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IN THIS ISSUE

Eyewitness Identification Reform in Massachusetts 52
By Stanley Z. Fisher

The Evolution of the Massachusetts Sex Offender Registry System 67
By Daniel A. Less

Case & Statute Comments

Tort Law — Slip and Fall in Supermarket — New Standard of Liability —
The Mode of Operation Approach 87
Sheehan v. Roche Brothers Supermarkets, Inc.

Civil Practice — Land Use — Administrative and Judicial Review 93
*Act Relative to Streamlining and Expediting the Permitting Process in the
Commonwealth*

Civil Procedure — Special Motion to Dismiss — Anti-SLAPP Statute 97
*The Cadle Company v. Schlichtmann; Kobrin v. Gastfriend; In the Matter of the
Discipline of an Attorney*

Tort Law — Commercial Landlord's Duty to Make Repairs 102
Humphrey v. Byron

Book Review

Profiles, Probabilities, and Stereotypes 108

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Eyewitness Identification Reform in Massachusetts

by Stanley Z. Fisher*



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Introduction

This article traces the impact of the new scientific learning upon police eyewitness identification procedures in the Commonwealth of Massachusetts. Over the past 25 years, experimental psychologists have devised more reliable techniques for gathering eyewitness identification evidence than have been traditionally used by police.¹ Massachusetts has over 350 autonomous municipal police departments,² plus

approximately 39 college campus police departments, the state police, and the MBTA (transit) Police Department.³ The decision how to investigate crime rests principally with the police chief responsible for each department.⁴ How does such a system of policing absorb new, scientifically superior methods of investigation?

Either compulsion or persuasion might be used to lead the police to reform their eyewitness identification practices. Compulsion, by either the legislature or the courts, has the advantage of achieving prompt, uniform policy change statewide. Thus, in England, eyewitness identification practices are governed by Practice Codes, approved by Parliament, violation of which can give rise to exclusionary sanctions.⁵ Closer to home, the New Jersey Supreme Court used its supervisory powers to compel reform.⁶

The alternative to reform by coercive means is to rely upon the discretion of executive branch officials. A police department on its own might decide to adopt procedural reform. A district attorney, lacking the authority to direct police how to conduct criminal investigations, might persuade police chiefs to adopt such reforms; or officials empowered to decide the curriculum for required police training might choose to include new eyewitness identification procedures. Because the pace and scope of executive branch reform depend ultimately upon the discretion of such individuals, these approaches will not immediately result in uniform adoption of more reliable identification practices. In the long run, however, freely chosen reforms might bring about more effective and lasting change than

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1. See, e.g., JAMES DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE AND THE BATTLE AGAINST MISIDENTIFICATION* (2005); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615.

2. See William Taylor, A Brief History [of the Massachusetts Chiefs of Police Association] 3 (2001), <http://www.masschiefs.org/Brief%20History%20by%20Bill%20Taylor.pdf> (last visited April 7, 2006) (long tradition of autonomous police departments going back to British tradition).

3. See Web sites for Massachusetts Police Departments, at <http://www.masshome.com/police.html>, and Massachusetts Chiefs of Police Association, at <http://www.masschiefs.org/membership/2007-2008%20MCOPA%20Directory.pdf>.

4. Like their counterparts almost everywhere in the United States, Massachusetts municipal and county police agencies operate free of control by prosecution or other executive branch authorities. The authority of each police department to determine its own investigative procedures is recognized in the Attorney General of Massachusetts and Massachusetts District Attorneys Association's, *REPORT OF THE JUSTICE INITIATIVE: RECOMMENDATIONS OF THE MASSACHUSETTS ATTORNEY GENERAL AND DISTRICT ATTORNEYS TO IMPROVE THE INVESTIGATION AND PROSECUTION OF CASES IN THE CRIMINAL JUSTICE SYSTEM* 8 (Sept. 2006), hereafter "Justice Initiative Report," available at http://www.mass.gov/Dmdaa/docs/justice_initiative_report/justice_initiative_report.pdf.

5. Codes of Practice, Code D, Identification of Persons by Police Officers (Eng. 2003), as amended (2005) in MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* at 758 (5th ed. 2005); Andrew Roberts, *The Problem of Mistaken Identification: Some Observations on Process*, 8 INT'L J. EVIDENCE & PROOF 100, 115 ff. (2004) (discussing sanctions for violation of the Practice Code D).

6. *State v. Delgado*, 188 N.J. 48, 57 (2006) (holding that as a condition of admissibility, police officers must record the details surrounding an out-of-court identification).

reforms imposed from above.⁷ As this article will show, eyewitness identification reform in Massachusetts has so far progressed mainly by voluntary executive action. As a consequence, reforms are occurring in many police departments, but have not been adopted uniformly across the commonwealth.

This article will describe the process of eyewitness identification reform in Massachusetts. After discussing the problem of mistaken eyewitness identification, and the major elements of procedural reform, the article will discuss the events leading to reform in Massachusetts, the nature of the reforms that have taken place, and issues for the future.

I. The Problem of Mistaken Eyewitness Identification Evidence

At Herbert Andrews' 1914 trial in Boston for passing bad checks, 17 eyewitnesses mistakenly identified him as the perpetrator. Convicted on all 17 counts, he was sentenced to jail. Fortunately for him, while he was incarcerated, more of the same bad checks were passed. As a result, the real criminal was apprehended and confessed to forging and passing many of the bad checks for which Andrews had been convicted. With the prosecutor's assent, Andrews was freed.⁸ Since then, a number of Massachusetts prisoners have been exonerated, including nine by deoxyribonucleic acid (DNA) evidence. In almost

all of the DNA cases, the convictions had rested, at least in part, on mistaken eyewitness identifications.⁹

The Massachusetts experience of the unreliability of eyewitness identification evidence is consistent with that of the nation. Since 1989, 200 prisoners in the United States have been exonerated by DNA evidence. In the overwhelming majority of those cases, and in many cases where exoneration resulted from non-DNA evidence, eyewitness misidentification contributed to the wrongful conviction.¹⁰ These exonerations gave dramatic support to claims by experimental psychologists that traditional police methods of gathering eyewitness identification evidence are dangerously unreliable. In recognition of this problem, U.S. Attorney General Janet Reno established in 1998 a multidisciplinary task force to study and advise on needed reforms. This resulted in 1999 in issuance of the influential National Institute of Justice report, *Eyewitness Evidence: A Guide for Law Enforcement* (the "Guide" or "N.I.J. Guide").¹¹ The Guide sought to improve the accuracy of eyewitness evidence by incorporating the insights of scientific research into police practice. Its publication spurred reform of police eyewitness identification procedures in several jurisdictions¹² and led to reform proposals in many others.¹³ For example, in 2001 Attorney General John Farmer of New Jersey promulgated eyewitness identification guidelines binding on all law enforcement agents in the state.¹⁴ Elsewhere, reform has occurred as a result of some combination

7. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (examining reforms as a "case study" of "a new paradigm of regulatory jurisprudence called 'democratic experimentalism' or 'new governance'"). According to Kruse, "[d]emocratic experimentalism eschews top-down 'command-and-control' regulation in favor of allowing practices to be developed from the bottom-up through provisional and localized problem solving, and embeds these local problem-solving efforts within larger structures of transparency that promote accountability and cross-jurisdictional learning." *Id.* at 648. Kruse maintains that this method of reform is more efficient because traditional regulations are often too general to meet the specific needs of local conditions. *Id.* at 679. Furthermore, democratic experimentalism is more effective because it "forces local agents to reflect on what they are doing and why they are doing it, providing the opportunity for genuine buy-in to occur." *Id.* at 680. See also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1271-72 (2002) (discussing the benefits of police rulemaking, which include "enhancing the quality of police decisions, ensuring fair and equal treatment of citizens, raising the visibility of police policymaking, and maximizing the likelihood of police compliance with constitutional norms").

8. See Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 13-14 (2002). According to the trial prosecutor, Andrews and the actual perpetrator "were as dissimilar in appearance as could be. There was several inches difference in height and there wasn't a similarity about them. To this day I can't understand the positiveness of those [identification] witnesses." *Id.* at 14.

9. Since 1997, 11 Massachusetts prisoners have been exonerated, nine by DNA evidence. See Fisher, *supra* note 8, at 63, Table 4 (listing eyewitness identification cases through 2001, including Marvin Mitchell (1997), Donnell Johnson (1999), Eric Sarsfield (1999), Neil Miller (2000), Marlon Passley (2000), Ulysses Rodriguez Charles (2001) and Angel Velazquez (2001)). DNA exonerations after 2001 involving mistaken eyewitness identification include the cases of Dennis Maher (2003), Stephan Cowans (2004) and Anthony Powell

(2004). A number of wrongful convictions in Massachusetts occurred before the era of DNA. See Fisher, *supra* note 8, *passim*.

10. See <http://www.innocenceproject.org/>, last visited February 18, 2007. Of the first 130 prisoners exonerated by DNA, 101 (77 percent) were convicted on the basis of mistaken eyewitness identification evidence. *Id.*; see also Samuel R. Gross et. al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 523-24 (2005) (in a study of both DNA- and non-DNA exonerations, mistaken identification was involved in 88 percent of the rape and sexual assault cases, and 50 percent of the erroneous murder convictions).

11. Available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

12. See, e.g., New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), available at <http://www.psychology.iastate.edu/FACULTY/gwells/njguidelines.pdf> (last visited June 28, 2006), cited hereinafter as "N.J. Attorney General Guidelines", adopting for New Jersey the "Eyewitness Identification Guidelines" created by the U.S. Department of Justice; Northampton [MA] Police Dep't, Administration and Operations Manual: Eyewitness Identification Procedure (2005), available at http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf; Minneapolis, Minnesota (MPD Policy Manual § 10-208.01, available at <http://www.ci.minneapolis.mn.us/mpdpolicy/10-200/10-200.asp>); 2005 Virginia Laws ch. 187 (Va. H.B. 2632), Va. Code § 19.2-390.02 (2005); 2005-2006 Wisc. Legis. Serv. Act 60 (Wis. A.B. 648 (2005), Wis. Stat. § 175.50 (2006)).

13. See, e.g., S.B. 1544 (Cal. 2006); H.B. 734 and S.B. 913 (Mass. 2005); A. 772 and A.B. 3483 (N.Y. 2005). In the past several years, 18 states have introduced legislation on eyewitness identification reforms. For a complete list, see State Legislation: Eyewitness Identification Reform, at http://www.nacdl.org/sl_docs.nsf/freeform/eyeID_legislation.

14. N.J. Attorney General Guidelines, *supra* note 12. Atypically, the New Jersey attorney general has authority to regulate local as well as state law enforcement investigation.

of legislative,¹⁵ judicial¹⁶ and executive¹⁷ action.

II. Reform Components

The most common eyewitness identification procedures include “show-ups,” in which the witness views a single suspect who has been detained, typically in the field, by police,¹⁸ and “lineups,” either photographic or “live,” in which the witness views a group of photographs or individuals. The *N.I.J. Guide* recommended a number of practices designed to avoid the potential for suggestiveness found to be inherent in traditional police identification procedures. Reforms inspired by the *Guide*’s recommendations typically require some or all of the following six procedures:¹⁹

1. *Cautionary instructions*: instructions to the witness before an identification procedure is conducted, designed to counter the witness’s tendency to engage in “relative judgment,” or to respond to perceived pressure from the administrator to make an identification.²⁰ The witness is told, among other things, that “the person who committed the crime may or may not be present;” “whether he/she makes an identification, the police will continue to investigate the case;” and that “it is just as important to clear innocent persons from suspicion as to identify guilty parties.”²¹

2. *Statement of confidence*: instructions to the witness that the procedure requires the investigator to ask the witness to state, in the witness’s own words, how certain the witness is of any identification. This reform is meant to guard against inflation of the eyewitness’s level of confidence between the time of initial identification and the trial, which can occur if the witness receives confirming feedback from the police or other witnesses.²²

3. *Composition of lineups*: minimum requirements for the composition of lineups.²³

4. *Sequential presentation*: presentation of lineup photographs or participants to witnesses sequentially rather than simultaneously.²⁴ Sequential presentation is meant to discourage a witness’s tendency in simultaneous lineups to engage in “relative judgment,” whereby the witness compares images in the lineup to each other, and chooses one that most resembles the image of the suspect in her mind.²⁵

5. *Blind administration*: administration of identification procedures, whereby the administrator does not know who the suspect is.²⁶ Called “the most important single reform that can be implemented to enhance the integrity of eyewitness identification evidence,”²⁷ blind administration serves to avoid the risk that the

15. See, e.g., Capital Punishment Reform Study Committee Act, Ill. S.B. 472, I.L.C.S., ch. 725 § 107A-5 (2003) (governing the administration of line-ups and photo-spreads, and also creating a pilot project implementing double-blind, sequential line-ups); 2005-2006 Wisc. Legis. Serv. Act 60 (Wis. A.B. 648 (2005)), Wis. Stat. § 175.50 (2006) (requiring police departments to adopt policies “designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases”). The Wisconsin statute also states that to the extent feasible, police departments should use blind procedures and show photos sequentially. Furthermore, identification procedures must be documented. *Id.*

16. See, e.g., *State v. Ledbetter*, 275 Conn. 534, 579 (2005) (requiring that, in situations in which line-up administrator failed to instruct witness that suspect may not be present in line-up, trial court must charge jury regarding risk of misidentification); *State v. Delgado*, 188 N.J. 48, 59 (2006) (holding that as condition of admissibility, police officers must record details surrounding out-of-court identification); *State v. DuBose*, 285 Wis.2d 143, 167-68 (2005) (holding show-up admissible as evidence only if it is necessary, and recommending procedures to make show-ups less suggestive, including statement to witnesses that “the real suspect may or may not be present, and that the investigation will continue regardless of the result of the impending identification procedure”).

17. See N.J. Attorney General Guidelines, *supra* note 12; Model Policy and Procedure for Eyewitness Identification (March 15, 2005) (recommending the use of double-blind, sequential photo arrays and live line-ups in Wisconsin police departments), available at http://www.law.wisc.edu/webshare/0218/ag_model_policy.pdf. In Wisconsin, all three branches of government have contributed to the reform. See also Kruse, *supra* note 7, at 685-90.

18. A one-on-one show-up is different from a “field view,” in which the police accompany the witness to view persons, not in detention, present in some public place. See *Commonwealth v. Chase*, 372 Mass. 736, 743-44 (1977). In Massachusetts, one-on-one show-up identifications are disfavored as inherently suggestive; if -- under the circumstances of the case -- they are “unnecessarily suggestive,” they are inadmissible under the due process clause of art. 12, Massachusetts Declaration of Rights. See *Commonwealth v. Johnson*, 420 Mass. 458, 464-65 (1995) (in contrast to the weak protection of federal constitutional due process as construed in *Manson v. Brathwaite*, 432 U.S. 98 (1977), state constitutional due process bars admission of unnecessarily suggestive identifications, even if they are reliable). But see *Commonwealth v. Martin*, 447

Mass. 274, 280-84 (2006) (expansively applying the standard for justifying use of one-on-one show-ups).

19. The scientific bases for these reforms are discussed in Wells, *supra* note 1, at 623-29.

20. See, e.g., N.I.J. Guide, *supra* note 11 & accompanying text, § II(C), V(B).

21. *Id.* § V(B).

22. *Id.* § II-C(7). See *Commonwealth v. Vardinski*, 438 Mass. 444, 453 (2003) (reversible error to restrict defendant’s cross-examination designed to show that post-identification police conduct boosted witness’s confidence in the accuracy of his identification); *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307, 311-12 & n.4 (2001), *aff’d*, 438 Mass. 444 (2003) (citing *N.I.J. Guide*’s prohibition on giving post-identification confirming feedback to witness as consistent with “approved” identification procedures in Massachusetts).

23. For example, matching fillers to the description of the perpetrator, not the suspect, see N.I.J. Guide, *supra* note 11 & accompanying text, at 29; requiring a minimum number of “fillers,” see, e.g., BUREAU OF TRAINING AND STANDARDS FOR CRIMINAL JUSTICE, STATE OF WISCONSIN, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 7, 17 (2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>; forbidding more than one suspect per lineup, see, e.g., *id.*; and ensuring that the suspect should not “stand out,” see, e.g., N.J. Attorney General Guidelines, *supra* note 12.

24. The *Guide* itself offers the sequential lineup method as an alternative to the traditional simultaneous method, but does not state a preference for either one. N.I.J. Guide, *supra* note 11 & accompanying text, at 9 and § V(C).

25. See Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM.CRIM.L.REV. 1271, 1279 (2005); Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 459-60 (2001).

26. On the ground that blind administration of lineups may be “impractical for some jurisdictions to implement,” the *Guide* does not recommend this practice. However, it identifies blind administration as suitable “for future exploration and field testing.” N.I.J. Guide, *supra* note 11 & accompanying text, at 9.

27. Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, CHAMPION, Apr. 2005, at 12, 18.

person administering the identification procedure will, consciously or unconsciously, influence the witness to identify the suspect.²⁸

6. *Documentation*: thorough documentation of identification procedures. This generates a record upon which the reliability of eyewitness identifications can later be evaluated.²⁹ Although experts disagree as to the desirability or feasibility of some of these reforms in particular circumstances,³⁰ a broad consensus supporting the need for them exists in the scientific community.

III. Background to Reform

Reforms in Massachusetts began in the wake of the 1999 *N.I.J. Guide*, and peaked in 2004. Since then, the reform movement has continued and spread.³¹

In 1999, the Northampton Police Department became the first in Massachusetts to reform its eyewitness identification procedures. The change was initiated by Detective Lieutenant Kenneth Patenaude of that department, who had served as a member of Attorney General Reno's task force. The Northampton procedures incorporated those recommended by the *N.I.J. Guide*, but also required the use of both the blind and sequential methods of conducting lineups.³² When, in 2004, the Boston Police Department and the district attorneys of several counties promoted eyewitness identification reform, they too included blind and sequential lineups as preferred practices.³³

The Massachusetts reform developments in 2004 occurred

against a background of increasing public attention to the problem of wrongful convictions, and to the role of mistaken eyewitness identification as the primary cause of such convictions. In the 13 months between April 2003 and May 2004, local media reported the release of five Massachusetts prisoners who had spent from six to 30 years in prison.³⁴ Three of the prisoners were exonerated by DNA evidence;³⁵ the other two convictions were vacated under circumstances raising strong doubts about their factual guilt.³⁶ In all three DNA exonerations, and in one of the non-DNA cases, the convictions had rested on mistaken eyewitness identifications. Responding to these developments, in May 2004, the *Boston Herald* and the local Fox News television station ran a combined newspaper-television series, entitled "*Justice Denied*," about 22 Massachusetts exonerations that had occurred over the preceding 20 years.³⁷ In this climate, three events spurring police and prosecution authorities to initiate reform of eyewitness identification procedures occurred.

A. Amendment to Discovery Rules

In March 2004, the Supreme Judicial Court ("SJC") adopted amendments to Massachusetts Criminal Procedure Rule 14, on Pretrial Discovery. Starting in September 2004, prosecutors were required to disclose to the defense "[a] summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures."³⁸ Even before

28. See, e.g., BUREAU OF TRAINING AND STANDARDS FOR CRIMINAL JUSTICE, STATE OF WISCONSIN, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 23, at 4; Wells, *supra* note 27, at 18; see also Commonwealth v. Vardinski, 53 Mass. App. Ct. 307, 311-12 & n.4 (2001), *aff'd*, 438 Mass. 444 (2003) (citing Commonwealth v. Chase, 372 Mass. 736, 740 (1977)) (characterizing blind lineup procedures "approved" in Massachusetts courts as consistent with the *N.I.J. Guide*, *supra* note 11 & accompanying text).

29. A requirement that police document the identification procedures in every case serves several purposes. First, the requirement structures and reinforces police compliance with the identification protocols. Second, it provides data that supervisors can use to monitor police practice and, if necessary, revise identification procedures. Third, it serves to inform prosecutorial decisions in conducting criminal prosecutions. Fourth, in the event of prosecution, it makes a record of events to which the defense will likely be given access, and which might be valuable evidence at trial.

30. See, e.g., Steblay et al., *supra* note 25, at 469.

31. For a lively and detailed account of eyewitness identification reform both nationally and in Massachusetts, see generally DOYLE, *supra* note 1.

32. After a trial period, the Northampton protocols were revised in 2001. See Northampton Police Department, Administration and Operations Manual: Eyewitness Identification Procedure (2005), available at http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf.

33. See Boston Police Department Rule 330, "General Considerations" and §5(D) (requiring use of blind and sequential lineup procedures unless "impracticable" and, in that case, a statement of the reasons why); Suffolk County's Report of the Task Force on Eyewitness Evidence, para. IV (July 2004), available at <http://www.mass.gov/da/suffolk/docs/120904.html>; Letter from William R. Keating, Norfolk District Attorney, in materials for seminar held by his office "Building an Effective Identification Case," July 15, 2004, on file with author (requesting law enforcement agencies conducting criminal investigations to be prosecuted by the Norfolk District Attorney's Office to use blind and sequential procedures where practicable). The Middlesex District Attorney's Office conducted regional trainings for police in summer 2004. The author does not know whether the training materials recommended the use of blind and/or sequential procedures.

The Middlesex sample police identification reporting forms, however, allow for both blind and non-blind, and both sequential and simultaneous, procedures. See MIDDLESEX DISTRICT ATTORNEY'S OFFICE, EYEWITNESS IDENTIFICATION PROCEDURE GUIDELINES app. B (2006), on file with author.

34. Maher (19 years); Drumgold (15 years); Stephan Cowans (six years); Powell (12 years); and Adams (30 years).

35. These were Maher, Cowans and Powell.

36. These were Drumgold and Adams.

37. See Franci Richardson and Maggie Mulvihill, *Justice Denied; It's Time for Age of Innocence: a Call for Commission on Wrongful Convictions*, BOSTON HERALD, May 7, 2004, at 6.

38. MASS. R. CRIM. P. 14(a)(1)(A)(viii). Before the amendment, such discovery had been treated as discretionary. See Reporter's Notes - Revised 2004, Massachusetts Rules of Court (2006), Notes to Rule 14. For the first time, the amendments required prosecutors to file with the court a "certificate of compliance" in each case, certifying that all required discovery had been disclosed, and identifying each item provided. MASS. R. CRIM. P. 14(a)(3). The documentation required by the amendment to Rule 14 is less demanding than that typically required by eyewitness identification reforms. Compared to Rule 14's vague "summary of identification procedures," reform measures typically specify recording requirements in some detail. For example, the Northampton, Massachusetts Police Department eyewitness identification procedures require police to document the date, time, names of all persons present and location of the procedure, the type of procedure, including whether lineups were or were not blind and sequential, and the results of the procedure. Police must also preserve photo arrays, and photograph or videotape live lineup presentations. Northampton Police Department, AOM Ch. 0-408, Eyewitness Identification Procedure, §§ III and V (2000). In other reform departments, police must document what cautionary witness instructions were given to the witness. With respect to documenting the witness's statements, reform protocols are also more specific than Rule 14. In place of Rule 14's required disclosure of "all [relevant] statements made in the presence of or by an identifying witness..." the Northampton protocol, for example, requires documentation of a show-up witness's first description of the perpetrator, identifying witness's statements of confidence, and witness non-identifications. *Id.* at §§ IV & V *passim*.

Rule 14 was amended, case law probably entitled defendants to this information before trial, either by means of discretionary discovery or voir dire.³⁹ Therefore, one might wonder whether the amendment required any change in police practice. In fact, however, it stimulated two responses by police and prosecutors.

First, some district attorneys held training sessions to alert police to the need in every case to document identification procedures. For example, the Middlesex District Attorney's Office held training sessions at which it distributed new police reporting forms with spaces for the information required by Rule 14.⁴⁰ District attorneys from the Cape and Islands, Essex, Hampden, and Norfolk Counties also trained police in the need to comply with Rule 14 as amended.⁴¹

Second, some district attorneys simultaneously trained police to comply with the amended rule and to adopt eyewitness identification reforms such as blind and sequential lineups.⁴² Thus, the impetus for action to comply with amended Rule 14 either led to, or coincided with, more wide-ranging reform of police eyewitness identification procedures.

The next two events raised the prospect of intervention to compel the police to alter eyewitness identification procedures. These were the filing of far-reaching reform legislation, and calls for the establishment of a Massachusetts innocence commission. Although neither was realized, each added to the impetus for law enforcement agencies to introduce reform themselves.

B. Proposed Legislation

Legislation to reform eyewitness identification procedures was first filed in 2003.⁴³ The bills, supported by members of the criminal

defense bar, would compel Massachusetts law enforcement agents to follow a prescribed, uniform set of identification procedures. They would regulate in detail the response to emergency calls, the conduct of on-scene investigation, pre-identification witness instructions, and the conduct of particular identification techniques. In addition, the proposed legislation would require lineup administrators to use the sequential method and, "whenever practical," "blind" personnel.⁴⁴ They would also require detailed documentation of investigations and identification procedures, including the video or audio recording of witness interviews where such could "reasonably be accomplished."⁴⁵

Although the identification procedures required by the proposed legislation largely mirror those recommended by the *N.I.J. Guide*, the latter was not intended to create legal mandates.⁴⁶ By contrast, the proposed statute provides three sanctions for police non-compliance with its provisions: 1) courts would consider non-compliance in ruling on motions to suppress eyewitness identifications; 2) the fact of non-compliance would be admissible to support claims of misidentification; and 3) courts would instruct the jury that they may consider evidence of non-compliance in determining the reliability of eyewitness identifications.⁴⁷

The legislature has not acted upon these bills. As stated by James Doyle in his book *True Witness*, "In Massachusetts, when identification reform legislation was introduced by — and regarded as the baby of — the defenders, the prosecutors' first reflex was to dig in their heels."⁴⁸ Even without active opposition by law enforcement personnel, legislators are understandably reluctant to become involved in regulating police investigation procedures, a reluctance supported by considerations both of politics and separation of powers.⁴⁹ Indeed, although similar legislation imposing detailed identification protocols

39. See *Commonwealth v. Clark*, 378 Mass. 392, 403 (1979) (defendant's right to know whether witness failed to identify his photograph); *Commonwealth v. Dougan*, 377 Mass. 303, 316 (1979) (due process guarantees right to explore details of identification procedures at trial); see generally ERIC D. BLUMENSON ET AL., MASSACHUSETTS CRIMINAL PRACTICE §16.6J (3d ed. 2003).

40. In the summer of 2004, Middlesex District Attorney Martha Coakley "conducted five regional training seminars for local police departments ... on the newly revised Rules of Criminal Procedure, and specifically on improved methodologies in eyewitness identification. The trainings were conducted as a result of work by the [MDAA] to address growing concerns about wrongful convictions in the Commonwealth and the need to comply with new discovery rules." Middlesex District Attorney Press Release on Justice Initiative (Sept. 11, 2006) (on file with author). See, e.g., Lineup Identification Checklist form distributed at the trainings, for documenting information about the lineup; the form includes spaces for recording, as Rule 14 requires, "Witness Identification Statements" and "Statements by any other people, made during ID procedure and in presence of witness."

41. At a training seminar held by the Norfolk County District Attorney's Office in July 2004, police were notified of the amendment and requested to "memorialize in writing all identification procedures and all comments made in the presence of, or by, an identifying witness regarding the identification procedure." "Notice of Change in Rules of Criminal Procedure Regarding Identification Procedures," in seminar materials cited *supra* note 33.

42. As a result of this timing, in the minds of at least some police officials, the amendments to Rule 14 required the adoption of eyewitness identification reforms. See, for example, the Somerville Police Department's transmission to its officers in October 2004 of new identification protocols: "Due to a recent change in the Massachusetts courts regarding discovery rules and procedures governing Eyewitness Identification, the Somerville Police Department has updated our

Eyewitness Identification Procedure Guidelines." General Order 2004-4, circulated to all personnel on October 12, 2004. (copy on file with author).

43. S.B. 173 (Mass. 2003).

44. See, e.g., S.B. 913 §§9(C)(1) and (2) (2005).

45. See, e.g., *id.* §7(D).

46. N.I.J. Guide, *supra* note 11 & accompanying text, Introduction 2. Most guidelines contain a disclaimer similar to that found in the Guide: "This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." See also DOYLE, *supra* note 1, at 180-81 (prosecutors' insistence that recommendations not be called "Guidelines" led to adoption of "Guide"); Letter from John J. Farmer, Jr., New Jersey attorney general, to all county prosecutors in New Jersey 3 (Apr. 18, 2001) (stating that "issuance of these Guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error") available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

47. See, e.g., S.B. 913 §11 (2005).

48. DOYLE, *supra* note 1, at 195.

49. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (legislators are relatively unsympathetic to the rights of the accused); Richard McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 131 n.112 (2005) (noting that "public pressure for crime control generates stronger incentives for politicians to appear 'tough on crime' than to ensure the most effective use of crime-fighting resources"). Compare the Wisconsin reform legislation, discussed, *infra*, at text following notes 124 and 126, which is more deferential to local law enforcement autonomy.

upon the police is pending in a number of jurisdictions,⁵⁰ few such bills have been enacted. Still, even a remote possibility of legislative intervention might have encouraged Massachusetts law enforcement officials to initiate procedural reform themselves.

C. Calls to Establish a Massachusetts Innocence Commission

Some jurisdictions have responded to the revelation of erroneous convictions by establishing special commissions to examine and address the problem.⁵¹ Some, but not all, of the commissions have power to subpoena documents and witnesses. In England, for example, Parliament established an independent Criminal Case Review Commission to receive and investigate prisoner claims of actual innocence. If the commission finds the prisoner's claim meritorious, it can send the case back to the courts or recommend a pardon.⁵² In Canada, special commissions of inquiry have studied particular miscarriages of justice, determined the causes of error, and proposed sweeping reforms.⁵³ In this country, "innocence commissions" have been established to investigate claimed miscarriages of justice and to recommend reforms designed to reduce the risk of erroneous convictions.⁵⁴ Typically, the commission membership is broadly representative, including police, prosecutors, defense attorneys, judges and academics. After a series of high-profile exonerations in North Carolina, for example, the chief justice of that state's supreme court in 2002 established a broadly based "Actual Innocence Commission" to review the causes of wrongful convictions and propose reforms.⁵⁵ In Connecticut, pursuant to legislation, the chief court administrator established an advisory commission to review wrongful conviction cases and recommend reforms "to lessen the likelihood of ... wrongful

convictions occurring in the future."⁵⁶

As the Massachusetts media in 2003 and 2004 reported one after another exoneration, some urged establishment of a commission that would investigate past cases and recommend reforms. Proponents included representatives of the defense bar, the New England Innocence Project and editorial writers for the three major Boston newspapers. Between January 2003 and June 2004, more than 15 newspaper editorials, "op-ed" pieces, and news articles urged this step. A few examples will give the flavor: In May 2003, after a court-ordered review of the Sean Drumgold case, a *Boston Globe* editorial called for the establishment of an innocence commission "to collect and analyze data in cases of wrongful conviction. The attorney general, distinguished legal professionals, and other experts should review each wrongful conviction and craft policies to prevent recurrences."⁵⁷ In November 2003, the head of the Massachusetts public defender agency was reported to have "urged the Legislature and Governor Mitt Romney to create a panel similar to the innocence commission created in Illinois after several death row inmates were exonerated."⁵⁸ In April and May 2004, the Massachusetts Association of Criminal Defense Lawyers ("MACDL") announced its intention to submit a formal petition to officials, including the attorney general and the SJC chief justice, requesting establishment of a commission with broad subpoena power to "review in detail what went wrong in the cases of 22 Bay State men wrongfully convicted since 1982 and establish reforms to prevent similar mistakes in the future."⁵⁹ MACDL reportedly hoped that the SJC would take the lead under its broad powers of superintendency over the state courts.⁶⁰ A *Boston Herald* editorial promptly seconded this idea.⁶¹ Adding to the momentum, SJC Justice Robert Cordy was reported to favor a

50. See National Association of Criminal Defense Lawyers, State Legislation: Eyewitness Identification Reform at http://www.nacdl.org/sl_docs.nsf/freeform/EyeID_legislation; S.B. 82 (West Virginia 2007) (requiring lineup administrators to give witnesses instructions and to record specified lineup details in writing; also establishes task force to study and identify best practices); S.B. 472 (Illinois 2003), Public Act 093-0605 codified at 725 ILCS 5/107A-5 (requiring instructions to lineup witnesses, photographing or otherwise recording of lineups, and establishing a pilot study on effectiveness of sequential lineup procedures).

51. See generally Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W.L. REV. 333 (2002); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of 'Innocence Commissions' in America*, 86 JUDICATURE 98 (Sept.-Oct. 2002).

52. Findley, *supra* note 51.

53. See Kathryn M. Campbell, *Policy Responses to Wrongful Conviction in Canada: The Role of Conviction Review, Public Inquiries and Compensation* (on file with author).

54. See, e.g., REPORT OF THE GOVERNOR'S COMMISSION (Ryan Commission) ON CAPITAL PUNISHMENT (2002) (suggesting reforms in Illinois); S. 44, 2004 Leg., Reg. Sess. (Cal. 2004) (establishing the California Commission on the Fair Administration of Justice); 2005-2006 Wisc. Legis. Serv. Act 60 (2005 A.B. 648) (implementing reforms recommended by the Avery Task Force).

55. Act of Aug. 3, 2006, ch. 184, 2006 N.C. Sess. Laws 184 (codified as amended at N.C. GEN. STAT. §§ 15A-1460-15A-1470) (establishing an Innocence Inquiry Commission in North Carolina). In 2003 the commission, which was composed

of prominent judges, law enforcement officials, a public defender and law professors, issued a set of recommendations for eyewitness identification.

56. Act of July 9, 2003, 2003 Conn. Acts 03-242 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. §§ 54-102g-j (2003)).

57. Editorial, *Justice for Drumgold*, BOSTON GLOBE, May 17, 2003, at A10.

58. Douglas Belkin, *Some Ask for Mass. Innocence Panel*, BOSTON GLOBE, Nov. 11, 2003, at B3.

59. Maggie Mulvihill & Franci Richardson, *Special Report: Justice Denied; It's Time for Age of Innocence: A Call for Commission on Wrongful Convictions*, BOSTON HERALD, May 7, 2004, at 7. See also Harvey A. Silverglate, *Let us now praise framed up men*, BOSTON PHOENIX, April 9-15, 2004 (n.p.), available at http://bostonphoenix.com/boston/news_features/top/features/documents/03741848.asp (MACDL plans to petition SJC to ask, among other things, for court-imposed reforms of eyewitness identification procedures). Reportedly, MACDL then-President Andrew Good and attorney Barry Scheck of the New York Innocence Project met with then-Attorney General Thomas Reilly "threatening to sue" if Reilly did not act. Comment of attorney Barry Scheck at 2006 Innocence Network Conference, Panel on Eyewitness Identification Reform, Seattle, Washington, March 18, 2006. At the time of writing this article, MACDL still plans to sue. Author's telephone conversation with attorney Andrew Good, Sept. 6, 2007.

60. *Id.*; see MASS. GEN. LAWS ch.211, §3 (2006).

61. Editorial, *Freeing the innocent, finding the guilty*, BOSTON HERALD, May 9, 2004, at 22.

statewide review of wrongful convictions.⁶² In opposition, Attorney General Thomas Reilly and the Massachusetts District Attorneys Association (“MDAA”) rejected the idea of an innocence commission with power “to force police, prosecutors and others involved in wrongful conviction cases to testify ... about what went wrong.”⁶³

In this climate of public discontent with the status quo, police and prosecutors took major steps toward reform.

IV. Law Enforcement Responses

Law enforcement responses, begun in the spring and summer of 2004, consisted of both local and statewide initiatives. In combination, these actions substantially advanced the continuing movement to reform police eyewitness identification procedures in the commonwealth. Typically, reforms have been implemented by individual police departments, in response to training initiatives conducted by various district attorneys. Three major initiatives are: 1. The Suffolk County/Boston Police Department Task Force on Eyewitness Evidence; 2. Police training by district attorneys in other counties; and 3. The MDAA/Attorney General’s “Justice Initiative.”

A. The Suffolk County/ Boston Police Department Task Force on Eyewitness Evidence

In March 2004, Suffolk County District Attorney Daniel Conley and Boston Police Commissioner Kathleen O’Toole announced the formation of a Task Force on Eyewitness Evidence.⁶⁴ Citing the recent rash of overturned convictions in cases originating primarily in Boston,⁶⁵ Conley and O’Toole charged the task force with “reviewing the investigative process for cases in which eyewitness identification was a significant issue, and recommending any appropriate changes in the means and manner of investigation.”⁶⁶ The task force’s members included two Boston police superintendents, the Suffolk County first assistant district attorney, criminal defense lawyers

and prominent experts in eyewitness identification. Its report, issued in July 2004, recommended wide-ranging reforms in the way eyewitness identification cases are investigated and prepared. Commissioner O’Toole and District Attorney Conley pledged to implement the recommended reforms promptly.⁶⁷ Soon afterwards, the Boston Police Department (“BPD”) adopted rules embodying the new identification protocols⁶⁸ and appropriate training sessions were conducted at the Boston Police Academy.

The Suffolk/BPD reforms incorporate the entire array of practices recommended by the *N.I.J. Guide*.⁶⁹ In addition, they go beyond the *Guide* in two significant respects. First, they *require* investigators either to use blind and sequential lineups, or, if an investigator finds it impracticable to do so, to “document any deviation and articulate the reason why [that] procedure could not be used.”⁷⁰ Second, in a novel step, the recommendations include rigorous instructions for prosecutors handling identification cases.⁷¹ For example, prosecutors must investigate and document the identification evidence in great detail, including the suspect’s alibi and any eyewitness non-identifications. Instead of presenting identification testimony to the grand jury through an investigator’s hearsay account, prosecutors must “use the Grand Jury to develop and document all the evidence concerning the description, the ID procedure, the crime scene, and the circumstantial evidence relevant to the identity of the perpetrator.”⁷² Furthermore, either the first assistant district attorney or the chief homicide prosecutor must screen all felony prosecutions involving eyewitness identification, and a committee of senior prosecutors will review eyewitness cases that involve “complex investigations, difficult issues and close calls on charging decisions.”⁷³ The task force report recommends ongoing training of personnel to implement the recommendations, and continuation of the task force to monitor the results.⁷⁴

In both scope and content, the Suffolk/BPD reforms establish a “gold standard” for reform nation-wide.⁷⁵ If properly implemented, the reforms would thoroughly address the weaknesses of traditional

62. Maggie Mulvihill, *Probe Fingers Unit*, BOSTON HERALD, May 8, 2004, at 7.

63. David Weber & Maggie Mulvihill, *Prosecutors push self-policing plan*, BOSTON HERALD, May 26, 2004, at 5.

64. See Daniel F. Conley, *Our Duty to Free the Wrongfully Convicted*, BOSTON GLOBE, March 19, 2004, at A15 (announcing creation of working group of police, prosecutors and defense attorneys).

65. The Task Force announcement closely followed the DNA exoneration of Anthony Powell, the fifth DNA exoneration in Boston (Suffolk County) since 1997, if one includes Rodriguez Charles, whose innocence the prosecution does not concede. See Fisher, *supra* note 8, at 29-30; see also David S. Beirstein, *Blind Spots*, BOSTON PHOENIX, April 23-29, 2004 (n.p.), available at http://bostonphoenix.com/boston/news_features/top/features/documents/03773010.asp. Neither Commissioner O’Toole nor District Attorney Conley had held their offices when the exonerees had been prosecuted and convicted.

66. See Executive Summary, Report of the Task Force on Eyewitness Evidence (July 2004), <http://www.mass.gov/dasuffolk/docs/120904.html> (hereinafter “Task Force Report”).

67. Ray Hainer, *New police policies aim at wrongful convictions*, THE [HYDE PARK] BULLETIN, Aug. 12, 2004, at 19. O’Toole promised to implement the policing reforms by September, 2004, after completion of mandatory training; Conley pledged to implement prosecution reforms immediately.

68. See BPD Rule 330, Procedures for Collection and Preservation of Eyewitness Identification Evidence; BPD Form 2986, Witness Preparation Form for Photos and Live Lineups. Reportedly, similar reforms have been adopted by the three other Suffolk County municipal police departments: Chelsea, Revere and Winthrop. Telephone interview with Joshua Wall, First Assistant District Attorney, Suffolk County District Attorney’s Office, March 15, 2006.

69. See *supra* text accompanying notes 19-30.

70. BPD Rule 330, Procedures for Collection and Preservation of Eyewitness Identification Evidence, “General Considerations,” §5(c) and (d); see also BPD Form 2986, Witness Preparation Form for Photos and Live Lineups, containing pre-viewing witness instructions.

71. Suffolk County was the first and only prosecution office in the nation to establish prosecution guidelines for evaluating identification cases. DOYLE, *supra* note 1, at 204.

72. Task Force Report, *supra* note 66, “Instructions for Prosecutors Investigating an Identification Case,” para. 2.

73. *Id.*, at 29.

74. *Id.*, Part VI.

75. Statement of Dr. Gary Wells, Task Force member, quoted in *Task Force Recommendations on Eyewitness Identification*, 39 Prosecutor 16 (April 2005).

police identification practices. However, as discussed below,⁷⁶ the extent to which police are implementing the reforms is open to question.

B. Prosecutors' Initiatives Outside of Suffolk County

In the summer and fall of 2004, a number of district attorneys held eyewitness identification training sessions for police, in which they urged departments in their counties to reform their practices along the lines recommended by the *N.I.J. Guide*. They also asked police to use blind and sequential lineup procedures. For example, in July 2004, Norfolk County District Attorney William Keating convened a meeting of all twenty-seven municipal police departments in the county, attended by more than 250 police officers.⁷⁷ The meeting featured presentations by Detective-Lieutenant Kenneth Patenaude of the Northampton Police Department, a psychologist, a law professor, a crime victim, and a prosecutor. District Attorney Keating requested, "where practicable," that all law enforcement agencies conducting criminal investigations to be prosecuted by his office use blind and sequential lineup procedures.⁷⁸ Reportedly, most Norfolk County police departments responded by reforming their methods of gathering and documenting eyewitness identification evidence.⁷⁹ In some Norfolk County departments, such as Wellesley, compliance extended to adopting new written protocols and witness instruction forms, which were reinforced by further training.⁸⁰

After the Norfolk County training, training sessions were conducted by the district attorneys of the Northern (Middlesex),⁸¹ Cape and Islands,⁸² and Berkshire⁸³ Districts. At least some other district attorneys have also trained police in the new procedures.⁸⁴ The extent to which police departments in the commonwealth have

adopted recommended changes in identification procedures is further discussed below.⁸⁵

C. MDAA/Attorney General's "Justice Initiative"

In May 2004, public pressure existed to establish a broadly representative Massachusetts "innocence commission," armed with subpoena power, to investigate wrongful convictions and propose needed reforms. "Adamantly opposed" to this idea, the MDAA and the attorney general announced their own response to the problem of wrongful convictions.⁸⁶ Their project, named the "Justice Initiative," undertook to study the recent Massachusetts exonerations of convicted persons to determine "what went wrong." It sought also to study the criminal justice system as a whole to "identify systemic problems and propose improvements in the investigation and prosecution of criminal cases."⁸⁷ The *Justice Initiative Report* addressed a number of systemic issues,⁸⁸ but reserved its most detailed and extensive recommendations for changing police practices for eyewitness identification. The report recommends that Massachusetts police departments adopt the procedures recommended by the *N.I.J. Guide*, as supplemented by N.I.J. electronic training materials.⁸⁹ It further recommends distribution of the *Guide* to all police officers, along with training in its procedures. An appendix to the report contains sample police reporting forms developed for use in Middlesex County.

In at least two noteworthy respects, the report's recommendations for reform are more conservative than those already in use by many Massachusetts police departments. Citing a controversial pilot study in Illinois that questions the reliability of sequential lineup procedures, the report explicitly declines to "mandate" sequential photo or live lineups.⁹⁰ It also expresses doubts about the feasibility of

76. See *infra* text accompanying notes 127-45.

77. Author's telephone interview with Norfolk County First Assistant District Attorney Dennis Mahoney, March 3, 2006.

78. Letter from William R. Keating, Norfolk District Attorney, in seminar materials, cited *supra* note 33.

79. According to Norfolk County First Assistant District Attorney Dennis Mahoney, most police reports reviewed by his office show adoption of both blind and sequential lineups. Author's telephone interview, March 3, 2006.

80. See Wellesley Police Department, "Eyewitness Identification," Policy & Procedure No. 1.12 (March 25, 2005). The Wellesley Police Department also devised witness instruction forms for show-ups, live lineups, photo arrays and voice identification lineups. The Wellesley police identification procedures apply to all criminal investigations, including misdemeanors like shoplifting.

81. See *supra* note 40.

82. The Cape and Islands District Attorney's Office held well-attended trainings on eyewitness identification procedures for police in October, 2004, on Cape Cod and on Martha's Vineyard. The trainings also covered *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004), and the amendment to Mass. R. Crim. P. 14. Telephone Interview with Michael Trudeau, Cape and Islands First Assistant District Attorney (Oct. 16, 2006).

83. In September, 2004, the Berkshire County District Attorney's Office conducted an identification procedures training for law enforcement agents. Email communication to author from Geline W. Williams, Executive Director, Massachusetts District Attorneys Association (October 24, 2006).

84. Both the Essex County and Hampden County District Attorneys have also trained police in the new identification procedures. Telephone interviews with Essex County First Assistant District Attorney John Dawley, December 4, 2006 and, on September 18, 2006, with officer at Southwick Police Department. The author has not been able to discover the extent of police training activities by other Massachusetts district attorneys.

85. See *infra* note 95.

86. David Weber & Maggie Mulvihill, *Prosecutors push self-policing plan*, BOSTON HERALD, May 26, 2004, at 5. Of the innocence commission idea, the *Herald* quoted District Attorney Martha Coakley as saying: "I think it's redundant. I think we can do it better, we can do it more quickly, and we can move ahead to fix it so it doesn't happen again instead of spending a lot of time with the bureaucracy that's going to send out subpoenas and sit for months and issue a thing that no one will read."

87. Justice Initiative Report, *supra* note 4, at 5.

88. The report recommended electronically recording interrogations, *id.* at 14, significantly expanding the resources available for the testing of DNA and other forensic evidence, *id.* at 14-18, better training for police officers and prosecutors, especially with respect to investigative procedures, *id.* at 18-20, and increasing the salaries for prosecutors and public defense attorneys in order to increase the retention rate of experienced attorneys, *id.* at 20-21.

89. Justice Initiative Report, *supra* note 4, § I(a). See N.I.J. Special Report, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/188678.htm>.

90. Justice Initiative Report, *supra* note 4, § I(c)(i), I(d)(i) at 10-12. The report also cites scientific literature suggesting that sequential arrays are less reliable than simultaneous arrays, and notes the N.I.J.'s failure to state a preference for sequential presentation. See Sheri H. Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March, 2006), available at http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf. For criticism of the Mecklenburg report as scientifically flawed, see, e.g., Attorney General of Wisconsin, Response to the Chicago Report on Eyewitness Identification Procedures (July 21, 2006), available at www.doj.state.wi.us/dles/tms/ILRptResponse.pdf; see also Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL., PUB. POL'Y & L. 394 (2006) (arguing that simultaneous lineups are in some instances superior to sequential lineups).

blind administration of lineups in small police departments.⁹¹

Although the MDAA initially stated its intention to complete the report by the end of summer 2004,⁹² it did not appear until September 2006. Whether or not, as critics claimed, this delay “stalled the Legislature for two years,”⁹³ announcement of the Justice Initiative does seem to have deflated the media’s enthusiasm for establishing a Massachusetts innocence commission. Also, by the time the report appeared, at least seven of the commonwealth’s eleven district attorneys had trained police in the new eyewitness identification procedures.⁹⁴ Together, these trainings reached personnel from more than half of the state’s police departments. As discussed immediately below, many officers were also exposed to the new procedures as part of training sponsored by the Municipal Police Training Committee (“MPTC”).

Because no entity keeps track of identification reform statewide, the number of Massachusetts police departments that have adopted the new procedures is unknown. Responding to an email survey of 328 Massachusetts police chiefs in 2006, thirty-seven of the fifty-

five responding chiefs reported having adopted reform procedures.⁹⁵ Although most reform departments were located in Middlesex, Norfolk and Suffolk Counties, others were spread throughout the commonwealth.⁹⁶ Thus, before the *Justice Initiative Report* appeared, eyewitness identification reform had likely taken root in a significant number of departments. Yet the report’s recommendations, carrying the imprimatur of both the MDAA and the attorney general, increase the likelihood that, over time, the reform movement will affect practices in every police department in the commonwealth.

V. Issues for the Future

A. The Role of the Courts

Alive to the risk that mistaken eyewitness identifications pose to accurate fact finding,⁹⁷ the SJC has adopted important safeguards against conviction on the basis of unreliable eyewitness evidence.⁹⁸ In the future, as defense lawyers seek by various means⁹⁹ to discover,

91. Justice Initiative Report, *supra* note 4, § I(c)(iii) and I(d)(iii), at 12. The report recommends the use of blind administration, subject to a “forceful caveat” regarding situations where, either because the department is too small or for some other reason, blind administration is impractical. In that case, the report encourages departments to adopt other safeguards “to ensure that [the investigator] is not in a position to unintentionally influence the witness’s selection.” The report offers no guidance to police departments on how to avoid administrator influence on witnesses in non-blind arrays. Compare the “folder system,” used in some police departments outside Massachusetts, that has been devised to guard against administrator influence of the witness in small police departments. See “The Folder System”: A Recommended Practice for the ‘Blind’ Administration of Eyewitness Procedures For Small Police Departments With Limited Resources, published by The Innocence Project (on file with the author); MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 23, at 12-14; see also Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 381, 406-09 (2006) (discussing implementation of blind administration in small Minnesota departments, and development of laptop computer lineup administration).

92. See Jonathan Saltzman, *Prosecutors Target Wrongful Convictions*, BOSTON GLOBE, May 26, 2004, at B1.

93. See, e.g., David S. Bernstein, *Justice Delayed: Tom Reilly’s initiative on wrongful convictions stalled the legislature for two years—for what?*, BOSTON PHOENIX, Feb. 15, 2006, available at http://thephoenix.com/article_ektid4260.aspx.

94. By sharing early drafts of the major elements of reform procedures with its members, the Justice Initiative reportedly influenced the content of those trainings. Author’s telephone conversation with Essex County First Assistant District Attorney John Dawley, December 4, 2006.

95. With the support of the Massachusetts Chiefs of Police Association (MCOPA), the author sent a questionnaire to 328 of its members in the summer and fall, 2006. Fifty-five chiefs (17%) responded. Thirty-seven departments reported having adopted reform procedures, including, mostly, written protocols requiring the use of blind, sequential lineups. Significantly, in response to the question: “If ... regional training [were offered] on eyewitness identification procedures, would you likely send officers for training?” 52 of the 55 responding chiefs answered “Yes.”

96. Twenty-four of the 37 reform departments are in Middlesex (sixteen), Norfolk

(six) and Suffolk (two) Counties. With the exception of Plymouth County, at least one police department in every county reported adopting reform procedures.

97. “There is no question that the danger of mistaken identification by a victim or a witness poses a real threat to the truth finding process of criminal trials. Indeed, mistaken identification is believed widely to be the primary cause of erroneous convictions.” *Commonwealth v. Johnson*, 420 Mass. 458, 465 (1995).

98. See *Commonwealth v. Vardinski*, 438 Mass. 444, 448 (2003) (reversible error to restrict defendant’s cross-examination designed to show that post-identification police conduct boosted witness’s confidence in the accuracy of his identification); *Commonwealth v. Santoli*, 424 Mass. 837, 845 (1997) (directing lower courts to refrain from issuing jury instructions suggesting that “the certainty with which a person makes an identification is a valid indicator of the accuracy of the recollection”); *Commonwealth v. Johnson*, 420 Mass. 458, 464-65 (1995) (in contrast to weak Federal constitutional due process standard of *Manson v. Brathwaite*, 432 U.S. 98 (1977), state constitutional due process bars admission of unnecessarily suggestive identifications, even if they are reliable); *Commonwealth v. Cuffie*, 414 Mass. 632, 644 app. (1993) (amending *Telfaire-Rodriguez* instructions to remove language potentially prejudicial to defendant); *Commonwealth v. Pressley*, 390 Mass. 617, 620 (1983) (entitling defendant, on request, to jury instruction on “good faith error” in identification); *Commonwealth v. Rodriguez*, 378 Mass. 296, 302 (1979) (adopting instructions of *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), for assessing reliability of eyewitness identification testimony); *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307, 311-12 & n.4 (2001), *aff’d*, 438 Mass. 444 (2003) (citing *N.I.J. Guide*’s prohibition on giving post-identification confirming feedback to witness as consistent with “approved” identification procedures in Massachusetts; see also MASS.R.CRIM.P. 14(a)(1)(A)(viii), mandating automatic pretrial disclosure of identification procedures, discussed *supra* at text accompanying notes 38-41).

99. Based on police failure to adopt, or follow, elements of the scientific reform agenda, defense attorneys will press judges to order discovery of police identification protocols and training materials, suppress identifications, admit expert testimony, and give cautionary jury instructions. A juror’s awareness that police identification procedures in a given case fall short of recognized “best practices” might influence the verdict. See James M. Lampinen et al., *The Reactions of Mock Jurors to the Department of Justice Guidelines for the Collection and Preservation of Eyewitness Evidence*, BASIC AND APPLIED SOCIAL PSYCHOLOGY, 27(2), 155-62 (Robert M. Arkin ed., 2005) (study shows that failure to follow recommended Department of Justice guidelines for conducting eyewitness identifications made mock jurors less likely to convict).

expose, and sanction police failure to employ scientifically reliable procedures, the SJC might impose additional safeguards. These might include, for example, requiring trial judges to give cautionary jury instructions regarding an investigator's failure to follow best eyewitness identification practices.¹⁰⁰ Although such rulings can be expected to encourage police departments to adopt and implement reforms,¹⁰¹ judicial safeguards are by nature incremental and limited.¹⁰² For the prospect of more sweeping reform measures, we must look to the executive and the legislature.

B. Police Training

Ideally, eyewitness identification procedures would be set forth in written protocols incorporated in each police department's operations manual, and reflected in reporting forms designed to document the procedures used in each case. Police would be trained in use of the protocols and the forms, and supervisors would regularly monitor their compliance. In a number of Massachusetts police departments, such as Boston, Cambridge, Carlisle, Chelsea, Cohasset, Framingham, Northampton and Wellesley, written policies and forms do exist, and police have been trained in their use. Statewide, however, only a small number of departments reportedly have written policies on eyewitness identification procedure.¹⁰³ The current reform movement has largely advanced by training police to use the new methods. In the absence of a legislative or judicial mandate compelling departments to adopt reform measures, training remains the most likely instrument of further change.

To understand how change through training might occur, one must consider the state of police training in the commonwealth. The responsibility and authority to set the training standards and curriculum for all Massachusetts municipal police officers rests with the MPTC, which is an agency of the Executive Office of Public

Safety.¹⁰⁴ All full-time municipal police officers must receive both basic and regular in-service training, for which the MPTC has power to prescribe the curriculum.¹⁰⁵ The MPTC also has the power to require specialized training for promoted officers, including newly appointed detectives.¹⁰⁶

Given its power under existing law, the MPTC could ensure that every Massachusetts police officer is trained in the new eyewitness identification procedures, by certified instructors, under a set, uniform curriculum. To an extent, the MPTC has pursued this goal. Thus, since 2005, its in-service training curriculum has instructed police in the new eyewitness identification protocols.¹⁰⁷ However, the extent to which such training has actually reached the bulk of current police officers, or is included in basic recruit training, is open to question.

A series of official reports over the past fifteen years call into question the effectiveness of police training programs in the commonwealth. According to the St. Clair Committee's report on the Boston Police Department in 1992, "[o]fficers [said] that training for supervisors, in-service personnel, detectives, [and others] was either entirely lacking or dangerously inadequate, given the needs of Boston officers."¹⁰⁸ For example, "[a] number of officers reported that the in-service training has become a joke.... Many officers admitted to the Committee that they have stopped going to in-service training.... The perception is that ... in-service training has become a low priority."¹⁰⁹ Also, "[t]here appears to be no special training for detectives: when patrol officers are promoted, they are simply assigned to a unit and expected to learn 'on the job.'"¹¹⁰ In 2004, the Healey Commission report echoed these criticisms: "[t]he in-service curriculum for municipal police officers in all areas of the Massachusetts criminal justice system has not been able to keep pace with the evolving demands being placed upon criminal justice personnel,"¹¹¹ and "departments have turned to private ... vendors for the majority of their specialized training needs."¹¹² The commission found that the MPTC has been unable to set and enforce

100. *Compare Commonwealth v. DiGiambattista*, 442 Mass. 423, 447-48 (2004) (interrogating officers' failure to "preserve an accurate and complete recording of [an] interrogation" will entitle defendant to instruction cautioning jury that "they should weigh evidence of the defendant's alleged statement with great caution and care;" in cases where voluntariness is a live issue, jury would also be instructed that absence of recording permits them to find that commonwealth had failed to prove statement was voluntary.); David M. Siegel, *Criminal Law: A New Regime of Electronic Recording of Police Interrogations*, 89 MASS. L. REV. 171 (2006).

101. Reportedly, the *DiGiambattista* decision has led police to change interrogation practices. See Noah Schaffer, *Tale of the Tape*, 35 MASS. LAW. WKLY. 1 (April 2, 2007) (on file with author) (increased police recording of interrogations since *DiGiambattista*); David E. Frank, *Defense lawyers reap benefits of ruling on taped confessions*, 34 MASS. LAW. WKLY. 65 (September 12, 2005) ("prosecutors seem resigned to the notion that all future confessions should be tape-recorded").

102. See Win S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WISC. L. REV. 529, 551 (arguing that judicial regulation of suggestive identification procedures is "at best, an inefficient solution to the problem of misidentification," and that "[l]itigation safeguards are simply ... an inadequate means of catching and correcting eyewitness error").

103. Interview with John Scheft, Law Enforcement Dimensions, Arlington, Massachusetts, July 11, 2006. According to Mr. Scheft, some departments have no written policies at all.

104. See MASS. GEN. LAWS ch. 41, §96B (2006). Created by statute in 1964, the

committee was later renamed the Criminal Justice Training Council, see Taylor, *supra* note 2, at 11. In 2002, the committee was given its current name, see St. 2002, c. 196.

105. MASS. GEN. LAWS ch. 41, § 96B (2006). In-service training is required for every police officer, including supervisors, detectives and patrol officers. Although secondary sources commonly refer to an in-service training requirement of forty hours per year, the statute simply requires in-service officers to receive training "at such intervals and for such periods as said [municipal police] department may determine." *Id.*

106. *Id.* (All promoted officers "shall... complete such other courses of supervisory training as said committee may determine.").

107. Email communication from John Sofis Scheft, Law Enforcement Dimensions (March 19, 2007).

108. Report of the BPD Management Review Committee, submitted to Mayor Raymond L. Flynn, January 14, 1992, at 70.

109. *Id.* at 73.

110. *Id.* at 74.

111. Final Report, Governor's Commission on Criminal Justice Innovation (2004) (hereinafter "Healey Commission Report") at 70 ("[A]n increasing number of municipal police departments ... are no longer attending the prescribed annual in-service training.").

112. *Id.* at 72. Several private vendors operate in Massachusetts, including Law Enforcement Dimensions (www.ledimensions.com) and Commonwealth Police Services (www.commonwealthpolice.net).

uniform training curricula¹¹³ or instructor certification.¹¹⁴ The factors blamed for these failures include 1) inadequate funding; 2) a lack of consensus on the value of training; and 3) the “inability of many agency heads to fund the replacement costs associated with sending personnel to training.”¹¹⁵ In 2006, the Justice Initiative endorsed the Healey Commission recommendations, noting the continued underfunding of the MPTC, and the absence of any requirement that police officers “routinely receive a standard, high-quality curriculum....”¹¹⁶ The Justice Initiative also recommended strict enforcement of in-service training requirements for veteran officers.¹¹⁷

In communications to the author, the MPTC contradicted the above-mentioned findings of the Healey Commission, which it claimed were inaccurate.¹¹⁸ According to the committee’s director of training, the curricula for both basic recruits and veteran officers are standardized and carefully monitored by the MPTC. Police departments have in fact been complying with annual in-service training requirements set by the MPTC, and all training is conducted by MPTC certified instructors. Furthermore, instruction in the new eyewitness identification procedures is included in the standard recruit curriculum, and was required as part of the “legal update” segment of in-service training for veteran officers in both 2005 and 2006.

It is hard to know what to make of these conflicting accounts of the operation of police training programs in the commonwealth.¹¹⁹ If the MPTC is in fact training all recruits and veteran police officers to conduct identification procedures under reform protocols, within a few years that process should result in statewide reform, obviating any need for legislative or judicial action. If, however, the Healey Commission account — which anecdotal evidence supports¹²⁰ — is correct, the prospects for universal adoption of reform identification procedures in Massachusetts are less certain. To the extent that the MPTC is not effectively performing its statutory role, each of the commonwealth’s 353 police departments controls the timing, content, and teacher qualifications of training for its recruits and

veteran officers. Each department chooses whether to send its officers to MPTC training sites, to conduct its own training, or to contract with private vendors of training services.¹²¹ Instructors outside of MPTC courses are free to use or ignore the MPTC lesson plan, and therefore to train police either in traditional or reform identification procedures. If these conditions exist, statewide training in new eyewitness identification procedures cannot be ensured. Unless, in that case, either the legislature or the judiciary intervenes, the progress of reform will continue to depend upon the initiatives of individual district attorneys and the discretion of particular police chiefs. In the interim, many Massachusetts police departments will continue to use identification procedures whose unreliability is generally acknowledged.

C. The Case for Legislative Action: The Wisconsin Model

As discussed above,¹²² the Massachusetts legislature has been understandably reluctant to prescribe particular investigative procedures that police must follow. However, on any reading of the facts regarding training, the legislature could advance the reform process in two less intrusive ways. First, the legislature could increase the funds available for statewide training in eyewitness identification procedures.¹²³ Second, following the examples of Wisconsin¹²⁴ and Virginia,¹²⁵ it could require police departments to evaluate, and consider revising, their eyewitness identification practices. Under the Wisconsin statute, every police force must adopt written policies for collecting eyewitness identification evidence, “designed to reduce the potential for erroneous identifications.” These policies must be reviewed biennially. In developing their policies, departments must consider “model policies and policies adopted by other jurisdictions,” and consider including practices “to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications.” These include documenting

113. See, e.g., Healey Commission Report, *supra* note 111, at 65 (MPTC lacks funds to monitor basic recruit instruction to ensure use of prescribed uniform curriculum) and 77 (“The MPTC must oversee and coordinate the curriculum being presented at each academy site and develop a plan to uniformly implement an updated version of the recruit curriculum.”).

114. Healey Commission Report, *supra* note 111, at 77 (“The current instructor certification process has not been invoked in recent years.”).

115. *Id.*

116. Justice Initiative Report, *supra* note 4, at 18-19.

117. Justice Initiative Report, *supra* note 4, at 19.

118. This paragraph relies on email correspondence from Mary Lou Powers, Director of Training for the MPTC, September 26 and 27, 2006, on file with the author. According to Ms. Powers, the Healey Commission did not contact the MPTC about any of the information in its report.

119. The authors of the relevant chapter of the Healey Commission Report have not responded to the author’s request for their comment on the MPTC’s disagreements with their Report.

120. The author’s interviews with several persons knowledgeable about police training support the Healey Commission view. For example, police trainer John Scheft reports that some recruit trainers have not been certified as instructors, and that academy recruit testing is not standardized. Email from John Sofis Scheft, Law Enforcement Dimensions to author (March 23, 2007) (on file with author). Furthermore, an examination of study and training materials prepared by private

vendors in the commonwealth confirms the view that, depending on the identity of the training entity, police will be instructed either in traditional or reform identification procedures. Compare JOHN S. SCHEFT, CRIMINAL PROCEDURE: STATION GUIDE, pt. 6 (2006) (explaining the new eyewitness identification procedures) with MASSACHUSETTS POLICE INSTITUTE, POLICE DESK REFERENCE TO CRIMINAL INVESTIGATION PROCEDURES, ch. 8 (2005) (discussing, in traditional fashion, only the constitutional constraints on admissibility of identification evidence under the Sixth Amendment and the Due Process Clause).

121. According to the commission, the curriculum for in-service training is determined by each MPTC regional academy director in consultation with area chiefs and officers. Healey Commission Report, *supra* note 111, at 65.

122. See text accompanying note 50.

123. See Collins, *supra* note 102, at 562-63 (recommending that the Wisconsin legislature take this approach).

124. 2005-2006 Wis. Sess. Laws 60 (A.B. 648), WIS. STAT. § 175.50 (2006). Earlier in 2005, the Wisconsin attorney general issued a model eyewitness identification policy, recommending blind, sequential and other reform procedures. See MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 23.

125. 2005 Virginia Laws ch. 187 (H.B. 2632), VA. CODE ANN. § 19.2-390.02 (2006); see also H. R. 50, 2007-08 Leg. Sess. (Vt. 2007) (legislative bill that would require law enforcement agencies to establish photographic and live lineup rules complying with certain requirements).

the identification procedure and outcome, minimizing factors that might inflate the witness's confidence in the identification and, to the extent feasible, using blind and sequential procedures. By following the Wisconsin model, the Massachusetts legislature would protect the discretion of police departments to choose identification procedures most suitable for local conditions, while at the same time directing their attention to the merits of substituting "best practices" for traditional methods. Although such legislation would not itself achieve uniformity, it would focus attention on and provide information about policies and procedures in force throughout the commonwealth.¹²⁶ It might also foster an ultimate move toward adoption of uniform procedures and standardized training in those procedures.

D. Implementation of Reform Policies: Report of a Pilot Study

As is well known, neither changes in official police investigative policy nor follow-up training of officers necessarily results in changed practices in the field.¹²⁷ Police departments might adopt reform eyewitness identification protocols and train officers in their use, but traditional practices might persist. Thorough, periodic monitoring and evaluation of investigative practices are essential to ensure that the new policies are implemented and, if officers find compliance problematic, that solutions are found to address the problems.

In order to gauge the extent to which Massachusetts police officers from departments that have adopted recommended eyewitness

identification procedures are complying with the new protocols, the author conducted, with student assistance, a pilot study of public defender case files opened in 2005 and 2006.¹²⁸ A sample of 197 serious cases, in fifty-three of which ID procedures were conducted, was drawn from two counties that have reported widespread adoption of, and training in, reform protocols: Suffolk (principally the BPD)¹²⁹ and Middlesex.¹³⁰ The study results suggest that, in several important respects, police practices either fall short of those required by the reform protocols in force, or are incompletely documented. Despite the limitations inherent in these data,¹³¹ the issue of compliance, discussed below, deserves further attention from policy-makers and trainers of police.

I shall restrict this discussion of compliance to the twenty-three photo arrays conducted by the BPD¹³² and police in Middlesex County. Police conducting photo arrays in both Boston and Middlesex County are either required or urged to employ three procedures: 1) blind administration, 2) sequential presentation, and 3) after viewing, obtain and record the witness's level of confidence in the identification, "in his or her own words."¹³³ The relevant protocols also stress the need for police to document these practices in each case.¹³⁴ This is important because, in complying with their obligation under Massachusetts Rule of Criminal Procedure 14 to disclose identification procedures to the defense, prosecutors depend upon the contents of police reports. In practice, they tend to comply with Rule 14 simply by turning over identification checklists, police reports, and other relevant documents prepared by the police.¹³⁵

126. The Wisconsin legislation does not make police department ID policies public. Therefore, as in Massachusetts at the present time, the existence and content of such policies would only be discoverable by requests to each department for voluntary disclosure, FOIA requests to each department or, in litigation of cases involving identification procedures, case-by-case discovery requests.

127. See, e.g., DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 154-55 (2005) (comparing the difficulty of changing police culture to "bending granite"). "Whether the resistance comes from policing's quasi-military rank structure or from something else, most agree that police departments strongly resist change." *Id.*

128. This work was performed under the author's supervision by Vanessa D'Anna, Boston University Law School Class of 2007, and Nicholas Beshara, Boston University Law School Class of 2006. For the results of a national survey of police eyewitness identification practices, see Wogalter et al., *A National Survey of US Police on Preparation and Conduct of Identification Lineups*, 10 *PSYCHOL. CRIME & LAW* 69 (Mar. 2004).

129. In the Boston CPCS office, serving clients charged in Boston and other towns in Suffolk County, we reviewed 116 cases involving at least one of the following charges: (1) sexual assault, rape, or indecent assault and battery, (2) robbery, (3) breaking and entering, (4) assault and battery, (5) home invasion, (6) kidnapping, (7) murder or attempted murder, (8) voluntary manslaughter. Of the 116 cases reviewed, 29 (25%) involved the use of eyewitness identification procedures ("ID cases").

The Suffolk ID cases were investigated by the police departments of Boston (24), Revere (one), Chelsea (two), and the MBTA (two). Because 83% of the Suffolk sample involved BPD cases, whose characteristics proved similar to those of cases we reviewed from the other Suffolk County police departments, we focus this discussion on the BPD cases.

130. In the Cambridge CPCS office we reviewed 81 Middlesex County cases involving the same serious charges as in Suffolk. Of the cases reviewed, 24 (30%) involved the use of eyewitness identification procedures ("ID cases"), conducted by the following police departments: Arlington (two), Belmont (one), Burlington (one), Cambridge (four), Everett (three), Framingham (three), Malden (one), MBTA (one), Medford (one), Melrose (one), Newton (two), Somerville (four),

Watertown (two), Wilmington (two), and Woburn (one). Agents of more than one police department participated in some of the identification procedures.

For the combined Middlesex and Suffolk samples, ID procedures took place in 27% (53 of 197) of the cases screened.

131. Defense files reveal ID procedures in cases resulting in prosecution, but not in cases that police investigators dropped because, for example, the procedures yielded no identification of a viable suspect. Also, defense files might fail to include significant documents relating to identification, to which the defense had access. With these limitations in mind, the author supplemented information gleaned from the defense files by conducting interviews with a number of knowledgeable police officers, prosecutors and police trainers.

132. Four more photo arrays were conducted by Suffolk County police departments outside of Boston, for a total of 27 photographic arrays in the Suffolk County case sample.

133. BPD Rule 330, §5D requires blind, sequential presentation of photo arrays. If the witness positively identifies a suspect in the photo array, then the administrator must "ask him/her to state how certain he/she is, in his/her own words," and then must "[d]ocument in an investigative report the exact words that [the witness] uses." Rule 330, §5E. Rule 330 also states that if compliance with one of its requirements is impracticable, then "the investigator must document any deviation and articulate the reason why the standard procedure could not be used." Rule 330, "General Considerations." Similarly, the Middlesex County Guidelines form urges the use of blind, sequential photo arrays. §III.B-C. Although the guidelines additionally require the administrator of the photo array to "[r]ecord the witness's own words and any spontaneous comments," they do not specifically mention "statements of confidence." See §III.F(4). The guidelines do, however, require the administrator of the photo array to give the following instruction to the witness: "As you look at each photo, if you see someone that you recognize, please tell me how you know the person, and in your own words, how sure you are of the identification." §III.E(10).

134. See BPD Rule 330, §5F; Middlesex Guidelines, *supra* note 133, §III.F.

135. Thus, the "Identification Procedures" portion of the "Commonwealth Certificate of Compliance" with Rule 14 typically recites, "[t]he Commonwealth is presently unaware of any other identification procedures other than those detailed in the provided police reports or attachments hereto."

Witness Advice Forms. Before conducting a photographic array, both Middlesex and BPD policies require the administering officer to read and explain instructions to the witness. The instructions are displayed on a form that must be signed by both the witness and the officer.¹³⁶ The forms include instructions that the witness will be shown photos that might or might not include a picture of the person who committed the crime.

Documentation of Procedures. Although both Boston and the Middlesex County departments require police to document their identification procedures, the two jurisdictions approach documentation differently. Middlesex takes a structured approach, in which police are instructed to fill out detailed report forms. These require officers to indicate by check marks that the procedure was either “sequential (one-by-one)” or “simultaneous (all at once),” and either “blind presenter (no information regarding suspect)” or “traditional presenter.” Although no space is expressly provided for witness “statements of confidence,” lined spaces exist for “Witness Identification Statements.” The BPD, in contrast, does not use structured forms. Instead, Boston police are required to document details of the procedure in the narrative portion of a separate investigative report.¹³⁷ In the case files the pilot study examined, neither form of documentation consistently revealed whether or not blind or sequential photo arrays had been conducted.¹³⁸ Nor, more strikingly, did either form of report document the identifying witness’s level of confidence in the witness’s own words.

Table A, below, summarizes the extent of police compliance with the requirements discussed above, insofar as documentation contained in the defense files revealed. These findings are discussed below.

Table A. Photo Arrays Conducted ¹³⁹		
	Boston Police Department (Suffolk County)	Middlesex County
Number of photo-ID procedures	12	11
Number of arrays in which case documents indicated that the administrator of array was blind/non-blind/unspecified	6/1/5	2/7/2
Number of arrays for which police indicated that photos were presented sequentially/simultaneously/unspecified	0/0/12	6/2/3
Number of arrays in which police documented identifying witnesses’ statements of confidence in their exact words	2	2

136. “Witness Preparation Form – Photo and Live Lineups,” BPD Form 2986; Middlesex County District Attorney, “Report of Photo Array Identification Procedure.”

137. BPD Rule 330 §5 F.

138. As shown in Table A, below, the Middlesex County police identification

checklists did often specify whether the photo arrays were presented sequentially, and BPD police reports often at least implied that they were administered blindly.

139. All of these photo arrays were conducted by police departments that, in response to the survey discussed *supra* at text accompanying note 95, indicated that they had adopted reform eyewitness identification procedures.

Findings: Blind Administration. While almost half of the BPD police reports showed evidence of blind administration, in Middlesex, where police are urged but not required to use the blind method,¹⁴⁰ only two of eleven photo arrays were recorded as blind. Strikingly, on five of the seven completed Middlesex photo array checklists, the officer did indicate whether the photographs were presented sequentially or simultaneously, but *failed* to check *either* “blind presenter” or “traditional presenter.” In four of those cases, the officer showed the photographs sequentially. Because scientists have warned about the special danger of suggestion from conducting non-blind lineups sequentially,¹⁴¹ this is worrisome. Considering local anecdotal evidence indicating a degree of police resistance to blind presentation,¹⁴² these data suggest a need to address the obstacles to implementation of this key reform.¹⁴³

Findings: Sequential Presentation. Of the eight Middlesex photo arrays for which we found checklist forms, six were conducted sequentially and two simultaneously. For the remaining three arrays, the pilot study found no documentation of the method of presenting the photographs.

BPD officers are required to document their ID procedures thoroughly in a separate police report. The police reports in our sample case files did not comply with that requirement. Although nine of the twelve BPD case files involving photo arrays contained signed Witness Preparation Forms, indicating that the photographs would be shown sequentially, none of the corresponding police reports reported the method of presentation. Possibly one could infer from the signed forms that the announced sequential procedure was in fact followed. However, as the following paragraph demonstrates, some police might instruct a witness one way and act in another.

Regardless, these data suggest a pattern of non-compliance with the BPD’s documentation requirements.

Findings: Statements of Witness Confidence.

A police officer who administers a photo array is either required (BPD) or urged (Middlesex) to ask an identifying witness to indicate “in your own words how certain you are of the identification.” The pilot study data suggest a pattern of non-compliance with this important component of eyewitness identification reform. In the Suffolk and Middlesex cases combined, out of 18 arrays that resulted in identifications, we found only four *verbatim* statements of witness confidence. In most cases, police instead used conclusory language of the sort typically used to report traditional identification procedures. Examples include “the victim positively identified photograph # 06,” “the victim identified suspect photo #5,” and the witness “picked [the suspect] out of a photo lineup.” None of these statements satisfies the requirement that a police investigator must “[d]ocument in an investigative report the exact words that [the witness] uses.”¹⁴⁴

The data on police show-up procedures were similar: out of nineteen witness identifications in show-ups,¹⁴⁵ we found only two statements of certainty. This degree of non-compliance suggests the need to determine whether a more widespread pattern exists and, if so, how it can be remedied.

To summarize, the pilot study suggests the existence of a mixed picture regarding police compliance with photo array reform procedures. On the positive side: Boston police appear generally to use blind administration of arrays; whether they also use sequential presentation is unclear. Middlesex police departments appear generally to use sequential presentations. On the negative side: Boston police do not appear to follow the requirement of documenting ID

140. Middlesex Guidelines, *supra* note 133, §III B-C.

141. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 640 (1998), available at http://www.psychology.iastate.edu/~glwells/Wells_articles_pdf/whitepaperpdf.pdf.

142. In conversations with the author, police and prosecutors have ascribed resistance to a variety of reasons, including skepticism about the value of blind procedures, belief that the requirement implies lack of trust in police investigators, and fear that defense attorneys will exploit jurors’ readiness to doubt that “blind” administrators were truly ignorant of the suspect’s identity. See also Michele McPhee, *Long Hot Summer of Cold Cases; Investigators: New Rules Cripple Probes*, BOSTON HERALD, July 1, 2005, at 5 (stating that police officers believe the

double-blind procedure “is flawed because detectives do not have a chance to read body language”).

143. One such obstacle is the difficulty of finding qualified blind administrators in small police departments. Both the Middlesex Guidelines, *supra* note 133, §III B, and the Justice Initiative Report, *see supra* note 4, express concern about the ability of small departments to use blind procedures, but suggest no specific alternatives. See *supra* note 91 (discussing experience in other jurisdictions).

144. BPD Rule 330, §5E.

145. Nine BPD show-ups and 10 Middlesex show-ups resulted in identifications. All of the Middlesex show-ups were conducted by police departments that, in response to the survey discussed *supra* at text accompanying note 95, indicated that they had adopted reform eyewitness identification procedures.

procedures in detail in their narrative reports. Middlesex officers appear to conduct non-blind sequential arrays.

Conclusions and Recommendations

Since 1997, Massachusetts has exonerated eleven prisoners. Behind each exoneration is the story of a man wrongfully convicted and incarcerated, and a victim whose assailant was never caught. Although the damage done to those wrongfully convicted cannot be erased by money payments, the commonwealth has so far paid \$4,324,000 to exonerees in statutory compensation.¹⁴⁶ To settle civil rights suits, Massachusetts cities and towns have so far paid exonerees more than \$11,000,000.¹⁴⁷

Recognizing that mistaken identifications contributed to most of these miscarriages of justice, a growing number of Massachusetts district attorneys have promoted, and police departments have adopted, eyewitness identification reforms. However, in departments that have adopted them, questions exist about the extent to which the reforms are being implemented.

In addition, many police departments continue to use identification practices that pose a needlessly high risk of misidentification. The availability of exonerating DNA evidence should not breed complacency about the risk. The pilot study confirms the general impression that police conduct most identification procedures in investigating crimes that rarely leave biological evidence, such as robbery and assault.¹⁴⁸ Therefore, DNA testing will not save us from the consequences of eyewitness error; an innocent, mistakenly identified “robber” will likely serve out his sentence without hope of exoneration. This knowledge lends urgency to the task of eyewitness identification reform.

In issuing the 2006 *Justice Initiative Report*, the attorney general and the MDAA have endorsed the need for reform. The challenge

now is to translate that commitment into reality statewide. Given the commonwealth’s fragmented, decentralized system of enforcement and training, how will that occur? The following measures deserve serious consideration:

1. Adoption of Wisconsin-style legislation requiring all police departments to adopt written policies for collecting eyewitness identification evidence “designed to reduce the potential for erroneous identifications”;

2. Support by the governor, the attorney general, and MDAA for funding to enable the MPTC to enforce uniform, statewide training of police of all ranks in reform eyewitness identification procedures;

3. In counties where police departments have adopted reforms, district attorneys and police chiefs should seek to fund, design, and carry out periodic, thorough studies of implementation. The reliability of such studies would be enhanced if designed by law enforcement officers in consultation with other knowledgeable parties, such as police trainers, academics, judges, and the criminal defense bar;

4. As criminal defendants raise eyewitness identification issues in trials, judges will increasingly need to evaluate the reliability of traditional investigative practices in light of current scientific evidence.

To paraphrase attorney James Doyle, “it remains to be seen whether [eyewitness identification reforms in Massachusetts] mark the end or beginning — the arrival of a ‘tipping point’ — or comprise nothing more than a group of dead ends.”¹⁴⁹ The evidence suggests that we have reached a tipping point. Hopefully, we will take the steps necessary to achieve effective, statewide reform.

146. As of April, 2007, nine exonerees have received awards under the 2004 Massachusetts compensation statute, MASS. GEN. LAWS ch. 258D, §§1-14 (2006): Stephan Cowans, Donnell Johnson, Lawyer Johnson, Dennis Maher, Neil Miller, Marvin Mitchell, Marlon Passley, Eric Sarsfield and Eduardo Velazquez. A number of other statutory claims are pending. Email communication from Massachusetts Deputy Chief Attorney General Peter Sacks to author (April 9, 2007). Before passage of the compensation statute, several exonerees were compensated by private legislative bills. See Fisher, *supra* note 8, tables at 13, 27. 147. Stephan Cowans, Neil Miller, Marvin Mitchell, Eric Sarsfield and Eduardo Velazquez have settled civil rights suits for substantial sums. A number of other exonerees have filed pending civil rights complaints.

148. Of the 53 pilot study cases in which police conducted identification

procedures, only one involved a charge of sexual assault. In contrast, 42 of the identification procedures were conducted in robbery cases, and four in non-sexual assaults. This discrepancy is consistent with data from other jurisdictions. A study in 2004 of 280 Minnesota cases in which lineups were conducted revealed that only 1.1% of the total involved alleged crimes of sexual assault. Email from Nancy Steblay to author (May 31, 2007), concerning study described in Klobuchar et al., *supra* note 91, at 392. See also Samuel R. Gross et al. *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530-31 (2005) (misidentifications in robberies far outnumber those in rapes, but, owing to DNA evidence, exonerations for rape are far more common than for robbery).

149. DOYLE, *supra* note 1, at 203-05.