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# Research and Reality: Better Understanding the Debate between Sequential and Simultaneous Photo Arrays

Frederick H. Bealefeld III

*Former Police Commissioner, Baltimore, MD Police Department.*

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# RESEARCH AND REALITY: BETTER UNDERSTANDING THE DEBATE BETWEEN SEQUENTIAL AND SIMULTANEOUS PHOTO ARRAYS

Frederick H. Bealefeld III\*

## I. INTRODUCTION

The criminal justice system seeks to protect the innocent and convict the guilty. For nearly two centuries, scientists, academics, law enforcement agencies, and others have worked to develop methods to identify those who commit crimes. Driven by technology and science, criminal justice professionals have made significant strides in suspect identification systems over the past 150 years. This article discusses the evolution of criminal identification systems in law enforcement starting in the late 1800s in Europe. Additionally, and more specifically, this article documents the history of the Baltimore Police Department's eyewitness identification procedures since 1983. It also discusses recent field studies and academic research related to photographic lineup procedures.

History teaches us that identification systems are developed, researched, and implemented only to be replaced by new and improved systems years later. Systems evolve as science, technology, and research evolve; the goal, however, remains the same: to protect the innocent and hold the guilty accountable. Law enforcement agencies, throughout time, have based their decisions to change or implement new identification systems based on their commitment to this core principle.

## II. THE FIRST CRIMINAL IDENTIFICATION SYSTEMS

How could Bertillon have been so wrong? The son of recognized physician, statistician, and anthropologist, Dr. Louis Bertillon,<sup>1</sup> Alphonse must certainly have felt the pressure to succeed. Born in Paris in the spring of 1853, Bertillon was twenty-six years old when

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\* Former Police Commissioner for the Baltimore Police Department.

1. Jim Fisher, *Alphonse Bertillon: The Father of Criminal Identification*, JIM FISHER: THE OFFICIAL WEB SITE (Jan. 7, 2008) at 1, <http://jimfisher.edinboro.edu/forensics/bertillon1.html>.

he began his career in law enforcement.<sup>2</sup> Hired as an assistant clerk in the criminal records office of the Paris Police Department, he quickly set himself to the task of assisting in the identification of criminals.<sup>3</sup> This was not an easy job since the department housed over five million files including eighty thousand mug shots.<sup>4</sup>

Since the department lacked a coherent filing system or manner to classify the personal data of criminals beyond their names, it was nearly impossible to hold recidivists accountable for prior bad conduct or to identify wanted persons.<sup>5</sup> This problem was hardly unique to France; even famed Scotland Yard lacked a system of criminal identification.<sup>6</sup> By the summer of 1879, Bertillon submitted a report to the chief of police proposing a means to identify criminals through a system of body measurements.<sup>7</sup> By combining several different physical measurements he calculated that the probability of finding two people exactly alike using these dimensions was over four million to one.<sup>8</sup>

While Bertillon was enthusiastic and convinced of the efficacy of "anthropometry,"<sup>9</sup> a term he used to describe his system, police leaders and detectives were skeptical.<sup>10</sup> Bertillon's proposals were rebuffed several times and were not tested until a leadership change within the department presented an opportunity.<sup>11</sup> In November of 1882, Bertillon was given the chance to prove his system through a three-month field test.<sup>12</sup> He found his first match late in February of

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2. *Id.*

3. *Id.* (noting Bertillon's enthusiasm for this employment opportunity despite the fact that it essentially required the repetitive task of transferring arrest and criminal background data onto standard forms).

4. *Id.*

5. *Id.* ("[Bertillon] noticed that arrestee physical descriptions were too general and vague, and the mug shots, taken by indifferent commercial photographers, were of low quality. Bertillon took note of the fact that many of the offenders, when posing for their photographs, had intentionally distorted their faces to disguise their appearances.").

6. *Id.*

7. *Id.* ("The fact the arrestee used another name would not fool the system which would be based on physical characteristics rather than names.").

8. *Id.*

9. *Id.*

10. *Id.* (noting that, initially, police leaders thought Bertillon's system was "some kind of joke" and a "pipe dream").

11. *Id.* (stating that the new police chief, Jean Camecasse, who allowed Bertillon to test his system, considered himself a reformer).

12. *Id.*

1883—an arrestee who had given a fictitious name several times.<sup>13</sup> Within a year, his team had identified three hundred recidivists without encountering two people with the same body measurements.<sup>14</sup> In December of 1884, the system was adopted by the French prison system and became known as Bertillonage.<sup>15</sup>

Detectives, while slow to embrace the system, were required to use it and noted that while it was possible to take measurements from prisoners in custody for identification purposes, the method could not be adapted to identify suspects in the field.<sup>16</sup> Bertillon acknowledged this deficiency and started using photography equipment to take arrest photos.<sup>17</sup> His practice of adding photographs to suspect identification files, including profile shots, is a technique that remains in practice today.

By 1885, Bertillon had become a celebrity in law enforcement circles and his method was being studied by criminal justice professionals in Great Britain and the United States.<sup>18</sup> “When, therefore, in 1883, Bertillon announced an exact method of identification by means of measurement he placed the entire world in his debt.”<sup>19</sup> That same year he was called to assist in the identification of an unidentified victim of a gunshot wound found badly decomposed along the banks of the Marne.<sup>20</sup> Bertillon was only able make five measurements, but those were enough to identify the man.<sup>21</sup> Bertillon’s identification ultimately enabled detectives to identify the victim’s killer and establish a motive for the crime.<sup>22</sup>

Another case example where Bertillon’s system was used involved a French anarchist known as Ravachol.<sup>23</sup> Following a series of bombing attacks targeting judges and prosecutors in the spring of 1892, police suspected that Ravachol was responsible for the attacks, and suspected that he was a common criminal whose real name was

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13. *Id.* (noting that the precision of Bertillon’s identification induced the criminal to admit that he was a repeat offender who had used aliases when arrested in the past).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Raymond B. Fosdick, *The Passing of the Bertillon System of Identification*, J. AM. INST. CRIM. L. & CRIMINOLOGY, May 1915–Mar. 1916, at 363, 364.

20. Fisher, *supra* note 1.

21. *Id.*

22. *Id.*

23. *Id.* at 2.

Francois Koenigstein.<sup>24</sup> After an April bombing of an apartment house, police apprehended Koenigstein, took his measurements, compared them to a previous arrest, and pronounced that Koenigstein and Ravachol were the same person.<sup>25</sup> At two separate trials, Koenigstein maintained his innocence, claiming that he had been mistakenly identified.<sup>26</sup> Only after being convicted of murder and sentenced to death did he admit the dual identity.<sup>27</sup> The case was reported in newspapers across Europe, further validating the effectiveness of Bertillon's system.<sup>28</sup>

Bertillon's system was used in thousands of cases with great success.<sup>29</sup> In England, Scotland Yard alone made 1,267 identifications using Bertillon's system from 1898-1901.<sup>30</sup> The implementation of "Bertillonage" spread to police departments and prison systems around the world.<sup>31</sup> "England, Germany, Austria, Russia, Switzerland, and several states in the United States had applied it in their police departments, and the Bertillon cabinet became the distinguishing mark of the modern police organization."<sup>32</sup> In 1893, the National Chiefs of Police considered a resolution at their convention proposing a national identification bureau in America.<sup>33</sup> The resolution was adopted, and Bertillonage became the primary method of identification.<sup>34</sup> The Chicago Police Department agreed to maintain the centralized criminal records repository and began operations in 1897.<sup>35</sup>

While the criminal justice community had become convinced of the validity of Bertillon's system for identifying criminals, others pursued different methods that they believed were superior.<sup>36</sup> In 1892, Francis Galton, an English biologist and physician, building off of work done by Henry Faulds,<sup>37</sup> a Scottish physician, published a

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Fosdick, *supra* note 19, at 363, 368.

31. *Id.* at 364.

32. *Id.*

33. Fisher, *supra* note 1, at 2.

34. *See id.*

35. *See id.*

36. *See id.*

37. In 1880, Dr. Henry Faulds published his observations in the journal *Nature*, in which he advanced the notion that because we have a series of ridged furrows on the tips of

little known work entitled *Finger Prints*.<sup>38</sup> Galton concluded that fingerprints would become a more efficient and effective manner of criminal identification.<sup>39</sup> Galton formed a grouping structure for basic patterns but had not solved the basic problem of how to effectively file and search the print cards. Without a classification system, the files would become a steadily increasing and unmanageable collection of records in file cabinets.

One year later, Bertillon published the *Textbook of Anthropometry*, which described his identification methodologies and criticized the use of fingerprinting as a sole means of identification.<sup>40</sup> He dismissed the fingerprint system as crude, messy, and beyond the ability of the ordinary police officer.<sup>41</sup>

In 1894, investigators from the French War Office sought Bertillon's assistance in a case of treason.<sup>42</sup> The army's intelligence service investigators had received documents from a spy operating inside the German Embassy, which were torn and of poor quality.<sup>43</sup> The government agents assured Bertillon that these documents had been authored by a captain in the French army, Alfred Dreyfus.<sup>44</sup> Bertillon, who had once dismissed handwriting as having little value in the identification of criminal suspects, agreed to compare the worn documents to handwriting samples collected from Captain Dreyfus.<sup>45</sup> Bertillon concluded that the documents were written by Dreyfus in such a manner as to appear not of his hand, essentially forging his own handwriting. Bertillon testified to this handwriting identification at trial.<sup>46</sup>

Dreyfus's attorneys presented testimony and analysis from their own expert, a document examiner with the Bank of France, who concluded that the document could have been written by a person other than Dreyfus.<sup>47</sup> While Bertillon had no qualification to make his finding, he was viewed as an expert since he had invented the

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our fingers, the impressions these ridges leave on objects could be used in crime scene investigations. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. HENRY T. F. RHODES, ALPHONSE BERTILLON: FATHER OF SCIENTIFIC DETECTION 178 & n.1 (1956); Fisher, *supra* note 1, at 2.

44. Fisher, *supra* note 1, at 2.

45. *Id.*

46. *Id.*

47. *Id.*

“science” of criminal identification and it was virtually impossible to impeach his credibility.<sup>48</sup> Based on the weight of Bertillon’s testimony, Dreyfus was convicted of treason and sentenced to life in prison.<sup>49</sup>

Ultimately, it came to light that Dreyfus had been framed.<sup>50</sup> The controversy surrounding the investigation, trials, and ultimate vindication of Dreyfus cannot be minimized. The case sent shock waves across Europe, and many have ranked it the most significant case of the nineteenth century.<sup>51</sup> Bertillon’s mistaken handwriting identification was clear and wrapped in faulty science. He drew incorrect conclusions that were not based on science, which resulted in false testimony and the conviction of an innocent man.<sup>52</sup>

Bertillon’s notorious error likely accelerated the rapid ascent of a rival identification system. In 1900, Edward Henry published *Classification and Uses of Fingerprints*, which explained a system that allowed fingerprints to be classified and filed, as well as quickly and reliably searched.<sup>53</sup> The fact that fingerprints were an absolute form of identification had long been established,<sup>54</sup> and Henry provided law enforcement agencies a means by which to use this valuable tool. Scotland Yard adopted the system in 1901, and before the end of the decade, most European and American criminal justice systems had followed suit.<sup>55</sup>

Until the time of his death in 1914, Bertillon remained convinced that fingerprints were an inferior method of suspect identification.<sup>56</sup> Ironically, in that same year, France adopted fingerprints as the standard method of criminal identification.<sup>57</sup> While the criminal justice community recognized that there were conflicts and disparities in Bertillon’s system during the twenty years it was in use, it was the best method available at the time. But the field of criminal identification eventually evolved and left Bertillon’s system behind.

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48. See RHODES, *supra* note 43, at 171, 173, 186; Fisher, *supra* note 1, at 2.

49. Fisher, *supra* note 1, at 2.

50. See, e.g., RHODES, *supra* note 43, at 168; Fisher, *supra* note 1, at 2.

51. See, e.g., Adam Gopnik, *Trial of the Century: Revisiting the Dreyfus Affair*, THE NEW YORKER (Sept. 28, 2009), [http://www.newyorker.com/arts/critics/books/2009/09/28/090928crbo\\_books\\_gopnik](http://www.newyorker.com/arts/critics/books/2009/09/28/090928crbo_books_gopnik); *The Dreyfus Affair: 100 Years On*, BBC NEWS (July 11, 2006), <http://news.bbc.co.uk/2/hi/europe/5166904.stm>.

52. RHODES, *supra* note 43, at 185–86; Fisher, *supra* note 1, at 2.

53. E.R. HENRY, *CLASSIFICATION AND USES OF FINGERPRINTS*, at iii–iv (1900).

54. Fisher, *supra* note 1, at 2.

55. *Id.*

56. *Id.*

57. See Fosdick, *supra* note 19, at 363.

### III. EYEWITNESS IDENTIFICATION PROCEDURES\*\*

At the start of the twentieth century, most law enforcement agencies relied on live, in-person eyewitness identifications, commonly known as showups. Following the report of a crime, officers would typically canvass the surrounding area for the person(s) matching the description provided by the victim or witnesses. As police found person(s) who matched the description, the victim or witness would be taken to view the suspect and make an identification in the field. While the use of this form of suspect identification may be operationally and investigatively expedient, it is the most suggestive and vulnerable to court challenge.

The live lineup is a procedure through which the suspect is placed in the company of several other persons of the same sex, race, and similar physical features and shown to victims and witnesses. “A live lineup provides an impression of height and build, allows the witness to see lineup members from different angles and to see them stationary and moving. Surely the availability of such cues will inform the identification response in ways that the (static) photoarray cannot.”<sup>58</sup> This procedure was the most commonly used method of suspect identification at the Baltimore Police Department for sixty years because detectives believed that it worked. Special rooms were constructed expressly for the purposes of conducting lineups. Lighting, secured viewing areas, and prisoner holding rooms were designed to maximize the efficiency of the procedure.

Conducting live lineups was manpower intensive. It was difficult to locate a sufficient number of “fillers” (those individuals similar in appearance to the suspect), and sometimes detectives paid people to participate in the process. In extreme cases, plain clothes officers or detectives served as fillers. The influence of the primary detective on lineup composition and victim/witness cannot be discounted. Despite the best efforts of detectives, victims and witnesses sometimes saw the fillers prior to viewing the lineup, which would prejudice the identification.

As crime increased<sup>59</sup> and it became more difficult to manage and present live lineups in Baltimore, technological advancements in

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\*\* Most of the information in Part III is based on knowledge the author gained throughout his more than thirty years of experience with the Baltimore Police Department.

58. Neil Brewer & Matthew A. Palmer, *Eyewitness Identification Tests*, 15 LEGAL & CRIMINOLOGY PSYCHOL. 77, 81 (2010).

59. According to Federal Bureau of Investigation data contained in the *Uniform Crime Report*, violent crime in Maryland increased from 4,691 incidents in 1960 to 24,512

photography, film processing, and records management created an alternative identification method. By 1970, detectives were creating extensive files of arrest photographs (mug shots) to show to crime victims and witnesses. The process of combing through hundreds of mug shots was extraordinarily time consuming, and often fatigued the witness to a degree that no identification could be made. Witnesses commonly had to schedule appointments to view mug shots and time delays may have dulled their recall.

In order to compose photo lineups, detectives worked to develop the suspect's identity through sources of information, confidential informants, and/or forensic evidence (usually latent fingerprints). Detectives then performed a name search query either through computerized records or through a hand search of indexes maintained in the Identification Section of the Criminal Records Division. A detective would then compare the data contained in those files—such as date of birth, height, weight, last known address, and criminal history—to the description of the suspect given by the victim and/or witness. The detective then submitted a request to the photo lab for a mug shot of the suspect.

Once the detective received the processed mug shot they would draw on filler files (repositories of extra or duplicate copies of other mug shots maintained by the detective, within the unit, or in the Identification Section). These filler files were critically important in the assembly of the photo array, and in most instances the detective worked conscientiously to find five other similar photographs. This effort was not confined to locating individuals with the same physical characteristics, but also with the same exposure, perspective, and time period.

Each of these factors presented challenges for detectives. Some mug shots were overexposed, causing the image and background to be very dark, others were underexposed, causing the image and background to be very light. A number of factors could affect the quality of the print, including a poor quality negative, defective light source, contaminated processing solution, or compromised film. Perspective could also affect the array.

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incidents in 1970. Federal Bureau of Investigation, *State-by-state and National Crime Estimates by Year(s)*, UCRDATATOOL.GOV, <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (Select Maryland as the state in the "Choose one or more state" category, select "Number of violent crimes" and "Violent crime rates" in the "Choose one or more variable groups" category, select 1960 to 1970 for the "Choose years to include" category, and then click "Get Table") (last visited Feb. 18, 2013); see also *Maryland Crime Rates 1960–2011*, DISASTER CENTER, <http://www.disastercenter.com/crime/mdcrime.htm> (last visited Jan. 30, 2013).

Arrestees were transported to the nearest police district. Each police district had its own equipment for fingerprinting and photographing prisoners. While efforts were made to standardize each of the eleven facilities (there were nine police districts, with separate locations for booking women and juveniles), for cameras, lighting equipment, background, and film, subtle differences emerged. For instance, cameras were placed at different distances from the arrestee due to space considerations at the facilities. Some of the photos showed the suspect from the neck to the top of the head while in others the suspect's upper chest and shoulders were visible. The manner used to memorialize the date and booking location created differences in appearance. The photo board, a small black box roughly the size of a sheet of notebook paper with moveable numbers and letters, was used to record the arrest date, booking location, and unique six digit identification number. In some locations, the photo board was worn around the neck and supported by a metal chain. In others, the board was held up at chest height by the prisoner.

Over time, patterns emerged. Mug shots taken by booking crews in the Southeast District differed noticeably from those taken in the Central District. A very cursory examination of all eleven booking stations would reveal a number of differences, even to an untrained eye. However, it was not a conscious institutional effort to cast one suspect as more sinister or highlight certain images over others. The cadet who was assigned to separate the images by cutting the negatives did not cut at different angles to improperly subconsciously influence a victim or witness viewing photos in an array.<sup>60</sup>

But these factors provided fodder for legal challenge. The Supreme Court had already ruled in 1968 that photographic identifications obtained through procedures "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" would prohibit admission at trial.<sup>61</sup> Two later Supreme Court cases likely influenced the manner in which the Baltimore Police Department conducted photographic lineups.<sup>62</sup> In *Neil v. Biggers*, a core issue was whether the identification procedures used by the police were so suggestive as to violate due

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60. These problems were largely resolved in 1995 when the state run Central Booking Intake Facility came online and took over all fingerprinting and photographing.

61. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

62. See *Manson v. Brathwaite*, 432 U.S. 98, 99 (1977); *Neil v. Biggers*, 409 U.S. 188, 189-90 (1972).

process.<sup>63</sup> In *Biggers*, the rape victim provided the police with a description of her attacker.<sup>64</sup> Over a period of seven months she viewed suspects through a variety of procedures, lineups, showups, and more than 30 photographs.<sup>65</sup> The court held that the victim had made no previous identification in viewing any of the other lineups and had essentially established a track record of reliability that would have negated the suggestiveness in the showup.<sup>66</sup>

In *Manson v. Brathwaite*, the identification of the suspect through a single photo was called into question.<sup>67</sup> An undercover police officer identified Brathwaite.<sup>68</sup> The Court supported the identification made by the police officer (Jimmy Glover) but stated:

Of course, it would have been better had D'Onofrio presented Glover with a photographic array including 'so far as practicable . . . a reasonable number of persons similar to any person then suspected whose likeness is included in the array.' The use of that procedure would have enhanced the force of the identification at trial and would have avoided the risk that the evidence would be excluded as unreliable.<sup>69</sup>

The Baltimore Police Department's primary effort in lineups appears to have been concentrated on the composition of the photographs and the construction of the array. The first Baltimore Police Department General Order<sup>70</sup> to address the issue of photographic arrays—General Order 17-83—was published in 1983.<sup>71</sup> Procedures outlined in that order instructed the police officer to assemble a group of not less than six photographs, including the suspect, to be shown to the victim or witness.<sup>72</sup> The first instruction in the 1983 order stated:

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63. *Neil*, 409 U.S. at 196.

64. *Id.* at 194.

65. *Id.* at 194-95.

66. *Id.* at 201.

67. *Manson*, 432 U.S. at 103-04.

68. *Id.* at 99-101.

69. *Id.* at 116-17 (citation omitted).

70. General Orders, as used by the Baltimore Police Department, are policy and procedural guidelines, published and communicated to sworn and civilian members, established through best practices, legal precedent, or recommendations specific to the Department.

71. Balt. Police Dep't General Order 17-83: Procedures for Viewing of Criminal Suspect Photographs (Nov. 10, 1983).

72. *Id.*

Members shall obtain a photograph of the suspect(s) which is not over three years old, if possible, and a minimum of 5 additional fill in photographs. Members should ensure that all photographs shall be of the same physical appearance i.e., size, finish (glossy, matte, etc.), age, etc. When suspect photographs are obtained from another jurisdiction, fill in photographs shall also be obtained from that jurisdiction.<sup>73</sup>

This instruction was meant to address the disparity and quality of negatives and photographs within the Department.

General Order 17-83 also provided instruction related to the manner in which the photos were to be presented to the victim or witness. Section 1, subsection D directed that “[p]hotographs shall be shown to one victim/witness at a time. The victim/witness should view the entire group of photographs even after a positive identification is made.”<sup>74</sup> Once an identification was made, the victim/witness was instructed to sign and date the back of the photograph, which was then submitted as evidence along with the fillers used.<sup>75</sup>

The order was especially significant in that it outlined procedures that we now define as sequential photo lineups. Police officers were required to prepare a supplemental report to the original offense report that listed the photograph identified by the victim/witness and “indicate[d] the sequential order in which the photographs were shown . . . [and] the position of the suspect.”<sup>76</sup>

The order did not require officers to document the scope of an identification made by a victim/witness viewing mug shots in the Identification Section. There would have been no way for detectives or prosecutors to determine if the witness had viewed a few photographs or thousands. Furthermore, it would be impossible to determine whether the other photographs viewed presented persons with similar or dissimilar characteristics.

Section 3 of the order addressed concerns raised by the Supreme Court’s decision in *Neil v. Biggers*,<sup>77</sup> by stating, “Photographic identification may be used as probable cause evidence to effect an arrest or obtain a warrant in a criminal case. However, there must be

73. *Id.* at § I(A).

74. *Id.* at § I(D).

75. *Id.* at § I(F), (G).

76. *Id.* at § I(E).

77. *Neil v. Biggers*, 409 U.S. 188, 198–200 (1972).

other corroborative evidence . . . .”<sup>78</sup> The order stated, “Emphasis should be placed on the totality of circumstances; duration of witness/perpetrator contact; relationship (if any) of witness/perpetrator; and, credibility of the witness(es).”<sup>79</sup> General Order 17-83 remained in effect until March of 1986.<sup>80</sup>

It is not surprising that the procedures in the 1983 order mirrored practices long employed by police officers and detectives operating without specific guidelines. The order simplified the practices by establishing a base number of photographs (6) to present to victims or witnesses and essentially eliminated the single photo show.<sup>81</sup> There is no indication that the Department applied any scientific method to the manner in which the photographs were to be presented.

The second General Order on photographic array procedures, General Order 10-86, followed many of the procedures established in General Order 17-83, but included three critical elements that did not exist in General Order 17-83.<sup>82</sup> The new order also indicated that the Baltimore Police Department had shifted from using a sequential method of presenting photographic lineups to a simultaneous method.<sup>83</sup> The Responsibilities section, Item 4, directed police officers to permanently affix the photographs to a newly created photograph lineup form.<sup>84</sup> The order also provided that “[t]he victim/witness should view the entire group of photographs on the form even after a positive identification is made.”<sup>85</sup> The final direction was printed at the top of the new lineup form, and stated:

This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards and moustaches may be easily changed. Also photographs may not always depict the true complexion of a person- it may be lighter or darker than shown in the photo. When you have looked at all the photos, tell me whether or not you see the

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78. General Order 17-83, *supra* note 71, at § I(A).

79. *Id.* at § III(B).

80. See Balt. Police Dep't General Order 10-86: Procedures for Viewing Criminal Suspect Photographs (Mar. 19, 1986).

81. See General Order 17-83, *supra* note 71, at § I(A).

82. See General Order 10-86, *supra* note 80.

83. *Id.*

84. *Id.* at § Responsibilities 4.

85. *Id.* at § Responsibilities 5.

person who committed the crime. Do not tell other witnesses that you have or have not identified anyone.<sup>86</sup>

In their work in the field of eyewitness identification, researchers Gary L. Wells and Deah S. Quinlivan stated, “At its simplest level, instructing the eyewitness that the culprit might not be in the lineup can be thought of as a procedure to relieve pressure on the witness to make a selection.”<sup>87</sup>

#### IV. UNRELIABILITY OF EYEWITNESS IDENTIFICATIONS

Since 1989, DNA evidence has been used to overturn more than 300 wrongful convictions across the country.<sup>88</sup> Seventy-five percent of these convictions were based on faulty eyewitness identifications.<sup>89</sup> The wrongful conviction of Kirk Bloodsworth, for the 1984 brutal rape and murder of nine-year-old Dawn Hamilton, is perhaps the best known example in Maryland.<sup>90</sup> Hamilton’s body was found in a wooded area in eastern Baltimore County.<sup>91</sup> Police officers and detectives swarmed the area and soon identified and charged Kirk Bloodsworth with the crime.<sup>92</sup> Bloodsworth was convicted, in two separate trials, largely based on the testimony of several eyewitnesses that placed him in the area that day.<sup>93</sup>

The detectives used a variety of identification methods including a composite.<sup>94</sup> Bloodsworth was identified in a photo lineup by a ten-year-old boy.<sup>95</sup> Another young boy, aged seven, observed

86. *Id.* at Annex A.

87. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW HUM. BEHAV. 1, 6 (Feb. 27, 2008), [http://www.psychology.iastate.edu/~glwells/Wells\\_articles\\_pdf/Manson\\_article\\_in\\_LHB\\_Wells.pdf](http://www.psychology.iastate.edu/~glwells/Wells_articles_pdf/Manson_article_in_LHB_Wells.pdf).

88. *Know the Cases: Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 4, 2013).

89. *Understanding the Causes: Witness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 4, 2013).

90. *See* Bloodsworth v. State, 76 Md. App. 23, 26–28, 543 A.2d 382, 384 (1987), cert. denied, 313 Md. 688, 548 A.2d 128 (1988); *Innocence Blog: 15 years of freedom for Kirk Bloodsworth*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/15\\_years\\_of\\_freedom\\_for\\_Kirk\\_Bloodsworth.php](http://www.innocenceproject.org/Content/15_years_of_freedom_for_Kirk_Bloodsworth.php) (last visited Feb. 4, 2013).

91. *Bloodsworth*, 76 Md. App. at 28, 543 A.2d at 384.

92. *See id.* at 28–30, 543 A.2d at 384–86.

93. *See id.* at 27–30, 543 A.2d at 384–85.

94. *Id.* at 28–29, 543 A.2d at 384–85.

95. *Id.* at 28, 543 A.2d at 385.

Bloodsworth in a live lineup but initially did not pick him out.<sup>96</sup> The seven-year-old boy identified a filler in the lineup as the man he had seen with the victim.<sup>97</sup> However, he later told his mother and then detectives that he initially identified the wrong man because he was afraid to identify the suspect (Bloodsworth) whom he observed in the lineup.<sup>98</sup> Prosecutors and detectives were certain that they had the right man.

Nine years later, Kirk Bloodsworth became the first death row inmate in the United States to be freed through DNA testing.<sup>99</sup> Evidence collected from the scene was exposed to DNA testing that was not possible in 1984. Ultimately, the true killer was identified through the post-conviction collection of the killer's DNA.<sup>100</sup> In 2004, he pled guilty to the crime and was sentenced to life in prison.<sup>101</sup> Bloodsworth's widely-publicized release prompted a groundswell of DNA exonerations as hundreds of convictions were overturned using new DNA testing procedures.<sup>102</sup>

While advancements in forensic sciences were revolutionizing criminal investigations, particularly in cases of murder and rape, debates raged on over the value of eyewitness identifications. Some researchers began challenging the manner in which lineups were presented to witnesses and the influences detectives could have on witnesses while making suspect identifications.<sup>103</sup> Gary Wells and a team of researchers began advocating for double-blind lineup administration in order to prevent police officers from having intentional or unintentional influence on eyewitness identification procedures: "The dynamic interaction between the person administering the lineup and the eyewitness, in conjunction with what we know about interpersonal influence, necessitates that the

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96. *Id.* at 28–29, 543 A.2d at 384–85.

97. *Id.*

98. *Id.* at 29, 543 A.2d at 385.

99. *Kirk Bloodsworth*, INNOCENCE PROJECT, [http://innocenceproject.org/Content/Kirk\\_Bloodsworth.php](http://innocenceproject.org/Content/Kirk_Bloodsworth.php) (last visited Feb. 18, 2012).

100. Mary Chalupsky, *From Death Row to Critic of Capital Punishment*, LIFE AND DEATH MATTERS (Nov. 3, 2010), <http://www.lifedeathmatters.com/2010/11/from-death-row-to-critic-of-capital.html>.

101. *Id.*; *Specific Cases*, MD. CITIZENS AGAINST STATE EXECUTIONS, <http://www.mdcase.org/node/39> (last visited Feb. 18, 2013).

102. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Feb. 18, 2013).

103. *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Feb. 18, 2013).

administering agent not know which person in the lineup is the suspect.”<sup>104</sup> Wells also proposed that the lineup be videotaped: “Videos are very limited in their visual scope, so there would have to be one camera focused on the eyewitness, one on the agent administering the lineup, and one on the lineup itself. In order to link any nonverbal behaviors of the agent or the lineup members to the reactions of the eyewitness, the cameras must be synchronized. In addition, the audio portion of a video is routinely very poor when nonprofessionals are making it.”<sup>105</sup>

#### V. ARE DOUBLE-BLIND AND SEQUENTIAL LINEUP PROCEDURES BETTER?

In October of 1999, the National Institute of Justice (NIJ) published, *Eyewitness Evidence: A Guide for Law Enforcement*.<sup>106</sup> The guide, which was developed by a technical working group of law enforcement professionals, outlined best practices and recommendations for procedures to use in conducting photographic lineups.<sup>107</sup> The introduction, authored by then Attorney General Janet Reno,<sup>108</sup> noted that cases based on eyewitness testimony are perhaps not as definitive as once thought:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory. This issue has been at the heart of a growing body of research in the field of eyewitness identification over the past decade.<sup>109</sup>

While the guide described the most commonly used methods of identification, it made no specific recommendation to law enforcement as to the value of one over the other.<sup>110</sup> Examining the

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104. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUMAN BEHAV. 603, 641–42 (1998).

105. *Id.* at 640–41.

106. NAT’L INST. OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999).

107. *Id.* at iii.

108. *See id.*

109. *Id.*

110. *See id.* at 27–28.

Police Department's General Order in effect at the time of this NIJ publication revealed no significant deviation from the preparation and presentation of the simultaneous photo lineup, including the witness instructions prior to viewing the array.<sup>111</sup>

Research prior to 2003 advocated for the double-blind sequential method.<sup>112</sup> Researchers argued that the alternative type of lineup presentations caused witnesses to use either relative or absolute judgments.<sup>113</sup> In addressing the simultaneous photo array, Wells reported, "There is good empirical evidence to indicate that eyewitnesses tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit relative to the other members of the lineup."<sup>114</sup> Describing the decision process of witnesses in the context of a sequential lineup, on the other hand, Wells wrote:

The eyewitness must decide at the time of each initial presentation whether that lineup member is the culprit. . . . [A] sequential lineup would largely nullify the ability of eyewitnesses to use a relative judgment strategy. Specifically, although an eyewitness could reason that a given lineup member (e.g., Number 3) was a relatively better match to the culprit than was a previously presented member (i.e., better than either Number 1 or Number 2), the witness could not be certain that a subsequent lineup member (yet to be viewed) would not prove to be an even better match to the culprit than the one being currently viewed. As a result, the eyewitness is forced to abandon the relative judgment strategy and use a more "absolute" strategy when confronted with a sequential presentation procedure.<sup>115</sup>

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111. Compare General Order 17-83, *supra* note 71, with NAT'L INST. OF JUSTICE, *supra* note 106, at 27-38.

112. See Sheri H. Mecklenburg et al., REP. TO THE LEGISLATURE OF THE ST. OF ILL.: THE ILL. PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCS. 3-4 (Mar. 17, 2006), <http://eyewitness.utep.edu/Documents/IllinoisPilotStudyOnEyewitnessID.pdf>. The term "double-blind" in this context means that the identity of the suspect is unknown to both the witness and the administrator. *Id.*

113. See GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK 81 (1988) (explaining the distinction between relative judgment and absolute judgment).

114. See Wells, *supra* note 104, at 613, 616-17.

115. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553, 561 (1993).

The abundant logic in these findings was compelling; as Commissioner, I contemplated how to design and implement a double-blind system in Baltimore in a manner that effectively used available resources. Finding detectives that were “blind” to a suspect being investigated by their squad mates would be difficult.

In 2003, acting on recommendations from a panel on capital punishment, the Illinois State Legislature commissioned a study to test the effectiveness of double-blind, sequential photographic identification.<sup>116</sup> Both the academic and clinical fields raised controversy between the two procedures (simultaneous and sequential).<sup>117</sup> Lawmakers believed questions about the most effective method could only be answered through a formalized field trial.<sup>118</sup> This field trial sidestepped the larger question of whether police can be trusted to conduct photo arrays without corrupting the witness. On April 20, 2006, the research team<sup>119</sup> presented their findings at a conference hosted by Loyola University School of Law.<sup>120</sup> At the time, I was Chief of Detectives and the results of this study had a direct bearing on my recommendations for conducting identification procedures within our Department. I was anxious to learn how the three departments involved in the field trial (the Chicago Police Department, the Joliet Police Department, and the Evanston Police Department) had addressed logistical problems.

“[T]he Illinois data showed that the sequential, double-blind lineups, when compared with the simultaneous method, produced a higher rate of known false picks and a lower rate of ‘suspect picks.’”<sup>121</sup> Interestingly, when using the double-blind, sequential lineup, the “new” best practices, witnesses identified more of the wrong people and fewer of the right people.<sup>122</sup> The study elaborated on the failure of the double-blind sequential when shown to certain

116. See Mecklenburg, *supra* note at 112, 8–9.

117. See Zack L. Winzeler, *Whoa, Whoa, Whoa...One at a Time: Examining the Responses to the Illinois Study on Double-Blind Sequential Lineup Procedures*, 2008 UTAH L. REV. 1595, 1604–05 (2008) (explaining the controversy between the two methods as articulated by academia and law enforcement).

118. See *id.* at 1605.

119. Sheri Mecklenburg, Assistant United States Attorney in Chicago, was appointed Program Director and author for the study by the Illinois State Police. Dr. Roy Malpass of the University of Texas, El Paso, and Dr. Ebbe Ebbesen of the University of California, San Diego, both well-recognized experts in the area of eyewitness identification, contributed to the report. Mecklenburg, *supra* note 112, at 22–23.

120. See *id.* at vii.

121. *Id.* at v.

122. See *id.* at 45–47.

classes of victims and witnesses such as children, the elderly, and in cases involving cross-racial identifications, multiple perpetrators, and suspects who do not match the description because of a change in appearance.<sup>123</sup> These were factors in thousands of cases in Baltimore each year, forcing me to consider the ramifications of introducing a procedure that would diminish our ability to identify offenders.

The study also addressed logistical difficulties that I had anticipated. The difficulty in finding detectives who could administer the arrays, especially in locations outside of police facilities, such as hospitals, in residences, or on the street,<sup>124</sup> was highly relevant to the Baltimore Police Department. Furthermore, the “blind administrator” was antithetical to the team framework of most investigative squads.<sup>125</sup> These logistical problems caused delays in which contact with victims and witnesses was lost or compromised, and in some cases impeded the ability to charge the suspect in a timely fashion.<sup>126</sup> Especially in light of these findings, I remained confident that Baltimore was using a sound identification procedure, one that could be modified at the margins perhaps, but solid nonetheless.

The condemnations of the *Chicago Field Study*, which came to be known as the *Mecklenburg Report*, came fast and furious. Researchers asserted that there were gross errors and that the study failed to follow basic scientific protocols.<sup>127</sup> In a scathing critique, psychology professor and chairman of social sciences at Iowa State University, Gary L. Wells, stated the report was a disappointment and expressed concern that the design of the study did not permit any clear conclusions.<sup>128</sup> Wells went on to note that the most significant flaw in the study was the failure to use blind administrators in the simultaneous lineups, essentially exposing those presentations to the corrupting influence of police detectives.<sup>129</sup> Specifically, Wells charged:

It is important to recognize that the administration of a photographic lineup is a “conversation” between the lineup

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123. *See id.* at 7.

124. *Id.* at 59.

125. *See id.* at 57 (discussing law enforcement’s concerns with using a blind administrator).

126. *See id.* at 58.

127. *See* Winzeler, *supra* note 117, at 1607 (explaining the criticism of the Mecklenburg report).

128. *See* Gary L. Wells, *Gary L. Wells’ Comments on the Mecklenburg Report*, IOWA ST. UNIV. DEP’T OF PSYCHOL., [http://www.psychology.iastate.edu/~glwells/Illinois\\_Project\\_Wells\\_comments.pdf](http://www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf) (last visited Feb. 18, 2013).

129. *See id.*

administrator and the eyewitness over a set of photos. The interaction between the eyewitness and the lineup administrator yields a product. When the lineup administrator knows the “correct” answer, the product cannot be said to be purely the result of the eyewitness’ memory.<sup>130</sup>

Professor Wells added the caveat that he was not alleging a conscious effort on the part of the administrators (i.e., detectives) to influence the witnesses’ decisions. In closing, Professor Wells added his strongest condemnation:

There is one claim in the Mecklenburg Report that I can state unequivocally to be false, or at least terribly misleading. Specifically, it is stated on page 32 that “The protocols and forms, like the surveys, were viewed and approved by Professors Malpass, Ebbesen, Wells and Steblay.” Although I did examine the survey, I had no input to or knowledge of the design of the study. In fact, I was shocked when I learned of the failure of the study to include a double-blind control for the simultaneous lineups, a fact I learned only when I read the final report. Nancy Steblay clearly states that she too had no idea that this study would have this design flaw. I have asked Sherri Mecklenburg to correct this misperception, but no corrections have yet been made as far as I am aware.<sup>131</sup>

While the debate raged as to the legitimacy of the *Mecklenburg Report*, it was clear that the concerns about police influence had not been addressed or resolved. In November of 2007, the Baltimore Police Department published General Order J-9: Photographic Array Procedures.<sup>132</sup> The order changed language used in prior publications in an effort to confront the charges of police influence in the outcome of witness identification. The Policy Declaration of General Order J-9 stated, in part, “The identification procedures shall be conducted in a manner that promotes the reliability, fairness, and objectivity of the witness’ identification.”<sup>133</sup> In the very next section, General

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130. *Id.*

131. *Id.*

132. Balt. Police Dep’t General Order J-9: Photographic Array Procedures (Nov. 30, 2007).

133. *Id.*

Information, the order provided, “No member of the Department will influence or attempt to influence the identification of a subject in the showing of a photographic array.”<sup>134</sup> The Required Action section of the order, Item 4.1, directed, “Explain to the individual that you are going to show them a group of photographs. Avoid saying anything to the witness that may influence the witness’ selection.”<sup>135</sup> Item 4.2 specifically required the officer to read the statement that had been printed on the photo identification form, essentially advising that the array may or may not contain a picture of the subject of the investigation.<sup>136</sup> Additionally, the order directed the officer to have the witness “note all comments as to the identification of the subject in the Comments section of the form.”<sup>137</sup>

## VI. THE FUTURE OF EYEWITNESS IDENTIFICATION

Nearly twenty-five years after the publication of the first general order on procedures for conducting photographic arrays, Baltimore has continued to adapt its practices in light of developments in the field of criminal identification, case law, technology, and best practices. Gone are the Bertillon cabinets, lineup rooms, mug shot cameras, hand cut negatives, and thousands of hand-typed index cards. While much has been done, two lingering and perhaps insuperable liabilities remain.

First are the failings of man. The Baltimore Police Department has clearly demonstrated a commitment to the core recommendations and best practices in the presentation of photographic arrays. The design of the lineup, the uniformity and content of the instructions to the witness, and requiring a written post-identification statement are consistent with the consensus derived from recent research. Despite—and sometimes in spite of—the Department’s best efforts, police officers fail and make mistakes. While the Department was rewriting the general order on photo array procedures, the United States Court of Appeals for the Fourth Circuit was deciding the case of *United States v. Saunders*.<sup>138</sup> The case involved uniformed Baltimore patrol officers who apprehended two suspects (Rodney Saunders and Tavon Walker) after they robbed a liquor store at

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134. *Id.*

135. *Id.* at § 4.1.

136. *See id.* at § 4.2.

137. *Id.*

138. *United States v. Saunders*, 501 F.3d 384, 390–93 (4th Cir. 2007) (holding the six-photo array shown to the witness was impermissibly suggestive but upholding the defendant’s conviction because witness’s identification was not impermissibly tainted by the suggestiveness).

gunpoint. Saunders was captured as he attempted to flee in a vehicle.<sup>139</sup> At question in the case were the identification procedures and the photographic array shown to the witness.<sup>140</sup> The court ruled that the photo array was “impermissibly suggestive” and that the lineup administrator failed to instruct the witness that the lineup may or may not contain a photograph of the suspect.<sup>141</sup> Although this procedure was well established within departmental policy, sometimes police officers fail to adhere to the prescribed policy.

The second liability is more problematic. Police departments constantly find themselves dealing with accusations of improper influence and corruption. Although these accusations are sometimes painfully true, law enforcement agencies go to great lengths to prevent improper influence through training, accountability, and oversight. While in any human organization corruption may exist, we must acknowledge that the vast majority of police officers and detectives are honest and follow the rules. They investigate their cases in an ethical manner and use procedures that ensure equal justice to victims and the accused. More to the point, most detectives deliver photographic arrays using a simultaneous method without influence or prejudice. Research conducted following the *Chicago Field Study*, using computers to administer lineups, concluded that the simultaneous procedure resulted in the identification of the suspect in 25.5% of the cases and the sequential procedure resulted in the identification of the suspect in 27.3% of the cases.<sup>142</sup> The false identification rates were higher in simultaneous arrays, 18.1% compared to 12.2% in sequential arrays.<sup>143</sup>

Notwithstanding these results, a sustainable solution cannot be to rely solely on technology and the cold calculus of computers to replace detectives just because of allegations of impropriety and corruption. Technology has its role in the future of police work—whether it’s red light cameras, dashboard cameras, or videotaped interviews—but hardworking detectives of good faith should remain the backbone of law enforcement. We understand the flaws in our system, just as our predecessors did in nineteenth-century France, but the justice system—from police and prosecutors to defendants and

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139. *Id.* at 387–88.

140. *See id.* at 389.

141. *Id.* at 390–91.

142. GARY L. WELLS, NANCY K. STEBLAY & JENNIFER E. DYSART, AM. JUDICATURE SOC’Y, A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS 5–6, 13 (2011).

143. *Id.* at 13.

defense attorneys to judges and jurors—is a system of ordinary men and women. And that is as it should be.