

VIRGINIA LAW REVIEW ONLINE

VOLUME 105

SEPTEMBER 2019

96–111

SELF-POLICING: DISSEMINATION AND ADOPTION OF POLICE EYEWITNESS POLICIES IN VIRGINIA

*Brandon L. Garrett**

Professional policing organizations emphasize the importance of the adoption of sound police policies and procedures, but doing so has traditionally been left to individual agencies. State and local government typically does not closely regulate police, and neither federal constitutional rulings nor state law typically set out in any detail the practices that police should follow. Thus, law enforcement agencies must themselves draft and disseminate policy. This Essay presents the results of studies used to assess the adoption of eyewitness identification policies by law enforcement agencies in Virginia. Policymakers were focused on this problem because Virginia experienced a series of DNA exonerations in cases involving eyewitness misidentifications. In 2005, lawmakers enacted a law that required agencies to have some written policy in place. However, there was little guidance on what that policy should be. To remedy this problem, the state law enforcement policy agency, the Virginia Department of Criminal Justice Services (“DCJS”), promulgated, in 2011, a detailed model policy on eyewitness procedure. Nevertheless, as reported in a 2013 study, those model practices were only haltingly adopted. In particular, many agencies did not use blind or blinded lineups, in which

* L. Neil Williams, Jr. Professor of Law, Duke University School of Law. I thank Amy Fly, Gina Sato, and Payton Bock for their invaluable research assistance in conducting the FOIA effort and assisting in coding the resulting police lineup policies. I thank Rebecca Brown and Gary Dillon for their invaluable comments on earlier drafts. I am grateful to online editor Ben Lucy for his extraordinary work during the publication process. This research was supported by the Duke Center for Science and Justice.

the administrator does not know which photo is that of a suspect or cannot view which photo the eyewitness is examining. In fall 2018, all of the over-300 law enforcement agencies in Virginia had their policies on this subject requested, using the state freedom of information law. The results show that there has now been widespread adoption of the DCJS model policy. Improved eyewitness identification practices have been adopted by the vast majority of agencies, including large and small agencies. This Essay concludes by asking what contributed to the extensive dissemination of a model police policy, and what its implications are for improving police policy and practice without the use of regulation.

INTRODUCTION.....	97
I. LEGISLATIVE AND POLICY BACKGROUND	101
A. <i>The Law and Science of Eyewitness Memory</i>	101
B. <i>Virginia Regulation of Eyewitness Identifications</i>	104
C. <i>The 2011 DCJS Model Policy</i>	105
D. <i>The 2013 Study of Virginia Lineup Procedures</i>	106
II. RESULTS OF THE 2018 STUDY OF VIRGINIA EYEWITNESS IDENTIFICATION POLICIES	107
III. IMPLICATIONS FOR FUTURE EFFORTS TO IMPROVE POLICE PRACTICES	110
CONCLUSION	111

INTRODUCTION

Professional policing organizations and agencies increasingly emphasize the importance of law enforcement adopting clear and comprehensive written policies and procedures, as well as accompanying training and supervision.¹ The focus on adoption of written policy has been particularly urgent in high profile areas like the use of deadly force, in which federal consent decrees have resulted in extremely detailed

¹ See, e.g., Police Exec. Research Forum, *Guiding Principles on Use of Force* (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> [https://perma.cc/D4-TQ-LZP7] (recommending policy for police use of force); President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing 19–20* (2015) [hereinafter *President’s Task Force on 21st Century Policing*], https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/4PL3-94FY] (emphasizing that law enforcement agencies “should have comprehensive policies” on issues such as the use of force as well as policies that are “reflective of community values”).

written policies.² The adoption of written policy has traditionally been far less common in the area of police evidence-gathering.³ However, in recent years, professional policing organizations have emphasized the role of best practices in policing, including in areas such as eyewitness identifications in which patrol guides traditionally did not offer detailed guidance.⁴ There is very little regulation of police, however, and state law itself rarely sets out practices that police should follow. Police must self-police: police organizations must themselves draft and disseminate policy. One pressing question is whether states or other actors, such as accreditation organizations, can disseminate model policies to promote adoption, particularly where there are so many smaller police agencies. This Essay describes a success story: one that suggests self-policing can occur under the right conditions.

One pressing area in which police policies had lagged was that of eyewitness procedures, where national policing organizations have strongly recommended the adoption of improved practices,⁵ but at the same time, national surveys have found highly uneven adoption of those best practices.⁶ Those best practices are extremely important. As the National Research Council explained in a landmark 2014 report

² Brandon L. Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 *Va. L. Rev.* 211 (2017) (describing federal consent decrees and analyzing the text of use of force policies adopted by major law enforcement agencies). For an example of a state law requiring agencies to adopt written policies regarding certain areas, including use of force, see, e.g., *Me. Rev. Stat. Ann. tit. 25, § 2803-B* (2015).

³ See Stanley Z. Fisher, “Just the Facts, Ma’am”: Lying and the Omission of Exculpatory Evidence in Police Reports, 28 *New Eng. L. Rev.* 1, 18 (1993).

⁴ The International Association of Chiefs of Police (“IACP”) has taken an active role in promoting consideration of ways to improve the “accuracy and thoroughness” of police investigations. Int’l Ass’n of Chiefs of Police, *National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 10* (2013), https://www.bja.gov/Publications/IACP-Wrongful_Convictions_Summit_Report.pdf [<https://perma.cc/EY7P-3JCQ>].

⁵ See, e.g., *Va. State Crime Comm’n, HB 207: Law Enforcement Lineups 15* (2010), http://vscc.virginia.gov/documents/2010/law_lineups.pdf [<https://perma.cc/TV4H-9AVD>] (referencing CALEA’s Law Enforcement Policy 42.2.11 as a model policy); U.S. Dep’t of Justice, *Tech. Working Group for Eyewitness Evidence, Eyewitness Evidence: A Guide for Law Enforcement iii* (1999), <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> [<https://perma.cc/-U2CG-XQ57>]; Int’l Ass’n of Chiefs of Police, *Model Policy: Eyewitness Identification* (2016) [hereinafter *IACP*], <https://www.theiacp.org/sites/default/files/2018-08/EyewitnessIDPolicy-2016.pdf> [<https://perma.cc/VRL2-CXJS>].

⁶ Many agencies have policies that are decades out of date, or they have no written policies at all. See, e.g., *Police Exec. Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies 46–47, 89* (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242617.pdf> [<https://perma.cc/2AM3-QT44>].

summarizing the scientific research in the area of human visual memory, “it is well known that eyewitnesses make mistakes and that their memories can be affected by various factors including the very law enforcement procedures designed to test their memories.”⁷ In particular, the hundreds of DNA exonerations in recent years, the vast majority of which involved eyewitness misidentifications, have brought home the malleability and fragility of eyewitness memory. DNA testing has resulted in the reversal of high-profile wrongful convictions, which have made the consequences of eyewitness misidentifications and poor police procedures particularly clear. In a book, I set out the results of a study of the role eyewitness evidence played in trials of the first 250 DNA exonerees.⁸ Over two-thirds of those exonerees had been convicted based on eyewitness misidentifications, and most had been misidentified following the use of suggestive law enforcement identification procedures.⁹

In this Essay, I present the results of studies used to assess the adoption of eyewitness identification policies in Virginia, a state in which prior guidance was very thin. Law enforcement agencies were required in 2005 to adopt a written policy, but they were free to adopt any policy of their choosing.¹⁰ All of the over-300 law enforcement agencies in Virginia had their policies on this subject requested, using the state freedom of information law. While, as of 2005, agencies were only required to have some written policy in place, over time, particularly beginning in 2011, the state law enforcement policy agency supplied detailed model policy on eyewitness procedure. One reason policymakers were focusing on this problem was that Virginia experienced a series of DNA exonerations in cases involving eyewitness misidentifications; as of 2013, thirteen of sixteen DNA exonerations in Virginia had involved eyewitness misidentifications.¹¹ Nevertheless, as reported in an earlier 2013 study,

⁷ Nat’l Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 1 (2014) [hereinafter *Nat’l Research Council*].

⁸ Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 9, 48 (2011).

⁹ *Id.* at 49.

¹⁰ Va. Code Ann. § 19.2-390.02 (West 2005).

¹¹ Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 Va. J. Crim. L. 1, 7–8 (2014) (describing examples of misidentifications from Virginia DNA exonerations). Similarly, the Virginia Department of Criminal Justice Services (“DCJS”) noted in their model policy that “[t]en of thirteen DNA exonerations in Virginia involved eyewitness misidentifications. Few cases in Virginia have been suitable for DNA testing, since the policy until the last decade was that crime scene evidence would be destroyed

those model practices were only being haltingly adopted.¹² In particular, many agencies did not have blind or blinded lineups, in which the administrator does not know which photo is that of the suspect or cannot view which photo the eyewitness is examining. A substantial body of basic research examines how humans perceive images and form visual memory. That research has been complemented by applied research in the area of eyewitness identification. This research has resulted in a large body of knowledge concerning how to test visual memory accurately, including face identification, and a set of best practices that are recommended to test and preserve the memory of an eyewitness.¹³ Scientists have emphasized that the use of blinding is “central to the scientific method because it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find.”¹⁴ Thus, blinding is essential to any objective factfinding.

Five years later, in 2018, we re-surveyed agencies and found that there is now extensive dissemination and widespread adoption of the state model policy. Specifically, the vast majority of agencies have adopted blinded policies, clear instructions to eyewitnesses, guidelines for selecting fillers for lineups, recording of confidence statements, and many agencies require videotaping of lineup procedures. Those improved eyewitness identification practices have been adopted by the vast majority of agencies over the past five years.

Part I discusses the law and science of eyewitness memory and the legislative and policy background in Virginia. Part II presents the findings of this study. This study, while it examines each of the features of the lineup policies adopted in Virginia, focuses first on the adoption of blind or blinded procedures. As described, such adoption occurred in less than half of the surveyed agencies in 2013, but by 2018, there had been a remarkable change, and the overwhelming majority had adopted blind or blinded procedures. Part III discusses why this change may have occurred

post-conviction. Those Virginia eyewitness identifications involved suggestive and unreliable eyewitness identification procedures.” Va. Dep’t of Criminal Justice Services, Model Policy on Eyewitness Identification, General Order 2-39, at 1 (2014) [hereinafter DCJS 2014 Model Policy]. Note that the author served on a Virginia Crime Commission task force that informed the revision of this DCJS model policy.

¹² See Garrett, *supra* note 11 (presenting a study of Virginia law enforcement policies, of which few complied with state model policy on lineup procedures).

¹³ See, e.g., Nat’l Research Council, *supra* note 7, at 103–09.

¹⁴ *Id.* at 106.

and the implications of this experience in Virginia for future efforts to improve police practices.

I. LEGISLATIVE AND POLICY BACKGROUND

A. The Law and Science of Eyewitness Memory

That eyewitness memory can be highly unreliable in police investigations has been a staple of criminal procedure for centuries. As the U.S. Supreme Court has put it, “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹⁵ However, the Supreme Court has not regulated police identification procedures in response to this well-known problem. Instead, the Court has set out broad and quite deferential rules that potentially exclude as evidence unnecessarily suggestive identifications, as a constitutional matter, leaving regulation of evidentiary questions largely to state courts or to police agencies in the first instance.¹⁶

Thus, as the National Research Council has suggested, “[t]he best guidance for legal regulation of eyewitness identification evidence comes

¹⁵ *United States v. Wade*, 388 U.S. 218, 228 (1967).

¹⁶ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The “reliability” factors adopted by the Court in *Manson*, having been already set out in its earlier ruling in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972), ask that the judge examine: (1) the eyewitness’s opportunity to view the defendant at the time of the crime; (2) the eyewitness’s degree of attention; (3) the accuracy of the description that the eyewitness gave of the criminal; (4) the eyewitness’s level of certainty at the time of the identification procedure; and (5) the length of time that had elapsed between the crime and the identification procedure. *Manson*, 432 U.S. at 98–99. The Court did not assign any particular weight to these various factors. The Supreme Court more recently has held that when unreliability in eyewitness identifications is not due to intentional police action, it is not regulated under the Due Process Clause at all. *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012). The Justices in *Perry* stated that the Court did “not doubt either the importance or the fallibility of eyewitness identifications,” but held that state legislation, evidence law, and safeguards such as expert testimony and jury instructions should be relied on to ensure the accurate presentation of eyewitness evidence. *Id.* at 245–46. A large body of scientific research has called into question the validity of many of the Supreme Court’s so-called “reliability” factors. For scholarly criticism in light of the social-science research, see, e.g., Suzannah B. Gambell, Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 *Wyo. L. Rev.* 189, 196–202 (2006); Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 *Val. U. L. Rev.* 109, 118–22 (2006); 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 *L. & Hum. Behav.* 1, 16 (2009).

not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers.”¹⁷ Police officers use a variety of different procedures to ask an eyewitness to identify a culprit, including: (1) showups; (2) photo arrays; (3) live lineups; and (4) mugshots and computer presentations of photos in which there is no designated suspect.¹⁸ In a showup, which usually occurs at or near the crime location and shortly after the crime occurred, officers present a single, live suspect to a witness.¹⁹ In photo arrays, officers present the eyewitness with a series of photographs, one of which is the suspect, and the others called “fillers,” or known non-suspects.²⁰ Live lineups, in which the suspect and fillers are presented in person to an eyewitness, are less commonly used.²¹ Additional procedures may be used in which officers do not have a suspect. If so, officers may show mug books or sets of photographs to see if the eyewitness can identify a suspect, or they may ask the eyewitness to help prepare a composite image or drawing of a culprit.²²

In scientific terms, the procedures used to test eyewitness memory should take account of both *estimator* variables and *system* variables.²³ Both types of variables can affect the memory of an eyewitness.²⁴ Estimator variables are factors relating to the conditions of the crime-scene viewing, such as the lighting, the eyewitness’s eyesight, familiarity with the perpetrator, or race.²⁵ Studies have shown that individuals display an “own-race bias,” or a greater difficulty identifying persons of

¹⁷ See Nat’l Research Council, *supra* note 7, at 5; see also President’s Task Force on 21st Century Policing, *supra* note 1, at 23 (recommending adoption of identification procedures “that implement scientifically supported practices that eliminate or minimize presenter bias or influence”).

¹⁸ See DCJS 2014 Model Policy, *supra* note 11, at 2–3.

¹⁹ See *id.* at 4–5.

²⁰ See IACP, *supra* note 5, at 1.

²¹ See Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, at 11–12 (forthcoming 2020), <http://apls.wildapricot.org/resources/Documents/Feb42019EWwhitepaper.pdf> [<https://perma.cc/W3-YH-G5L8>].

²² A recent draft White Paper describes the state of scientific research on eyewitness identification procedures. *Id.*

²³ Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 *J. Personality & Soc. Psychol.* 1546 (1978) (first coining the terms “estimator” and “system” variables).

²⁴ *Id.* at 1548.

²⁵ *Id.* at 1548–50.

a different race.²⁶ Estimator variables cannot be controlled by law enforcement.²⁷ In contrast, *system variables* are factors associated with the procedures that officers use to obtain identifications by an eyewitness.²⁸ System variables can be controlled by law enforcement.²⁹

The National Research Council report made quite clear its recommendation that blind or blinded lineups should be used by law enforcement.³⁰ This recommendation is based upon decades of research in a number of fields on the ways in which the expectations of an administrator can bias subjects, including through inadvertent means of communication. “Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array.”³¹ By contrast, “[t]he ‘blinded’ procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system.”³²

The National Research Council report also highlighted that agencies should adopt standard instructions for eyewitnesses.³³ Those instructions should inform the eyewitness that a culprit may or may not be present in the lineup.³⁴ That instruction is crucial because an eyewitness otherwise may expect that the culprit will be present and that there is a correct choice that should be made. Showups should be limited in their use.³⁵ Such an instruction can still be given before conducting a showup, and agencies should have standard instructions and procedures to avoid undue suggestion in showup procedures.³⁶ The confidence of the eyewitness should be documented, preferably through a recording of the entire eyewitness identification procedure.³⁷ Standard procedures should use terminology that is easily understandable by eyewitnesses.³⁸ There should

²⁶ See Nat’l Research Council, *supra* note 7, at 96.

²⁷ Wells, *supra* note 23, at 1548.

²⁸ See *id.* at 1552–55.

²⁹ *Id.* at 1552.

³⁰ Nat’l Research Council, *supra* note 7, at 3.

³¹ *Id.* at 106.

³² *Id.* at 107.

³³ *Id.* at 3.

³⁴ *Id.* at 107.

³⁵ See *id.* at 26–27.

³⁶ See *id.*

³⁷ See *id.* at 108–09.

³⁸ *Id.* at 107.

be clear rules on the number and selection of fillers for lineups.³⁹ There are a number of state statutes and model policies that provide useful models for agencies,⁴⁰ as well as a recent update to the White Paper by the American Psychology-Law Society that summarizes the state of the research on eyewitness identification procedures.⁴¹

B. Virginia Regulation of Eyewitness Identifications

In 2005, the Virginia General Assembly enacted legislation requiring that police adopt some form of written eyewitness identification procedure.⁴² DCJS had in place, from 1993 through 2005, an extremely brief model policy on eyewitness identification.⁴³ The new 2005 legislation was accompanied by a more detailed model policy.⁴⁴ However, the 2005 model policy did not include instructions on how to effectively “blind” a lineup by presenting photos in folders, held by the eyewitness so they cannot be seen by the administrator, without the need to obtain an administrator who is unfamiliar with the investigation. The folder-shuffle method is an inexpensive and practical solution to the problem of blinding; in addition, agencies can use computerized administration of eyewitness identification procedures.⁴⁵ In addition, the 2005 model policy had mandated sequential policies, but only made blind administration optional.⁴⁶ A 2010 survey by the Virginia State Crime Commission found that at least twenty-five percent of agencies responding to the survey still had no policy on the subject, despite enactment of that legislation five

³⁹ See *id.* at 26–27.

⁴⁰ See, e.g., N.C. Gen. Stat. Ann. § 15A-284.52 (West 2016); Ohio Rev. Code Ann. § 2933.83 (West 2010); Va. State Crime Comm’n, HB 207: Law Enforcement Lineups 15 (2010), http://vscc.virginia.gov/documents/2010/law_lineups.pdf [https://perma.cc/TV4H-9AVD] (referencing CALEA’s Law Enforcement Policy 42.2.11 as a model policy); IACP, *supra* note 5; DCJS 2014 Model Policy, *supra* note 11.

⁴¹ See Wells et al., *supra* note 21.

⁴² Virginia Code § 19.2-390.02 (West 2005) states: “Policies and procedures for law enforcement to conduct in-person and photo lineups—The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups.”

⁴³ See Va. Dep’t of Criminal Justice Services, Report on the Law Enforcement Lineup Policy Survey and Review, General Order 2-1, at 26 (2012), https://web.archive.org/web/20150915001917/http://www.dcjs.virginia.gov/research/documents/LawEnforceLineup_final.pdf [hereinafter Lineup Policy Survey].

⁴⁴ See *id.*, General Order 2-39, at 20–25.

⁴⁵ See Nat’l Resource Council, *supra* note 7, at 107.

⁴⁶ See Va. State Crime Comm’n, HB 207: Law Enforcement Lineups 8 (2010), http://vscc.virginia.gov/documents/2010/law_lineups.pdf [https://perma.cc/TV4H-9AVD].

years earlier requiring that written procedures be adopted (and presumably even more agencies not responding lacked policies).⁴⁷

C. The 2011 DCJS Model Policy

In Virginia, a new state model policy was adopted by the Department of Criminal Justice Services (“DCJS”) in 2011 in response to a series of DNA exonerations caused by eyewitness misidentifications, as well as concern with the slow pace of adoption of best practices.⁴⁸ The DCJS model policy is not only quite detailed but also flexible, as it is designed to be operationalized by agencies of different sizes and resources. The policy reflects each of the best practices highlighted in the National Research Council report (although it pre-dates that report).

Importantly, the DCJS model policy states that all eyewitness identification procedures should be conducted blind, by an officer who does not know which photo is that of the suspect, or blinded, so that the administrator cannot tell whether the eyewitness is examining the suspect photo.⁴⁹ To respond to the concern raised by smaller agencies, that it is not always practically possible to spare an additional officer unfamiliar with the suspect’s identity, the DCJS model policy sets out the “folder shuffle” method.⁵⁰ That method provides a way to inexpensively make a procedure blind (and sequential) by placing the photos in folders and shuffling them, with several blanks at the end. The eyewitness can open the folders and examine the photos inside, without the administrator seeing what the eyewitness is viewing. In addition to requiring blind or blinded procedures, the 2011 DCJS model policy also sets out consistent instructions to eyewitnesses, requires careful documentation of the confidence and statements by the eyewitness, and encourages both audio and video recordings to be made of the entire identification procedure.⁵¹ These procedures were far more detailed than the prior model policy, and they provide a comprehensive model for agencies of all sizes.⁵² In 2014,

⁴⁷ See *id.* at 18.

⁴⁸ Va. Dep’t of Criminal Justice Services, Model Policy on Eyewitness Identification, General Order 2-39, at 1 (2011) [hereinafter DCJS 2011 Model Policy] (on file with Virginia Law Review Association).

⁴⁹ *Id.* at 6–7.

⁵⁰ *Id.* at 5–6.

⁵¹ *Id.* at 9–11.

⁵² See Lineup Policy Survey, *supra* note 43, General Order 2-1, at 26.

minor revisions were made to the model policy, largely to clarify the folder method procedures.⁵³

D. The 2013 Study of Virginia Lineup Procedures

A spring 2013 study of lineup procedures in Virginia found that despite the passage of additional time since the model policy had been promulgated and disseminated to agencies throughout the state, many agencies still were not adopting the model policy, and crucially, were not conducting lineups blind or blinded.⁵⁴ Of the 201 agencies that responded to either the survey or the Freedom of Information Act (“FOIA”) requests, 145 supplied eyewitness identification policies.⁵⁵ “Troubling findings included that in total, only 40%, or 58 of 144 policies,” provided by responding agencies, “required blind lineup procedures or made them available as an option.”⁵⁶ Only 6% of agencies that provided policies had adopted the entire model policy disseminated by DCJS.⁵⁷ “[O]f the 144 eyewitness identification policies reviewed, 29% or 42 policies required blind lineup procedures. Ten more required that blind lineups be used where practicable.”⁵⁸ Six more provided that blind lineups be available as an optional practice.⁵⁹

Regarding the folder shuffle method, “[o]nly 9 agencies described the folder shuffle method as an option.”⁶⁰ The folder shuffle method was fairly new and had been first recommended, as noted, in the 2011 DCJS model policy as a way for small agencies to effectively blind a lineup procedure.⁶¹ “Instead, far more common were policies that were sequential, but not blind: two-thirds or 63% of the departments required or offered sequential lineups (91 of 144).”⁶² Those policies may have made lineups even less reliable, since a sequential policy introduces more

⁵³ See DCJS 2014 Model Policy, *supra* note 11, at 5–7.

⁵⁴ Garrett, *supra* note 11, at 15–16. “A DCJS follow-up survey of 267 law enforcement agencies in September 2011 created additional new cause for concern,” since it “indicated that most departments still had not adopted best practices.” That survey was conducted shortly after the new model policy took effect. *Id.* at 13.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 15.

⁵⁹ *Id.*

⁶⁰ *Id.* at 17.

⁶¹ See DCJS 2011 Model Policy, *supra* note 48, at 5.

⁶² Garrett, *supra* note 11, at 17.

interaction between the administrator and the eyewitness, since each picture is shown one at a time; a non-blind sequential policy may give greater cause to fear that suggestion can contaminate the results.⁶³

Further, “[o]nly 88 of 144 departments had required standard instructions [to the eyewitness] as a matter of policy.”⁶⁴ Only “[a]bout half, or 71 of 144 agencies’ policies, required taking a confidence statement of some kind using the eyewitnesses’ own words. Those that did require taking a confidence statement often did not detail how that should occur.”⁶⁵ Most (63%) had sequential policies; however, 23% had sequential but not blind policies.⁶⁶ As noted, such policies may be even more vulnerable to suggestion than policies that had previously been in place. And 41 agencies (mostly sheriffs’ offices that may not conduct investigations in which identification procedures would be used) responded that they did not have eyewitness identification policies.⁶⁷

II. RESULTS OF THE 2018 STUDY OF VIRGINIA EYEWITNESS IDENTIFICATION POLICIES

In fall 2018, every policing agency in Virginia was mailed a FOIA request for all eyewitness identification policies.⁶⁸ In 2018, 193 agencies supplied policies, which constituted a much higher response rate than to the FOIA requests made for the 2013 study. An additional 40 agencies responded that they do not conduct investigations and do not have a policy—or simply do not have a policy.

Blind and blinded lineups. Of those that did supply policies, 158 agencies had blind policies, with just 30 of the 159 saying that they conduct lineups blind only where it is practicable to do so. Just 22 agencies did not provide for blind or blinded lineups. Compare these figures to those in 2013, where only 58 policies required or made optional blind or blinded lineup policies.⁶⁹ While 166 agencies use sequential lineups, just a handful of agencies use sequential but not blind policies.

⁶³ See *id.* at 17–18.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 17.

⁶⁷ *Id.* at 14–15.

⁶⁸ Part II analysis is derived from data collected by the author. Brandon L. Garrett, VA Eyewitness Policies Data Set (2019) (on file with author).

⁶⁹ Garrett, *supra* note 11, at 15.

Folder method. In another major change from the 2013 study, in 2018, 129 agencies had adopted policies that use the folder method or made it available as an option when there is not an independent officer available to conduct the photo array procedure. Compare these figures to those in 2013, where only 9 policies included the folder shuffle option, indicating that smaller agencies were not aware of the DCJS recommendations to make blinded lineups feasible at low cost.⁷⁰

Sequential lineups. Almost without exception, they required sequential as well (the problem had been with those that were sequential but not blind). Moreover, in 2013, there were 51 agencies, out of 144 responding that had extremely brief policies, many dating back to a rudimentary 1993 model policy, which were only a few paragraphs long and included no meaningful operational instructions.⁷¹

Instructions to witnesses. In 2013, many agencies did not have policies detailing instructions to be given to eyewitnesses; only 88 of 144 policies surveyed at that time included such guidance in policies.⁷² In 2018, in contrast, this was nearly universal. Of the 193 policies obtained, 167 had policies on instructions to eyewitnesses, 168 had in their policies requirements and instructions on obtaining confidence statements from eyewitnesses,⁷³ and 166 had a required statement from the administrator to the eyewitness that the suspect may or may not be present.

Fillers. Almost all of the policies had language indicating that fillers should resemble the suspect and stating how many filler photos should be included in a lineup; 171 of the 193 policies included policies on fillers.

Recording. Regarding electronic recording of eyewitness identification procedures, another important change since 2013 was that 76 required videotaping and 42 additional agencies required audio. In 2013, only 25 agencies made recording an option.⁷⁴ This marks a dramatic shift towards electronic recording of eyewitness identification procedures.

The figure below displays a comparison as between the 2013 and 2018 findings, displaying the number of agencies adopting each type of procedure.

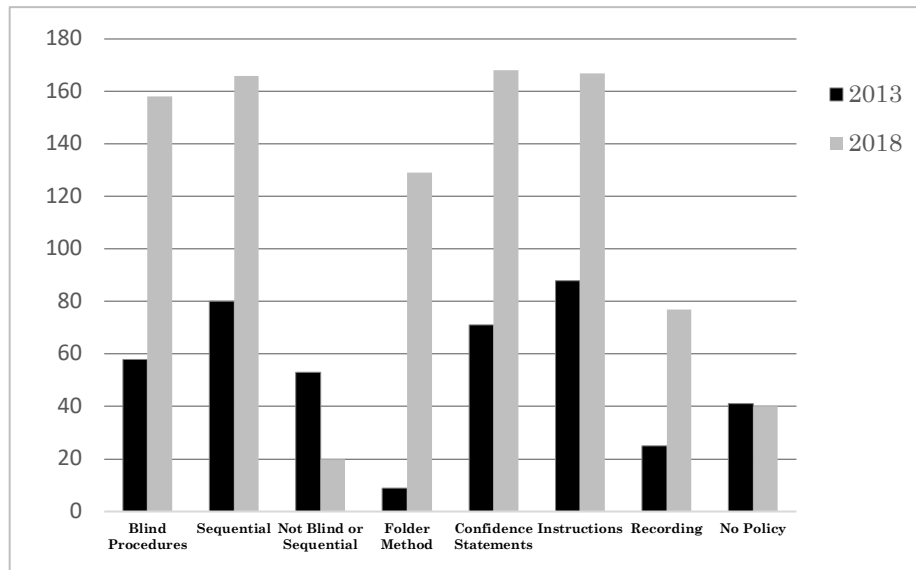
⁷⁰ Id. at 17.

⁷¹ Id. at 18.

⁷² Id. at 20.

⁷³ In 2013, only half of the agencies required taking a confidence statement from an eyewitness. Id. at 21.

⁷⁴ Id.

Figure 1. Virginia Lineup Policies, 2013 and 2018

One important question was whether different agencies responded to the FOIA requests in 2018 as compared to 2013, which could explain the very different patterns observed in the policies. Of the 87 that did not have blind policies in 2013, most of those agencies, 50 of them, have since changed and adopted blind policies. Only 13 have remained the same, and continue not to use blind eyewitness identification policies. It was 23 of those agencies that did not have blind policies that did not respond to the 2018 survey. Nine agencies responding for the first time to the new 2018 survey, which did not respond in 2013, have non-blind policies.

DCJS Model Policy adoption. This change marks a near universal adoption of the 2011 DCJS model policy, with its revisions, by Virginia law enforcement agencies. Not all of these policies include verbatim all of the language from the DCJS model policy, but many of these agencies have recently adopted policies that use much of the DCJS language. Only a handful of agencies, in 2018, still had such cursory and problematic policies, which is also a very important change.

III. IMPLICATIONS FOR FUTURE EFFORTS TO IMPROVE POLICE PRACTICES

By 2018, the vast majority of Virginia residents lived in jurisdictions in which best practices regarding eyewitness identifications had been adopted. The larger agencies, with one exception, have all adopted these best practices. As a result, of the 8.5 million Virginia residents, only 9% or about 740,000 people, lived in jurisdictions that have not adopted these policies. Of the 126 accredited agencies in Virginia, only six very small agencies did not adopt the DCJS model policy in substance.⁷⁵

What changed between 2013 and 2018? A combination of efforts by policing organizations, dissemination between agencies, regional training by DCJS, media coverage in response to the 2013 study, and involvement of the Crime Commission, all may have helped to drive this change. There was some media attention to the 2013 survey findings, and in response, some agencies stated that they planned to update their policies.⁷⁶ There was legislation introduced in 2014 to require that agencies conform to the DCJS model policy, but it was tabled in the committee in which it was introduced.⁷⁷ The introduction of that draft legislation may have had some limited impact.

The involvement of professional policing organizations was also crucial to the success of these efforts. Executive Director Dana Schrad of the Virginia Association of Chiefs of Police worked with police chiefs, following the prior survey, to assess efforts to revise policies.⁷⁸ As noted, almost all accredited agencies later adopted these policies, at least among responding agencies. The Virginia accrediting organization added additional language regarding content of eyewitness identification policies.⁷⁹ Meanwhile, DCJS led new efforts to conduct training on the DCJS policy and made agencies aware of its provisions. The DCJS policy

⁷⁵ I am grateful to Gary Dillon for his assistance with this analysis.

⁷⁶ See, e.g., Jordan Fifer, *Lineup Policies Slow to Catch On*, *Roanoke Times*, (Aug. 31, 2013), https://www.roanoke.com/news/virginia/lineup-policies-slow-to-catch-on/article_98-95c72d-c5b5-5f9c-8b80-10c12b9b8f0c.html [<https://perma.cc/XD77-FGLE>] (describing how agencies were in the process of updating their policies).

⁷⁷ See H.D. 805, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).

⁷⁸ See Fifer, *supra* note 76.

⁷⁹ See Va. Law Enf't Prof'l Standards Comm'n, *Virginia Law Enforcement Accreditation Program Manual* 26, 54–55 (2016), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/law-enforcement/virginia-law-enforcement-accreditation-program-manual.pdf> [<https://perma.cc/Z4KL-PSM6>]. In Virginia, agencies may be accredited through the Virginia Law Enforcement Professional Standards Commission. See Va. Law Enf't Prof'l Standards Comm'n, *About VLEPSC*, http://vlepsec.org/wp/?page_id=96 [<https://perma.cc/H7PZ-FBWV>] (last visited July 18, 2019).

was modestly revised to respond to agencies' questions about the meaning of certain provisions. Observers noted that successful implementation of the DCJS model policy in small jurisdictions "should be persuasive" to other small departments.⁸⁰ Agencies seemed to pass on information about the issue through word of mouth and sharing best practices. In addition, accrediting agencies, policing associations, insurance providers, and lawmakers remained interested in the problem and continued to make agencies aware of the need to pay attention to the issue.

CONCLUSION

The results of this survey give reason to be more optimistic that policing agencies, even in jurisdictions with large numbers of fairly small agencies, can adopt best practices in a consistent fashion, at least if sustained efforts are made to engage with agencies. In 2013, based on the results of the survey of Virginia lineup policies, I suggested that due to institutional inertia, not policy choices, there was far too slow a pace of adoption of best practices. At the time, it appeared that stronger regulatory measures might be needed to safeguard the accuracy of criminal investigations. However, five years later, the evidence suggests that policing institutions can slowly come to adopt best practices, without such stronger regulatory measures. A combination of training, growing awareness, media coverage, and sharing of information between agencies, may have resulted in a real statewide improvement of practices: self-policing was successful in adoption of improved police policy. These results suggest that close work—with professional policing organizations, policymakers, accreditation bodies, and police agencies themselves—can be an effective way to shape law enforcement policy through self-policing.

⁸⁰ Karen L. Bune, Virginia Pushes a 'Best Practice' Model for Suspect Lineups, *PoliceOne.com* (Oct. 4, 2013), <https://www.policeone.com/chiefs-sheriffs/articles/6493783-Virginia-pushes-a-best-practice-model-for-suspect-lineups/> [<https://perma.cc/YE5T-LXH3>].