sup>nd</sup> sess. (2014), accessed August 13, 2021, <https://house.mo.gov/billtracking/bills141/sumpdf/HB1840L.pdf>.

<sup>53</sup> Personal communication with former Missouri Representative Jay Swearingen, August 14, 2021.

<sup>54</sup> Michael Ollove, “Police are Changing Lineups to Avoid False IDs,” *Stateline* (an initiative of The Pew Charitable Trusts), July 13, 2018, accessed August 10, 2021, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/13/police-are-changing-lineups-to-avoid-false-ids>.

procedures in lineups conducted in the field (as opposed to a police station); the situation in certain cases, such as gang-related crimes, where officers develop a rapport with witnesses who may not be as trusting if asked to identify suspects by a different officer (to ensure a “double-blind lineup”); and the cost of maintaining videotapes, particularly for smaller departments. We were unable to locate any research from those states that have implemented best practices that the first two issues have hampered effective investigation and enforcement of laws. However, we concede that agencies will need to build in the cost of videotaping into their budgets, as they have when required to videotape confessions or save body camera footage. When sufficient funding for videotaping is not available, the option of taking still photographs and a written log of the eyewitness procedure may be a useful alternative.

### **Argument in favor and benefits**

The bulk of evidence accumulated to date demonstrates that eyewitnesses, for a variety of reasons, make mistakes when identifying suspects, and that subsequent courtroom testimony is flawed. Moreover, unless jurisdictions have implemented procedures, such as routinely including expert testimony on the topic, or instructing jurors regarding the limitations of eyewitness identification, jurors may place a great deal of weight on this testimony. The potential consequences of continuing to rely on eyewitness evidence without taking steps to ensure its accuracy, or at least ensure jurors’ understanding of its fallibility, are enormous. Actual perpetrators might evade arrest and go on to commit more crimes, both because a witness fails to recognize a suspect who is the actual perpetrator, and because the true perpetrator goes undetected when the witness chooses the wrong person. And, as discussed earlier, innocent people may be arrested, convicted, and serve decades in prison for crimes they did not commit. Thus, the stakes are high in terms of protecting public safety and ensuring that our criminal justice system is fair and just.

Law enforcement agencies that choose to adopt the evidence-based practices discussed herein may find there are other benefits. Showing good faith efforts to strengthen investigative procedures and reduce wrongful arrests improves police-citizen relationships. Agencies can demonstrate they are progressive and evidence-based, enhancing agency competency and their reputations.

Adoption of these practices need not be costly nor time-intensive. The time investment needed to reduce the probability of a tainted identification is minimal, and carries little, if any, fiscal burden. There is, of course, some cost and time commitment involved with training officers on proper procedures. However, as noted earlier in this article, there are abundant resources available to guide law enforcement agencies in developing and implementing new protocols. Moreover, larger agencies may find it cost-efficient and practical to train a small group of officers to function as that agency’s designated specialists in matters involving eyewitnesses. Finally, states that opt to mandate use of best practices can also consider mandating training academies to include a module on these practices, for both new and seasoned officers.

The primary objection to legislative mandates is the threat they pose to local autonomy — similar to the arguments put forth in response to national or state mandates directed at public schools. Some broad mandates may not be suited for all local jurisdictions and therefore, locally crafted policies may be preferable and best meet the needs of different groups of citizens with various needs and interests. Yet this argument does not hold up well in regard to law enforcement and eyewitness reforms. These practices are unlikely to have unintended negative consequences, and if they do, these are outweighed by their benefits. Moreover, they are almost apolitical in content — as likely to be accepted by conservatives as liberals. Unlike more controversial law enforcement and court reforms, such as mandatory body cameras, abolishing certain methods used for restraining suspects, and even eliminating bargains for jailhouse informants, they are not burdensome and do not hamstring police officers. It would be ideal if law enforcement agencies were to voluntarily adopt the best practices for using eyewitnesses in investigations, relying on persuasion, incremental change, and modeling of best practices by high-profile agencies. Yet this is unlikely to occur on a large scale. Missouri is not unusual in terms of the sheer number of

law enforcement agencies that operate independently of one another. These agencies are accustomed to functioning with a high level of autonomy in regard to many of their day-to-day tasks and practices. There are jurisdictional and geographic barriers as well as varying oversight arrangements within local governments that constrain voluntary change statewide. Chiefs, sheriffs, and other agency heads may know little about best practices and the empirical evidence supporting these, and detectives and front-line officers may know even less, since these practices are not part of standard police academy curricula. As a result, agencies continue to pursue the path of “this is how we’ve always done it.”

Considering the vast body of evidence supporting specific eyewitness reforms, the risks inherent in not doing so, and the availability of pragmatic educational resources on the topic, it is puzzling why most law enforcement agencies across the United States have yet to embrace these practices. The failure to do so suggests that their value is not recognized among agency leaders and front-line staff, or implementation is not prioritized.

Missouri’s General Assembly should follow the example of those states that have passed laws requiring law enforcement agencies follow best practices in regard to use of eyewitnesses. The simplest measure would be to resurrect the previously introduced bills, particularly SB 162 or HB 1840. Further, they should require or incentivize Missouri law enforcement training academies to adopt instructional modules on the procedures.

## **Conclusion**

Unquestionably, police are tasked with responsibilities that often have no easy solutions and are the results of more widespread social problems. Despite the focus of some reformers for greater accountability within police departments, these public agencies’ inability to eradicate issues such as homelessness, substance abuse, lack of economic opportunities, poor parenting practices, and other social ills cannot be counted against them. While they are in a position to collaborate with other parts of government to impact societal challenges, they cannot do so alone in light of the magnitude of these problems, the lack of resources they have to address them, the inadequate level of evidence to guide professional practice, and the political controversies inherent in overcoming them. Instead, this article offers a specific police reform that is entirely within the control of police departments, is not resource intensive, is supported by empirical research, and is relatively uncontroversial politically. In contrast to the more controversial reform measures promoted to stem police misconduct, our recommendations represent an achievable incremental improvement that strengthens the legitimacy of the criminal justice process and furthers evidence-based practice within policing.