EYEWITNESS IDENTIFICATIONS AND POLICE PRACTICES: A VIRGINIA CASE STUDY

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ABSTRACT

Over three decades of social science research have powerfully shown that lineup procedures really matter and that eyewitness errors predictably result from substandard lineups. Yet traditionally, many police departments had no written policies at all on conducting photo arrays or lineups. In response, more police departments, prosecutors, state courts and legislatures have acted to improve identification procedures. Although much has changed in the past decade, less is known about how many police departments have not yet adopted best practices. This Essay reports the results of a 2013 survey conducted of lineup procedures in Virginia, where a new state model policy was adopted in 2011 in response to a series of DNA exonerations caused by eyewitness misidentifications, as well as concern with the slow pace of adoption of best practices. Of the 201 law enforcement agencies that responded, 144 supplied eyewitness identification policies. Troubling findings included that in total, only 29%...

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required blind lineup procedures and only 40% made blind lineup procedures available even as an option. Only 6% adopted the revised model policy. The results suggest that institutional inertia, and not policy choices, explain the slow pace of adoption of best practices. As a result, dissemination of best practices by state policymakers may not be enough, and stronger regulatory measures may be required to safeguard the accuracy of criminal investigations.

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INTRODUCTION

In the past decade, far more attention has been paid to the importance of eyewitness identification procedures in criminal cases. Tens of thousands of criminal investigations hinge on the memory of an eyewitness each year, but the memory of an eyewitness is malleable and must be tested with care. The Supreme Court in Manson v. Brathwaite, decided in 1977, emphasized how “reliability is the linchpin in determining the admissibility of identification testimony.” Yet little was known about what made eyewitness identifications reliable.

Beginning in the 1970s, social scientists began to conduct a groundbreaking body of research demonstrating how eyewitness memory can be dramatically affected by the procedures that a police administrator uses when conducting an identification procedure. Having an officer who knows which person in the lineup is the suspect can affect the eyewitness: a central recommendation is that police conduct lineups, typically an array of six photographs, “blind” by using an administrator who does not know which person is the suspect. The accuracy and confidence of the eyewitness may be similarly affected if police stack the lineup so that one suspect stands out, give feedback or reinforcement like “Good job, you picked the right one,” or fail to tell the eyewitness that the suspect might or might not be present. Lineup procedures really matter. Yet traditionally, many police departments had no written policies at all on conducting photo arrays or lineups.

In the late 1990s, the Department of Justice convened a task force that drew national attention to the need for sound lineup procedures. What was the impetus for the concern that police adopt best practices for lineups? The DOJ cited the growing body of social science research on eyewitness memory, how lineup procedures can affect eyewitness


memory, and also a mounting number of wrongful convictions based on
eyewitness misidentifications. Beginning in the late 1980s, DNA testing
uncovered high-profile wrongful convictions, which made the dangers of
eyewitness misidentifications more salient than ever before. In a book, I
presented a study of the role eyewitness evidence played in trials of the
first 250 DNA exonorees. Over two-thirds were convicted based on
eyewitness misidentifications, and most of those eyewitnesses identified
innocent people following suggestive identification procedures.

In response, more police departments, prosecutors, state courts and
legislatures have acted to improve identification procedures. Several
states have enacted legislation requiring improved eyewitness
identification procedures; other states through judicial decisions or binding
guidelines have adopted best practices; still more states have required
written procedures or further study of the problem; and still additional
states have adopted recommended practices, as has the International
Association of Chiefs of Police (IACP).

3 See United States Department of Justice, Office of Justice Programs,
www.ncjrs.gov/pdffiles1/nij/178240.pdf; see also James M. Doyle, True Witness:

4 Brandon L. Garrett, Convicting the Innocent: Where Criminal
Prosecutions Go Wrong 48 (2011).

5 Id.

6 See id. at 64; Brandon L. Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev.
451 (2012); see also Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55,

7 To date, seven states, Illinois, Maryland, North Carolina, Ohio, Texas, West
Virginia, and Wisconsin, have passed statutes regulating eyewitness identification
Safety § 3-506 (West 2007); N.C. Gen. Stat. § 15A-284.52 (West 2007); Ohio Rev. Code
Code Ann. § 62-1E-1 (West 2013); Wis. Stat. § 175.50 (West 2005). Six more states,
Connecticut, Georgia, Nevada, Vermont, Virginia, and Rhode Island, recommended
studying the problem further, or requiring some form of written policy, while still
additional jurisdictions and departments have adopted voluntary guidelines. Conn. Gen.
Stat. § 54-1p (West 2012); Nev. Rev. Stat. § 171.1237 (West 2011); R.I. Gen. Laws § 12-
Although much has changed in the past decade in particular, less is known about how many police departments still have not adopted improved practices. Surveys that have been conducted strongly indicate that many agencies, particularly outside jurisdictions that require adoption of such practices, continue not to have any written policies on the subject of eyewitness identifications, much less policies that comport with best practices. A national survey of over 600 agencies sponsored by the National Institute of Justice found in 2013 that 77 percent reported no written policy for show-ups, or procedures involving a single suspect, 64 percent reported no written policy for photo lineups, involving a photo of a suspect together with a number of “filler” photos of additional individuals, and 84 percent report no written policy for live lineups, involving a suspect and “filler” individuals presented to the eyewitness in person. Why have quite inexpensive changes, particularly the practices


supported by social science research, been adopted so slowly? That is a question that I sought to examine in a case study of Virginia lineup practices.

In Part I, I discuss the DNA exonerations that first attracted attention to the problem of eyewitness identification practices in Virginia, followed by the efforts of legislators, the Virginia State Crime Commission, and the Virginia Department of Criminal Justice Services (DCJS) to improve police lineup procedures beginning in 2005. In Part II, I describe the Spring 2013 survey conducted of lineup procedures in Virginia. Of the 201 agencies that responded to either the survey or the FOIA requests, 145 supplied eyewitness identification policies. Troubling findings included that in total, only 40%, or 58 of 144 policies, required blind lineup procedures or made them available as an option. The revised model policy adopted by DCJS in 2011 has not yet been adopted by many agencies, with only 6% of agencies that provided policies having adopted it. In Part III, I conclude by describing what might explain the slow pace of adoption of improved eyewitness identification policies and by asking what can be done to encourage more widespread adoption of best practices by law enforcement.

I. EYEWITNESS IDENTIFICATION PROCEDURES IN VIRGINIA

Virginia makes for a useful case study in the pace of adoption of best practices by police departments generally, and in the area of eyewitness identification procedures in particular. What made the problem of eyewitness error salient in Virginia, as in other jurisdictions, were DNA techniques, 74% of respondent officers learned how to conduct lineups from another officer, while 18% cited to specific rules and regulations and 31% from written police guidelines on lineups. Michael S. Wogalter, Roy S. Malpass, and Dawn E. McQuiston, A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups, 10 Psychol., Crime & L. 69 (2004). In addition, a few single-state surveys have been conducted; see supra note 7. A Texas survey found only 12% of responding departments had any written policies, and perhaps in part in response, legislation requiring written policies was then enacted. Erin Mulvaney, Senate OKs wrongful-conviction bills, Dallas Morning News, May 19, 2011, at A01.
exonerations. Virginia has had a series of high-profile DNA exonerations involving eyewitness misidentifications: 13 of 16 DNA exonerations in Virginia involved eyewitness misidentifications.

A. VIRGINIA DNA EXONERATIONS

One telling example is the case of Troy Webb, who served seven and half years for a rape that he did not commit before being exonerated by DNA testing. The lineup was suggestive: only four of the photos resembled the victim's description. The victim was unable to help detectives draw a composite of the assailant. When she was shown a photo array with Webb's picture in it, she was initially uncertain about an identification of Webb. To make sure, the next day, the police conducted a second identification procedure, but Webb's photo was the only one repeated in the second array (and it was a five-year-old photo). Such repetition predictably signals which is the person that police care about.9

As in the other cases of DNA exonerees that I studied, the eyewitnesses in Virginia cases expressed complete confidence that they had correctly identified the culprit, although we now know that they were wrong. That confidence may have increased over time. As in the Webb case, in the Walter Snyder case, the victim was initially unsure; in fact, she initially did not identify him, but set aside three others of the seven pictures that "sparked something in [her] eye."10 Yet at trial, she was confident—but only after she had seen him in the neighborhood, and then police arranged a one-on-one show-up identification procedure in the police station, and after police had made comments to her about their suspect, including telling her that the defendant lived across the street.11

11 Id. at 112-16.
Similarly, the victim in Marvin Anderson’s case was asked: “Is there any doubt in your mind that this man right here is the individual who did these crimes to you?” The victim answered, “No, there is no doubt in my mind whatsoever.” In the Edward Honaker case, the victim was asked “Now, this is very important . . . Is there any doubt in your mind?” The victim replied, “No sir, no sir, no doubt at all. This is the man right here, sitting right here. There is no doubt.”

In some cases the lineups were obviously suggestive. Marvin Anderson served 15 years for a rape that he did not commit. Anderson’s was the only color photo included in the lineup; police included his photo identification from work. The victim was not told that the culprit might not be present in the array; in fact, the person whose DNA later identified him as the actual culprit had his photo in an earlier photo array, but she did not identify him. Anderson’s photo not only stood out, but he was the only person whose photo had been included to be then included by the police in a subsequent live lineup. Despite those suggestive procedures, the trial judge ruled that “there’s been no showing here that the photographs were irregular or were arranged in any irregular way or, uh, were presented in any way to, uh, identify a particular person.”

Willie Davidson was identified in a show-up that was not only unnecessary, but also highly suggestive. The victim had only seen her assailant in the dark with his face covered by a stocking; really, she could not make an identification. Davidson described how the victim still identified him, but only after police repeatedly pulled a stocking over his head and off, and asked the victim each time to identify him, asking, “is this it, is that it?”

14 Id. at 66.
B. 2005 Legislation

Those are just a few of the Virginia DNA exoneration cases involving eyewitness errors. The cases illustrate the need for careful procedures and training on best practices in conducting eyewitness identifications. After all, even such flawed identification procedures were presented in the courtroom; judges did not suppress the identifications and they permitted still more powerful courtroom identifications of those innocent people. As the Virginia Department of Criminal Justice Services (DCJS) wrote in 2011:

Ten of thirteen DNA exoneration cases in Virginia involved eyewitness misidentifications. Few cases in Virginia have been suitable for DNA testing, since the policy until the last decade was that crime scene evidence would be destroyed post-conviction. Those Virginia eyewitness identifications involved suggestive and unreliable eyewitness identification procedures.16

Moreover, existing lineup procedures in Virginia appeared out of date. DCJS had in place, from 1993 through 2005, an extremely barebones model policy on eyewitness identification.17 That policy “very briefly describes” the types of lineups: live presentation of a row of suspects, a photo array displaying a set of photographs of suspects, or a show-up in which shortly after an incident a single suspect is presented to an eyewitness. However, that extremely brief model policy offered no instructions and almost no guidance at all on how to conduct those different types of procedures. That model policy was only a few lines long.18 More important, it did not even suggest that best practices such as


18 Id. at 33-34. “VII. Eyewitnesses
blind administration, clear instructions, and careful documentation of eyewitness statements, be conducted.

In part responding to those DNA exonerations and also the social science research setting out best practices for lineups, in 2005, the Virginia Legislature enacted legislation requiring that police adopt some form of written eyewitness identification procedure. Virginia Code § 19.2-390.02 states:

Policies and procedures for law enforcement to conduct in-person and photo lineups—The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups.19

While that legislation did not require agencies to adopt any particular written policy, DCJS did substantially revise and update the recommended

A. Eyewitness identifications generally do not provide reliable evidence during criminal investigations. Consequently, the Supreme Court has addressed this issue in numerous cases and set forth guidelines to be followed when eyewitness identifications are solicited by officers. Eyewitness identifications may take the following form.

1. On-scene identification [:] One-on-one identifications have been held constitutional so long as the period of time between the offense and the identification is brief. One to three hours would be a reasonable amount of time.

2. Lineups [:] Lineups should be conducted using a minimum of six persons having similar physical characteristics as the suspect. The accused has the right to have an attorney present during the lineup and the lineup may not take place until the attorney is present. The attorney may not offer any suggestions concerning the conduct of the lineup, but may merely observe. Officers shall document the date, time, place, name of participants and witnesses, and the location of suspect/participants in the lineup.

3. Photo lineups [:] In conducting photo lineups, the photos shall depict persons displaying similar physical characteristics as the suspect. Simply showing an eyewitness a single photo of the suspect has been ruled unconstitutional. As a general rule, a photo lineup containing 6–8 photos is reasonable. Photographs shown to witnesses shall not contain any identifying information. Photo lineups will be documented as under (2) above.”

model policy, included as part of the Model Policies Manual for Virginia Law Enforcement Agencies. General Order 2-39 was adopted in July 2005, and remained in place until it was revised in November 2011. That 2005 model policy described for the first time the use of blind and sequential eyewitness identification procedures. Blind procedures are procedures employing an administrator who does not know which is the suspect. Sequential eyewitness identification procedures present images to the eyewitness one at a time. The 2005 model policy included detailed, clear instructions to be provided to an eyewitness, including an explanation that the suspect may or may not be present.

However, the 2005 model policy did not include instructions on how to effectively “blind” a lineup by presenting photos in folders, held by the eyewitness so they cannot be seen by the administrator, without the need to obtain an administrator who is unfamiliar with the investigation. In addition, the 2005 model policy had mandated sequential policies, but only made blind administration optional. Following the 2005 legislation, the emphasis in the efforts by the Department of Criminal Justice Services and the Crime Commission had been to encourage departments to adopt sequential lineup procedures.

This recommendation that agencies adopt sequential but not necessarily blind policies was problematic. As a result, agencies may have made their lineups more error-prone than they already were. As will be discussed more below, the administrator has a more prolonged interaction with the eyewitness during a sequential or one-at-a-time presentation of images, creating even more opportunity for suggestion, whether intended or completely unintended. It is especially important that a sequential procedure be conducted blind. But in Virginia, the model policy and training efforts after 2005 emphasized sequential but non-blind policies.

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20 Virginia Department of Criminal Justice Services, supra note 17, at 7.
C. 2010 DCJS SURVEY

The question was how many departments would adopt the recommended best practices. A 2010 survey by the Virginia State Crime Commission found that at least 25% of agencies responding to the survey still had no policy on the subject, despite enactment of that legislation five years earlier requiring that written procedures be adopted (and presumably even more agencies not responding lacked policies). Of agency policies reviewed, 66% used the sequential method, displaying images one at a time, but only 6% required the use of an independent or blind administrator.

D. A NEW MODEL POLICY: DCJS GENERAL ORDER 2-39

One response was the introduction of legislation that would have required that police use best practices in eyewitness identifications in Virginia. That legislation was referred by the legislature for further study by the Virginia State Crime Commission, but did not go forward. In response, in December 2010, the Virginia Crime Commission recommended that the Department of Criminal Justice Services draft a new model policy, and one that would provide options for smaller agencies. The Commission also asked DCJS to develop training for law enforcement, and conduct an audit on the status of lineup policies adopted. And the Commission asked that the Virginia Law Enforcement

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23 Id. at 18, 22 (reporting that there were 75% or 95 of 127 responding agencies; but even of those, only 82 agencies of 134 surveyed submitted policies); see also Chelyen Davis, Panel Head Favors New Rules on Police Lineups, FREE LANCE-STAR (Sept. 9, 2010) available at http://fredericksburg.com/News/FLS/2010/092010/09092010/574245/mobile.

24 See VIRGINIA STATE CRIME COMMISSION, supra note 22, at 22, 24.

25 Id.
Professional Standards Commission (VLEPSC) consider revising the accreditation standard for lineups.\textsuperscript{26}

The result was an excellent revised model policy drafted by DCJS, which took effect on November 16, 2011. This DCJS model policy can serve as a model for any jurisdiction, around the country. The updates to the model policy were intended to make it clearer, for instance, by “adding definitions for various terms used in the policy, including blind administration, confidence statements, fillers, folder shuffle method and show-up identifications.”\textsuperscript{27} The new model policy was also designed to be practical for agencies of all sizes. As noted, one concern was that smaller departments were not adopting the central reform: blind administration of lineups. The “folder shuffle” method provided a way for small departments to make a procedure blind (and sequential) by simply placing the photos in folders, shuffling them, with several blanks at the end. The eyewitness can open the folders and examine the photos in turn, without the administrator seeing what the eyewitness is looking at. The new model policy described clear instructions to eyewitnesses, careful documentation of the confidence and statements by the eyewitness, and encouraging video recordings to be made of identification procedures.

A DCJS follow-up survey of 267 law enforcement agencies in September 2011 created new cause for concern. This DCJS survey indicated that most departments still had not adopted best practices.\textsuperscript{28} For example, and perhaps most important, only 13\% reported that they use independent administrators to conduct lineups, although 28\% reported that they did so when possible; of the 115 policies reviewed, far more, or 39\%, reported use of independent administrators.\textsuperscript{29} Many of the agencies that did have policies (23\%) still had policies based on the quite outdated 1993 model policy. More agencies (52\%) had policies based on the 2005

\textsuperscript{26}Id. at 5.

\textsuperscript{27}VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES, supra note 17, at 7.

\textsuperscript{28}Id. at 3. DCJS contacted 267 Virginia law enforcement agencies; 135 agencies responded, and of those, 115 provided policies to DCJS.

\textsuperscript{29}Id. at 5.
policy. The survey noted that a “challenge mentioned by smaller agencies is the difficulty in practicing the double blind method or using an independent administrator for lineups.” As a result, most agencies were still conducting sequential but non-blind lineups. As noted, this was a very troubling and error-prone combination of procedures.

E. THE 2013 SURVEY

The DCJS 2011 survey was conducted shortly before the much-revised model policy officially took effect. One question was whether the adoption of the new model policy, combined with early efforts to introduce training on that policy, might have improved the adoption of revised eyewitness identification policies in Virginia. That was certainly the intent when DCJS was tasked with drafting a revised model policy for law enforcement agencies.

Of the over 350 law enforcement agencies in Virginia, over 200 responded either to a request for policies or a Freedom of Information Act (FOIA) request. First, a request was sent to police chiefs through the Virginia Association of Chiefs of Police. While that request was pending, a set of FOIA requests were sent out by law students at the University of Virginia School of Law, requesting policies relating to lineups, as well as several other subjects, as part of an independent research project. From February through April 2013, 201 agencies responded either to the request through the Virginia Association of Chiefs of Police, or to a FOIA request sent out by a law student (most responded to the FOIA).

Of the 201 agencies that responded to either the survey or the FOIA requests, 144 supplied eyewitness identification policies. In addition, two agencies had policies but stated they were currently in the process of revising them, and therefore did not supply a policy. Of the agencies that did not supply policies, 41 responded that they did not have eyewitness identification policies, and 14 more withheld policies when

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30 Id. at 8.
31 Id. at 6.
responding to the FOIA. Such agencies may therefore not be in compliance with the 2005 statute that requires all agencies to have a written policy on the subject of eyewitness identifications.

Ten of the 41 agencies that said they did not have policies were police departments. Thus, most of the agencies that stated they did not have written policies were Sheriff’s Offices without criminal investigation responsibilities (in Virginia some Sheriff’s Offices do and some do not have such responsibilities). However, such an agency can adopt a policy stating that any eyewitness identification procedures will be conducted by another agency in the jurisdiction. While some agencies supplied such a policy, it is quite possible that some agencies may have such a placeholder policy but did not supply them in response to the FOIA requests.32

II. SURVEY FINDINGS
A. BLIND LINEUP PROCEDURES

As the figure depicts, of the 144 eyewitness identification policies reviewed, 29% or 42 policies required blind lineup procedures. Ten more required that blind lineups be used where practicable. Six more required that lineups be blind as an optional practice.33 In total, 40% or 58 of 144 policies required blind lineups or made blind lineup procedures available as an option. This was similar to the results of the national NIJ-sponsored study by the Police Executive Research Forum (PERF) in 2013, which found that 31% of surveyed departments used blind photo lineups, with most using blind sequential policies.34

32 Indeed, a handful of agencies mentioned in letters accompanying FOIA responses that they do not have criminal investigation responsibilities, but did not supply a policy stating as much.

33 Such policies do not explain when blind policies should be used, and are troubling policies, not just absent more information about how such policies are implemented in practice, but also because using the folder method, a blinded lineup, is always practicable.

34 See POLICE EXECUTIVE RESEARCH FORUM, supra note 8, at 61-62.
Figure 1. Number and Percentage of Departments Adopting Types of Eyewitness Identification Policies

The number of agencies adopting blind identification procedures was troubling, since the current DCJS model policy adopted in 2011 and revised in 2012 highlights the importance of requiring blind procedures, and the prior DCJS model policy dating back to July 1, 2005, had recommended use of blind lineup procedures.\(^{35}\) These results were an improvement over the 2010 survey results finding that only 6% of agencies used a blind administrator, but less than the 47% using a blind administrator reported in the 115 policies surveyed by DCJS in 2011.\(^{36}\)

The agencies that did include blind policies seemed to be doing so because of the recommendations from DCJS. For example, such agencies usually included an explanation of the purpose of such a procedure, adopting the language of the DCJS model policies:

The investigator in charge should select an individual who does not know which member of the lineup is the ‘true’ suspect to conduct any lineups in order to avoid inadvertent

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\(^{35}\) See **Virginia Department of Criminal Justice Services**, *supra* note 20, at 21 (Gen. Order 2-39, Suspect Lineup Procedure).

signs or body language that may lead or cause a witness to make an incorrect identification. The officer/investigator selected should be thoroughly familiar with this procedure.\footnote{None of the names of the agencies from which policy language is quoted are included here. I do not name individual agencies, because I agreed to keep agency names anonymous when requesting policies from the Chief’s Association, and the law students who had sent FOIA requests did the same.}

Also troubling, only 9 agencies described the folder shuffle method as an option. The folder shuffle method was first recommended in the 2011 DCJS model policy as a way for small agencies to effectively blind a lineup procedure. Only a few of the more recently revised policies—policies revised to effectively incorporate the entire set of 2011-2012 DCJS recommendations—included a folder shuffle option. That suggests that the small agencies either still did not know about the existence of this folder shuffle option, or decided not to adopt it, or had simply not reviewed their policies since the 2011 model policy was adopted. Of the 96 agencies that have revised their policies since 2001, about half, or 45, required or provided as an option blind lineups.

Instead, far more common were policies that were sequential, but not blind: two-thirds or 63\% of the departments required or offered sequential lineups (91 of 144). Of those, 80 agencies require sequential photo lineups. In addition, 5 agencies made sequential policies available where practicable, and 6 made it optional. Many of these policies incorporated much of the language from the 2005 DCJS model policy, but omitting the language concerning blind lineups. All of the 58 agencies with blind policies or blind options were also departments that required sequential photo lineups.

However, 33 agencies required or make optional sequential lineups\footnote{A non-blind procedure without blind procedures in place.} That is, 23\% percent of the agencies whose policies were examined had sequential policies alone. Such policies may be even more error-prone than having adopted no changes at all. A sequential lineup prolongs the interaction with the administrator (“Is this the one? Is this the one? Or is this the one?”) A non-blind procedure
may be far more prone to influence by the expectations of the administrator and may lead both to more identifications of fillers, and other mistakes, even misidentifications of innocent suspects.

Of the 144 agencies, 53 had neither sequential or blind procedures. There were many agencies that had adopted none of the major reforms at all. Of those, 51 departments had extremely brief policies that contained no meaningful instructions at all for carrying out live or photographic lineups. Some of those agencies may have supplied their rough guidelines without their actual policies. Of those, 39 departments followed the extremely rudimentary 1993 model policy from DCJS.

B. SUGGESTION

Of the 144 policies reviewed, 43 had no language regarding minimizing suggestion. Of those that did, much of the language was highly formulaic. Some agencies clearly were aware of the danger of inadvertent suggestion, but took no measures, the most important of which is adopting blind lineups to prevent it. A large number, 91 policies, included statements cautioning against some form of suggestion. For example, one agency cautions: “Officers should be careful and avoid inadvertent signaling to the witness that may influence their selection. We all must ensure that inadvertent verbal cues or body language do not impact on a witness. Our search is for the truth.” How a policy can prevent “inadvertent” cues by just telling officers not to do something inadvertent is a mystery. Instead, agencies must simply adopt blind lineup procedures, or the folder system alternative.

More typical was language forbidding outright suggestion in the form of spoken statements: “do not make suggestive statements that may influence the judgment or perception of the witness.” Or: “At no time will the administrator provide any feedback to the witness.” Or: “The victim/witness making the identification must be handled courteously but not in any way led or otherwise influenced in their selection or identification of an individual.” Some policies simply briefly noted that outright misconduct is not tolerated: “No leading or suggestive comments
or feedback.” Or: “The officer will refrain from helping the victim/witness pick someone from line-up.” Many policies stated, following the language of the 2005 DCJS Model Policy: “Avoid saying anything to the witness that may influence the witness’ selection.”38 One policy notes: “The Deputy will never make verbal or nonverbal communication with the witness while the photo spread is being viewed and will never make confirmation of any photo selected by the witness.” Another policy explains: “The investigator in charge will be responsible for his/her lineup. In doing this, the investigating officer shall avoid inadvertent signs or body language that may lead or cause a witness to make an incorrect identification.” Another policy, without requiring blind procedures, just states that officers should conduct procedures in a way that “minimizes inadvertent biases.” Of course, the officer may not be able to avoid making inadvertent non-verbal communications. Several policies just vaguely state: “Officers shall remain neutral to the eyewitness identification.”

One policy appeared to call for highly suggestive conduct. The policy recommends that the officer “make inquiries” if a witness seems to be staring at a particular photograph in the array. A handful of departments recommended, not blind procedures, but having the officer stand behind the witness: “Additionally, in order to ensure that inadvertent cues or body language do not impact a witness, the officer conducting a photographic lineup should whenever practical, hand the photographs to the witness by standing behind or to the side of the witness. That will help alleviate any inadvertent facial expressions, smile, frowns, or other unintended clues to the witness. The officer should be careful to avoid inadvertent signaling of the correct response to the witness.”

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38 See Virginia Department of Criminal Justice Services, supra note 20, at 24 (Gen. Order 2-39, Suspect Lineup Procedure, at VI(k)).
C. Instructions to Eyewitnesses

Many agencies did not even have policies detailing the instructions to be given to an eyewitness (although some may have them separately documented in instruction forms not provided). Only 88 of 144 departments had required standard instructions as a matter of policy. Of those, only 7 had a standard instruction that the administrator does not know which one is the suspect. More common, 82 had instructions that the culprit may or may not be present in the lineup. Fewer agencies, 63 agencies, had instructions that the investigation will continue regardless whether anyone is identified in the procedure. Some agencies also instructed that: “it is just as important to clear innocent persons from suspicion as to identify guilty parties.” This is not very different than the results in the 2010 survey, which found that only 57% of policies provided formal instructions to eyewitnesses.39

D. Constructing the Lineup

Almost all agencies, 135 of 144, had a policy for numbers of fillers, and almost all required 5 or more fillers. Almost all of the policies, 125 of 144, stated that fillers should be selected to fairly resemble the suspect. Many did not specify where the filler photographs were to come from; a few noted that “the Pistol computerized record system” may be used to provide pictures for a photo array.

While almost all agencies, 140 of 144, had a policy for photographic lineups, many did not have the facilities for or did not permit live lineups; 78 of 144 permitted live lineups. Many also did not set out policies for show-ups; 84 had show-up policies, almost all of which set out when it is appropriate to conduct a show-up, but very few did so with the detail and with instructions on how to conduct a more neutral show-up that are described in the current DCJS model policy.

Very few policies stated how to record lineups and few made video or audio recording an option (14 departments suggested video and 11 suggested audio). Most required written recording of the results, but usually by asking the eyewitness to initial and sign a photo array form.

E. CONFIDENCE STATEMENTS AND FEEDBACK

About half, or 71 of 144 agencies’ policies, required taking a confidence statement of some kind using the eyewitnesses’ own words. Those that did require taking a confidence statement often did not detail how that should occur. For example, many policies tracked the prior language in the 2005 DCJS Model Policy, in VII.B: “When documenting the identification procedure, the person administering the lineup should record both identification and non-identification results, including the witness’ own words.” Another policy stated that “The Deputy will document or record exactly what the witness says about any selection they make.” One simply stated, “include the witness’ own words regarding their degree of certainty.” Some suggested that the officer should speculate about the witnesses’ certainty: one policy called for a “supplementing report including the witnesses’ level of certainty based on witness statements and officer observations.” Another policy stated only that: “Notes should be taken about any comments made by the witness during the lineup procedure.”

Only 51 policies addressed post-identification feedback. One policy stated: “The officer should never give any indication as to whether they believe that the identification was correct or incorrect or otherwise comment on the identification other than to determine the witnesses’ level of certainty or whether there is anything about the picture that is different from what they remember.” More policies included language from the 2005 DCJS model policy: “If an identification is made, avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including all required signatures and paperwork) has been completed.”
CONCLUSION

It was clear that the vast majority of Virginia law enforcement agencies still followed earlier and outdated model policies. Quite a few agencies still follow the extremely brief and limited 1993 model policy. The vast majority follow some version of the 2005 model policy, but as discussed, often without adopting the key reform made far more prominent in the current model policy: blind administration. The figure below displays how many departments adopted each model policy. As discussed earlier, a troubling number still adopted the 1993 model policy (39 agencies) and still more, not depicted below, adopted a modified and still quite rudimentary version of a pre-2005 policy (12 agencies). Far more common was some version of the 2005 model policy, sometimes modified, and sometimes omitting blind lineup procedures. Very few, only 6% of agencies, have adopted the current 2011-2012 model policy.

![Figure 2. Number of Departments Adopting DCJS Model Policies.](image)

What this suggests is that the slow pace of improvements may simply reflect failures to keep policies up to date. Institutional inertia may be the main problem. Nor is this necessarily something that just affects small versus large agencies, although there appears to be slightly better
compliance among larger agencies. When I used the size of the population that agencies serve as a proxy for agency size and selected just the agencies that serve more than 50,000 people, of those that responded to the survey or FOIA requests, there were 24 that had policies, and 14 that did not, with 6 withholding policies. Of the 24 agencies serving 50,000 or more people, 5 had policies that made blind administration a requirement and 8 made it an option, a 50% rate, somewhat more than the overall 40% rate among agencies generally. However, only two of these largest agencies had adopted the current 2011-2012 DCJS model policy.

Using a more direct measure for agency size, I separately examined these data in connection with the numbers of full-time officers employed by each agency. Selecting just the 30 largest agencies, all of those that had more than 100 full-time officers, 18 policies were obtained, one lacked a policy, while 5 withheld policies, and two stated they were in the process of revising their policies. Only one of those 30 largest agencies had adopted the current 2011-2012 DCJS model policy. Only 3 made blind administration required, with 4 more making blind administration an option. Thus, among the 30 largest agencies, 7 of 18 policies obtained had blind or blind-optional policies, or 38%, slightly less than the average across agencies of all sizes.

Similarly, the national 2013 NIJ-sponsored PERF survey found that most agencies, on a range of subjects, had not made any changes to their identification procedures since 1999, although up to 40% had made some changes, and particularly “very recently” in 2010 or 2011. That survey also found that agencies that did change to a blind, sequential procedure concluded that “the changes were not seen as being difficult”

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40 I am very grateful to Gary Dillon and the Department of Criminal Justice Services for locating and sharing data on the populations served by agencies in Virginia.


42 See POLICE EXECUTIVE RESEARCH FORUM, supra note 8, at 61-62.
and in interviews, agencies noted that they have perceived “a greater level of confidence in the quality of evidence” as a result of the changes.43

Where most agencies are not accredited by a state agency, there may simply not be enough attention paid in some agencies, perhaps regardless of their size, to following the text of new model policies.44 One purpose of the Symposium event this Journal convened in Spring 2013 was to promote more awareness of the 2011 model policy and training on it in Virginia, and its importance. Both before and after that event, as well as following the release of this study, the Virginia Association of Chiefs of Police, for example, sent out emails to its membership urging close attention to the DCJS model policy.

These findings suggest much more must be done to disseminate best practices, particularly where most are not accredited. Our criminal justice system is highly fragmented. If important reforms based on decades of social science research are not readily adopted by police, then legislators should be far more aggressive in enacting legislation to require that such practices be adopted. Nor need legislation adopted a static set of recommended practices; a statute could simply require compliance with a model policy drafted by an agency like DCJS.45 Institutional inertia may similarly contribute to failures to adopt other types of important law enforcement policies. Perhaps state regulatory agencies or crime commissions should be given regulatory authority over police practices. Local control can permit flexibility and accountability, but if it leads to systemic failures to adopt techniques that help to identify the guilty and clear the innocent, then stronger measures should be taken to safeguard criminal investigations.

43 See Id. at 74-75.

44 In Virginia, agencies may be accredited through the Virginia Law Enforcement Professional Standards Commission. See http://www.dcjs.virginia.gov/accred/.

45 A piece of legislation, HB 205, was introduced in the Virginia House of Delegates in January 2014 by Del. Alfonso Lopez, to require that all agencies conform to the DCJS Model Policy, but it was tabled by the Committee for Courts and Justice. See HB 805 Lineups; model policy established by Department of Criminal Justice Services, at http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+HB805.