

## INTERROGATION POLICIES

*Brandon L. Garrett* \*

### INTRODUCTION

In *Miranda v. Arizona*, the Supreme Court discussed at length actual police policies, manuals, and training on interrogations to explain the need for the well-known warnings the Court required to precede custodial interrogations.<sup>1</sup> The Court noted: “A valuable source of information about present police practices . . . may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.”<sup>2</sup> The Court cited to studies of police practices,<sup>3</sup> and focused on the Fred E. Inbau and John E. Reid manual on interrogations, first published in 1962, and still the authoritative treatise.<sup>4</sup> The Court described “tactics . . . designed to put the subject in a psychological state where his story is but

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\* © Brandon L. Garrett, 2014. Professor of Law, University of Virginia School of Law. Many thanks to Gregory DeClue, Richard Leo, Eve Brensike Primus, and James Trainum for their input, encouragement, and invaluable comments on earlier drafts. I particularly thank Christine Shu, Aurora Heller, and the students of the Virginia Innocence Project Student Group (VIPS), whose remarkable work and tireless efforts in obtaining policies from Virginia law enforcement made this research possible.

1. 384 U.S. 436, 444, 448–49 (1966); see Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 672 (1996) (“[T]he *Miranda* rights have been so entrenched in American popular folklore as to become an indelible part of our collective heritage and consciousness.”).

2. *Miranda*, 384 U.S. at 448; see Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 855 (2014) (discussing the manuals, reports, and texts on police interrogation practices relied upon by the Supreme Court in *Miranda*).

3. *Miranda*, 384 U.S. at 448 & n.8 (citing various studies of police practices, including Wayne R. LaFare, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L.Q. 331, 335 (1962)).

4. *Id.* at 448–49 & n.9 (“The methods described in Inbau & Reid, *Criminal Interrogation and Confessions* . . . have had rather extensive use among law enforcement agencies. . . .”); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 412 (2013) (“The Reid Method remains the leading training program in the United States and underlies most contemporary interrogation practice. . . .”). See generally FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2013) (describing methods of interrogation).

an elaboration of what the police purport to know already—that he is guilty.”<sup>5</sup> Those tactics ranged from “Mutt and Jeff” routines to outright deception and trickery.<sup>6</sup>

To this day, comparatively little is known about what goes on inside the interrogation room, or outside of the interrogation room for that matter, since police also have broad authority to conduct non-custodial interviews.<sup>7</sup> Cases of known false confessions provide detailed information about what can go wrong.<sup>8</sup> Professors Barry Feld and Richard Leo have done important research examining the record of videotaped interrogations.<sup>9</sup> Others, such as Professors Saul Kassin and Dick Reppucci conducted national and statewide surveys of law enforcement regarding training and practices.<sup>10</sup>

Still, less is known about written police interrogation policies. Police agencies adopt detailed manuals with procedures for a range of subjects, including arrest procedures, evidence handling, investigations, and use of force. No studies of written policies on interrogations have been conducted. One reason is that such law enforcement policies are not easy to obtain. Additionally, law enforcement agencies traditionally have not adopted detailed poli-

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5. *Miranda*, 384 U.S. at 450.

6. *Id.* at 452–55. The Supreme Court reexamined police interrogation policies in *Misouri v. Seibert*, 542 U.S. 600, 609–11 & n.2 (2004) (addressing police strategies for pre- and post-*Miranda* warning statements).

7. See Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. CHI. L. REV. DIALOGUE 116, 127–29 (2013) (discussing the issues with non-custodial and informal police interrogations).

8. *Id.* at 124–26. See generally Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. \_\_\_\_ (forthcoming 2015) (on file with author) (examining false confessions in DNA exoneration cases).

9. See Feld, *supra* note 4, at 419–20; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 222–23 (2006) (examining the relationship between interrogation tactics, false confessions, and wrongful convictions in juvenile cases); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268 (1996) (examining the “character, context and outcome of interrogation and confession in ordinary criminal cases”).

10. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 389–90 (2007); N. Dickson Reppucci et al., *Custodial Interrogation of Juveniles: Results of a National Survey in Police*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67, 67, 69 (G. Daniel Lassiter & Christian A. Meissner eds., 2010). See generally Jessica O. Kostelnik & N. Dickon Reppucci, *Reid Training and Sensitivity to Developmental Maturity in Interrogation: Results from a National Survey of Police*, 27 BEHAV. SCI. & L. 361 (2009) (exploring the different factors from the Reid technique that factor in to false confessions).

cies concerning interrogations.<sup>11</sup> Instead, many rely on informal and unwritten practices, including training on constitutional requirements.<sup>12</sup> Such training is considered specialized and often consists of outside training for detectives on interrogation techniques, including training through organizations specializing in interrogation.<sup>13</sup> One organization that is particularly known for such training is John E. Reid & Associates, Inc., which publishes the Inbau & Reid treatise.<sup>14</sup> However, in recent years, many more law enforcement agencies have revisited written policies on interrogations to adopt policies to record interrogations and in the process revisited training accompanying such policies.<sup>15</sup> They have done so in response to high-profile false confessions brought to light by DNA testing, specifically in death penalty cases.<sup>16</sup> Those cases have shown how confessions can be contaminated; without an electronic recording of the entire interrogation, it can be difficult to know whether the suspect actually knew detailed information about the crime, or whether law enforcement provided that information.<sup>17</sup> Policies and practices of recording entire interrogations have been adopted as a technique to help prevent contaminated false confessions.<sup>18</sup> Such practices, as well as an increasing number of state laws and model policies requiring

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11. Kassin et al., *supra* note 10, at 382.

12. See Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1526 (2008) (describing manual containing constitutional implications which has become the essence of interrogation techniques).

13. See *Training Programs*, JOHN E. REID & ASSOCS., INC., [http://www.reid.com/training\\_programs/r\\_training.html](http://www.reid.com/training_programs/r_training.html) (last visited Feb. 27, 2015); *Books*, JOHN E. REID & ASSOCS., INC., <http://www.reid.com/store2/list.html?searchtype=book> (last visited Feb. 27, 2015); see also Weisselberg, *supra* note 12, at 1533–36.

14. *Id.*

15. See Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175, 176 (2006) [hereinafter Sullivan, *The Time Has Come*] (noting trend toward requiring custodial suspect recordings); *id.* at 182–87 (listing agencies that record interrogations); Weisselberg, *supra* note 12, at 1530–37; Peter Carlson, *You Have the Right to Remain Silent . . . But in the Post-Miranda Age, The Police Have Found New and Creative Ways to Make You Talk*, WASH. POST, Sept. 13, 1998, at 8–9.

16. See Garrett, *Contaminated Confessions Revisited*, *supra* note 8 at \_\_\_ (studying the wave of exoneration by DNA of innocent people who falsely confessed, including three cases where the individual was sentenced to death).

17. See *id.* at \_\_\_ (explaining the overwhelming prevalence of confession contamination in known false confessions and future need for recordings).

18. See Sullivan, *The Time Has Come*, *supra* note 15, at 178–80 (discussing benefits of recording police interrogations).

recording police interrogations, have renewed interest in the subject of interrogation policies.<sup>19</sup>

This symposium essay examines Virginia interrogation policies as a case study. There was little information available about how many Virginia agencies record entire interrogations, nor was there information about the actual written policies adopted by Virginia agencies. However, there was no good reason to think that many Virginia agencies recorded interrogations. The Virginia Department of Criminal Justice Services (“DCJS”) did not have a model policy regarding interrogation procedures, aside from a portion of a policy on handling juvenile suspects.<sup>20</sup> A survey conducted in 2009 of Virginia agencies found that only a handful of agencies required recording of interrogations.<sup>21</sup>

This symposium essay provides a first look at interrogation policies across a state. Students at the University of Virginia School of Law Virginia Innocence Project Student Group (“VIPS”) obtained responses to Freedom of Information Act (“FOIA”) requests from over 180 law enforcement agencies, 116 of which provided interrogation policies.<sup>22</sup> Few agencies require recording of entire interrogations as a matter of policy; 8% did so (or 9 of 116). One-half (or 58 of 116) of the policies obtained, made recording an option, but did not encourage it or provide guidance on how to record.<sup>23</sup> Only a handful of policies provided any guidance on how to conduct juvenile interrogations. None of the policies contained guidance on interrogation of intellectually disabled individuals. Only a handful said anything about how to properly conduct an

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19. See Garrett, *Contaminated Confessions Revisited*, *supra* note 8, at \_\_\_ (“Fourteen states and the District of Columbia now require recording of at least some interrogations in statutes with varying provisions concerning admissibility consequences of failure to do so, while five others do so as a result of judicial rulings; and still other jurisdictions, including federal law enforcement agencies, now record interrogations pursuant to official memoranda and policies.”); see also Thomas P. Sullivan, *Arguing for Statewide Uniformity in Recording Custodial Interrogations*, CRIM. JUST., Spring 2014, at 21, 24–25.

20. DCJS MODEL POLICIES: JUVENILE PROCEDURES (2008), available at <http://www.dcjs.virginia.gov/cple/sampleDirectives/>

21. JON GOULD, THE INNOCENCE COMMISSION; PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 150–52 & tpls 4.2 & 4.3 (2008). Of 108 agencies surveyed, only 4% always required recording of interrogations, and 84% stated they record interrogations rarely, never, or only occasionally. *Id.*

22. This article analyzes research obtained through FOIA requests to Virginia law enforcement agencies. The FOIA material is confidential and the author has all information on file. The law enforcement responses are marked in footnotes as “FOIA Responses” and Professor Garrett’s compilation of the research is marked as “FOIA Data.”

23. See *infra* Part II.

interview, or cautioning against feeding facts through leading questions. Over one-third of the policies (41 of 116) were very brief and chiefly noted that the Miranda warnings must be given. In addition, 58 agencies responded that they lacked any written policies on interrogations.

Thus, despite adoption of recording of interrogations as a potential option by many agencies, very few agencies actually require doing so as a matter of policy, and few provide guidance on how to record, much less on the proper conduct of interrogations.<sup>24</sup> This is despite the notable role false confessions have played in high profile reversals of convictions in Virginia, including in the death row case of Earl Washington, Jr.<sup>25</sup> Confessions continue to provide central evidence in capital cases in Virginia, as well as in less serious cases, such as in juvenile cases.<sup>26</sup> A real overhaul of interrogation policy and practice is necessary, to safeguard evidence in the most serious death penalty cases, and in far more mundane cases, such as those involving vulnerable juveniles. Jurisdictions that do record interrogations and that have created model policies can provide useful models for those jurisdictions currently lacking such policies.<sup>27</sup>

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24. See Spencer S. Hsu, *Interrogation Policies Often Lacking in Virginia*, WASH. POST, Sept. 7, 2014, at C1.

25. Joaquin Sapien, *Death Penalty Report Cites Value of Taping Interrogations*, PROPUBLICA (May 7, 2014, 10:32 AM), <http://www.propublica.org/article/death-penalty-report-cites-value-of-taping-interrogations>.

26. See Frank Green, *Survey: Virginia Law Enforcement Agencies Lack Written Interrogation Policies*, RICH. TIMES-DISPATCH (Sept. 7, 2014) [hereinafter Green, *Survey*] [http://www.timesdispatch.com/news/state-regional/survey-virginia-law-enforcement-agencies-lack-written-interrogation-policies/article\\_dc12b96d-be8f-53c2-a4a2-18c172ad25dc.html](http://www.timesdispatch.com/news/state-regional/survey-virginia-law-enforcement-agencies-lack-written-interrogation-policies/article_dc12b96d-be8f-53c2-a4a2-18c172ad25dc.html).

27. See, e.g., N.Y. State Div. of Criminal Justice Serv., *Recording of Custodial Interrogations, Model Policy* (2013) (model policy concerning recording interrogations); Int'l Ass'n of Chiefs of Police, *Interviewing and Interrogating Juveniles Model Policy* (May 2012) (detailed policy concerning questioning of juveniles); Int'l Ass'n of Chiefs of Police, *Electronic Recording of Interrogations and Confessions Model Policy* (Feb. 2006) (detailed model policy providing procedures for electronic recording of interrogations); Broward Cnty. Sheriff's Office, G.O. 01-33 (Nov. 17, 2001) (detailed policy concerning interrogation of suspects with developmental disabilities, including guidelines for interrogation and post-confession analysis) (on file with author).

## I. INTERROGATION POLICIES, FALSE CONFESSIONS, AND THE VIRGINIA DEATH PENALTY

### A. *The Earl Washington, Jr. Case*

The problem of false confessions became particularly salient in Virginia due to one of the best-known false confessions in the country, the case of Earl Washington, Jr., the only death row inmate exonerated by DNA testing in Virginia.<sup>28</sup> Washington came within nine days of an execution, and he was in prison for eighteen years before DNA evidence exonerated him.<sup>29</sup> The case involved the rape and murder of a young woman in the small town of Culpeper, Virginia.<sup>30</sup> Before she died from her wounds, she told police that a single black man, who she did not know, had attacked her.<sup>31</sup> The local police had no suspects, but a year later, Earl Washington, Jr., a twenty-three-year-old black, borderline intellectually disabled, farmhand, came to the attention of police in a neighboring county after a minor assault.<sup>32</sup> Always agreeable, Washington readily admitted to committing the murder.<sup>33</sup>

When questioned about four other unsolved crimes, Washington also “confessed,” agreeing with what the police said to him each time.<sup>34</sup> Borderline intellectually disabled people can be quite compliant with authority.<sup>35</sup> In those four cases, the victims came forward or other evidence definitively cleared Washington; either

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28. Frank Green, *Study: More Innocent People Sentenced to Death Than Exonerated*, RICH. TIMES-DISPATCH (Apr. 28, 2014, 2:57 PM), [http://www.timesdispatch.com/news/study-more-innocent-people-sentenced-to-death-than-exonerated/article\\_ffbe0810-cf06-11e3-8712-0017a43b2370.html](http://www.timesdispatch.com/news/study-more-innocent-people-sentenced-to-death-than-exonerated/article_ffbe0810-cf06-11e3-8712-0017a43b2370.html).

29. Lance Griffin, *Seeking the Truth*, DOTHAN EAGLE, Aug. 26, 2007.

30. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 29, 145 (2011) [hereinafter GARRETT, CONVICTING THE INNOCENT]; see also MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR. xi (2003).

31. EDDS, *supra* note 30, at xi.

32. *Id.* at xi, 25, 35.

33. See Jim Spencer, *Quiet Man Has an Eloquent Story to Tell*, DAILY PRESS (Feb. 14, 2001), [http://articles.dailypress.com/2001-02-14/news/0102140032\\_1\\_death-penalty-earl-washington-washington-s-life](http://articles.dailypress.com/2001-02-14/news/0102140032_1_death-penalty-earl-washington-washington-s-life); see also EDDS, *supra* note 30, at 37–38, 206.

34. EDDS, *supra* note 30, at 36–37, 42–43.

35. See Brooke A. Masters, *Misssteps on Road to Injustice*, WASH. POST, Dec. 1, 2000, at A1; see also Lisa Provence, *Wrong(ed) Man: Earl Washington Awarded \$2.25 Million*, THE HOOK (May 11, 2006, 7:00 AM), <http://www.readthehook.com/79342/news-wronged-man-earl-washington-awarded-225-million> (noting Professor Richard Leo’s discussion of such behavior at the post-exoneration civil rights trial).

no charges were brought or the charges were dismissed.<sup>36</sup> But the police then asked him about the high-profile unsolved murder case in neighboring Culpeper County.<sup>37</sup> Washington agreed he committed that crime as well.<sup>38</sup> Knowing far more about the case, the two officers working on the Culpeper case questioned him.<sup>39</sup> This interrogation was not recorded.<sup>40</sup> The officers had the ability to audio record such interrogations; they had recorded interviews with other suspects, but tellingly chose not to do so with Washington.<sup>41</sup>

Most of the typed confession statement they prepared, and had Washington sign, consisted of him saying “[y]es sir” in response to their questions.<sup>42</sup> However, in a key passage, the typed statement read as follows:

*Officer 1:* Did you leave any of your clothing in the apartment?

*Washington:* My shirt.

*Officer 1:* The shirt that has been shown you, it is the one you left in apartment?

*Washington:* Yes sir.

*Officer 2:* How do you know it is yours?

*Washington:* That is the shirt I wore.

*Officer 1:* What makes it stand out?

*Washington:* A patch had been removed from the top of the pocket.

*Officer 2:* Why did you leave the shirt in the apartment?

*Washington:* It had blood on it and I didn’t want to wear it back out.

*Officer 2:* Where did you put it when you left?

*Washington:* Laid it on top of dresser drawer in bedroom.<sup>43</sup>

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36. See, e.g., Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1091–92 (2001).

37. *Id.* at 1092.

38. See *id.*

39. *Id.* at 1093.

40. *Id.*

41. See *id.* at 1092–93; Sullivan, *The Time Has Come*, *supra* note 15, at 178.

42. See Statement of Earl Washington, Jr. at 148–49, *Washington v. Commonwealth*, 323 S.E.2d 577 (Va. 1984) (No. 840776) [hereinafter statement of Earl Washington, Jr.]; see also Freedman, *supra* note 36, at 1092–93.

43. Statement of Earl Washington, Jr., *supra* note 42, at 149.

The central evidence at his trial was this statement.<sup>44</sup> Washington appeared to volunteer that he left a shirt at the victim's apartment.<sup>45</sup> This was not information police had previously made public.<sup>46</sup> While he appeared to know about an identifying characteristic, a torn-off patch, the detectives were holding the shirt in front of him during the interrogation.<sup>47</sup> But Washington also appeared to know another detail: where the shirt had been left, in a dresser drawer in the bedroom.<sup>48</sup> Finally, Washington said he left it because it "had blood on it."<sup>49</sup> However, the shirt no longer "had blood on it," since the stained spots had been cut out for analysis by the state crime lab.<sup>50</sup> A borderline intellectually disabled person would not be expected to guess all of that.

When Washington was asked truly open-ended questions during the interrogation, however, he guessed wrong.<sup>51</sup> When asked the race of the victim, for example, he said black: she was in fact white.<sup>52</sup> He described stabbing the victim a few times: she was stabbed thirty-eight times.<sup>53</sup> He described the victim as short: she was tall.<sup>54</sup> He said no one else was there: the victim's two young children were there.<sup>55</sup> Police asked Washington to take them to the crime scene: he led them all around Culpeper.<sup>56</sup> When police drove him past the victim's building several times, he still did not identify it.<sup>57</sup> Finally, when in the victim's apartment complex, police asked him to point to her building and he pointed to "the ex-

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44. See Freedman, *supra* note 36, at 1094.

45. *Washington v. Wilmore*, 407 F.3d 274, 277 (4th Cir. 2005).

46. *Id.*

47. *Id.* at 276–77.

48. *Washington v. Commonwealth*, 323 S.E.2d 577, 582–83 (Va. 1984).

49. *Id.* at 582.

50. *Id.* at 587.

51. See Stacy Du Clos, *Lessons from State v. Lawson: The Reliability Framework Applied to Confessions and Admissions*, 18 LEWIS & CLARK L. REV. 227, 260–61 (2014) (“[I]n the now well-known case of exoneree Earl Washington, Jr., Mr. Washington made several bad guesses in response to open-ended questions.”).

52. Freedman, *supra* note 36, at 1093 (“[T]he interrogating officer . . . testified that Mr. Washington initially wrongly identified Ms. Williams as having been black, and only corrected the statement on being re-asked the question.”).

53. See *id.*

54. *Id.* (noting that the victim was 5'8”).

55. See *id.* at 1094.

56. See Transcript of Record at 622–23, *Washington v. Commonwealth*, 323 S.E.2d 577 (Va. 1984) (No. 840776).

57. *Id.* at 623–25.

act opposite end;” when the officer pointed to her apartment and asked if that was it, he finally “said that it was.”<sup>58</sup>

The prosecutor emphasized in closing that the police were not “lying” and “didn’t suggest to him” how the crime had been committed, and that Washington knew exactly how the crime had been committed.<sup>59</sup> The prosecutor continued, “Now, how does somebody make all that up, unless they were actually there and actually did it? I would submit to you that there can’t be any question in your mind about it, the fact that this happened and the fact that Earl Washington Junior did it.”<sup>60</sup> During a brief penalty phase, the jury readily sentenced Washington to death.<sup>61</sup> After the prosecutor described the gruesome murder in detail, the defense gave a closing statement that was only a paragraph long, chiefly reminding the jury that “this is Earl Washington’s day in Court and you must do him justice.”<sup>62</sup>

On appeal, the Supreme Court of Virginia ruled in 1984 that there were no procedural problems with the trial, and found his confession to be voluntary and properly admitted at trial.<sup>63</sup> The court noted: “Here, the defendant identified the shirt as his own by pointing out a unique characteristic he recognized, a place where a patch had been ripped from a pocket.”<sup>64</sup> The 1600 page habeas petition filed in the Virginia court was dismissed without even a hearing, and the Supreme Court of Virginia summarily denied review, following its usual practice.<sup>65</sup> The Fourth Circuit later dismissed the federal habeas petition, emphasizing “Washington had supplied without prompting details of the crime that were corroborated by evidence taken from the scene and by the observations of those investigating the [victim’s] apartment.”<sup>66</sup> As a final effort, his lawyers asked the governor for a pardon and for DNA testing, which by 1993, was finally available for use in crim-

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58. *Id.* at 625.

59. *Id.* at 722–24.

60. *Id.* at 724.

61. *Id.* at 810–11.

62. *Id.* at 801–02.

63. *Washington v. Commonwealth*, 323 S.E.2d 577, 583–86 (Va. 1984).

64. *Id.* at 587.

65. Freedman, *supra* note 36, at 1098, 1099 & n.78.

66. *Washington v. Murray*, 4 F.3d 1285, 1292 (4th Cir. 1993).

inal cases.<sup>67</sup> The test results excluded Washington, but citing to the confession evidence, in January 1994, the governor gave him only partial clemency: he would not be executed, but would spend his life in prison.<sup>68</sup> The governor again cited to the facts in the confession statement: “[He] had knowledge of evidence relating to the crime which it can be argued only the perpetrator would have known.”<sup>69</sup>

Journalists in the late 1990s uncovered that a second DNA test conducted in 1993 also excluded Washington.<sup>70</sup> It was not until 2000, however, that new DNA tests were conducted, which confirmed his innocence, as well as matching an individual in the federal DNA databank (who years later pleaded guilty to the murder) and a pardon was granted.<sup>71</sup> Only in 2001, was Earl Washington, Jr., finally freed.<sup>72</sup> The DNA tests in 2000 were initially botched, delaying his exoneration, and as a result, Washington’s case generated an important audit into the Virginia crime lab.<sup>73</sup> Washington’s case also helped to encourage Virginia to pass a statute granting a right to DNA testing and relief based on new evidence of innocence.<sup>74</sup> Years later, it came out that one of the officers admitted that those key facts were likely not volunteered by Washington, but rather were told to him by the police.<sup>75</sup> The confession was contaminated; an innocent man could not have known those details about the murder.

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67. Freedman, *supra* note 36, at 1099–1100.

68. Governor Lawrence Douglas Wilder, List of Pardons, Commutations, Reprives, and Other Forms of Clemency: Conditional Pardon of Earl Washington, Jr., S. DOC. NO. 2, Reg. Sess. (Va. 1984).

69. *Id.*

70. See *The Case for Innocence: Four Cases*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/> (last visited Feb. 27, 2014).

71. See GARRETT, CONVICTING THE INNOCENT, *supra* note 30, at 30; Freedman, *supra* note 36, at 1103; Provenca, *supra* note 35.

72. Provenca, *supra* note 35.

73. See James Dao, *Lab’s Errors Force Review of 150 DNA Cases*, N.Y. TIMES (May 7, 2005), [http://www.nytimes.com/2005/05/07/national/07dna.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/05/07/national/07dna.html?pagewanted=print&_r=0) (noting that the independent audit, called for by former Governor Mark Warner, uncovered numerous problems in the way the DNA tests were analyzed and conducted in the *Williams* case).

74. Frank Green, *Cuccinelli’s Office Considers Legislation to Loosen 21-Day Rule*, RICH. TIMES-DISPATCH [http://www.tim.esdispatch.com/news/cuccinelli-s-office-considers-legislation-to-loosen-day-rule/article\\_25dc1768-c1ab-579d-b176-de8e7bebf47b.html](http://www.tim.esdispatch.com/news/cuccinelli-s-office-considers-legislation-to-loosen-day-rule/article_25dc1768-c1ab-579d-b176-de8e7bebf47b.html) (last updated July 26, 2014).

75. GARRETT, CONVICTING THE INNOCENT, *supra* note 30, at 30.

Washington's case is not alone, not even in Virginia. Take, for example, the high-profile Norfolk Four cases in which confessions were later undermined by DNA tests.<sup>76</sup> In those cases, the then-Governor of Virginia granted partial clemency, but not full exonerations.<sup>77</sup> Another well-known Virginia DNA exoneration, that of David Vasquez, involved a contaminated confession in which detectives could be heard supplying facts to Vasquez on the recorded portion of the interrogation.<sup>78</sup> The confession of Curtis Jasper Moore led to his conviction in 1978 for a murder, but a federal judge reversed the conviction in 1983, finding that police had coerced this mentally ill suspect.<sup>79</sup> It was not until 2008, two years after Moore had died, that DNA testing cleared Moore and implicated the actual culprit.<sup>80</sup> Despite these high-profile false confession cases and others not involving DNA tests, there is still no requirement in Virginia that interrogations be recorded.<sup>81</sup>

### B. *The Virginia Death Penalty and Interrogation Policies*

An important American Bar Association report assessing the state of the death penalty in Virginia focused on problematic interrogations and the dangers of false confessions as one of the many areas of improvement urgently needed in Virginia.<sup>82</sup> This report noted that only a handful of agencies in Virginia reported videotaping interrogations.<sup>83</sup> Even those that did have a practice of videotaping interrogations did not necessarily adopt firm rules on the subject. For example, the ABA noted how “[t]he Arlington

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76. See TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

77. See, e.g., Tom Jackman & Anita Kumar, *3 of 'Norfolk 4' Conditionally Pardoned in Rape, Killing*, WASH. POST, Aug. 7, 2009, at A1.

78. Garrett, *Contaminated Confessions Revisited*, *supra* note 8, at 64–65.

79. See Green, *Survey*, *supra* note 26.

80. *Id.*

81. See AM. BAR ASSOC., *THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT 55* (Aug. 2013) [hereinafter ABA REPORT], available at [http://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/va\\_complete\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf).

82. *Id.* at xiii–iv.

83. *Id.* at 55 (citing a report by the Northwestern University School of Law Center for Wrongful Convictions, and finding that these agencies record at least some interrogations: the Alexandria Police Department, the Chesterfield County Police Department, the Clarke County Sheriff, the Fairfax Police Department, the Loudoun County Sheriff, the Norfolk Police Department, the Richmond Police Department, the Stafford County Sheriff, and the Virginia Beach Police Department).

County Police Department's custodial interrogation policy states that '[a]ll suspect and defendant interviews shall be recorded by CIS detectives on the iRecord system,' a digital video recording tool."<sup>84</sup> But, the ABA noted that the "policy does not specify whether the entirety of the interrogation, including any waiver of rights must be recorded."<sup>85</sup> In response to a follow-up, "the department stated that video-recording of the suspect's waiver of rights and confession is 'encouraged but not mandatory.'"<sup>86</sup> Other departments identified as possibly having recording requirements appeared to similarly make recording optional, or perhaps encouraged but not necessarily mandatory.<sup>87</sup>

Nevertheless, confession evidence continues to play an important role in capital cases in Virginia.<sup>88</sup> Quite a few recent Virginia capital trials have involved confession evidence, or confessions by co-defendants. For example, Michael Hash, who was exonerated when a federal judge granted habeas corpus based on new evidence of innocence, was a case that also involved confessions taken by Culpeper police.<sup>89</sup>

In general, death penalty cases and death eligible cases have often involved confession evidence.<sup>90</sup> For example, John J. Donohue's study of the Connecticut death penalty found that 59% of the death eligible murders since 1973 involved confession statements made to the authorities, and in addition, 43% involved incriminating statements to third parties.<sup>91</sup> A study by David C. Baldus, George Woodworth, and Charles A. Pulaski, found that

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84. *Id.* at 56.

85. *Id.*

86. *Id.*

87. *See, e.g., id.*

88. *See Current Death Row Inmates in Virginia*, PRODEATHPENALTY.COM, <http://www.prodeathpenalty.com/virginia/row.html> (last visited Feb. 27, 2015).

89. *See Michael Hash*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3977> (last visited Feb. 27, 2015).

90. *See False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions> (last visited Feb. 27, 2015).

91. John J. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 26, 26–27 n.35 (Stanford L. Sch., John M. Olin Program in L. & Econ., Working Paper Series, Paper No. 464 2014) (describing how 121 of the 205 death eligible cases involved confession statements to the authorities, while 88 involved incriminating statements to a third party). Of the 9 death sentences in Connecticut since 1973, 5 involved confession statements; 3 involved self-incriminating statements to third parties. *Id.*

29% of cases in a sample of 1066 Georgia murder and voluntary-manslaughter cases involved incriminating statements by the defendant or a co-perpetrator.<sup>92</sup> There are also reasons to think that more coercive interrogation tactics may be used in death penalty investigations; for example, as Sam Gross has described, police may also be more intent on conducting lengthy interrogations in capital cases.<sup>93</sup> Half, or ten of the twenty DNA exonerations of persons who had been sentenced to death nationwide have involved false confessions.<sup>94</sup>

## II. STUDY OF VIRGINIA INTERROGATION POLICIES

### A. *The Virginia Innocence Project Student Group—Freedom of Information Act Project*

To learn more about actual law enforcement policies in Virginia, VIPS, a student group at the University of Virginia School of Law, in a labor-intensive project lead initially by Christine Shu, sent a set of FOIA requests in early 2013 to all Virginia law enforcement agencies. Their hard work and diligent follow-up to those requests resulted in a large collection of 116 policies regard-

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92. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 67 n.10, 549, 562 (1990). Descriptions of the type of evidence was not a main focus of the study, and no strength of evidence data was coded in the first of the two studies examining procedural reform. *See id.* at 477 n.72. Those studies focused on cases in which there was a murder conviction, and where therefore the evidence was presumably stronger. *See id.* However, defendant cooperation with authorities, which included confession, was associated with death sentencing. *Id.* at 73 tbl.1; *see also id.* at 193 n.44. A study of the death penalty in Maryland found that 18% of the cases involved a “full confession to first-degree murder” and that 6% involved a “full confession to second-degree murder,” while 15% involved a “full confession to aggravating circumstances”; over 9% of the cases involved a jailhouse informant. RAYMOND PATERNOSTER ET AL., FINAL REPORT: AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION tbl.9 (2003), *available at* [http://www.aclu-md.org/uploaded\\_files/0000/0376/md\\_death\\_penalty\\_race\\_study.pdf](http://www.aclu-md.org/uploaded_files/0000/0376/md_death_penalty_race_study.pdf). For the effect of the defendant making a full confession on death sentencing in Maryland, *see id.* at tbls. 11A, 11E, 12A, 12E, 13A & 13F.

93. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 478–79, 485 (1996) (noting also that “false confessions are a much more common cause of errors for homicides than for other crimes”); *see Illinois*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/illinois-1> (last visited Feb. 27, 2015). In the cases of the “Death Row Ten” whose exonerations accompanied the end of the death penalty in Illinois, all ten had alleged that their confessions were the product of police torture. Welsh S. White, *Confessions in Capital Cases*, U. ILL. L. REV. 979, 988 n.52 (2003).

94. Garrett, *Contaminated Confessions Revisited*, *supra* note 8, at 5 n.14.

ing interrogations. Their work also provided a collection of policies concerning other important subjects, including eyewitness identifications, which I have examined elsewhere.<sup>95</sup>

Fifty-eight agencies responded to the FOIA that they did not have policies on interrogations.<sup>96</sup> Of those, fifteen were sheriff's offices that did not have law enforcement responsibilities and therefore did not conduct interrogations.<sup>97</sup> Several agencies that lacked policies on interrogations, however, did provide policies concerning the maintenance of interview rooms at their police stations, or policies concerning police cruiser cameras or body cameras worn by officers.<sup>98</sup> Eleven agencies declined to provide interrogation policies, and one more heavily redacted its policy, citing to inapplicable FOIA exceptions.<sup>99</sup> None of the names of the particular agencies adopting particular policies, or from which policy language is quoted are included, unless the agency in question has spoken publicly about its policy separate from this study. The VIPS Group had agreed to keep agency names anonymous when requesting these policies using FOIA requests.

### B. *Study Findings*

What did these interrogation policies look like? About one-third of the 116 policies, or 41 of them, were extremely brief and chiefly noted that *Miranda* warnings must be given, that a juvenile's parents or guardians should be notified, and that basic features of the interrogation should be documented, such as the *Miranda* waiver and the time, place, and duration of the interrogation.<sup>100</sup>

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95. See generally Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1 (2014) (examining, of 201 agencies that responded, eyewitness identification policies supplied by 144 agencies).

96. Brandon L. Garrett, Data Obtained Through Responses to Freedom of Information Act Requests [hereinafter FOIA Data] (on file with author).

97. *Id.*

98. *Id.*

99. *Id.* Two agencies responded but stated that they were still in the process of locating and sending their policies. The agencies that did not comply with the FOIA request typically cited to VA. CODE ANN. § 2.2-3706(2), which relates to criminal records and does not apply to interrogation related policies, and VA. CODE ANN. § 2.2-3705.2(6), which applies in part to "operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques." VA. CODE ANN. §§ 2.2-3705(6), 2.2-3706(2) (Repl. Vol. 2014). Policies for interviewing and interrogating suspects do not involve "surveillance techniques."

100. FOIA Data, *supra* note 96.

Those barebones policies are no doubt supplemented by additional legal training provided to officers, as well as training in interrogation techniques, and further work to study and improve those curricula would be quite useful. Perhaps it is unsurprising that the *Miranda* rule was the most common subject of these policies; 106 of 116 included some statement that the *Miranda* warnings must be given.<sup>101</sup> The few others typically noted that “all constitutional precautions” must be taken.<sup>102</sup>

Police manuals contain detailed rules on any number of subjects, ranging from use of force, to maintenance of equipment, to collection of evidence. In general, interrogation policies were far less detailed and provided far less guidance than policies concerning eyewitness identifications, which are the subject of a Virginia DCJS model policy, and which all Virginia agencies must have in writing as required by a state statute.<sup>103</sup> For almost a decade, policymakers in Virginia have updated model policies, issued reports, and studied ways to improve lineup procedures.<sup>104</sup> The result has been some real progress, although the vast majority of agencies have not adopted the most up-to-date model policy and have real flaws in their eyewitness identification procedures. However, those mixed results are many steps ahead of progress that has been made in the interrogation area.

There is no legislation, nor a model policy on the subject of police interrogations in Virginia. As noted, there is a model policy on the handling of juvenile suspects generally.<sup>105</sup> That model policy counsels videotaping of interrogations of juvenile suspects.<sup>106</sup> The policy states: “Officers/Investigators shall electronically rec-

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101. *Id.*

102. University of Virginia School of Law Virginia Innocence Project Student Group, Responses to Freedom of Information Act Requests [hereinafter FOIA Responses] (on file with author).

103. VA. CODE ANN. § 19.2-390.02 (Repl. Vol. 2008); see VA. DEPT OF CRIM. JUSTICE SERVS., GENERAL ORDER 2-1, in REPORT ON THE LAW ENFORCEMENT LINEUP POLICY SURVEY AND REVIEW 26, 28–30, 33–34 (2012), available at [http://www.dcjs.virginia.gov/research/documents/LawEnforceLineup\\_final.pdf](http://www.dcjs.virginia.gov/research/documents/LawEnforceLineup_final.pdf).

104. See, e.g., VA. STATE CRIME COMM'N, LAW ENFORCEMENT LINEUPS (2010) (citing H.B. 207, 2010 Gen. Assemb., 2010 Sess. (Va. 2010)), available at <http://vsc.virginia.gov/documents/Law%20Enforcement%20Lineups.pdf>.

105. VA. DEPT OF CRIM. JUSTICE SERVS., MODEL POLICIES FOR VIRGINIA LAW ENFORCEMENT AGENCIES: JUVENILE PROCEDURES No. 2-29 (Dec. 15, 2008), available at <http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm>.

106. *Id.* at 2-29.10.

ord in their entirety *custodial interrogations* conducted at law enforcement or corrections facilities. Video and audio recording is preferred. Audio-only recording is acceptable when video capabilities are unavailable.”<sup>107</sup>

However, the model policy then indicates that agencies may choose to limit the situations in which recording is required.<sup>108</sup>

### C. *Electronic Recording of Interrogations*

Most Virginia law enforcement agencies do not require recording, even where practical or feasible, or even for selected crimes. Very few do so. Only nine of the 116 policies required electronic recording in some form.<sup>109</sup> Of those, only four outright required recording.<sup>110</sup> The others stated that it should be done where feasible.<sup>111</sup> For example, one stated that “These efforts should be audio or videotaped whenever possible.”<sup>112</sup> Another required officers to electronically record custodial interviews of felony suspects at places of detention whenever feasible.<sup>113</sup> One policy stated, “It is encouraged that all Interrogations be recorded, especially if it is probable that they will be used in court later.”<sup>114</sup>

Two of the recording policies limit recording to specified major crimes; one, for example, required that “suspect interviews in the crimes specified below will be videotaped in their entirety” and listing a range of serious offenses, from homicide, to sexual assaults, to persons suspected of committing multiple burglaries or larcenies.<sup>115</sup> Another stated, “All custodial interviews will be recorded via audio or audiovisual means.”<sup>116</sup> A third stated simply,

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107. *Id.*

108. *Id.* (“NOTE: Department should indicate here all situations in which electronic recording of interrogations is required. For example, the Department may record ALL interrogations in any matter involving a crime, or may record only interrogations in matters involving felony crimes, or may record interrogations in matters involving specified crimes.” (bold omitted)).

109. FOIA Data, *supra* note 96.

110. *Id.*

111. *Id.*; FOIA Responses, *supra* note 102.

112. FOIA Responses, *supra* note 102.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

“All custodial interviews will be audio taped at a minimum, videotape is preferred if available.”<sup>117</sup>

However, half of the policies, or 58 of the 116 policies, made recording optional in some fashion.<sup>118</sup> I should also note that 44 of the 116 policies did not say anything about the subject of recording or documenting interrogations, which is also highly troubling.<sup>119</sup> To be sure, according to the ABA assessment, at least a few departments that have policies with that language do make an informal practice of recording some categories of interrogations.<sup>120</sup> Several agencies have informed me of such informal policies of videotaping all interrogations. It may be that something more like fifteen to twenty agencies in Virginia routinely videotape interrogations if the informal practice extends somewhat more broadly than the written policies.

However, the text of the policies making recording optional typically did not provide either encouragement to record entire interrogations, or direction on how to do so.<sup>121</sup> Those policies typically directed officers only to document the provision of *Miranda* warnings and the time and duration of the interrogation, without providing any suggestion that officers may document entire interrogations or how they should do so.<sup>122</sup>

A large number of policies (34 of them) stated using the same boilerplate language that: “[D]etailed notes or a recorded tape shall be made of the interrogation for court use giving time, date, location, deputies present, waiver of rights, and the time the interrogation ended.”<sup>123</sup> Those policies implied recording can be an option, but perhaps just limited to recording bare information about the suspect, the time and date, and documenting the *Miranda* waiver. In addition, several policies stated:

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117. *Id.*

118. FOIA Data, *supra* note 96.

119. *Id.*

120. See ABA REPORT, *supra* note 81, at 55.

121. FOIA Responses, *supra* note 102 (describing policies but leaving out any detail regarding how to record interview and showing ambivalence towards preferring recording over taking notes).

122. *Id.*

123. FOIA Data, *supra* note 96; FOIA Responses, *supra* note 102.

Recording confessions:

- a. Tape record
- b. Handwritten
- c. Memorization
- d. Video<sup>124</sup>

Why “memorization” is an appropriate way to document an entire interrogation is not at all clear. One particularly candid policy emphasized that recording was chiefly for obtaining a confession statement itself and not to record entire interrogations.<sup>125</sup> The policy did emphasize in all caps: “DO NOT TURN OFF AND ON DURING QUESTIONING. THIS WILL HURT YOU IN THE COURT PROCEDURES.”<sup>126</sup> However, the policy then cautioned:

Prior to recording anything on tape, you will have already interviewed the victim/witness or suspect and know what they have to say. You should write down notes of the important information. This will allow for a smoother taped statement or confession. This will also allow you to INTERROGATE any suspect prior to the taped confession.<sup>127</sup>

The policy added: “NOTE: YOU NEVER WANT TO HAVE THE INTERROGATION PROCESS ON TAPE. ONLY THE CONFESSION!”<sup>128</sup> The policy also included a handwritten note, stating “[u]nless it is a violent crime.”<sup>129</sup> It is unclear what policy significance that handwritten note had or who wrote it.

The policies concerning maintaining interview rooms always specified that audio and video equipment was available, and should be used if the suspect was left alone in the room.<sup>130</sup> Quite a few agencies noted that they had in-house video recording systems, but did not provide policies on how or when to properly use such equipment during interrogations.<sup>131</sup> Only a few of those policies provided guidance on how to properly conduct the electronic recording.<sup>132</sup> One stated, for example, that: “Explanations for any

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124. FOIA Data, *supra* note 96.

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. FOIA Responses, *supra* note 102.

131. *Id.*

132. *Id.*

interruptions in the audio/video recorded interview must be given at the beginning and/or the end of the interruption, so as to minimize any speculation as to what took place during the interruption.”<sup>133</sup> That policy added, “There is no expectation of privacy while in the Department. Therefore, the suspect need not be told that the interview is being recorded.”<sup>134</sup>

Thus, a model policy would be quite useful to provide guidance on how to properly record interrogations. For example, the DCJS model on juvenile interrogations counsels that “[w]hen making an audio-visual recording, position the device so as to maintain an equal camera focus on both the questioner and the juvenile to the extent reasonably practical.”<sup>135</sup> The DCJS policy adds, “Electronic recording shall start at the initiation of the interrogation, not at the start of the formal statement, and continue until questioning ends.”<sup>136</sup> The new federal memorandum issued by the U.S. Department of Justice similarly contains detailed instructions concerning recording of interrogations.<sup>137</sup>

#### D. *Juvenile Interrogation Procedures*

There has been much research on the vulnerability of juveniles to coercion in the interrogation setting;<sup>138</sup> it is a subject that the

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133. *Id.*

134. *Id.*

135. VA. DEP’T OF CRIM. JUSTICE SERVS., MODEL POLICIES FOR VIRGINIA LAW ENFORCEMENT AGENCIES: JUVENILE PROCEDURES No. 2-29.11 (Dec. 15, 2008), available at <http://www.dcls.virginia.gov/cple/sampleDirectives/>. The model policy adds, “Research has shown that focusing the camera solely on the suspect during an interrogation distorts jurors’ perceptions regarding the voluntariness of the statement.” *Id.* (bold omitted) (citing G. Daniel Lassiter et al., *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867, 868, 871 (2002)).

136. VA. DEP’T OF CRIM. JUSTICE SERVS., MODEL POLICIES FOR VIRGINIA LAW ENFORCEMENT AGENCIES: JUVENILE PROCEDURES No. 2-29.11 (Dec. 15, 2008), available at <http://www.dcls.virginia.gov/cple/sampleDirectives/index.cfm>.

137. Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Policy Concerning Electronic Recording of Statements (May 12, 2014), available at <http://www.npr.org/blogs/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-video-taping-the-questioning-of-suspects>.

138. *E.g.*, Alison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 944 (2010); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010). On the juveniles’ comprehension of *Miranda* warnings, see Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POLY & L. 638

Supreme Court has repeatedly addressed, holding in *J.D.B. v. North Carolina*, for example, that juveniles are more vulnerable to coercion, and therefore custody should be assessed from their point of view, as well as noting the incidence of false confessions among juveniles.<sup>139</sup> The Reid training recommends taking “extreme caution and care” when questioning juveniles.<sup>140</sup> An important national survey by Jessica Kostelnik and Dick Reppucci found a general lack of awareness among agencies of the possibility that juveniles be interrogated differently.<sup>141</sup>

In Virginia, while most policies did address the topic of juvenile interrogations (89 of 116 policies obtained did so),<sup>142</sup> few provided detail apart from stating that officers should “take care when advising juveniles of their rights” and that “[w]henver possible, the child’s parents should be present” for the *Miranda* waiver.<sup>143</sup> A few policies also provided an explanation of the procedures in the juvenile justice system.<sup>144</sup> Many policies did note that no more than two deputies should question a juvenile and one suggested that only one deputy be present.<sup>145</sup> Few policies complied with the current DCJS model policy that states, “[T]he interrogation shall be handled by one officer if at all possible in order to lessen the chance of the juvenile feeling intimidated or pressured.”<sup>146</sup> Only one policy followed the guidance of DCJS in requiring that all juvenile

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(2008).

139. 131 S. Ct. 2394, 2404–05 (2011); see Joshua A. Tepfer et al., *Scrutinizing Confessions in a New Era of Juvenile Jurisprudence*, 50 Ct. Rev. 4, 4, 7–8 (2014); see also *In re Gault*, 387 U.S. 1, 52 (1967) (noting that “authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children”); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (noting “a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police”).

140. John E. Reid & Associates, Inc., *Take Special Precautions When Interviewing Juveniles or Individuals with Significant Mental or Psychological Impairments*, REID.COM (last modified Sept. 29, 2012), <http://www.reid.com/pdfs/20120929d.pdf>.

141. See Kostelnik & Reppucci, *supra* note 10, at 364.

142. FOIA Data, *supra* note 96.

143. *E.g.*, FOIA Responses, *supra* note 102.

144. See, *e.g.*, *id.*

145. *Id.*

146. VA. DEPT OF CRIM. JUST. SERVS., MODEL POLICIES FOR VIRGINIA LAW ENFORCEMENT AGENCIES: JUVENILE PROCEDURES No. 2-29.10 (Dec. 15, 2008), available at <http://www.dcs.virginia.gov/cple/sampleDirectives/index.cfm>; see FOIA Data, *supra* note 96.

interrogations be videotaped or recorded.<sup>147</sup> Nor were other aspects of the guidance from DCJS followed.

In particular, few agencies counseled officers on how to approach the substance of questioning juveniles. A few policies stated that for juveniles, “[t]he interrogation shall be short” or of a reasonable length, or otherwise noted that less coercive techniques should be used.<sup>148</sup> One policy stated that no “psychological pressure or deceptions” should be used and that officers should not “prolong” interrogations of juveniles.<sup>149</sup> Another policy stated that: “The duration of a juvenile interview will be limited to six hours.”<sup>150</sup> That policy added that: “It is preferable that members of the Juvenile Crimes Squad be involved at all stages of the interview.”<sup>151</sup> These findings suggest that far more needs to be done at the policy level to ensure that juveniles are appropriately interrogated, not using the same techniques as with adults, but using age-appropriate procedures.

#### E. *Coercion and Voluntariness*

No policies contained any guidance on the interrogation of mentally ill or intellectually disabled individuals. The officers who interrogate individuals like Earl Washington, Jr. should know that highly suggestible individuals should be questioned very differently.<sup>152</sup> One study showed, for example, that half of mildly intellectually disabled individuals cannot correctly paraphrase *any* of the five *Miranda* warnings (compared to under one percent in the general population).<sup>153</sup> The few policies that addressed anything beyond the general concern that under the “totality of the circumstances” one should not coerce suspects only did so in fairly general terms.<sup>154</sup> Those policies just noted that the mental capacity of a person being questioned was a factor to con-

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147. *See id.*; FOIA Data, *supra* note 96.

148. FOIA Responses, *supra* note 102.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* Saul M. Kasin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 20–21 (2010).

153. *Id.* at 21.

154. FOIA Responses, *supra* note 102.

sider. Another policy made very brief statements, such as, “Sworn personnel shall carefully assess the suspect’s background, age, education, mental impairment, and physical condition to determine vulnerability to coercion before interrogation.”<sup>155</sup> How that assessment is to be done and what training informs such judgments is unclear. Some of the more detailed policies only raised the issue of vulnerable individuals by way of explaining that “[i]f officers use trickery, threats, or offer promises to obtain confessions” the officers should then “[c]arefully assess the suspect’s background, age, education, mental impairment, and physical condition to determine vulnerability to coercion.”<sup>156</sup> Such statements imply that this careful assessment need not be done absent use of “trickery, threats,” or promises, which is an incorrect statement as to the law, and is poor policy.<sup>157</sup>

Some, but not most, policies address the provision of interpreters to individuals who do not speak English well. Only 44 of 116 policies included language regarding identifying non-English speakers and providing interpreters or sign-language interpreters for the hearing impaired.<sup>158</sup>

Many policies simply restated a few of the basic constitutional requirements as set out in Supreme Court decisions. Some very brief policies noted, “all constitutional precautions must be taken.”<sup>159</sup> Others simply noted that “[d]eputies shall not coerce or obtain involuntary confessions . . .” or that officers must ensure that “[a]ll statements or confessions are of a voluntary nature and no coercion whatsoever is used.”<sup>160</sup> In contrast, as noted, policies sometimes did address the topic of coercion during interrogations more specifically, but chiefly to just repeat Supreme Court case law regarding the totality of the circumstances test.<sup>161</sup> Far from providing guidance to officers, many policies noted: “The courts have provided [deputies] with much latitude in interrogating suspects. If a suspect claims that he or she was coerced into confess-

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155. *Id.*

156. *Id.*

157. *See id.*

158. FOIA Data, *supra* note 96.

159. FOIA Responses, *supra* note 102.

160. *Id.*; FOIA Data, *supra* note 96.

161. FOIA Responses, *supra* note 102; FOIA Data, *supra* note 96.

ing, the courts will examine the interrogation according to the totality of the circumstances.”<sup>162</sup>

Not only did policies inadequately discuss the vulnerability of certain types of individuals, such as juveniles, the intellectually disabled, and the mentally ill, but policies did not address other types of coercion, such as the use of deceptive or coercive tactics.<sup>163</sup> It is a staple of police interrogation to use a range of deceptive and coercive tactics, beginning with isolating the suspect in an interrogation, building rapport, and then placing pressure on a suspect so that the only seemingly rational choice is to confess.<sup>164</sup> Guidance on when it is appropriate to use the more heavy-handed tactics would be desirable. As noted, the few policies to address the topic at all, simply indicated that officers could use trickery and other deceptive tactics, so long as they conduct an ill-defined assessment first.<sup>165</sup> Additional policies noted, without explanation, that the use of innovative and proper procedures can produce valuable evidence from victims, witnesses, and suspects.<sup>166</sup> One policy noted that polygraph examinations should not immediately follow “lengthy” interrogations.<sup>167</sup>

False confessions like in Earl Washington’s case made dramatic the need for officers to be trained not to contaminate confessions by asking leading questions and feeding facts to the suspect. Only two agencies provided guidance in policies on how to conduct interviews.<sup>168</sup> One noted that during interrogations and interviews, “The interviewer should NOT lead the subject.”<sup>169</sup> No other agencies in Virginia addressed that crucial subject of confession contamination.<sup>170</sup> Nor did policies truly address length of

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162. *Id.* (emphasis omitted).

163. FOIA Data, *supra* note 96.

164. *Miranda v. Arizona*, 384 U.S. 436, 449–50 (1966); *see, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 915–17 (2004); Kassin et al., *supra* note 10, at 12.

165. FOIA Data, *supra* note 96.

166. FOIA Responses, *supra* note 102.

167. *Id.*

168. FOIA Data, *supra* note 96; FOIA Responses, *supra* note 102.

169. FOIA Responses, *supra* note 102.

170. *See* FOIA Data, *supra* note 96; *see also* Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 845, 847–49 (2012); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1119 (1997); Tepfer et al., *supra* note 138, at 916–17. *See generally* Garrett, *Contaminated Confessions Revisited*, *supra* note 8 (discussing the re-

interrogations. That is, the main way that policies addressed the length of interrogations, outside of those regarding juveniles, was to note: “There is no time limit to the interrogation.”<sup>171</sup> Such language is quite contrary to what training manuals recommend.<sup>172</sup> A few policies did note that for juveniles, the duration of the interrogation should be “reasonable.”<sup>173</sup>

#### F. *Miranda Warnings*

Perhaps ironically, given the *Miranda* Court’s criticism of police policy and training on interrogations (but not at all surprisingly given the intent to supply a clear bright line rule for police to follow), nearly all of these policies noted that police should provide the *Miranda* warnings.<sup>174</sup> As noted, they typically counseled special care when advising juveniles of their rights. Some policies described the Supreme Court case law surrounding the *Miranda* warnings in some detail, noting how to address resumption of questioning after assertion of the right to counsel, and what types of noncustodial interviews do not require providing *Miranda* warnings.<sup>175</sup> The right to counsel itself, however, including what must be done if a suspect does ask to see a lawyer, was often not carefully addressed.

### CONCLUSION

What has been learned from prominent death row exonerations, like that of Earl Washington, Jr., and other exonerations involving false confessions? Apparently, very little has changed in Virginia. Indeed, Culpeper County, where Washington was interrogated, and where Michael Wayne Hash was interrogated (his conviction was overturned by a federal judge in 2012), for decades apparently had no policy requiring electronic recording of inter-

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newed and alarming occurrence of false confessions that have contaminated interrogations and been the result of inappropriate questioning techniques, many of which have resulted in subsequent exonerations through various scientific testing methods).

171. FOIA Responses, *supra* note 102.

172. *Clarifying Misinformation About the Reid Technique*, JOHN E. REID & ASSOC., INC., <http://www.reid.com/pdfs/20120920.pdf> (last visited Feb. 27, 2015).

173. FOIA Responses, *supra* note 102.

174. *Id.*

175. *Id.*

rogations, leaving such matters to the discretion of the officers involved even in the most serious cases.<sup>176</sup> There is a real need in Virginia for a detailed model policy concerning interrogations. Many agencies retained the same brief boilerplate policies concerning interrogations. Many noted they had video or audio recording equipment—used to monitor suspects when left alone in interrogation rooms—but its use was not required as a matter of course during the interrogations themselves.

Interrogation policies in Virginia are in need of a major overhaul. Of course, written policies are, and must be, accompanied by ongoing supervision and training. Some agencies apparently record interrogations despite written policies that do not require, or guide, the practice. For other agencies, however, the interrogation training and practices that accompany those policies may similarly be in real need of improvement. Both written and unwritten policies and training should reflect sound practices. Where even the most serious capital cases can go terribly wrong due to coercion and contamination of confessions, far more attention to the process of eliciting and documenting confessions is needed.

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176. See Ron Counts, *UVA Professor: 'Not Surprised' by Hash Case*, STAR-EXPONENT (last updated Jan. 30, 2013), [http://www.dailyprogress.com/starexponent/news/local\\_news/uva-professor-not-surprised-by-hash-case/article\\_73f6634a-a5a2-54b9-b496-b3b412ef37e4.html?mode=jqm](http://www.dailyprogress.com/starexponent/news/local_news/uva-professor-not-surprised-by-hash-case/article_73f6634a-a5a2-54b9-b496-b3b412ef37e4.html?mode=jqm).