



UNC  
SCHOOL OF GOVERNMENT

## **2017 Juvenile Defender Conference**

August 11, 2017 / Chapel Hill, NC

Sponsored by the

The University of North Carolina School of Government and  
Office of Indigent Defense Services

# **ELECTRONIC COURSE MATERIALS**

## **2017 Juvenile Defender Conference**

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*Cosponsored by the UNC-Chapel Hill School of Government  
& Office of Indigent Defense Services*

### **AGENDA**

8:00 to 8:45am	Check-in
8:45 to 9:00	Welcome <i>Austine Long, Program Attorney</i> UNC School of Government, Chapel Hill, NC
9:00 to 10:00	<b>Detention Hearings [60 min.]</b> <i>Martin Moore, Assistant Public Defender</i> Asheville, NC
10:00 to 10:15	Break
10:15 to 11:45	<b>Motions to Suppress [90 min.]</b> <i>Mary Stansell, Assistant Public Defender</i> Office of the Public Defender, Raleigh, NC <i>Kim Howes, Assistant Juvenile Defender</i> Indigent Defense Services, Raleigh, NC
11:45 to 12:45	Lunch ( <i>provided in building</i> ) *
12:45 to 2:15	<b>Capacity to Proceed [90 min.]</b> <i>Terri Johnson, Attorney</i> Statesville, NC
2:15 to 2:30	Break ( <i>light snack provided</i> )
2:30 to 3:30	<b>Implicit Bias (Ethics) [60 min]</b> <i>James Drennan, Adjunct and Former Albert Coates Professor</i> UNC School of Government, Chapel Hill, NC
3:30 to 4:30	<b>Case Law Update [60 min.]</b> <i>LaToya Powell, Assistant Professor of Public Law and Government</i> UNC School of Government, Chapel Hill, NC

**CLE HOURS: 6** (Includes 1 hour of ethics/professional responsibility)

\* IDS employees may not claim reimbursement for lunch

## **SOG Resources for Civil Defenders**

**Author :** Austine Long

**Categories :** [Civil Practice](#)

**Tagged as :** [Public defenders](#); [SOG resources](#);

**Date :** August 2, 2017

In preparation for the upcoming parent attorney and juvenile defender annual conferences, I reviewed the list of resources and information that we provide for defenders. Our main resource is the [Indigent Defense Education \(IDE\)](#) page on the School of Government (SOG) website. It contains a list of upcoming programs and links to manuals and other resources for public defenders and private assigned counsel.

While speaking with my colleagues and reviewing the SOG site, I realized there are a number of other resources and materials useful for public defenders and private assigned counsel. SOG faculty focus on specific areas of law and work with particular groups of government officials and others who work in that area of law. I decided in this post to share some of the SOG resources outside of IDE that may assist defenders in representing indigent clients in civil cases.

### **On the Civil Side**

We believe that civil cases are interesting, so we created the [On the Civil Side](#) blog in January 2015. SOG faculty and staff write about important and interesting issues for court personnel and lawyers working in civil court proceedings. You can check the site on Wednesday and Friday for a new post. If you do not want to miss a post, you can use an RSS feed to send the new post automatically to an RSS reader or you can subscribe by email.

### **Juvenile Law**

The [juvenile law page](#) of the SOG website provides materials for practitioners working in the area of juvenile delinquency and abuse, neglect and dependency (A/N/D) proceedings. Discussed below are a few resources that are beneficial for juvenile defenders and parent attorneys.

The [Juvenile Delinquency Case Compendium](#) is an online searchable database and user-friendly tool. It includes a comprehensive collection of case annotations, and covers all published appellate court decisions related to juvenile delinquency proceedings in North Carolina from January 2007 to the present. LaToya Powell, Assistant Professor of Law and Government, created the juvenile delinquency case compendium and keeps it up to date.

The [Child Welfare Case Compendium \(CWCC\)](#) is also an online searchable database and user-friendly tool designed for attorneys and judicial officials. It contains annotations of published opinions addressing child welfare issues decided by the North Carolina appellate courts and the U.S. Supreme Court from January 2014 to present. Sara DePasquale, Assistant Professor of Law and Government, created the CWCC and keeps it up to date.

[NC Juvenile Justice-Behavioral Health Information Sharing Guide \(April 2015\) by Mark Botts and LaToya Powell](#). The guide is a collaboration among multiple agencies and partners. It is designed to address and improve information sharing procedures for youth involved in the juvenile justice and mental health/substance abuse systems.

[Beyond the Bench \(podcast\) Season 2: Homelessness, Neglect, and Child Welfare in North Carolina](#), hosted by Sara DePasquale (2016-2017). In six episodes, you will hear from people with different perspectives, including the judge, a

parent attorney, the child's guardian ad litem, county departments, and shelter providers. Each episode represents a different stage in the child welfare process.

[Stages of Abuse, Neglect, and Dependency Cases in North Carolina: From Report to Final Disposition](#) by Sara DePasquale (2015). This reference guide is a good overview for any practitioner new to this area of law. It includes a color-coded chart of the A/N/D process and is available for purchase [here](#).

The [social services page](#) on the SOG website contains resources, publications and information in the area of social services law. One resource that caught my attention is the [Social Services Confidentiality Research Tool](#). It is a useful tool for any practitioner who needs to locate and interpret applicable confidentiality laws.

## **Guardianship and Civil Commitment**

The [mental health page](#) on the SOG website provides information about North Carolina's mental health, developmental disabilities, and substance abuse services system. It includes an online learning program on [Involuntary Commitment](#). The online program consists of four modules in which Mark Botts, Associate Professor of Public Law and Government, explains the legal criteria and procedure for involuntary commitment. The mental health page also provides links to AOC forms, publications, and other resources for involuntary commitments.

Meredith Smith, Assistant Professor of Public Law and Government, provides written summaries of recent NC Court of Appeals and NC Supreme Court cases on incompetency and guardianship. The July 2017 Summaries are located [here](#). Assistant Professor Smith primarily focuses on areas of law where clerks of superior court exercise judicial authority, and she consults with attorneys and clerks about their cases. You can find publications and other resources written by Assistant Professor Meredith Smith [here](#).

## **Child Support Contempt**

The [IDE online learning library](#) includes a course on the basics of contempt. In this introductory course, Michael Crowell, former Professor of Public Law and Government, explains the difference between criminal and civil contempt. He also discusses the sanctions available for both criminal and civil contempt and the procedures for both. Attorneys can view the online program free or for a fee if they want CLE credit.

Michael Crowell's bulletin on [Contempt](#) (Dec. 2015) provides a detailed discussion about civil and criminal contempt. It includes information about issues such as burden and standard of proof, willfulness, the right to jury trial, self-incrimination, and appeals.

## **IDE Manuals**

Manuals for the substantive areas I discussed can be viewed or downloaded free at [Indigent Defense Manual Series](#). Although the Indigent Defense Manual Series does not include a manual about child support contempt, defenders can access the Child Support Chapter from the North Carolina Trial Judges' Bench Book, District Court. Links to the child support chapter and the A/N/D manual are on the Indigent Defense Manual Series site under Other Manuals. A new edition of the comprehensive A/N/D reference, manual will be available in the fall of this year.

Please share with me your ideas for any other resources that SOG could create that would be helpful to practitioners working in these civil law areas.

# **DETENTION HEARINGS**

## Detention Hearings



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## Culture of Detention

- Know your jurisdiction
  - Judges
  - Prosecutors
  - Type of crime juvenile is charged with
  - Type of crimes your jurisdiction/court is accustomed to seeing
- Secure/nonsecure custody is meant to serve a limited purpose
- Speak to fellow juvenile advocates

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## Types of Detention

- What is the purpose of juvenile detention?
  - "...it depends."
  - What stage in the process?
    - Pre-adjudication?
    - Post-adjudication?

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### Temporary Custody

- Physical custody of the juvenile until order for secure or nonsecure custody can be obtained
- 3 Circumstances under 7B-1900
  - 1.) By LEO if grounds exist for the arrest of an adult under 15A-401(b)
  - 2.) By LEO or juvenile court counselor if reasonable grounds to believe juvenile is an undisciplined juvenile
  - 3.) By LEO or court counselor, by a member of the Black Mtn. Center, Alc. Rehab Ctr., and Juvenile Evaluation Center...or by personnel of the Division if there are reasonable grounds to believe the juvenile is an absconder from any residential facility operated by the Division or from an approved detention facility.

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### § 15A-401. Arrest by law-enforcement officer.

- (b) Arrest by Officer Without a Warrant. -
  - (1) Offense in Presence of Officer. - An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense, or has violated a pretrial release order entered under G.S. 15A-534 or G.S. 15A-534.1(a)(2), in the officer's presence.
  - (2) Offense Out of Presence of Officer. - An officer may arrest without a warrant any person who the officer has probable cause to believe:
    - a. Has committed a felony; or
    - b. Has committed a misdemeanor, and:
      - 1. Will not be apprehended unless immediately arrested, or
      - 2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or
    - c. Has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2; or
    - d. Has committed a misdemeanor under G.S. 14-33(a), 14-33(c)(1), 14-33(c)(2), or 14-34 when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in G.S. 50B-1; or
    - e. Has committed a misdemeanor under G.S. 50B-4.1(a); or
    - f. Has violated a pretrial release order entered under G.S. 15A-534 or G.S. 15A-534.1(a)(2).

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### Duties of Person Taking Juvenile Into Temp. Custody

- Notify parent, guardian, custodian
- Must release the juvenile to the juvenile's parent, guardian, or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary\*
  - Can be returned to school

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### Duties of Person Taking Juvenile Into Custody

- If juvenile is not released, LEO must request a petition pursuant to 7B-1803 or 1804
- Once drawn and verified, LEO contacts CC; if juvenile CC files the petition, CC contacts judge for determination of need for continued custody

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### Limit on Temporary Custody

- Maximum of 12 hours per 7B-1901(b)
- Unless...
  - Saturday
  - Sunday
  - Holiday
- In which case, maximum of 24 hours
- Petition or Motion for Review Must be Filed and an Order for Secure (or Nonsecure) Custody Must be Issued

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### Theoretical Rights

- No formal remedy:
  - Suppress statements on constitutional grounds
  - Negotiate for release from secured custody more quickly
    - "Heart-strings approach" w/ judge
- Any unique relief granted in your jurisdiction?

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### Secure Custody – Types

- Pre-adjudication
- Post-adjudication
- Post-disposition

Statutory authority to issue a custody order – 7B-1902

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### Place of Secure Custody

- 7B-1905: No juveniles in adult facilities
- Limited exception in 1905(c)

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### Time Limits

- Limit on Secure Custody Order
  - 5 days
  - Then....Adjudicate or Secure Custody Hearing
- Subsequent hearings must be held at max of 10 day intervals
- 7-B 1906

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**Bases for Pre-adjudication Secure Custody**

- Factual basis for believing there is a reasonable factual basis to believe that the juvenile committed the offense and one of 8 (9?) circumstances:
  - Felony + demonstration of danger to property or persons
  - Danger to persons + Misdemeanor W/ Element of Assault or Misdemeanor Use/Threat/Display of Firearm or other Deadly Weapon
    - Demonstration of danger to PERSONS and charged with impaired driving offense
  - FTA on pending delinquency charge, probation violation, or post-release

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**Bases for Pre-adjudication Sec. Custody (cont.)**

- Charge pending and reasonable cause to believe the juvenile will not appear in court
- Absconder from custody (in this or any other state) or any residential facility operated by DJJ
- Attempted (or successful) self-inflicted physical injury
  - \*Juvenile must have been refused admission to hospital
  - 24 hours limit
  - Physician must be notified
  - Continuous supervision
- Runaway + inappropriate for nonsecure custody (or refuses) AND court finds need to evaluate for med or psych treatment (or to facilitate reuniting of juvenile w/ family)

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**Bases for Pre-adjudication Sec. Custody (cont.)**

- Alleged to be undisciplined and has willfully FTA'd in court after proper notice

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### Secure Custody Hearing - Shackling

- When is it appropriate?
- 7B-2402.1:
  - Only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom.
- Request to be heard – if judge denies unshackling, get it on the record
- If restraints are ordered, judge must make findings of fact in support of the order

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### Detention Hearings – Secure Custody

- Juvenile cannot be held under secure custody order for more than five calendar days without a hearing
- If order entered by CC pursuant to authority delegated by administrative order of the court, hearing at next regularly scheduled court session if it precedes five-day limit
- Cannot be waived
- Subsequent hearing must be held at intervals of no more than 10 (calendar) days

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### Detention Hearings – Nonsecure Custody

- Juvenile cannot be held under a nonsecure custody order for more than seven days without hearing
- Subsequent hearings on continued nonsecure custody shall be held within seven BUSINESS days of initial hearing
- Intervals of no more than 30 CALENDAR days
- Waiver only through counsel

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### Detention Hearings

- Private counsel?
- If not, always court appointed counsel
  - 7B-1906(c)
- Jurisdictional differences?

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### Burden for Custody Hearing

- Falls on the State... 7B-1906(d)
- "...The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The court shall not be bound by the usual rules of evidence at the hearings."

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### Preparing for a Detention Hearing

- Listen to client
  - Best source of info on charge and their support network
- DJJ information and records
  - Particularly for those previously on diversion contracts
  - Repeat offender?
- Communication with parents
  - Work schedules
  - Understand juvenile's past behaviors and identify patterns
- Familiarize yourself with juvenile's MH diagnoses

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Advocacy: Factors That Can Help

- Stable home life
- Consistent supervision
  - Immediate and extended family
- Extracurricular Involvement
  - Including after school academic programs
- Internships/employment/community service in place already
- Electronic monitoring (double-edged sword)
- Positive detention report

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Preparing (continued)

- Academic Supports
  - IEPs?
  - Supportive teacher/mentor?
- Previous engagement with local services
  - Group homes
  - Therapists

Presentation is everything!

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Misconception That Detention Will Help



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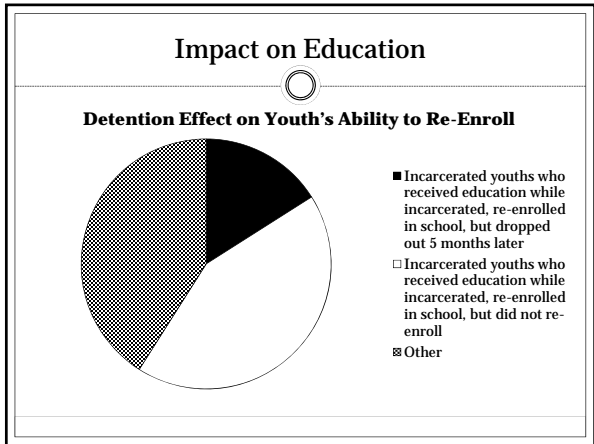
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- ### Collateral Risks of Not Returning to School
- Higher unemployment
  - Poorer health
  - Lower earning potential
  - 3.5x more likely than high school graduates to be arrested

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### Correlated with Higher Risk of Violent Crime

“...researchers interviewed 1,829 people, ages 10 to 18, who were detained at the Cook County Juvenile Temporary Detention Center in Chicago between 1995 and 1998. The young people were arrested for a variety of reasons, but they weren't necessarily convicted of a crime.

The researchers continued to follow up with them over the years. By 2011, 111 of them had died, and more than 90 percent of them were killed with guns. The findings were published Monday in the journal *Pediatrics*.”

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### Limitations

- Court can set “appropriate” conditions if the juvenile is released from secure custody
- Condition must be related to assuring juvenile's future appearance
- 7B-1906(f) outlines some restrictions

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### Post-Adjudication Secure Custody

- 7B-1903(c)
- Standard?
- Constitutional arguments + know your judges
- Request findings of fact on a post-adjudication order
  - Help make case law!
- Request hearings pursuant to 7B-1906(b)

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### Post-Adjudication Secure Custody (cont.)

- Be aware of the maximum confinement term for the offense and your client's delinquency history
- Statute assure a review hearing every 10 CALENDAR days

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### Long Distance Hearings

- Can be done via audio AND video if court and juvenile can see and hear each other
- There must be a defined procedure and type of equipment
  - Must be submitted to AOC by chief district judge and approved by AOC
- Juvenile still entitled to confidentiality

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### Recording the Hearing

- Not automatic or required
- Must request pursuant to 7A-198(a))

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### Hypothetical

- Jon enjoys loves his parents and his home. Despite the fact that his stepmom doesn't talk to him very much, his father and siblings are generally kind and supportive. His father works 12 hour shifts and Jon's stepmom stays at home most of the day, but occasionally takes his siblings out in the evening for family bonding time. In the past, when mom leaves, Jon likes to sneak out to see his new girlfriend, Ygritte, or run around with the wild kids in Carrboro.
- Pre-adjudication – Jon is charged with larceny of a dog (Class I Felony). Court Counselor Joffrey and ADA Cersei are arguing that your client should stay in custody because Jon doesn't have a healthy respect for authority and might run away
- Argue for Jon's release!

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### Hypothetical

- O.J. has just been adjudicated (proven beyond a reasonable doubt) responsible for two assaults. ADAs Clark and Darden are thrilled and immediately request that Judge Ito put and keep O.J. in secure custody pending disposition.
- What are the best arguments for OJ's pre-disposition release?

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### Hypothetical

- You are appointed to represent Walter White. Walter is charged with possession with the intent to sell, manufacture, or deliver methamphetamine (felony). First formal charge, but CC has heard whispers from other juveniles that Walter is a bad boy, but isn't exactly sure what he's been up to. He has never been accused of being violent, makes good grades (especially in chemistry), and his grandparents have offered to watch him leading up to adjudication.
- CC Hank and the DA are arguing that Walter should remain in secure custody because he is charged with such a serious crime and might run away.

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### Hypothetical

- You have been appointed to represent Sherlock. Sherlock has had past DJJ involvement, including one successful diversion contract for a non-violent offense and previously faced two charges that he cleverly got dismissed with your co-worker, Attorney Watson.
- CC Moriarti is beyond frustrated with your client. Despite Sherlock's exceptional detention report (minus his inability to be friendly with peers), Moriarti insists that because Sherlock missed a prior court date due to his lack of ride, that he is a flight risk. He has also asked the DA to discuss the current allegation of throwing his friend Lestrade's favorite laptop and allegedly threatening to break his iPhone if he upsets him again. Moriarti also has brought proof that Sherlock is a very good shot and thinks he is a danger to the community.
- For good measure, he also brought an audio recording from Sherlock's initial detention screening/interview stating "I'm not a psychopath, I'm a high-functioning sociopath," hoping for him to be held in secure custody pending a hospital visit

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**Resources**



- NC DHHS Licensed Residential Treatment Facilities
  - <https://www2.ncdhhs.gov/dhsr/data/mhllist.pdf>
- Comprehensive Clinical Assessments
  - <https://carolinaoutreach.com/services/child-services/clinical-assessments/>
- North Carolina Juvenile Defender Blog
  - <https://ncjuveniledefender.com/blog/>

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**State Detention Centers**



- Alexander Juvenile Detention Center
- Cabarrus Regional Detention Center
- Cumberland Regional Juvenile Detention Center
- New Hanover Regional Juvenile Detention Center
- Pitt Regional Juvenile Detention Center
- Wake Juvenile Detention Center

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**County Detention Centers**



- Durham County Youth Home
- Guilford County Juvenile Detention Center

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Contact Information
<div>828.423.0845</div> <div>Martin.E.Moore@nccourts.org</div> <div>Martin@MartinEkimMoore.com</div>


# **MOTIONS TO SUPPRESS**

## SUPPRESSION

Not an exhaustive list!

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## Goals

- Requirements for Motions to Suppress
- Types of evidence subject to exclusion
- Practice tips




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## In re Gault

The 4<sup>th</sup> Amendment applies to juveniles too!!  
Even kids have a right to privacy!

Always ask yourself:  
Under what authority did the government (LEO, SRO, teacher, JCC)  
question, search or seize my client?

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### N.C.G.S. 7B- 2408.5

If a Motion to Suppress is made before Adjudicatory hearing, it MUST -

➤ Be Written

➤ Served on ADA

\* Include an Affidavit containing FACTS in support – may be based on:

➤ personal knowledge

➤ “on information and belief”




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### Procedural

✓ File before P.C. or Adjudicatory Hearing

✓ Serve on ADA

✓ Request hearing on motion

✓ Once the juvenile has properly raised the suppression issue, the burden shifts to the State

➤ Preponderance of the evidence that the challenged evidence is admissible

▪ *State v. Johnson*, 304 N.C. App. 680 (1982), (stating preponderance of the evidence standard).

▪ *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for court to deny defense motion to suppress “for failure of proof”).

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### MTS Summarily GRANTED if:

❖ Motion complies with statutory requirements AND State concedes truth of allegations;

OR

❖ State stipulates that evidence sought to be suppressed will not be offered into evidence in any juvenile proceeding.

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### MTS Summarily DENIED if:

Your motion does not allege a legal basis

OR

Your affidavit does not (as matter of law) support your allegation

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### Motion to Suppress at the hearing

❖ May be made orally or in writing

❖ Determination made in same manner as MTS filed prior to hearing




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### What can you suppress?

- ✓ Your client's **statements/actions**
  - to LEO, JCC, possibly other state actors (teachers, counselors), anyone!
  - Co-respondent's statement
- ✓ Tangible **Evidence**
  - drugs, (stolen) property, blood/urine test, cell phone pictures, anything collected by LEO, SRO teacher, JCC
- ✓ **Identifications**
  - line up, show up, photo array, single picture (yearbook)

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## STATEMENTS

Miranda?  
Constitutional or Statutory?

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## Co-Respondent's Statement

Under the Confrontation Clause of the 6<sup>th</sup> Amendment & Article I, § 24 of the North Carolina Constitution –

- Portions of an accomplice's confession that are not genuinely self-inculpatory ("I did it"), but are blame-shifting ("he did it" or "we did it") are ordinarily not admissible
- §15A-927(c) codifies *Bruton* rule (*Bruton v. United States*, 391 U.S. 123 (1968)).
- Only applies if State wants to try join the juveniles for trial.

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## Miranda? 7B-2101

Was it custodial?



Was it interrogation?




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## Custodial - Interrogation

- ✓ Was it custodial?
  - Setting, free to leave, length of time, hour of day, # LEOs present, show of force, uniforms, guns, what kid was told
- ✓ Was statement in response to questions?
  - Was LEO implying a need for a response? ("you f \_\_\_\_ up")
- ✓ Were *Miranda* and statutory right to have a parent present warnings given?
- ✓ Was parent actually present? (§7B-2101(b))
- ✓ Did the juvenile already have an attorney?

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## Was it waived?

### Knowing?

Kids think "right to remain silent" means "until cop asks me a question" !!

### Intelligent?

IQ, maturity level, mental health issues, age

### Voluntary?

Coercion, threats/promises, mom saying "tell them"?!

See *State v. Saldierna*, \_\_ N.C. App. \_\_ (July 18, 2017). On remand from the NC Supreme Court's decision in *State v. Saldierna*, \_\_ N.C. \_\_, 794 S.E.2d 474 (2016).

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## Constitutional -Voluntary?

*JDB* applies – "reasonable juvenile"

- (*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011))

Did your client understand that s/he didn't HAVE to talk?

Court looks at "totality of circumstances"

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## practice tips

Use §7B-1900 & 1901 to help define "in custody" when LEO has juvenile.

Remember – it's an objective test

➤ whether a reasonable juvenile in the position of the respondent would believe himself to be in custody;

OR

➤ that he had been deprived of his freedom of action in some significant way, and is not based on the subjective intent of the interrogator or the perception of the person under questioning.

ANY statement made to JCC during intake is inadmissible pre-disposition (§7B-2408)

On probation? ANY of juvenile's statements that JCC tries to tell ADA about new petitions should still be suppressible under §7B-2408 (it's still pre-dispo)

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## Tangible Evidence

"person, houses, papers, and effects"  
(lockers, book bags, and cell phones)

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## Warrants "particularly describing"

Warrant requirements apply to juveniles - READ the search warrant!

If the place to be searched or thing to be seized is not well defined –  
suppress as - ineffective/invalid warrant  
- beyond the scope of warrant

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## Warrantless Searches Require PC plus -

- Exigent circumstances:
  - Safety of officer
  - Destruction of evidence
- Outside of school – kids have same Constitutional rights as adults
  - What RAS did LEO have to stop/question?
    - (kid possessing a cig is NOT illegal!)
  - What PC did LEO have to search?
  - Was it search incident to a lawful arrest?

Argue to suppress all “fruit of poisonous tree”

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## School Searches & Seizures?

The 4<sup>th</sup> Amendment still applies!!

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## School Search

- ✓ Lower standard for school officials (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985))
  - Reasonable under all the circumstances
- ✓ Official still needs “reasonable suspicion”
  - Was it “justified at inception”?
    - reliable tip, more than hunch
  - Was it “reasonable in scope”?
    - not intrusive in light of age & gender?
    - Weighed against school's safety interest (guns/drugs)

See: *In the Matter of D.L.D.*, 694 S.E.2d 395 (2010) & *In the Matter of T.A.S.*, 713 S.E.2d 211 (2011)

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## School Resource Officers

- The lower standard for school Officials includes SROs when –
  - involved at the request of the school principal, involvement was minimal relative to the principal's, SRO did not initiate the investigation, and did not direct the principal's actions (*In re D.D.*, 146 N.C. App. 309 (2001))

CAN'T search just "because on probation" (need reasonable suspicion)  
15A allows for adult, but NO equivalent in 7B!

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## Practice Tips - Questions to Ask???

- ✓ Who initiated the search?
- ✓ Who performed the search?
- ✓ Where was it done?
- ✓ Who was present?
- ✓ How was it done (beyond scope of suspicion or too intrusive)?




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## IDENTIFICATIONS

Who's looking at me?




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## Identification

- ✓ Violates due process clause when –
  - procedure is suggestive, AND
  - suggestiveness of procedure results in strong probability of misidentification
  - Eyewitness Identification Reform Act - §15A-284.5 0– 284.53
- ✓ Get local sheriff & police policies
- ✓ Look at how the ID was made
- ✓ Did LEO follow the procedures?

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## How was the ID made? Was it suggestive?

- ✓ Line up (rarely done with kids!)
  - Only person or in police car
- ✓ Show up (often prejudicial facts)
  - Only person or in police car
- ✓ Photo-array (similarity of photos? – how shown?)
  - Stands out based on size, age, apparel
  - LEO or SRO makes comments that taints the procedure
- ✓ Single photo (suggestive – problematic – but typical yearbook picture!)

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## Did it create a risk of misidentification?

### Five Factors:

1. Opportunity of the witness to view the respondent at the time of the crime;
2. Witness's degree of attention;
3. Accuracy of the witness's prior description of the respondent;
4. Level of certainty demonstrated by the witness at the time of confrontation; and
5. Length of time between the crime and confrontation.

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We're always here to help!

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Assistant Juvenile Defender	Juvenile Chief
N.C. Office of the Juvenile Defender	Wake Public Defender Office
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## SUMMARY OF THE REID INTERROGATION TECHNIQUE<sup>1</sup>

<b>SET UP</b>	<ul style="list-style-type: none"><li>▪ Contains instructions on how to set room up before interrogation so that suspect is in plain view.</li><li>▪ Once seated, interrogation begins; just before interrogation begins, have rapport stage; Non-confrontational interview (20-45 minutes);</li><li>▪ Use of Bait Questions (Is there any reason why witnesses would be telling us you were at the crime scene?)</li><li>▪ Use of Behavior Provoking Response Questions (What do you think should happen to the person who committed this crime?)</li><li>▪ Gives instructions on how to interpret verbal and non-verbal behaviors (which attributes dishonesty to many non-verbal behaviors that are typical manifestations of anxiety).</li></ul>
<b>STEP ONE: THE POSITIVE CONFRONTATION</b>	<ul style="list-style-type: none"><li>▪ Confront suspect with guilt</li><li>▪ Repeat several times</li><li>▪ Look for signs of deception</li><li>▪ Even without evidence, assure suspect he or she is guilty</li><li>▪ Persuade suspect he or she is caught and powerless to change situation</li><li>▪ Shift from rapport-building to confrontation mode occurs quickly, suddenly: "We're not here to talk about whether you committed the crime, but why you did it." – MESSAGE CONVEYED: "We think you're guilty; we have evidence that you're guilty, and confession would give you some benefit later."</li></ul>
<b>STEP TWO: THEME DEVELOPMENT</b>	<ul style="list-style-type: none"><li>▪ Minimize suspect's guilt</li><li>▪ Show sympathy</li><li>▪ Gain trust ("I know you're not a bad person." "We want to help you out.")</li></ul>

<b>STEP THREE: HANDLING DENIALS</b>	<ul style="list-style-type: none"> <li>▪ Interrupt all statements of denial</li> <li>▪ Innocent denials are “spontaneous, forceful, direct”</li> <li>▪ Guilty denials are “defensive, qualified, hesitant”</li> <li>▪ (Not true, but keep interrupting to show control over suspect)</li> </ul>
<b>STEP FOUR: OVERCOMING OBJECTIONS</b>	<ul style="list-style-type: none"> <li>▪ We know you did it, doesn’t matter what you say, we know</li> <li>▪ When the suspect says something like, “I wouldn’t steal money. I’m an honest person,” the interrogator then incorporates the objection into the theme, such as: “Yes, of course you are an honest person; that’s why we’re sure you’d only do this because of your desperate financial straits.”</li> </ul>
<b>STEP FIVE: PROCURING AND RETAINING THE SUSPECT’S ATTENTION</b>	<ul style="list-style-type: none"> <li>▪ Do not lose suspect’s attention</li> <li>▪ Keep suspect talking and alert; touch them; use eye contact; get closer</li> </ul>
<b>STEP SIX: HANDLING THE SUSPECT’S PASSIVE MOOD</b>	<ul style="list-style-type: none"> <li>▪ Show sympathy; urge suspect to tell truth</li> <li>▪ “Just help us out.” “We just need you to help us and tell us what happened.” “We know you’re not a bad person.”</li> </ul>
<b>STEP SEVEN: PRESENTING AN ALTERNATIVE QUESTION</b>	<ul style="list-style-type: none"> <li>▪ The two choices are both guilty, but one is the maximized version that is presented – the one the interrogator says everyone will assume occurred if there is no confession – and the other alternative is the minimized version per the theme developed</li> <li>▪ E.g., angry and wanted revenge vs. accident</li> </ul>
<b>STEP EIGHT: DETAILING THE OFFENSE</b>	<ul style="list-style-type: none"> <li>▪ Get suspect to provide details of crime/things only the criminal would know</li> <li>▪ Often done by giving suspect photos of crime scene; telling suspect about the crime; taking suspect to crime scene; anything to get suspect to share info</li> </ul>



<b>STEP NINE: ELEMENTS OF ORAL AND WRITTEN STATEMENTS</b>	<ul style="list-style-type: none"> <li>▪ Get written and signed confession</li> <li>▪ Once written, police type up their own version of the confession and purposefully insert errors; cross them out; get suspect to initial them; and get suspect to sign each page (this makes it appear that suspect read and edited the statement)</li> </ul>
<b>CAUTIONS</b>	<ul style="list-style-type: none"> <li>▪ Instruct students that they should not use unless reasonably certain of the suspect's guilt</li> <li>▪ Instruct investigators to "use caution" when using the technique with juveniles (but also say that same rules that apply to adults apply to youth)</li> </ul>

<sup>1</sup> These "steps" are outlined on JOHN E. REID & ASSOC., [http://www.reid.com/educational\\_info/criticttechnique.html](http://www.reid.com/educational_info/criticttechnique.html) (last visited June 27, 2012) ; the titles of each step come from the Reid informational brochure; *see also* Fred E. Inbau, CRIMINAL INTERROGATIONS AND CONFESSIONS (4th ed. 2004). The summary of the steps was created by an attorney familiar with the technique who is not affiliated with John E. Reid Interrogations, Inc.

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO.

IN RE:

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Juvenile

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AFFIDAVIT IN SUPPORT OF  
MOTION TO SUPPRESS

I, ATTORNEY, being duly sworn, deposes and says:

1. On May 25, 20\_\_ several petitions were filed against the respondent alleging Felony Breaking and Entering, larceny pursuant to B&E, and Injury to Real Property.
2. On May 31, 20\_\_ the respondent through his attorney filed a motion for Discovery and Exculpatory Material, which was granted.
3. That on or about June 19 20\_\_, the State of North Carolina, through assistant district attorney provided to the juvenile discovery including police reports from the TOWN Police Department.
4. That these documents included information regarding the juvenile having made statements to various officers as a part of this investigation.
5. That, upon information and belief, the statements taken by Officer LEO were taken in violation of the juvenile's Statutory and Constitutional rights.
6. That, upon information and belief, the juvenile was in handcuffs at the time these statements were taken.
7. That, upon information and belief, the juvenile had not been given any Miranda and/or statutory juvenile warnings prior to these statements.
8. That, upon information and belief, there was no parent present during any of the statements made by the juvenile.
9. That, upon information and belief, some statements were taken by Officer LEO2, while the juvenile was in custody at the police station. That these statements were in violation of the juvenile's rights because even if given after he was read his juvenile Miranda rights he had invoked his right to remain silent and his parent was not present.

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ATTORNEY

Sworn and subscribed before me this the \_\_\_\_ day of 20\_\_.

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO.

In the matter of:

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Juvenile

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MOTION TO SUPPRESS  
EVIDENCE

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court, pursuant to N.C. Gen. Stat. § 7A-2106 and 15A-279 and pursuant to 7B-2408.5, to suppress the evidence collected by law enforcement pursuant to a Non-Testimonial Order on or about April 21, 2009, which the Juvenile believes and alleges that the State intends to use at the adjudicatory hearing of this case.

The Juvenile contends that the exclusion of the evidence is required by the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Sections 20, 23 and 27, of the North Carolina Constitution.

The Juvenile requests an evidentiary hearing on this motion.

In support of this motion, the Juvenile states the following:

1. Counsel for the Juvenile received from the State a police report in response to the Juvenile's Motion for

Discovery and Exculpatory Material filed on September 10, 2009.

2. According to the State's discovery, the juvenile's fingerprints were collected by a Detective \_\_\_\_\_ of the TOWN Police Department on or about DATE, pursuant to a Non-Testimonial Order for comparison.
3. According to the documents provided by the State, and according to the juvenile, at no time did Detective advise the juvenile of his right to counsel at the time of collecting the fingerprints pursuant to the Non-Testimonial Order.
4. N.C.G.S. 7B-2106 requires that law enforcement must follow the procedures laid out in N.C.G.S. Article 14, 15A-274, et seq. for the collection of any evidence by a Non-Testimonial Order.
5. N.C.G.S. 15A-279(d) requires that law enforcement must advise the juvenile of his right to have legal counsel present at the testing procedure.
6. Therefore the evidence was obtained in substantial violation of both the U.S. and North Carolina Constitutions and North Carolina General Statutes.

WHEREFORE, the Juvenile requests that the Court hold an evidentiary hearing on this matter and suppress any evidence

obtained pursuant to the Non-Testimonial Order.

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO.

In the matter of:

XX,

Juvenile

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MOTION TO SUPPRESS  
EVIDENCE

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court, pursuant to N.C. Gen. Stat. § 7B-2408.5, to suppress the evidence collected by law enforcement on or about DATE, which the Juvenile, believes and alleges, the State intends to use at the adjudicatory hearing of this case on petition alleging possession with intent to sell and deliver marijuana.

The Juvenile contends that the exclusion of the evidence is required by the Fourth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Sections 23 of the North Carolina Constitution.

The Juvenile requests an evidentiary hearing on this motion.

In support of said motion the Juvenile states the following:

### Background

1. Counsel for the Juvenile received from the State a police report.
2. According to the State's discovery, evidence was collected by an Officer \_\_\_\_\_ of the TOWN Police Department on or about DATE, at \_\_\_\_\_ High School.
3. According to the police report, a student told Officer \_\_\_\_\_ that another student named "\_\_\_\_" had brought drugs to school to sell. The principal of High School, Principal, called XX who goes by "\_\_\_\_," out of class to his office.
4. Principal and Officer interviewed XX in Principal's office.
5. Initially, Principal searched XX's backpack and found a marijuana cigarette.
6. According to the Police report, being in a small room with XX made Officer "very uneasy" because in his "\_\_\_\_ years of being a police officer [he] knew that drug dealers . . . keep weapons on them." Officer briefly frisked XX and found no contraband. He states that he smelled marijuana coming from XX's front pocket. He felt a lump in XX's back pocket and removed ninety-five dollars.

7. After the pat-down, Officer allowed XX to sit down.  
At that point, Officer "knew XX had something on him because of his [relaxed] body demeanor." Officer states that he had the juvenile stand up again and pulled up XX's sagging pants and saw a "not" (sic) in the front of his pants.
8. XX remembers that Officer shook his pants after having him stand up again for the second search.
9. Officer looked into XX's pants and underpants and found a medicine bottle with the contraband marijuana.

#### Argument

10. In order to comply with the Fourth Amendment, a frisk for weapons must be (1) at the outset based on reasonable articulable suspicion and (2) "reasonably related in scope to the circumstances which justified" the frisk. Terry v. Ohio, 392 U.S. 1, 21 (1968).
11. A pat-down for weapons may not be used as a substitute for probable cause to search for other contraband. But if "a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy." Minnesota v. Dickerson, 508 U.S. 366, 375



(1993)(emphasis added).

12. A mere hunch does not constitute the reasonable articulable suspicion sufficient to justify a search. Terry, 392 U.S. at 27.
13. The Supreme Court has used a similar standard in evaluating school searches. See New Jersey v. T.L.O., 469 U.S. 325, 340-341 (applying the Terry rubric).
14. A school search must also be reasonable "in light of the age and sex of the student and the nature of the infraction." Id. at 342.
15. A search of a child's undergarments constitutes a "strip search." Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2641 (2009) (concluding that search that involved looking at a students breasts and genitals could fairly be called a "strip search").
16. Principal search of XX's backpack and Officer's frisk were reasonable under Terry and T.L.O.
17. Officer's seizure of the ninety-five dollars from XX was unreasonable. It was certainly not "immediately apparent" that the money in XX's pants was contraband, and, indeed, it was not contraband. Dickerson, 508 U.S. at 375. The ninety-five dollars should thus be suppressed. N.C. Gen. Stat. § 15A-974. Additionally, any evidence discovered as a result of

the discovery of the ninety-five dollars must be suppressed as "fruit of the poisonous tree." Segura v. United States, 468 U.S. 796, 804 (1984).

18. Officer's search of XX's pants, after he had already ascertained that XX had no weapons, was not based on reasonable articulable suspicion. It was, as Officer all but states in his report, based only on a hunch. This hunch may not be the basis of reasonable articulable suspicion. Terry, 392 U.S. at 27.

19. Additionally and alternatively, Officer's search of XX's undergarments was unreasonable in light of XX's age and the nature of the infraction. See T.L.O., 469 U.S. at 342; Redding, 129 S. Ct. 2640-42. Officer had no reason to believe that XX had contraband in his underwear. As the Supreme Court stated in Redding: "When the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short." 129 S. Ct. at 2642.

20. For any reason articulated above, the medicine bottle and marijuana should be suppressed. N.C. Gen. Stat. § 15A-974.

WHEREFORE, the Juvenile requests that the Court hold an evidentiary hearing on this matter and suppress the evidence collected as a result of Officer's extended "strip search" of the juvenile.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Mary Wilson  
Juvenile Chief

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO.

In the matter of:

JUVENILE,  
Juvenile

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ORDER TO SUPPRESS  
EVIDENCE

This Court heard evidence on the defendant's motion to suppress on DATE in \_\_\_\_\_ County Juvenile Court. The State was represented by ADA. The Respondent was present and represented by JD. Having heard evidence from both the State and the Respondent and having heard arguments of counsel, the Court makes the following:

#### FINDINGS OF FACT

1. Two vehicles located at the residence on \_\_\_\_\_ Lane, TOWN, North Carolina, belonging to VICTIM, were unlawfully broken into and entered during the early morning hours of DATE.
2. Some of the items taken from these vehicles were later recovered in a bedroom of the residence on \_\_\_\_\_ Lane, TOWN, North Carolina in which the respondent lived.
3. Several officers that responded to the \_\_\_\_\_ Lane residence entered the juvenile's residence several times.
4. The first time the officers entered the residence, the entry was for the legal purpose, as a protective sweep for officer safety.
5. The second and third time officers entered the residence, when they actually seized the evidence collected from the residence as stated in paragraph two, the officers did not have valid consent to enter and search and were no longer acting pursuant to a legal purpose of a protective sweep.
6. The third entry was by mere acquiescence on the part of the home owner and occupants.
7. The State has the burden to prove that the officer's entry was pursuant to valid consent from the homeowner/occupants or pursuant to other legal purposes (protective sweep).

CONCLUSIONS OF LAW

1. The evidence collected during the third entry into the residence was not seized pursuant to valid consent of the homeowner or occupants.
2. The officer's third entry into the residence was not pursuant to a protective sweep or other legal purposes.
3. All the evidence seized from the respondent's residence at \_\_\_\_\_ Lane should be suppressed.

THEREFORE THE ORDER OF THE COURT IS that the respondent's motion to suppress is granted.

This the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Juvenile Court Judge



University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2010-13

POLICE-INDUCED CONFESSIONS: RISK FACTORS AND  
RECOMMENDATIONS

Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson,  
Richard A. Leo, and Allison D. Redlich

# Police-Induced Confessions: Risk Factors and Recommendations

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Gisli H. Gudjonsson · Richard A. Leo ·  
Allison D. Redlich

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**Abstract** Recent DNA exonerations have shed light on the problem that people sometimes confess to crimes they did not commit. Drawing on police practices, laws concerning the admissibility of confession evidence, core principles of psychology, and forensic studies involving multiple methodologies, this White Paper summarizes what is known about police-induced confessions. In this review, we identify suspect characteristics (e.g., adolescence; intellectual disability; mental illness; and certain personality traits), interrogation tactics (e.g., excessive interrogation time; presentations of false evidence; and minimization), and the phenomenology of innocence (e.g., the tendency to waive *Miranda* rights) that influence confessions as well as their effects on judges and juries. This article concludes with a strong recommendation for the mandatory electronic recording of interrogations and considers other possibilities

for the reform of interrogation practices and the protection of vulnerable suspect populations.

**Keywords** Police interviews · Interrogations · Confessions

In recent years, a disturbing number of high-profile cases, such as the Central Park jogger case, have surfaced involving innocent people who had confessed and were convicted at trial, only later to be exonerated (Drizin & Leo, 2004; Gudjonsson, 1992, 2003; Kassin, 1997; Kassin & Gudjonsson, 2004; Lassiter, 2004; Leo & Ofshe, 1998). Although the precise incidence rate is not known, research suggests that false confessions and admissions are present in 15–20% of all DNA exonerations (Garrett, 2008; Scheck, Neufeld, & Dwyer, 2000; <http://www.innocenceproject.org/>). Moreover, because this sample does not include those false confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions, the cases that are discovered most surely represent the tip of an iceberg.

In this new era of DNA exonerations, researchers and policy makers have come to realize the enormous role that psychological science can play in the study and prevention of wrongful convictions. In cases involving wrongfully convicted defendants, the most common reason (found in three-quarters of the cases) has been eyewitness misidentification. Eyewitness researchers have thus succeeded at identifying the problems and proposing concrete reforms. Indeed, following upon an AP-LS White Paper on the subject (Wells et al., 1998), the U.S. Department of Justice assembled a working group of research

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psychologists, prosecutors, police officers, and lawyers, ultimately publishing guidelines for law enforcement on how to minimize eyewitness identification error (Technical Working Group for Eyewitness Evidence, 1999; see Doyle, 2005; Wells et al., 2000). While other problems have been revealed—for example, involving flaws in various forensic sciences (see Faigman, Kaye, Saks, & Sanders, 2002), the number of cases involving confessions—long considered the “gold standard” in evidence—has proved surprising (<http://www.innocenceproject.org/>).

Wrongful convictions based on false confessions raise serious questions concerning a chain of events by which innocent citizens are judged deceptive in interviews and misidentified for interrogation; waive their rights to silence and to counsel; and are induced into making false narrative confessions that form a sufficient basis for subsequent conviction. This White Paper summarizes much of what we know about this phenomenon. It draws on core psychological principles of influence as well as relevant forensic psychology studies involving an array of methodologies. It identifies various risk factors for false confessions, especially in police interviewing, interrogation, and the elicitation of confessions. It also offers recommendations for reform.

Citing the impact on policy and practice of the eyewitness White Paper, Wiggins and Wheaton (2004) called for a similar consensus-based statement on confessions. Fulfilling this call, the objectives of this White Paper are threefold. The first is to review the state of the science on interviewing and interrogation by bringing together a multidisciplinary group of scholars from three perspectives: (1) clinical psychology (focused on individual differences in personality and psychopathology); (2) experimental psychology (focused on the influence of social, cognitive, and developmental processes); and (3) criminology (focused on the empirical study of criminal justice as well as criminal law, procedure, and legal practice). Our second objective is to identify the dispositional characteristics (e.g., traits associated with *Miranda* waivers, compliance, and suggestibility; adolescence; mental retardation; and psychopathology) and situational-interrogation factors (e.g., prolonged detention and isolation; confrontation; presentations of false evidence; and minimization) that influence the voluntariness and reliability of confessions. Our third objective is to make policy recommendations designed to reduce both the likelihood of police-induced false confessions and the number of wrongful convictions based on these confessions.

## BACKGROUND

The pages of American legal history are rich in stories about false confessions. These stories date back to the

Salem witch trials of 1692, during which about 50 women confessed to witchcraft, some, in the words of one observer, after being “tyed... Neck and Heels till the Blood was ready to come out of their Noses” (Karlsen, 1989, p. 101). Psychologists’ interest as well can be traced to its early days as a science. One hundred years ago, in *On the Witness Stand*, Hugo Munsterberg (1908) devoted an entire chapter to the topic of “Untrue Confessions.” In this chapter, he discussed the Salem witch trials, reported on a contemporary Chicago confession that he believed to be false, and sought to explain the causes of this phenomenon (e.g., he used such words as “hope,” “fear,” “promises,” “threats,” “suggestion,” “calculations,” “passive yielding,” “shock,” “fatigue,” “emotional excitement,” “melancholia,” “auto-hypnosis,” “dissociation,” and “self-destructive despair”).

## DNA Exonerations and Discoveries in the U.S.

In 1989, Gary Dotson was the first wrongfully convicted individual to be proven innocent through the then-new science of DNA testing. Almost two decades later, more than 200 individuals have been exonerated by post-conviction DNA testing and released from prison, some from death row. In 15–20% of these cases, police-induced false confessions were involved (Garrett, 2008; [www.innocenceproject.org](http://www.innocenceproject.org/)). A disturbing number of these have occurred in high-profile cases, such as New York City’s Central Park Jogger case, where five false confessions were taken within a single investigation. In that case, five teenagers confessed during lengthy interrogations to the 1989 brutal assault and rape of a young woman in Central Park. Each boy retracted his statement immediately upon arrest, saying he had confessed because he expected to go home afterward. All the boys were convicted and sent to prison, only to be exonerated in 2002 when the real rapist gave a confession, accurately detailed, that was confirmed by DNA evidence (*People of the State of New York v. Kharey Wise et al.*, 2002).

Post-conviction DNA tests and exonerations have offered a window into the causes of wrongful conviction. Researchers and legal scholars have long documented the problem and its sources of error (Borchard, 1932; Frank & Frank, 1957; see Leo, 2005 for a review). Yet criminal justice officials, commentators, and the public have tended until recently to be highly skeptical of its occurrence, especially in death penalty cases (Bedau & Radelet, 1987). The steady stream of post-conviction DNA exonerations in the last two decades has begun to transform this perception. Indeed, these cases have established the leading causes of error in the criminal justice system to be eyewitness misidentification, faulty forensic science, false informant testimony, and false confessions (Garrett, 2008).



## The Problem of False Confessions

A false confession is an admission to a criminal act—usually accompanied by a narrative of how and why the crime occurred—that the confessor did not commit. False confessions are difficult to discover because neither the state nor any organization keeps records of them, and they are not usually publicized. Even if they are discovered, false confessions are hard to establish because of the difficulty of proving the confessor's innocence. The literature on wrongful convictions, however, shows that there are several ways to determine whether a confession is false. Confessions may be deemed false when: (1) it is later discovered that no crime was committed (e.g., the presumed murder victim is found alive, the autopsy on a "shaken baby" reveals a natural cause of death); (2) additional evidence shows it was physically impossible for the confessor to have committed the crime (e.g., he or she was demonstrably elsewhere at the time or too young to have produced the semen found on the victim); (3) the real perpetrator, having no connection to the defendant, is apprehended and linked to the crime (e.g., by intimate knowledge of nonpublic crime details, ballistics, or physical evidence); or (4) scientific evidence affirmatively establishes the confessor's innocence (e.g., he or she is excluded by DNA test results on semen, blood, hair, or saliva).

Drizin and Leo (2004) analyzed 125 cases of proven false confession in the U.S. between 1971 and 2002, the largest sample ever studied. Ninety-three percent of the false confessors were men. Overall, 81% of the confessions occurred in murder cases, followed by rape (8%) and arson (3%). The most common bases for exoneration were the real perpetrator was identified (74%) or that new scientific evidence was discovered (46%). With respect to personal vulnerabilities, the sample was younger than the total population of murderers and rapists: A total of 63% of false confessors were under the age of 25, and 32% were under 18; yet of all persons arrested for murder and rape, only 8 and 16%, respectively, are juveniles (Snyder, 2006). In addition, 22% were mentally retarded, and 10% had a diagnosed mental illness. Surprisingly, multiple false confessions to the same crime were obtained in 30% of the cases, wherein one false confession was used to prompt others. In total, 81% of false confessors in this sample whose cases went to trial were wrongfully convicted.

Although other researchers have also documented false confessions in recent years, there is no known incidence rate, and to our knowledge empirically based estimates have never been published. There are several reasons why an incidence rate cannot be determined. First, researchers cannot identify the universe of false confessions because no governmental or private organization keeps track of this

information. As noted earlier, the sample of discovered cases is thus incomplete. Second, even if one could identify a nonrandom set of hotly contested and possibly false confessions, it is often difficult if not impossible as a practical matter to obtain the primary case materials (e.g., police reports; pretrial and trial transcripts; and electronic recordings of the interrogations) needed to determine "ground truth" with sufficient certainty to prove that the confessor is innocent. Also, it is important to note that although most case studies are based in the U.S. and England, proven false confessions have been documented in countries all over the world—including Canada (CBC News, August 10, 2005), Norway (Gudjonsson, 2003), Finland (Santtila, Alkiora, Ekholm, & Niemi, 1999), Germany (Otto, 2006), Iceland (Sigurdsson & Gudjonsson, 2004), Ireland (Inglis, 2004), The Netherlands (Wagenaar, 2002), Australia (Egan, 2006), New Zealand (Sherrer, 2005), China (Kahn, 2005), and Japan (Onishi, 2007).

For estimating the extent of the problem, self-report methods have also been used. Sigurdsson and Gudjonsson (2001) conducted two self-report studies of prison inmates in Iceland and found that 12% claimed to have made a false confession to police at some time in their lives, a pattern that the authors saw as part of the criminal lifestyle. In a more recent study of Icelandic inmates, the rate of self-reported false confessions had increased (Gudjonsson, Sigurdsson, Einarsson, Bragason, & Newton, 2008). Similar studies have been conducted in student samples within Iceland and Denmark. Among those interrogated by police, the self-reported false confession rates ranged from 3.7 to 7% among college and older university students (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006; Gudjonsson, Sigurdsson, & Einarsson, 2004; Steingrimsdottir, Hreinsdottir, Gudjonsson, Sigurdsson, & Nielsen, 2007; Gudjonsson, Sigurdsson, Bragason, Einarsson, & Valdimarsdottir, 2004). In a North American survey of 631 police investigators, respondents estimated from their own experience that 4.78% of innocent suspects confess during interrogation (Kassin et al., 2007). Retrospective self-reports and observer estimates are subject to various cognitive and motivational biases and should be treated with caution as measures of a false confession rate. In general, however, they reinforce the wrongful conviction data indicating that a small but significant minority of innocent people confess under interrogation.

## POLICE INTERROGATIONS IN CONTEXT

The practices of interrogation and the elicitation of confessions are subject to historical, cultural, political, legal, and other contextual influences. Indeed, although this article is focused on confessions to police within in a

criminal justice framework, it is important to note that similar processes occur, involving varying degrees of pressure, within the disparate frameworks of military intelligence gathering and corporate loss-prevention investigations. Focused on criminal justice, we examine American interrogation practices of the past and present; the role played by *Miranda* rights; the admissibility and use of confession evidence in the courts; and current practices not only in the U.S. but in other countries as well.

### “Third-Degree” Practices of the Past

From the late nineteenth century through the 1930s, American police occasionally employed “third-degree” methods of interrogation—inflicting physical or mental pain and suffering to extract confessions and other types of information from crime suspects. These techniques ranged from the direct and explicit use of physical assaults to tactics that were both physically and psychologically coercive to lesser forms of duress. Among the most commonly used “third-degree” techniques were physical violence (e.g., beating, kicking, or mauling suspects); torture (e.g., simulating suffocation by holding a suspect’s head in water, putting lighted cigars or pokers against a suspect’s body); hitting suspects with a rubber hose (which seldom left marks); prolonged incommunicado confinement; deprivations of sleep, food, and other needs; extreme sensory discomfort (e.g., forcing a suspect to stand for hours on end, shining a bright, blinding light on the suspect); and explicit threats of physical harm (for a review, see Leo, 2004). These methods were varied and commonplace (Hopkins, 1931), resulting in large numbers of coerced false confessions (Wickersham Commission Report, 1931).

The use of third-degree methods declined precipitously from the 1930s through the 1960s. They have long since become the exception rather than the rule in American police work, having been replaced by interrogation techniques that are more professional and psychologically oriented. The twin pillars of modern interrogation are behavioral lie-detection methods and psychological interrogation techniques, both of which have been developed and memorialized in interrogation training manuals. By the middle of the 1960s, police interrogation practices had become entirely psychological in nature (Wald, Ayres, Hess, Schantz, & Whitebread, 1967). The President’s Commission on Criminal Justice and the Administration of Justice declared in 1967: “Today the third degree is virtually non-existent” (Zimring & Hawkins, 1986, p. 132). Still, as the United States Supreme Court recognized in *Miranda v. Arizona* (1966), psychological interrogation is inherently compelling, if not coercive, to the extent that it relies on sustained pressure, manipulation, trickery, and deceit.

### Current Law Enforcement Objectives and Practices in the U.S.

American police typically receive brief instruction on interrogation in the academy and then more sustained and specialized training when promoted from patrol to detective. Interrogation is an evidence-gathering activity that is supposed to occur after detectives have conducted an initial investigation and determined, to a reasonable degree of certainty, that the suspect to be questioned committed the crime.

Sometimes this determination is reasonably based on witnesses, informants, or tangible evidence. Often, however, it is based on a clinical hunch formed during a pre-interrogation interview in which special “behavior-provoking” questions are asked (e.g., “What do you think should happen to the person who committed this crime?”) and changes are observed in aspects of the suspect’s behavior that allegedly betray lying (e.g., gaze aversion, frozen posture, and fidgety movements). Yet in laboratories all over the world, research has consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception (DePaulo et al., 2003). Hence, it is not surprising as an empirical matter that laypeople on average are only 54% accurate at distinguishing truth and deception; that training does not produce reliable improvement; and that police investigators, judges, customs inspectors, and other professionals perform only slightly better, if at all—albeit with high levels of confidence (for reviews, see Bond & DePaulo, 2006; Meissner & Kassin, 2002; Vrij, 2008).

The purpose of interrogation is therefore not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. Rather, police are trained to interrogate only those suspects whose culpability they “establish” on the basis of their initial investigation (Gordon & Fleisher, 2006; Inbau, Reid, Buckley, & Jayne, 2001). For a person under suspicion, this initial impression is critical because it determines whether police proceed to interrogation with a strong presumption of guilt which, in turn, predisposes an inclination to ask confirmatory questions, use persuasive tactics, and seek confessions (Hill, Memon, & McGeorge, 2008; Kassin, Goldstein, & Savitsky, 2003). In short, the single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure the conviction of offenders (Leo, 2008).

Designed to overcome the anticipated resistance of individual suspects who are presumed guilty, police interrogation is said to be stress-inducing by design—structured to promote a sense of isolation and increase the anxiety and despair associated with denial relative to confession. To achieve these goals, police employ a number of tactics. As

described in Inbau et al.'s (2001) *Criminal Interrogation and Confessions*, the most influential approach is the so-called Reid technique (named after John E. Reid who, along with Fred Inbau, developed this approach in the 1940s and published the first edition of their manual in 1962). First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing “themes” that minimize the crime and lead suspects to see confession as an expedient means of escape. The use of this technique has been documented in naturalistic observational studies (Feld, 2006b; Leo, 1996b; Simon, 1991; Wald et al., 1967) and in recent surveys of North American investigators (Kassin et al., 2007; Meyer & Reppucci, 2007).

### Miranda Warnings, Rights, and Waivers

One of the U.S. legal system's greatest efforts to protect suspects from conditions that might produce involuntary and unreliable confessions is found in the U.S. Supreme Court decision in *Miranda v. Arizona* (1966). The Court was chiefly concerned with cases in which the powers of the state, represented by law enforcement, threatened to overbear the will of citizen suspects, thus threatening their Constitutional right to avoid self-incrimination.

In *Miranda*, the Court offered a remedy, requiring that police officers had to inform suspects of their rights to remain silent and to the availability of legal counsel prior to confessions. This requirement aimed to strike a balance against the inherently threatening power of the police in relation to the disadvantaged position of the suspect, thus reducing coercion of confessions. In cases involving challenges to the validity of the waiver of rights, courts were to apply a test regarding the admissibility of the confession at trial. Statements made by defendants would be inadmissible if a waiver of the rights to silence and counsel was not made “voluntarily, knowingly, and intelligently.” One year after the *Miranda* decision, *In re Gault* (1967) extended these rights and procedures to youth when they faced delinquency allegations in juvenile court.

Forty years later, there is no research evidence that *Miranda* and *Gault* achieved their ultimate objective. Police officers routinely offer the familiar warnings to suspects prior to taking their statements. But research has not unequivocally determined whether confessions became more or less likely, are any more or less reliable, or are

occurring in ways that are more or less “voluntary, knowing, and intelligent” than in the years prior to *Miranda*. Several years ago, Paul Cassell, an outspoken critic of *Miranda*, had maintained (based on pre-post studies as well as international comparisons) that the confession and conviction rates have dropped significantly as a direct result of the warning and waiver requirements, thus triggering the release of dangerous criminals (Cassell, 1996a, 1996b; Cassell & Hayman, 1996). Yet others countered that his analysis was based on selective data gathering methods and unwarranted inferences (Donahue, 1998; Feeney, 2000; Thomas & Leo, 2002); that these declines, if real, were insubstantial (Schulhofer, 1996); that four out of five suspects waive their rights and submit to questioning (Leo, 1996a, 1996b); and that the costs to law enforcement were outweighed by social benefits—for example, that *Miranda* has had a civilizing effect on police practices and has increased public awareness of constitutional rights (Leo, 1996c; Thomas, 1996).

In recent years, the U.S. Supreme Court has upheld the basic warning-and-waiver requirement (*Dickerson v. United States*, 2000)—for example, refusing to accept confessions given after a warning that was tactically delayed to produce an earlier inadmissible statement (*Missouri v. Seibert*, 2004). Practically speaking, however, research has suggested that the Court's presumption concerning the protections afforded by *Miranda* warnings is questionable. At minimum, a valid waiver of rights requires that police officers provide suspects an understandable description of their rights and that suspects must understand these warnings to waive them validly. What empirical evidence do we have that *Miranda's* procedural safeguards produce these conditions?

First, the *rights* of which suspects must be informed were clearly defined in *Miranda*, but the *warnings* were not. The *Miranda* decision included an appendix wherein the Court offered an example of the warnings that were suggested, but police departments were free to devise their own warnings. A recent study examined 560 *Miranda* warning forms used by police throughout the U.S. (Rogers, Harrison, Shuman, Sewell, & Hazelwood, 2007). A host of variations in content and format were identified, and metric analysis of their wording revealed reading-level requirements ranging from third-grade level to the verbal complexity of postgraduate textbooks (see Kahn, Zapf, & Cooper, 2006, for similar results; also see Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008). Moreover, *Miranda* warning forms varied considerably in what they conveyed. For example, only 32% of the forms told suspects that legal counsel could be obtained without charge. Thus, many warning forms raise serious doubts about the knowing and intelligent waiver of rights by almost any suspect who is “informed” by them.

Second, studies have repeatedly shown that a substantial proportion of adults with mental disabilities, and “average” adolescents below age 16 have impaired understanding of *Miranda* warnings when they are exposed to them. Even adults and youth who understand them sometimes do not grasp their basic implications. Many of these studies have examined actual adult or juvenile defendants, using reliable procedures that allow the quality of an individual’s understanding to be scored according to specified criteria. For example, do people after warnings factually understand that “I don’t have to talk” and that “I can get an attorney to be here now and during any questioning by police?” To answer this question, respondents have been examined in the relatively benign circumstance of a testing session with a researcher rather than in the context of an accusatory, highly stressful interrogation using standardized *Miranda* warnings that have about an average sixth- to seventh-grade reading level. Thus, the results obtained in these studies represent people’s grasp of the *Miranda* warnings under relatively favorable circumstances. Under these conditions, average adults exhibit a reasonably good understanding of their rights (Grisso, 1980, 1981). But studies of adults with serious psychological disorders (Cooper & Zapf, 2008; Rogers, Harrison, Hazelwood, & Sewell, 2007) or with mental retardation (Clare & Gudjonsson, 1991; Everington & Fulero, 1999; Fulero & Everington, 1995; O’Connell, Garmoe, & Goldstein, 2005) have found substantial impairments in understanding of *Miranda* warnings compared to nonimpaired adult defendants.

Many studies have examined adolescents’ understanding of *Miranda* warnings, and the results have been very consistent (Abramovitch, Higgins-Biss, & Biss, 1993; Abramovitch, Peterson-Badali, & Rohan, 1995; Colwell et al., 2005; Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003; Grisso, 1980, 1981; Redlich, Silverman, & Steiner, 2003; Viljoen, Klaver, & Roesch, 2005; Viljoen & Roesch, 2005; Wall & Furlong, 1985). In one comprehensive study, 55% of 430 youth of ages 10–16 misunderstood one or more of the *Miranda* warnings (for example, “That means I can’t talk until they tell me to”). Across these studies, the understanding of adolescents ages 15–17 with near-average levels of verbal intelligence tends not to have been inferior to that of adults. But youth of that age with IQ scores below 85, and average youth below age 14, performed much poorer, often misunderstanding two or more of the warnings.

Some studies have shown that many defendants, especially adolescents, who seem to have an adequate factual understanding of *Miranda* warnings, do not grasp their relevance to the situation they are in (e.g., Grisso, 1980, 1981; Viljoen, Zapf, & Roesch, 2007). For example, one may factually understand that “I can have an attorney

before and during questioning” yet not know what an attorney is or what role an attorney would play. Others may understand the attorney’s role but disbelieve that it would apply in their own situation—as when youth cannot imagine that an adult would take their side against other adults, or when a person with paranoid tendencies believes that any attorney, even his own, would oppose him.

The ability to grasp the relevance of the warnings beyond having a mere factual understanding of what they say is sometimes referred to as having a “rational understanding” or “appreciation” of the warnings. Many states, however, require only a factual understanding of *Miranda* rights for a “knowing and intelligent” waiver (e.g., *People v. Daoud*, 2000). In those states that apply a strict factual understanding standard, youth who technically understand the warnings (e.g., “I can have an attorney to talk to” or “I can stay silent”) but harbor faulty beliefs that may distort the significance of these warnings (“An attorney will tell the court whatever I say” or “You have to tell the truth in court, so eventually I’ll have to talk if they want me to”) are considered capable of having made a valid waiver, even if they have no recognition of the meanings of the words or a distorted view of their implications.

Even among those with adequate understanding, suspects will vary in their capacities to “think” and “decide” about waiving their rights. Whether decision-making capacities are deemed relevant for a “voluntary, knowing, and intelligent” waiver will depend on courts’ interpretations of “intelligent” or “voluntary.” Several studies have thus examined the decision-making process of persons faced with hypothetical *Miranda* waiver decisions.

Studies of adolescents indicate that youth under age 15 on average perform differently from older adolescents and adults. They are more likely to believe that they should waive their rights and tell what they have done, partly because they are still young enough to believe that they should never disobey authority. Studies have also shown that they are more likely to decide about waiver on the basis of the potential for immediate negative consequences—for example, whether they will be permitted to go home if they waive their rights—rather than considering the longer-range consequences associated with penalties for a delinquency adjudication (Grisso, 1981; Grisso et al., 2003). Young adolescents presented with hypothetical waiver decisions are less likely than older adolescents to engage in reasoning that involves adjustment of their decisions based on the amount of evidence against them or the seriousness of the allegations (Abramovitch, Peterson-Badali, & Rohan, 1995). These results regarding the likelihood of immature decision-making processes are consistent with research on the development of psychosocial abilities of young adolescents in everyday circumstances (Steinberg & Cauffman, 1996) and other



legal contexts (Grisso & Schwartz, 2000; Owen-Kostelnik, Reppucci, & Meyer, 2006).

Other *Miranda* decision-making studies have examined the suggestibility of persons with disabilities (Clare & Gudjonsson, 1995; Everington & Fulero, 1999; O'Connell, Garmoe, & Goldstein, 2005) and adolescents (Goldstein et al., 2003; Redlich et al., 2003; Singh & Gudjonsson, 1992). Suggestibility refers to a predisposition to accept information communicated by others and to incorporate that information into one's beliefs and memories. In general, these studies indicate that persons with mental retardation and adolescents in general are more susceptible to suggestion in the context of making hypothetical waiver decisions, and that greater suggestibility is related to poorer comprehension of the warnings. These results take on special significance in light of observational studies of police behavior when obtaining *Miranda* waiver decisions from adolescents (Feld, 2006a, 2006b) and adults (Leo, 1996b). As described elsewhere in this article, police officers often approach suspects with "friendly" suggestions regarding both the significance of the *Miranda* waiver procedure and their decision. In either case, results indicate that adults with disabilities and adolescents in general are prone to adjust their behaviors and decisions accordingly.

In a formal sense, whether one waives his or her rights voluntarily, knowingly, and intelligently does not have a direct bearing on the likelihood of false confessions (Kassin, 2005; White, 2001). The decision to waive one's rights in a police interrogation does not necessarily lead to a confession, much less a false confession. Nevertheless, research cited earlier regarding the lack of attentiveness of persons with disabilities and adolescents to long-range consequences suggests an increased risk that they would also comply with requests for a confession—whether true or false—to obtain the presumed short-term reward (e.g., release to go home). In addition, some studies have found that poor comprehension of *Miranda* warnings is itself predictive of a propensity to give false confessions (Clare & Gudjonsson, 1995; Goldstein et al., 2003). Sometimes this stems from low intelligence or a desire to comply; at other times it appears to be related to a naïve belief that one's actual innocence will eventually prevail—a belief that is not confined to adolescents or persons with disabilities (Kassin & Norwick, 2004).

Finally, many states require the presence of a parent or other interested adult when youth make decisions about their *Miranda* rights (Oberlander, Goldstein, & Goldstein, 2003). These rules are intended to offer youth assistance in thinking through the decision while recognizing that caretakers cannot themselves waive their children's rights in delinquency or criminal investigations. Studies have shown, however, that the presence of parents at *Miranda* waiver events typically does not result in any advice at all or, when

it does, provides added pressure for the youth to waive rights and make a statement (Grisso & Ring, 1979). The presence of parents may be advisable, but it does not offer a remedy for the difficulties youth face in comprehending or responding to requests for a waiver of their rights.

In summary, research suggests that adults with mental disabilities, as well as adolescents, are particularly at risk when it comes to understanding the meaning of *Miranda* warnings. In addition, they often lack the capacity to weigh the consequences of rights waiver, and are more susceptible to waiving their rights as a matter of mere compliance with authority.

## Overview of Confession Evidence in the Courts

American courts have long treated confession evidence with both respect and skepticism. Judicial respect for confessions emanates from the power of confession evidence and the critical role that confessions play in solving crimes. The U.S. Supreme Court has recognized that confession evidence is perhaps the most powerful evidence of guilt admissible in court (*Miranda v. Arizona*, 1966)—so powerful, in fact, that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained" (*Colorado v. Connelly*, 1986, p. 182 citing McCormick, 1972, p. 316).

Judicial skepticism of confession evidence stems from the historical fact that some law enforcement officers, aware that confession evidence can assure conviction, have abused their power in the interrogation room. As the U.S. Supreme Court stated in *Escobedo v. Illinois* (1964): "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation" (pp. 488–489).

Judicial concern with juror over-reliance on confession evidence gave rise to a series of evolving rules designed to curb possible abuses in the interrogation room, exclude unreliable confessions from trial, and prevent wrongful convictions. These doctrines, which developed both in the common law of evidence and under the Constitution as interpreted by the U.S. Supreme Court, fell into two distinct sets of legal rules: corroboration rules and the voluntariness rules (Ayling, 1984; Leo, Drizin, Neufeld, Hal, & Vatner, 2006).

### Corroboration Rules

The corroboration rule, which requires that confessions be corroborated by independent evidence, was the

American take on the English rule known as the *corpus delicti* rule. *Corpus delicti* literally means “body of the crime”—that is, the material substance upon which a crime has been committed” (Garner, 2004, p. 310). The rule was founded at common law in England in the wake of *Perry’s Case*, a seventeenth-century case in which a mother and two brothers were convicted and executed based upon a confession to a murder that was later discovered to be false when the supposed murder victim turned up alive (Leo et al., 2006). America’s version of *Perry’s Case* is the infamous 1819 case of Stephen and Jesse Boorn, two brothers who were convicted and sentenced to death in Manchester, Vermont for the murder of their brother-in-law Russell Colvin. Fortunately for the two men, both of whom had confessed to the killing under intense pressure from authorities, their lawyers located Colvin alive before their hangings took place (Warden, 2005).

In American homicide cases, in response to *Boorn*, the rule came to mean that no individual can be convicted of a murder without proof that a death occurred, namely the existence of a “dead body.” As the rule evolved in the courts over time, it was applied to all crimes and required that before a confession could be admitted to a jury, prosecutors had to prove: (1) that a death, injury, or loss had occurred and (2) that criminal agency was responsible for that death, injury, or loss (Leo et al., 2006). The rule was designed to serve three purposes: to prevent false confessions, to provide incentives to police to continue to investigate after obtaining a confession, and to safeguard against the tendency of juries to view confessions as dispositive of guilt regardless of the circumstances under which they were obtained (Ayling, 1984).

The *corpus delicti* rule does not require corroboration that the defendant committed the crime, nor does it demand any proof of the requisite mental state or any other elements of the crime. Moreover, the rule only requires corroboration of the fact that a crime occurred; it does not require that the facts contained in the confession be corroborated. Given the relative ease of establishing the *corpus delicti* in most criminal cases (e.g., producing a dead body in a homicide case and showing that death was not self-inflicted or the result of an accident), and the weight that most jurors attach to confession evidence, prosecutors can still obtain many convictions from unreliable confessions. The rule thus makes it easier in some cases for prosecutors to convict both the guilty and the innocent (Leo et al., 2006).

At the same time, in a certain class of cases, the *corpus delicti* rule may bar the admission of reliable confessions. Because the rule requires that prosecutors prove that there be death or injury resulting from a criminal act, prosecutors may have a hard time getting confessions admitted when

the evidence is unclear as to whether any injury had occurred (e.g., child molestation without physical evidence) or whether it resulted from an accident or natural causes as opposed to a criminal act (e.g., child death by smothering or Sudden Infant Death Syndrome; see Taylor, 2005).

For these reasons and others, the rule has been severely criticized. In *Smith v. United States* (1954), the U.S. Supreme Court criticized the *corpus delicti* rule for “serv[ing] an extremely limited function” (p. 153). The Court noted that the rule was originally designed to protect individuals who had confessed to crimes that never occurred but that it does little to protect against the far more frequent problem wherein a suspect confesses to a crime committed by someone else. In short, the rule did “nothing to ensure that a particular defendant was the perpetrator of a crime” (*State v. Mauchley*, 2003, p. 483).

In place of the *corpus delicti* rule, the Supreme Court, in two decisions released on the same day—*Smith* and *Oppen v. United States* (1954)—announced a new rule, dubbed the trustworthiness rule, which requires corroboration of the confession itself rather than the fact that a crime occurred. Under the trustworthiness rule, which was adopted by several states, the government may not introduce a confession unless it provides “substantial independent evidence which would tend to establish the trustworthiness of the confession” (*State v. Mauchley*, 2003, p. 48; citing *Oppen*).

In theory, the trustworthiness standard is a marked improvement on the *corpus delicti* rule in its ability to prevent false confessions from entering the stream of evidence at trial. In practice, however, the rule has not worked to screen out false confessions. Because investigators sometimes suggest and incorporate crime details into a suspect’s confession, whether deliberately or inadvertently, many false confessions appear highly credible to the secondhand observer. Without an electronic recording of the entire interrogation process, courts are thus left to decide a swearing contest between the suspect and the detective over the source of the details contained within the confession. Moreover, the quantum of corroboration in most jurisdictions that apply the trustworthiness doctrine is very low, allowing many unreliable confessions to go before the jury (Leo et al., 2006).

### *Rules Prohibiting Involuntary Confession*

Until the late eighteenth century, out-of-court confessions were admissible as evidence even if they were the involuntary product of police coercion. In 1783, however, in *The King v. Warrickshall*, an English Court recognized the inherent lack of reliability of involuntary confessions and established the first exclusionary rule:

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled [sic] to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt ...but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape...that no credit ought to be given it; and therefore it should be rejected (*King v. Warrickshall*, 1783, pp. 234–235).

The basis for excluding involuntary confessions in *Warrickshall* was a concern that confessions procured by torture or other forms of coercion must be prohibited because of the risk that such tactics could cause an innocent person to confess. In other words, involuntary confessions were to be prohibited because they were unreliable. Following *Warrickshall*, in the late 1800s, the U.S. Supreme Court adopted this reliability rationale for excluding involuntary confessions in a series of decisions (*Hopt v. Utah*, 1884; *Pierce v. United States*, 1896; *Sparf v. United States*, 1895; *Wilson v. United States*, 1896).

The Supreme Court adopted a second rationale for excluding involuntary confessions in 1897, in *Bram v. United States*. In *Bram*, the Court for the first time linked the voluntariness doctrine to the Fifth Amendment's provision that "no person shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination was not rooted in a concern about the reliability of confessions. Rather, its origins were grounded in the rule of *nemo tenetur seipsum prodere* ("no one is bound to inform on himself"), a rule dating back to the English ecclesiastical courts which sought to protect individual free will from state intrusion (Leo et al., 2006). The rule of *nemo tenetur*, which was adopted in the colonies and incorporated into the Fifth Amendment, applied only to self-incriminating statements in court, and had never been applied to extrajudicial confessions. By mixing two unrelated voluntariness doctrines, *Bram* rewrote history and provoked considerable confusion by courts and academics alike (Wigmore, 1970). Still, it gave birth to a new basis for excluding involuntary confession evidence—the protection of individual free will.

A third basis for excluding involuntary confessions began to emerge in 1936, in the case of *Brown v. Mississippi*, to deter unfair and oppressive police practices. In *Brown*, three black tenant farmers who had been accused of murdering a white farmer were whipped, pummeled, and tortured until they provided detailed confessions. The Court unanimously reversed the convictions of all three defendants, holding that confessions procured by physical abuse and torture were involuntary. The Court established the Fourteenth Amendment's due process clause as the constitutional test for

assessing the admissibility of confessions in state cases. In addition to common law standards, trial judges would now have to apply a federal due process standard when evaluating the admissibility of confession evidence, looking to the "totality of the circumstances" to determine if the confession was 'made freely, voluntarily and without compulsion or inducement of any sort' (*Haynes v. Washington*, 1963, quoting *Wilson v. United States*, 1896). As such, the Court proposed to consider personal characteristics of the individual suspect (e.g., age, intelligence, mental stability, and prior contact with law enforcement) as well as the conditions of detention and interrogation tactics that were used (e.g., threats, promises, and lies).

This deterrence rationale, implied in *Brown*, was made even more explicit in *Haley v. Ohio*, a case involving a 15-year-old black boy who was questioned throughout the night by teams of detectives, isolated for 3 days, and repeatedly denied access to his lawyer (*Haley v. Ohio*, 1948). While the majority held that the confession was obtained "by means which the law should not sanction" (pp. 600–601), Justice Frankfurter, in his concurrence, went a step further, stating that the confession must be held inadmissible "[t]o remove the inducement to resort to such methods this Court has repeatedly denied use of the fruits of illicit methods" (p. 607).

As these cases suggest, the Supreme Court relied on different and sometimes conflicting rationales for excluding involuntary confessions throughout the twentieth century (Kamisar, 1963; White, 1998). It was not always clear which of the three justifications the Court would rely on when evaluating the voluntariness of a confession. Nevertheless, the Court did appear to designate certain interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and promises of leniency—as presumptively coercive and therefore unconstitutional (White, 2001). The Court also considered the individual suspect's personal characteristics, such as age, intelligence, education, mental stability, and prior contact with law enforcement, in determining whether a confession was voluntary. The template of the due process voluntariness test thus involved a balancing of whether police interrogation pressures, interacting with a suspect's personal dispositions, were sufficient to render a confession involuntary (Schulhofer, 1981).

The "totality of the circumstances" test, while affording judges flexibility in practice, has offered little protection to suspects. Without bright lines for courts to follow, and without a complete and accurate record of what transpired during the interrogation process, the end result has been largely unfettered and unreviewable discretion by judges. In practice, when judges apply the test, "they exclude only the most egregiously obtained confessions and then only

haphazardly” (Feld, 1999, p. 118). The absence of a litmus test has also encouraged law enforcement officers to push the envelope with respect to the use of arguably coercive psychological interrogation techniques (Penney, 1998). Unlike its sweeping condemnation of *physical* abuse in *Brown v. Mississippi*, the Court’s overall attitude toward *psychological* interrogation techniques has been far less condemnatory. In particular, the Court’s attitudes toward the use of maximization and minimization (Kassin & McNall, 1991) and the false evidence ploy and other forms of deception (Kassin & Kiechel, 1996)—techniques that have frequently been linked to false confessions (Kassin & Gudjonsson, 2004)—has been largely permissive. A discussion of some of these cases follows.

#### *Cases Addressing Interrogation Tactics: Maximization and Minimization*

Today’s interrogators seek to manipulate a suspect into thinking that it is in his or her best interest to confess. To achieve this change in perceptions of subjective utilities, they use a variety of techniques, referred to broadly as “maximization” and “minimization” (Kassin & McNall, 1991). Maximization involves a cluster of tactics designed to convey the interrogator’s rock-solid belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift the suspect’s mental state from confident to hopeless. Toward this end, it is particularly common for interrogators to communicate as a means of inducement, implicitly or explicitly, a threat of harsher consequences in response to the suspect’s denials (Leo & Ofshe, 2001).

In contrast, minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question. Using this approach, the interrogator offers sympathy and understanding; normalizes and minimizes the crime, often suggesting that he or she would have behaved similarly; and offers the suspect a choice of alternative explanations—for example, suggesting to the suspect that the murder was spontaneous, provoked, peer-pressured, or accidental rather than the work of a cold-blooded premeditated killer. As we will see later, research has shown that this tactic communicates by implication that leniency in punishment is forthcoming upon confession.

As the 1897 case of *Bram v. United States* demonstrates, minimization has been part of the arsenal of police interrogation tactics for over a century. In *Bram*, the authorities induced the defendant to confess based on the kind of unspoken promise that anchors the modern psychological interrogation: “Bram, I am satisfied that you killed the captain. But some of us here think you could not have done

the crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders” (*Bram v. United States*, 1897, p. 539). This statement contained no direct threats or promises; rather, it combined elements of maximization (the interrogator’s stated certainty in the suspect’s guilt) and minimization (the suggestion that he will be punished less severely if he confesses and names an accomplice). Using language that condemns the latter, the Supreme Court reversed Bram’s conviction, holding that a confession “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight” (pp. 542–543).

Although a strict interpretation of *Bram* seemed to suggest a ban on minimization, courts throughout the twentieth century followed a practice of evading, contradicting, disregarding, and ultimately discarding *Bram* (Hirsch, 2005a). Briefly in the 1960s, it appeared that the Supreme Court was ready to revitalize *Bram* and to apply it broadly to the psychological interrogation techniques taught by such legendary police reformers as Chicago’s Fred Inbau and John Reid. Indeed, the landmark case of *Miranda v. Arizona* (1966), described earlier, cited *Bram* and condemned the Reid technique and other tactics that “are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty” (p. 450). This newfound concern with the impact of psychological interrogation tactics, however, was short lived. In the immediate aftermath of *Miranda*, the Supreme Court adopted a more deferential attitude toward law enforcement in its confession jurisprudence. In particular, *Arizona v. Fulminante* (1991) in dicta may have sounded the death knell for *Bram*. Responding to a party’s invocation of *Bram*, the Court casually remarked that “under current precedent [*Bram*] does not state the standard for determining the voluntariness of a confession” (p. 286). However, White (1997) noted that “as *Fulminante*’s holding indicates, some promises may be sufficient in and of themselves to render a confession involuntary; other promises may or may not be permissible depending upon the circumstances” (p. 150).

#### *Cases Addressing Interrogation Tactics: Trickery and Deception*

The false evidence ploy is a controversial tactic occasionally used by police. Not all interrogation trainers approve of this practice (Gohara, 2006), the use of which has been implicated in the vast majority of documented police-induced false confessions (Kassin, 2005). In several pre-*Miranda* voluntariness cases, the U.S. Supreme Court recognized that deception can induce involuntary confessions, although the Court never held that such tactics would automatically invalidate a confession. In *Leyra v. Denno* (1954), for



example, Leyra asked to see a physician because he was suffering from sinus problems and police brought in a psychiatrist who posed as a general physician. The Supreme Court held that the “subtle and suggestive” questioning by the psychiatrist amounted to a continued interrogation of the suspect without his knowledge. This deception and other circumstances of the interrogation rendered Leyra’s confession involuntary. Similarly, in *Spano v. New York* (1959), the suspect considered one of the interrogating officers to be a friend. The Court held that the officer’s false statements, in which he suggested that the suspect’s actions might cost the officer his job, were a key factor in rendering the resulting confession involuntary. In *Miranda v. Arizona* (1966), the Supreme Court discussed the use of trickery and deception and noted that the deceptive tactics recommended in standard interrogation manuals fostered a coercive environment. Again, the Court did not specifically prohibit such tactics, choosing instead to offer suspects some relief from the coercive effect by empowering them with rights which could be used to bring interrogation to a halt. The criticism of deception may have fanned hopes that the Court would deal a more direct blow to this controversial tactic in future cases. But such hopes were quickly quashed.

Three years later, in *Frazier v. Cupp* (1969), the Supreme Court addressed interrogation trickery and issued a decision that to this day has been interpreted by police and the courts as a green light to deception. In *Frazier*, police used a standard false evidence ploy—telling Frazier that another man whom he and the victim had been seen with on the night of the crime had confessed to their involvement. The investigating detective also used minimization, suggesting to Frazier that he had started a fight with the victim because the victim made homosexual advances toward him. Despite the use of these deceptive tactics, the Court held that Frazier’s confession was voluntary. This ruling established that police deception by itself is not sufficient to render a confession involuntary. Rather, according to *Frazier*, deception is but one factor among many that a court should consider. Some state courts have distinguished between mere false assertions, which are permissible, and the fabrication of reports, tapes, and other evidence—which is not. In the Florida case of *State v. Cayward* (1989), the defendant’s confession was suppressed because police had typed up a phony crime laboratory report that placed Cayward’s DNA on the victim. However, the court’s concern was not that the manufactured evidence might prompt an innocent person to confess but that it might find its way into court as evidence. Similarly, New Jersey confessions were suppressed when produced by a fake, staged audiotape of an alleged eyewitness account (*State v. Patton*, 1993) and a fake crime lab report identifying the suspect’s DNA at the crime scene (*State v. Chirokovskic*, 2004). This is where the law remains today despite numerous cautionary notes

from academics and researchers on the use of deception (Gohara, 2006; Gudjonsson, 2003; Kassin, 2005; Kassin & Gudjonsson, 2004; Skolnick & Leo, 1992; but see Grano, 1994; Slobogin, 2007).

### Practices in England

Interrogations and confession evidence are regulated in England and Wales by the Police and Criminal Evidence Act of 1984 (PACE; Home Office, 1985), which became effective in January 1986. The Act is supplemented by five Codes of Practice, referred to as Codes A (on stop and search), B (entry and searches of premises), C (detention and questioning of suspects), D (on identification parades), and E (tape recording of interviews). The Codes provide guidance to police officers concerning procedures and the appropriate treatment of suspects. Code C is particularly relevant to issues surrounding “fitness to be interviewed,” as it provides guidance “on practice for the detention, treatment and questioning of persons by police officers” (Home Office, 2003, p. 47).

The most important interview procedures set out in PACE and its Codes of Practice are that: Suspects who are detained at a police station must be informed of their legal rights; in any 24-h period the detainee must be allowed a continuous period of rest of at least 8 hours; detainees who are vulnerable in terms of their age or mental functioning should have access to a responsible adult (known as an ‘appropriate adult’), whose function is to give advice, further communication, and ensure that the interview is conducted properly and fairly; and all interviews shall be electronically recorded.

Compared to the approach typically taken in the U.S. (e.g., using the Reid technique), investigative interview practices in England are less confrontational. Williamson (2007) discussed in detail how psychological science has influenced the training of police officers and their interviewing practice, making it fairer and more transparent. Prior to 1992, investigators in Britain received no formal training and the chief purpose of interviewing suspects was to obtain confessions. Following some high-profile miscarriages of justice, such as the “Guildford Four” and “Birmingham Six,” the Association of Chief Police Officers for England and Wales (ACPO) published the first national training program for police officers interviewing both suspects and witnesses. This new approach was developed through a collaboration of police officers, psychologists, and lawyers. The mnemonic PEACE was used to describe the five distinct parts of the new interview approach (“Preparation and Planning,” “Engage and Explain,” “Account,” “Closure,” and “Evaluate”). The theory underlying this approach, particularly in cases of witnesses, victims, and cooperative suspects, can be traced

to Fisher and Geiselman's (1992) work on the "Cognitive Interview" (Milne & Bull, 1999; for research evidence, see Clarke & Milne, 2001; Williamson, 2006). Recent analyses of police–suspect interviews in England have revealed that the confrontation-based tactics of maximization and minimization are in fact seldom used (Soukara, Bull, Vrij, Turner, & Cherryman, *in press*; Bull & Soukara, 2009).

## POLICE-INDUCED FALSE CONFESSIONS

As described earlier, the process of interrogation is designed to overcome the anticipated resistance of individual suspects who are presumed guilty and to obtain legally admissible confessions. The single-minded objective, therefore, is to increase the anxiety and despair associated with denial and reduce the anxiety associated with confession. To achieve these goals, police employ a number of tactics that involve isolating the suspect and then employing both negative and positive incentives. On the negative side, interrogators confront the suspect with accusations of guilt, assertions that are made with certainty and often bolstered by evidence, real or manufactured, and a refusal to accept alibis and denials. On the positive side, interrogators offer sympathy and moral justification, introducing "themes" that normalize and minimize the crime and lead suspects to see confession as an expedient means of escape. In this section, we describe some core principles of psychology relevant to understanding the suspect's decision making in this situation; then we describe the problem of false confessions and the situational and dispositional factors that put innocent people at risk.

### Types of False Confessions

Although it is not possible to calculate a precise incidence rate, it is clear that false confessions occur in different ways and for different reasons. Drawing on the pages of legal history, and borrowing from social-psychological theories of influence, Kassin and Wrightsman (1985) proposed a taxonomy that distinguished among three types of false confession: voluntary, coerced-compliant, and coerced-internalized (see also Kassin, 1997; Wrightsman & Kassin, 1993). This classification scheme has provided a useful framework for the study of false confessions and has since been used, critiqued, extended, and refined by others (Gudjonsson, 2003; Inbau et al., 2001; McCann, 1998; Ofshe & Leo, 1997a, 1997b).

#### *Voluntary False Confessions*

Sometimes innocent people have claimed responsibility for crimes they did not commit without prompting or

pressure from police. This has occurred in several high-profile cases. After Charles Lindbergh's infant son was kidnapped in 1932, 200 people volunteered confessions. When "Black Dahlia" actress Elizabeth Short was murdered and her body mutilated in 1947, more than 50 men and women confessed. In the 1980s, Henry Lee Lucas in Texas falsely confessed to hundreds of unsolved murders, making him the most prolific serial confessor in history. In 2006, John Mark Karr volunteered a confession, replete with details, to the unsolved murder of young JonBenet Ramsey. There are a host of reasons why people have volunteered false confessions—such as a pathological desire for notoriety, especially in high-profile cases reported in the news media; a conscious or unconscious need for self-punishment to expiate feelings of guilt over prior transgressions; an inability to distinguish fact from fantasy due to a breakdown in reality monitoring, a common feature of major mental illness; and a desire to protect the actual perpetrator—the most prevalent reason for false admissions (Gudjonsson et al., 2004; Sigurdsson & Gudjonsson, 1996, 1997, 2001). Radelet, Bedau, and Putnam (1992) described one case in which an innocent man confessed to a murder to impress his girlfriend. Gudjonsson (2003) described another case in which a man confessed to murder because he was angry at police for a prior arrest and wanted to mislead them in an act of revenge.

#### *Compliant False Confessions*

In contrast to voluntary false confessions, compliant false confessions are those in which suspects are induced through interrogation to confess to a crime they did not commit. In these cases, the suspect acquiesces to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward. Demonstrating the form of influence observed in classic studies of social influence (e.g., Asch, 1956; Milgram, 1974), this type of confession is an act of mere public compliance by a suspect who knows that he or she is innocent but bows to social pressure, often coming to believe that the short-term benefits of confession relative to denial outweigh the long-term costs. Based on a review of a number of cases, Gudjonsson (2003) identified some very specific incentives for this type of compliance—such as being allowed to sleep, eat, make a phone call, go home, or, in the case of drug addicts, feed a drug habit. The desire to bring the interview to an end and avoid additional confinement may be particularly pressing for people who are young, desperate, socially dependent, or phobic of being locked up in a police station. The pages of legal history are filled with stories of compliant false confessions. In the 1989 Central Park jogger case described earlier, five

teenagers confessed after lengthy interrogations. All immediately retracted their confessions but were convicted at trial and sent to prison—only to be exonerated 13 years later (*People of the State of New York v. Kharey Wise et al.*, 2002).

### *Internalized False Confessions*

In the third type of false confession, innocent but malleable suspects, told that there is incontrovertible evidence of their involvement, come not only to capitulate in their behavior but also to believe that they may have committed the crime in question, sometimes confabulating false memories in the process. Gudjonsson and MacKeith (1982) argued that this kind of false confession occurs when people develop such a profound distrust of their own memory that they become vulnerable to influence from external sources. Noting that the innocent confessor's belief is seldom fully internalized, Ofshe and Leo (1997a) have suggested that the term “persuaded false confession” is a more accurate description of the phenomenon. The case of 14-year-old Michael Crowe, whose sister Stephanie was stabbed to death in her bedroom, illustrates this type of persuasion. After a series of interrogation sessions, during which time police presented Crowe with compelling false physical evidence of his guilt, he concluded that he was a killer, saying: “I’m not sure how I did it. All I know is I did it.” Eventually, he was convinced that he had a split personality—that “bad Michael” acted out of a jealous rage while “good Michael” blocked the incident from memory. The charges against Crowe were later dropped when a drifter in the neighborhood that night was found with Stephanie’s blood on his clothing (Drizin & Colgan, 2004).

### **Relevant Core Principles of Psychology**

Earlier we reviewed the tactics of a modern American interrogation and the ways in which the U.S. Supreme Court has treated these tactics with respect to the voluntariness and admissibility of the confessions they elicit. As noted, the goal of interrogation is to alter a suspect’s decision making by increasing the anxiety associated with denial and reducing the anxiety associated with confession (for an excellent description of a suspect’s decision-making process in this situation, see Ofshe & Leo, 1997b).

Long before the first empirical studies of confessions were conducted, the core processes of relevance to this situation were familiar to generations of behavioral scientists. Dating back to Thorndike’s (1911) law of effect, psychologists have known that people are highly responsive to reinforcement and subject to the laws of conditioning, and that behavior is influenced more by perceptions of short-term than long-term consequences. Of

distal relevance to a psychological analysis of interrogation are the thousands of operant animal studies of reinforcement schedules, punishment, appetitive, avoidance, and escape learning, as well as behavioral modification applications in clinics, schools, and workplaces. Looking through this behaviorist lens, it seems that interrogators have sometimes shaped suspects to confess to particular narrative accounts of crimes like they were rats in a Skinner box (see Herrnstein, 1970; Skinner, 1938).

More proximally relevant to an analysis of choice behavior in the interrogation room are studies of human decision making in a behavioral economics paradigm. A voluminous body of research has shown that people make choices that they think will maximize their well-being given the constraints they face, making the best of the situation they are in—what Herrnstein has called the “matching law” (Herrnstein, Rachlin, & Laibson, 1997). With respect to a suspect’s response to interrogation, studies on the discounting of rewards and costs show that people tend to be impulsive in their orientation, preferring outcomes that are immediate rather than delayed, with delayed outcomes depreciating over time in their subjective value (Rachlin, 2000). In particular, animals and humans clearly prefer delayed punishment to immediate aversive stimulation (Deluty, 1978; Navarick, 1982). These impulsive tendencies are especially evident in juvenile populations and among cigarette smokers, alcoholics, and other substance users (e.g., Baker, Johnson, & Bickel, 2003; Bickel & Marsch, 2001; Bickel, Odum, & Madden, 1999; Kollins, 2003; Reynolds, Richards, Horn, & Karraker, 2004).

Rooted in the observation that people are inherently social beings, a second set of core principles is that individuals are highly vulnerable to influence from change agents who seek their compliance. Of direct relevance to an analysis of interrogation are the extensive literatures on attitudes and persuasion (Petty & Cacioppo, 1986), informational and normative influences (e.g., Asch, 1956; Sherif, 1936), the use of sequential request strategies, as in the foot-in-the-door effect (Cialdini, 2001), and the gradual escalation of commands, issued by figures of authority, to effectively obtain self- and other-defeating acts of obedience (Milgram, 1974). Conceptually, Latane’s (1981) social impact theory provides a predictive mathematical model that can account for the influence of police interrogators—who bring *power*, *proximity*, and *number* to bear on their exchange with suspects (for a range of social psychological perspectives on interrogation, see Bem, 1966; Davis & O’Donahue, 2004; Zimbardo, 1967).

A third set of core principles consists of the “seven sins of memory” that Schacter (2001) identified from cognitive and neuroscience research—a list that includes memory transience, misattribution effects, suggestibility, and bias.

When Kassin and Wrightsman (1985) first identified coerced-internalized or coerced-persuaded false confessions, they were puzzled. At the time, existing models of memory could not account for the phenomenon whereby innocent suspects would come to internalize responsibility for crimes they did not commit and confabulate memories about these nonevents. These cases occur when a suspect is dispositionally or situationally rendered vulnerable to manipulation and the interrogator then misrepresents the evidence, a common ploy. In light of a now extensive research literature on misinformation effects and the creation of illusory beliefs and memories (e.g., Loftus, 1997, 2005), experts can now better grasp the process by which people come to accept guilt for a crime they did not commit as well as the conditions under which this may occur (see Kassin, 2008).

### Situational Risk Factors

Among the situational risk factors associated with false confessions, three will be singled out: interrogation time, the presentation of false evidence, and minimization. These factors are highlighted because of the consistency in which they appear in cases involving proven false confessions.

#### *Physical Custody and Isolation*

To ensure privacy and control, and to increase the stress associated with denial in an incommunicado setting, interrogators are trained to remove suspects from their familiar surroundings and question them in the police station—often in a special interrogation room. Consistent with guidelines articulated by Inbau et al. (2001), most interrogations are brief. Observational studies in the U.S. and Britain have consistently shown that the vast majority of interrogations last approximately from 30 minutes up to 2 hours (Baldwin, 1993; Irving, 1980; Leo, 1996b; Wald et al., 1967). In a recent self-report survey, 631 North American police investigators estimated from their experience that the mean length of a typical interrogation is 1.60 hours. Consistent with cautionary advice from Inbau et al. (2001) against exceeding 4 hours in a single session, these same respondents estimated on average that their longest interrogations lasted 4.21 hours (Kassin et al., 2007). Suggesting that time is a concern among practitioners, one former Reid technique investigator has defined interrogations that exceed 6 hours as “coercive” (Blair, 2005). In their study of 125 proven false confessions, Drizin and Leo (2004) thus found, in cases in which interrogation time was recorded, that 34% lasted 6–12 hours, that 39% lasted 12–24 hours, and that the mean was 16.3 hours.

It is not particularly surprising that false confessions tend to occur after long periods of time—which indicates a dogged persistence in the face of denial. The human needs for belonging, affiliation, and social support, especially in times of stress, are a fundamental human motive (Baumeister & Leary, 1996). People under stress seek desperately to affiliate with others for the psychological, physiological, and health benefits that social support provides (Rofe, 1984; Schachter, 1959; Uchino, Cacioppo, & Kiecolt-Glaser, 1996). Hence, prolonged isolation from significant others in this situation constitutes a form of deprivation that can heighten a suspect’s distress and incentive to remove himself or herself from the situation. Depending on the number of hours and conditions of interrogation, sleep deprivation may also become a source of concern. Controlled laboratory experiments have shown that sleep deprivation, which may accompany prolonged periods of isolation, can heighten susceptibility to influence and impair decision-making abilities in complex tasks. The range of effects is varied, with studies showing that sleep deprivation markedly impairs the ability to sustain attention, flexibility of thinking, and suggestibility in response to leading questions (Blagrove, 1996; for a review, see Harrison & Horne, 2000). This research literature is not all based in the laboratory. For example, performance decrements have been observed in medical interns (e.g., Veasey, Rosen, Barzansky, Rosen, & Owens, 2002; Weinger & Ancoli-Israel, 2002)—as when sleep deprivation increased the number of errors that resident surgeons made in a virtual reality surgery simulation (Taffinder, McManus, Gul, Russell, & Darzi, 1998). Also demonstrably affected are motorists (Lyznicki, Doege, Davis, & Williams, 1998) and F-117 fighter pilots (Caldwell, Caldwell, Brown, & Smith, 2004). Combining the results in a meta-analysis, Pilcher and Huffcut (1996) thus concluded that: “overall sleep deprivation strongly impairs human functioning.” The use of sleep deprivation in interrogation is hardly a novel idea. In *Psychology and Torture*, Suedfeld (1990) noted that sleep deprivation is historically one of the most potent methods used to soften up prisoners of war and extract confessions from them. Indeed, Amnesty International reports that most torture victims interviewed report having been deprived of sleep for 24 hours or more.

#### *Presentations of False Evidence*

Once suspects are isolated, interrogators, armed with a strong presumption of guilt, seek to communicate that resistance is futile. This begins the confrontation process, during which interrogators exploit the psychology of inevitability to drive suspects into a state of despair. Basic research shows that once people see an outcome as inevitable, cognitive and motivational forces conspire to



promote their acceptance, compliance with, and even approval of the outcome (Aronson, 1999). In the case of interrogation, this process also involves interrupting the suspect's denials, overcoming objections, and refuting alibis. At times, American police will overcome a suspect's denials by presenting supposedly incontrovertible evidence of his or her guilt (e.g., a fingerprint, blood or hair sample, eyewitness identification, or failed polygraph)—even if that evidence does not exist. In the U.S., it is permissible for police to outright lie to suspects about the evidence (*Frazier v. Cupp*, 1969)—a tactic that is recommended in training (Inbau et al., 2001), and occasionally used (Kassin et al., 2007; Leo, 1996b).

Yet basic psychological research warns of the risk of this manipulation. Over the years, across a range of sub-disciplines, basic research has revealed that misinformation renders people vulnerable to manipulation. To cite but a few highly recognized classics in the field, experiments have shown that presentations of false information—via confederates, witnesses, counterfeit test results, bogus norms, false physiological feedback, and the like—can substantially alter subjects' visual judgments (Asch, 1956; Sherif, 1936), beliefs (Anderson, Lepper, & Ross, 1980), perceptions of other people (Tajfel, Billig, Bundy, & Flament, 1971), behaviors toward other people (Rosenthal & Jacobson, 1968), emotional states (Schachter & Singer, 1962), physical attraction (Valins, 1966), self-assessments (Crocker, Voelkl, Testa, & Major, 1991), memories for observed and experienced events (Loftus, 2005), and even certain medical outcomes, as seen in studies of the placebo effect (Brown, 1998; Price, Finniss, & Benedetti, 2008). Scientific evidence for human malleability in the face of misinformation is broad and pervasive.

The forensic literature on confessions reinforces and extends this classic point, indicating that presentations of false evidence can lead people to confess to crimes they did not commit. This literature is derived from two sources of information. First, studies of actual cases reveal that the false evidence ploy, which is not permitted in Great Britain and most other European nations, is found in numerous wrongful convictions in the U.S., including DNA exonerations, in which there were confessions in evidence (Drizin & Leo, 2004; Leo & Ofshe, 1998). That this tactic appears in proven false confession cases makes sense. In self-report studies, actual suspects state that the reason they confessed is that they perceived themselves to be trapped by the weight of evidence (Gudjonsson & Sigurdsson, 1999; Moston, Stephenson, & Williamson, 1992).

Concerns about the polygraph are illustrative in this regard. Although it is best known for its use as a lie-detector test, and has value as an investigative tool, posttest “failure” feedback is often used to pressure suspects and can prompt false confessions. This problem is so common

that Lykken (1998) coined the term “fourth degree” to describe the tactic (p. 235), and the National Research Council Committee to Review the Scientific Evidence on the Polygraph (2003) warned of the risk of polygraph-induced false confessions. In a laboratory demonstration that illustrates the point, Meyer and Youngjohn (1991) elicited false confessions to the theft of an experimenter's pencil from 17% of subjects told that they had failed a polygraph test on that question.

The second source of evidence is found in laboratory experiments that have tested the causal hypothesis that false evidence leads innocent people to confess to prohibited acts they did not commit. In one study, Kassin and Kiechel (1996) accused college students typing on a keyboard of causing the computer to crash by pressing a key they were instructed to avoid. Despite their innocence and initial denials, subjects were asked to sign a confession. In some sessions but not others, a confederate said she witnessed the subject hit the forbidden key. This false evidence nearly doubled the number of students who signed a written confession, from 48 to 94%.

Follow-up studies have replicated this effect to the extent that the charge was plausible (Horselenberg et al., 2006; Klaver, Lee, & Rose, 2008), even when the confession was said to bear a financial or other consequence (Horselenberg, Merckelbach, & Josephs, 2003; Redlich & Goodman, 2003), and even among informants who are pressured to report on a confession allegedly made by another person (Swanner, Beike, & Cole, *in press*). The effect has been particularly evident among stress-induced males (Forrest, Wadkins, & Miller, 2002) and children and juveniles who tend to be both more compliant and suggestible than adults (Candel, Merckelbach, Luyen, & Reyskens, 2005; Redlich & Goodman, 2003). Using a completely different paradigm, Nash and Wade (2009) used digital editing software to fabricate video evidence of participants in a computerized gambling experiment “stealing” money from the “bank” during a losing round. Presented with this false evidence, all participants confessed—and most internalized the belief in their own guilt.

One needs to be cautious in generalizing from laboratory experiments. Yet numerous false confession cases have featured the use and apparent influence of the false evidence ploy. In one illustrative case, in 1989, 17-year-old Marty Tankleff was accused of murdering his parents despite the complete absence of evidence against him. Tankleff vehemently denied the charges for several hours—until his interrogator told him that his hair was found within his mother's grasp, that a “humidity test” indicated he had showered (hence, the presence of only one spot of blood on his shoulder), and that his hospitalized father had emerged from his coma to say that Marty was his assailant—all of which were untrue (the father never

regained consciousness and died shortly thereafter). Following these lies, Tankleff became disoriented and confessed. Solely on the basis of that confession, Tankleff was convicted, only to have his conviction vacated and the charges dismissed 19 years later (Firstman & Salpeter, 2008; Lambert, 2008).

#### *Minimization: Promises Implied But Not Spoken*

In addition to thrusting the suspect into a state of despair by the processes of confrontation, interrogators are trained to minimize the crime through “theme development,” a process of providing moral justification or face-saving excuses, making confession seem like an expedient means of escape. Interrogators are thus trained to suggest to suspects that their actions were spontaneous, accidental, provoked, peer-pressured, drug-induced, or otherwise justifiable by external factors. In the Central Park jogger case, every boy gave a false confession that placed his cohorts at center stage and minimized his own involvement (e.g., 16-year-old Kharey Wise said he felt pressured by peers)—and each said afterward that he thought he would go home after confessing based on statements made by police.

Minimization tactics that imply leniency may well lead innocent people who feel trapped to confess. Two core areas of psychology compel this conclusion. The first concerns the principle of reinforcement. As noted earlier, generations of basic behavioral scientists, dating back to Thorndike (1911), and formalized by Skinner (1938), have found that people are highly responsive to reinforcement and the perceived consequences of their behavior. More recent studies of human decision making have added that people are particularly influenced by outcomes that are immediate rather than delayed, the latter depreciating over time in their subjective value (Rachlin, 2000). The second core principle concerns the cognitive psychology of pragmatic implication. Over the years, researchers have found that when people read text or hear speech, they tend to process information “between the lines” and recall not what was stated per se, but what was *pragmatically implied*. Hence, people who read that “The burglar goes to the house” often mistakenly recall later that the burglar actually broke into the house; those who hear that “The flimsy shelf weakened under the weight of the books” often mistakenly recall that the shelf actually broke (Chan & McDermott, 2006; Harris & Monaco, 1978; Hilton, 1995). These findings indicate that pragmatic inferences can change the meaning of a communication, leading listeners to infer something that is “neither explicitly stated nor necessarily implied” (Brewer, 1977).

Taken together, basic research showing that people are highly influenced by perceived reinforcements and that people process the pragmatic implications of a

communication suggests the possibility that suspects infer leniency in treatment from minimizing remarks that depict the crime as spontaneous, accidental, pressured by others, or otherwise excusable—even in the absence of an explicit promise. To test this hypothesis, Kassin and McNall (1991) had subjects read a transcript of an interrogation of a murder suspect (the text was taken from an actual New York City interrogation). The transcripts were edited to produce three versions in which the detective made a contingent explicit promise of leniency, used the technique of minimization by blaming the victim, or did not use either technique. Subjects read one version and then estimated the sentence that they thought would be imposed on the suspect. The result: As if explicit promises had been made, minimization lowered sentencing expectations compared to conditions in which no technique was used.

More recently, researchers have found that minimization can also lead innocent people to confess. Using the computer crash paradigm described earlier, Klaver, Lee, and Rose (2008) found that minimization remarks significantly increased the false confession rate when the accusation concerning the forbidden key press was plausible. Russano, Meissner, Kassin, and Narchet (2005) devised a newer laboratory paradigm to not only assess the behavioral effects of minimization but to assess the diagnosticity of the resulting confession (a technique has “diagnosticity” to the extent that it increases the ratio of true to false confessions). In their study, subjects were paired with a confederate for a problem-solving study and instructed to work alone on some problems and jointly on others. In the *guilty* condition, the confederate sought help on a problem that was supposed to be solved alone, inducing a violation of the experimental prohibition. In the *innocent* condition, the confederate did not make this request to induce the crime. The experimenter soon “discovered” a similarity in their solutions, separated the subject and confederate, and accused the subject of cheating. The experimenter tried to get the subject to sign an admission by overtly promising leniency (a deal in which research credit would be given in exchange for a return session without penalty), making minimizing remarks (“I’m sure you didn’t realize what a big deal it was”), using both tactics, or using no tactics. Overall, the confession rate was higher among guilty subjects than innocent, when leniency was promised than when it was not, and when minimization was used than when it was not. Importantly, diagnosticity—defined as the rate of true confessions to false confessions—was highest at 7.67 when no tactics were used (46% of guilty suspects confessed vs. only 6% of innocents) and minimization—just like an explicit offer of leniency—reduced diagnosticity to 4.50 by increasing not only the rate of true confessions (from 46 to 81%) but even more so the rate of false confessions (which tripled from 6 to 18%). In short,

minimization provides police with a loophole in the rules of evidence by serving as the implicit but functional equivalent to a promise of leniency (which itself renders a confession inadmissible). The net result is to put innocents at risk to make false confessions.

It is important to note that minimization and the risk it engenders is not a mere laboratory phenomenon. Analyzing more than 125 electronically recorded interrogations and transcripts, Ofshe and Leo (1997a, 1997b) found that police often use techniques that serve to communicate promises and threats through pragmatic implication. These investigators focused specifically on what they called *high-end inducements*—appeals that communicate to a suspect that he or she will receive less punishment, a lower prison sentence, or some form of prosecutorial or judicial leniency upon confession and/or a higher charge or longer prison sentence in the absence of confession. In some homicide cases, for example, interrogators suggested that if the suspect admits to the killing it would be framed as unintentional, as an accident, or as an act of justifiable self-defense—not as premeditated cold-blooded murder, the portrayal that would follow from continued denial. This is a variant of the “maximization”/“minimization” technique described by Kassin and McNall (1991), which communicates through pragmatic implication that the suspect will receive more lenient treatment if he or she confesses but harsher punishment if he or she does not.

### Dispositional Risk Factors

In any discussion of dispositional risk factors for false confession, the two most commonly cited concerns are a suspect’s age (i.e., juvenile status) and mental impairment (i.e., mental illness, mental retardation). These common citations are because of the staggering overrepresentation of these groups in the population of proven false confessions. For example, of the first 200 DNA exonerations in the U.S., 35% of the false confessors were 18 years or younger and/or had a developmental disability. In their sample of wrongful convictions, Gross, Jacoby, Matheson, Montgomery, and Patel (2005) found that 44% of the exonerated juveniles and 69% of exonerated persons with mental disabilities were wrongly convicted because of false confessions.

#### *Adolescence and Immaturity*

There is strong evidence that juveniles are at risk for involuntary and false confessions in the interrogation room (for reviews see Drizin & Colgan, 2004; Owens-Kostelnik, Reppucci, & Meyer, 2006; Redlich, 2007; Redlich & Drizin, 2007; Redlich, Silverman, Chen, & Steiner, 2004). Juveniles are over represented in the pool

of identified false confession cases: 35% of the proven false confessors in the Drizin and Leo (2004) sample were younger than age 18, and within this sample of juveniles, 55% were aged 15 or younger. Comparatively, of all persons arrested for murder and rape, only 8 and 16%, respectively, are juveniles (Snyder, 2006). Numerous high-profile cases, such as the Central Park Jogger case (Kassin, 2002), have demonstrated the risks of combining young age, and the attributes that are associated with it (e.g., suggestibility, heightened obedience to authority, and immature decision-making abilities), and the psychologically oriented interrogation tactics described earlier. Hence, Inbau et al. (2001) concede that minors are at special risk for false confession and advise caution when interrogating a juvenile. Referring to the presentation of fictitious evidence, for example, they note: “This technique should be avoided when interrogating a youthful suspect with low social maturity” (p. 429).

The field of developmental psychology was born over a century ago in the influential writings of James Baldwin, Charles Darwin, G. Stanley Hall, and William Stern (see Parke, Ornstein, Rieser, & Zahn-Waxler, 1994). Since that time, basic research has shown that children and adolescents are cognitively and psychosocially less mature than adults—and that this immaturity manifests in impulsive decision making, decreased ability to consider long-term consequences, engagement in risky behaviors, and increased susceptibility to negative influences. Specifically, this body of research indicates that early adolescence marks the onset of puberty, heightening emotional arousability, sensation seeking, and reward orientation; that mid-adolescence is a period of increased vulnerability to risk-taking and problems in affect and behavior; and that late adolescence is a period in which the frontal lobes continue to mature, facilitating regulatory competence and executive functioning (for reviews, see Steinberg, 2005; Steinberg & Morris, 2001). Recent neurological research on brain development dovetails with findings from behavioral studies. Specifically, these studies have shown continued maturation during adolescence in the limbic system (emotion regulation) and in the prefrontal cortex (planning and self-control), with gray matter thinning and white matter increasing (Steinberg, 2007).

The developmental capabilities and limitations of adolescents are highly relevant to behavior in the interrogation room. In *Roper v. Simmons* (2005), Justice Kennedy cited three general differences between juveniles and adults in support of the Court’s reasoning for abolishing the death penalty for juveniles. First, he addressed the lessened maturity and responsibility of juveniles compared to adults with specific mention to the 18-year bright-line requirements for marriage without parental consent, jury duty, and voting. Second, Justice Kennedy noted that “juveniles are

more vulnerable or susceptible to negative influences and outside pressures, including peer pressure” (p. 15). Consistent with this portrait, Drizin and Leo (2004) found in their sample of false confessions that several involved two or more juveniles (out of 38 multiple false confession cases, half involved juveniles). In recommending that police “play one [suspect] against the other,” Inbau et al. (2001) note that this tactic may be especially effective on young, first-time offenders (pp. 292–293). Third, Justice Kennedy recognized that juveniles’ personality or “character” is not as well developed as adults. In light of the volatility of adolescence, it is interesting that Inbau et al. (2001) also suggest “themes” for confession that exploit a juvenile’s restless energy, boredom, low resistance to temptation, and lack of supervision.

Drawing on basic principles of developmental psychology, there is now a wealth of forensically oriented research indicating that juveniles—suspects, defendants, and witnesses—have age-related limitations of relevance to the legal system in comparison to adults. For example, individuals younger than 16 years generally have impairments in adjudicative competence (e.g., the ability to help in one’s own defense) and comprehension of legal terms (Grisso et al., 2003; Saywitz, Nathanson, & Snyder, 1993). In a subset of studies particularly germane to interrogations, several researchers employing a range of methodologies have shown that the risk of false confession is heightened during childhood and adolescence relative to adulthood. Of particular note, as described earlier, juveniles are more likely than adults to exhibit deficits in their understanding and appreciation of the *Miranda* rights that were explicitly put into place to protect people subject to “inherently coercive” interrogations (see Grisso, 1981; Redlich et al., 2003).

In the first set of studies, laboratory-based experiments have examined juveniles’ responses in mock crimes and interrogations. Using the Kassin and Kiechel (1996) computer crash paradigm, Redlich and Goodman (2003) found that juveniles aged 12- and 13-years-old, and 15- and 16-years-old, were more likely to confess than young adults (aged 18–26 years), especially when confronted with false evidence of their culpability. In fact, a majority of the younger participants, in contrast to adults, complied with the request to sign a false confession without uttering a word. In another laboratory experiment, researchers examined the effect of positive and negative reinforcement on children aged 5 through 8 years (Billings et al., 2007). Reinforcement strongly affected children’s likelihood of making false statements: Of those in the reinforcement condition, 52% made false admissions of guilty knowledge and 30% made false admissions of having witnessed the crime (within a span of 3.5 minutes!). In contrast, of children in the control condition, only 36 and 10% made

false guilty knowledge and admissions, respectively. These findings mirror the vast majority of studies on the interview-relevant abilities of child-victim/witnesses (e.g., Garven, Wood, & Malpass, 2000).

In a second set of studies, youths have made decisions in response to hypothetical scenarios. Goldstein et al. (2003) investigated male juvenile offenders’ self-reported likelihood of providing false confessions across different interrogation situations and found that younger age significantly predicted false confessions (25% surmised that they would definitely confess despite innocence to at least one of the situations). Similarly, Grisso et al. (2003) examined juveniles’ and young adults’ responses to a hypothetical mock-interrogation situation—specifically, whether they would confess to police, remain silent, or deny the offense. Compared to individuals aged 16 and older, those between 11 and 15 were significantly more likely to report that they would confess.

In a third set of studies, juveniles have been asked to self-report on actual interrogation experiences. In a sample of 114 justice-involved juveniles, Viljoen, Klaver, and Roesch (2005) found that suspects who were 15-years old and younger, compared to those who were 16- and 17-years old, were significantly more likely to waive their right to counsel and to confess. Overall, only 11 (less than 10%) said they had asked for an attorney during police questioning (see also Redlich et al., 2004) and 9 (6%) said they had at some point falsely confessed. A survey of over 10,000 Icelandic students aged 16–24 years similarly revealed that of those with interrogation experiences, 7% claimed to have falsely confessed, with the rates being higher among those with more than one interrogation experience (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006). In a massive and more recent effort, more than 23,000 juveniles from grades 8, 9, and 10 (average age of 15.5 years) were surveyed from seven countries—Iceland, Norway, Finland, Latvia, Lithuania, Russia, and Bulgaria. Overall, 11.5% (2,726) reported having been interrogated by police. Within this group, 14% reported having given a false confession (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, *in press*).

### *Cognitive and Intellectual Disabilities*

Much of what is true of juveniles is similarly true for persons with intellectual disabilities—another group that is over-represented in false confession cases (see Gudjonsson, 2003; Gudjonsson & MacKeith, 1994). Hence, in *Atkins v. Virginia* (2002), the U.S. Supreme Court explicitly cited the possibility of false confession as a rationale underlying their decision to exclude this group categorically from capital punishment. The case of Earl Washington is illustrative of the problem. Reported to have an IQ ranging



from 57 to 69 and interrogated over the course of 2 days, Washington “confessed” to five crimes, one being the rape and murder of a woman (charges resulting from the other four confessions were dismissed because of inconsistencies). Although he could not provide even basic details (e.g., that the victim was raped or her race) and although much of his statement was inconsistent with the evidence, Washington—who was easily led by suggestive questions and deferred to authority figures—was convicted, sentenced to death, and incarcerated for 18 years before being exonerated (Hourihan, 1995).

Mental retardation represents a constellation of symptoms, disorders, and adaptive functioning. The condition is defined by an IQ score of 70 or below and a range of impairments, such as adapting to societal norms, communication, social and interpersonal skills, and self-direction (American Psychiatric Association, 1994). In training police recruits, Perske (2004) identifies from research a number of tendencies exhibited by people who are mentally retarded. Collectively suggesting a heightened susceptibility to influence, the list includes the tendencies to rely on authority figures for solutions to everyday problems; please persons in authority; seek out friends; feign competence; exhibit a short attention span; experience memory gaps; lack impulse control; and accept blame for negative outcomes.

Some researchers have provided evidence for the diminished capacity of persons with cognitive disabilities in studies pertaining to interrogation (Fulero & Everington, 2004). Across four studies of *Miranda* comprehension, findings are quite consistent in showing that persons with mental retardation have significant deficits in their understanding and appreciation of *Miranda* warnings (Cloud, Shepard, Barkoff, & Shur, 2002; Everington & Fulero, 1999; Fulero & Everington, 1995; O’Connell, Garmoe, & Goldstein, 2005). For example, O’Connell et al. (2005) found that 50% of people with mild mental retardation in their sample could not correctly paraphrase *any* of the five *Miranda* components (see also Everington & Fulero, 1999). In comparison, less than 1% of adults in the general population score similarly low (Grisso, 1996). Moreover, research on the capacity of persons with mental retardation to learn and retain the knowledge and skills necessary to be competent suspects and defendants demonstrates that a significant number cannot meet this threshold, even with education (Anderson & Hewitt, 2002).

Everington and Fulero (1999) also examined the suggestibility of persons with mental retardation. Using the Gudjonsson Suggestibility Scale (GSS; a measure of interrogative suggestibility), they found that people with mental retardation were more likely to yield to leading questions and change their answers in response to mild negative feedback (see also O’Connell et al., 2005).

Gudjonsson (1991) examined GSS scores among three groups: alleged false confessors, alleged true confessors, and suspects who resisted confession during questioning. He found the alleged false confessors to have the lowest IQ scores as well as the highest suggestibility scores compared to the other two groups (Gudjonsson & Clare, 1995). Finally, Clare and Gudjonsson (1995) examined perceptions of a videotaped suspect who provides a true and false confession during an interrogation and found that 38% of perceivers with intellectual disabilities, compared to only 5% of those without intellectual disabilities, believed the suspect would be allowed to go home while awaiting trial. Additionally, only 52% believed that the suspect should obtain legal advice if innocent, compared to 90% of others.

### *Personality and Psychopathology*

In terms of susceptibility to false confession, it is important to consider other individual factors of relevance to a person’s decision to confess. Gudjonsson (2003) discusses a number of personal risk factors, including enduring personality traits (e.g., suggestibility, compliance) as well as psychopathology and personality disorders—categories within the DSM-IV Axis I and II diagnostic framework that are relevant to false confessions.

A number of large-scale studies of false confessions, carried out in Iceland, show the importance of antisocial personality traits and history of offending both among prison inmates (Sigurdsson & Gudjonsson, 2001) and community samples (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006, 2007; Gudjonsson, Sigurdsson, Bragason, et al., 2004; Gudjonsson et al., 2004). There have also been cases in which the personality disorder was considered crucial to understanding the false confession (Gudjonsson, 2006; Gudjonsson & Grisso, 2008). One interpretation of this finding is that persons with antisocial personality disorder, or antisocial traits, are more likely to be involved in offending, more often interviewed by police, and prone to lie for short-term instrumental gain, and are less concerned about the consequences of their behavior. This increases their tendency to make false denials as well as false confessions depending on their need at the time.

Psychopathology seems to be linked to false confessions in that persons with mental illness are over-represented in these cases. Psychological disorder is often accompanied by faulty reality monitoring, distorted perception, impaired judgment, anxiety, mood disturbance, poor self-control, and feelings of guilt. Gudjonsson (2003) provided a number of examples of cases where false confessions were directly related to specific disorders. Following the release of the Birmingham Six in 1991, research conducted for the British Royal Commission on Criminal Justice found that about 7% of suspects detained at police stations had a

history of mental illness and that many more were in an abnormal mental state due to anxiety and mood disturbance (Gudjonsson, Clare, Rutter, & Pearse, 1993). Similar findings were found in a recent study among suspects at Icelandic police stations (Sigurdsson, Gudjonsson, Einarsson, & Gudjonsson, 2006). In the U.S., research has consistently shown that rates of serious mental illness in the criminal justice system are at least two to five times higher than rates in the general population (e.g., James & Glaze, 2006; Lamb & Weinberger, 1998). To further compound the problem, the majority (75–80%) of offenders with mental illness have co-occurring substance abuse or dependence disorders (Abram, Teplin, & McClelland, 2003), which is an additional risk factor for false confessions (see Sigurdsson & Gudjonsson, 2001).

There is currently little research available to show how different disorders (e.g., anxiety, depression, and schizophrenia) potentially impair the suspect's capacity to waive legal rights and navigate his or her way through a police interview (Redlich, 2004). However, there is recent evidence from two separate studies to suggest that depressed mood is linked to a susceptibility to provide false confession to police (Gudjonsson et al., 2006; Sigurdsson et al., 2006). Gudjonsson et al. (2007) also recently found that multiple exposures to unpleasant or traumatic life events were significantly associated with self-reported false confessions during interrogation. Rogers et al. (2007a) found that most mentally disordered offenders exhibited insufficient understanding of *Miranda*, particularly when the warnings required increased levels of reading comprehension. Finally, Redlich (2007) found that offenders with mental illness self-reported a 22% lifetime false confession rate—notably higher than the 12% found in samples of prison inmates without mental illness (Sigurdsson & Gudjonsson, 1996).

An important type of psychopathology in relation to false confessions is attention deficit hyperactivity disorder (ADHD), which consists of three primary symptoms: inattention, hyperactivity, and impulsivity (American Psychiatric Association, 1994). This condition is commonly found among offenders (Young, 2007). Moreover, research shows that people with ADHD cope during questioning by answering a disproportionate number of questions with “don't know” replies—which may lead police to be suspicious of their answers (Gudjonsson, Young, & Bramham, 2007). They may also exhibit high levels of compliance. Gudjonsson et al. (2008) found that the rate of self-reported false confessions was significantly higher among prisoners who were currently symptomatic for attention deficit hyperactivity disorder (ADHD) than among the other prisoners (41 and 18%, respectively). These findings highlight the potential vulnerability during questioning of people who are currently symptomatic for ADHD.

### *Protections for Vulnerable Suspects in England*

When the police interview mentally disordered persons and juveniles in England and Wales, there are special legal provisions available to ensure that their statements to police are reliable and properly obtained—for example, in the presence of “appropriate adults.” The current legal provisions are detailed in the Codes of Practice (Home Office, 2003). Even when the police adhere to all the legal provisions, a judge may consider it unsafe and unfair to allow the statement to go before the jury. Here the crucial issue may be whether or not the defendant was “mentally fit” when interviewed. The term “fitness for interview” was first introduced formally in the current Codes of Practice, which became effective in 2003.

Fitness for interview is closely linked to the concept of “legal competencies,” which refers to an individual's physical, mental, and social vulnerabilities that may adversely affect his or her capacity to cope with the investigative and judicial process (Grisso, 1986). Historically, legal competence constructs relating to confession evidence have focused primarily on the functional deficits of juveniles (Drizin & Colgan, 2004), and adult defendants with mental retardation (Fulero & Everington, 2004) and mental illnesses (Melton, Petrila, Poythress, & Slobogin, 1997). Increasingly, the construct of legal competence in criminal cases is also being applied to defendants with “personality disorder” (Gudjonsson & Grisso, 2008). The introduction of “fitness to be interviewed” within the current Codes of Practice in England and Wales is a significant step toward protecting vulnerable suspect populations (Gudjonsson, 2005). Indeed, a similar framework has been introduced in New Zealand and Australia (Gall & Freckelton, 1999).

### **Innocence as a Risk Factor**

On September 20, 2006, Jeffrey Mark Deskovic was released from a maximum-security prison in New York, where he spent 15 years for a murder he said he committed but did not. Why did he confess? “Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear,” Deskovic said. Certain that DNA testing on the semen would establish his innocence, he added: “I thought it was all going to be okay in the end” (Santos, 2006, p. A1).

On the basis of anecdotal and research evidence, Kassir (2005) suggested the ironic hypothesis that *innocence* itself may put *innocents* at risk. Specifically, it appears that people who stand falsely accused tend to believe that truth and justice will prevail and that their innocence will become transparent to investigators, juries, and others. As a result, they cooperate fully with police, often failing to

realize that they are suspects not witnesses, by waiving their rights to silence and a lawyer and speaking freely to defend themselves. Thus, although mock criminals vary their disclosures according to whether the interrogator seems informed about the evidence, innocents are uniformly forthcoming—regardless of how informed the interrogator seems (Hartwig, Granhag, Strömwall, & Kronkvist, 2006; Hartwig, Granhag, Strömwall, & Vrij, 2005).

Based on observations of live and videotaped interrogations, Leo (1996b) found that four out of five suspects waive their rights and submit to questioning—and that people who have no prior record of crime are the most likely to do so. In light of known recidivism rates, this result suggested that innocent people in particular are at risk to waive their rights. Kassin and Norwick (2004) tested this hypothesis in a controlled laboratory setting in which some subjects but not others committed a mock theft of \$100. Upon questioning, subjects who were innocent were more likely to sign a waiver than those who were guilty, 81 to 36%. Afterward, most innocent subjects said that they waived their rights precisely because they were innocent: “I did nothing wrong,” “I had nothing to hide.” The feeling of reassurance that accompanies innocence may be rooted in a generalized and perhaps motivated belief in a just world in which human beings get what they deserve and deserve what they get (Lerner, 1980). It may also stem from the “illusion of transparency,” a tendency for people to overestimate the extent to which their true thoughts, emotions, and other inner states can be seen by others (Gilovich, Savitsky, & Medvec, 1998; Miller & McFarland, 1987). Whatever the mechanism, it is clear that *Miranda* warnings may not adequately protect the citizens who need it most—those accused of crimes they did not commit (Kassin, 2005).

These findings suggest that people have a naïve faith in the power of innocence to set them free. This phenomenology was evident in the classic case of Peter Reilly, an 18-year-old who falsely confessed to the murder of his mother. When asked years later why he did not invoke his *Miranda* rights, Reilly said, “My state of mind was that I hadn’t done anything wrong and I felt that only a criminal really needed an attorney, and this was all going to come out in the wash” (Connery, 1996, p. 93). Innocence may lead innocents to forego other important safeguards as well. Consider the case of Kirk Bloodsworth, the first death row inmate to be exonerated by DNA. In 1985, based solely on eyewitness identifications, Bloodsworth was convicted for the rape and murder of a 9-year-old girl. He was exonerated by DNA 8 years later and ultimately vindicated when the true perpetrator was identified. The day of his arrest, Bloodsworth was warned that there would be cameras present and asked if he wanted to cover his head with a

blanket. He refused, saying he did nothing wrong and was not going to hide—even though potential witnesses might see him on TV (Junkin, 2004).

## THE CONSEQUENCES OF CONFESSION

It is inevitable that some number of innocent people will be targeted for suspicion and subjected to excessively persuasive interrogation tactics, and many of them will naively and in opposition to their own self-interest waive their rights and confess. One might argue that this unfortunate chain of events is tolerable, not tragic, to the extent that the resulting false confessions are detected by authorities at some point and corrected. Essential to this presumed safety net is the belief that police, prosecutors, judges, and juries are capable of distinguishing true and false confessions.

The process begins with the police. Numerous false confession cases reveal that once a suspect confesses, police often close their investigation, deem the case solved, and overlook exculpatory evidence or other possible leads—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation (Drizin & Leo, 2004; Leo & Ofshe, 1998). This trust in confessions may extend to prosecutors as well, many of whom express skepticism about police-induced false confessions, stubbornly refusing to admit to such an occurrence even after DNA evidence has unequivocally established the defendant’s innocence (Findley & Scott, 2006; Hirsch, 2005b; Kassin & Gudjonsson, 2004). Upon confession, prosecutors tend to charge suspects with the highest number and types of offenses, set bail higher, and are far less likely to initiate or accept a plea bargain to a reduced charge (Drizin & Leo, 2004; Leo & Ofshe, 1998; but see Redlich, *in press*).

Part of the problem is that confessions can taint other evidence. In one case, for example, Pennsylvania defendant Barry Laughman confessed to rape and murder, which was later contradicted by blood typing evidence. Clearly influenced by the confession, the state forensic chemist went on to concoct four “theories,” none grounded in science, to explain away the mismatch. Sixteen years later, Laughman was set free (<http://www.innocenceproject.org>). Recent empirical studies have demonstrated the problem as well. In one study, Dror and Charlton (2006) presented five latent fingerprint experts with pairs of prints from a crime scene and suspect in an actual case in which they had previously made a match or exclusion judgment. The prints were accompanied either by no extraneous information, an instruction that the suspect had confessed (suggesting a match), or an instruction that the suspect was in custody at the time (suggesting an exclusion). The misinformation

produced a change in 17% of the original, previously correct judgments. In a second study, Hasel and Kassin (2009) staged a theft and took photographic identification decisions from a large number of eyewitnesses who were present. One week later, individual witnesses were told that the person they had identified denied guilt, or that he confessed, or that a specific other lineup member confessed. Influenced by this information, many witnesses went on to change their identification decisions, selecting the confessor with confidence, when given the opportunity to do so.

Not surprisingly, confessions are particularly potent in the courtroom. When a suspect in the U.S. retracts his or her confession, pleads not guilty, and goes to trial, a sequence of two decisions is set into motion. First, a judge determines whether the confession was voluntary and hence admissible as evidence. Then a jury, hearing the admissible confession, determines whether the defendant is guilty beyond a reasonable doubt. But can people distinguish between true and false confessions? And what effect does this evidence have within the context of a trial?

Research on the impact of confessions throughout the criminal justice system is unequivocal. Mock jury studies have shown that confessions have more impact than other potent forms of evidence (Kassin & Neumann, 1997) and that people do not fully discount confessions—even when they are judged to be coerced (Kassin & Wrightsman, 1980) and even when the confessions are presented secondhand by an informant who is motivated to lie (Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008). For example, Kassin and Sukel (1997) presented mock jurors with one of three versions of a murder trial transcript. In a low-pressure version, the defendant was said to have confessed to police immediately upon questioning. In a high-pressure version, participants read that the suspect was in pain and interrogated aggressively by a detective who waved his gun in a menacing manner. A control version contained no confession in evidence. Presented with the high-pressure confession, participants appeared to respond in the legally prescribed manner. They judged the statement to be involuntary and said it did not influence their decisions. Yet when it came to the all-important verdict measure, this confession significantly increased the conviction rate. This increase occurred even in a condition in which subjects were specifically admonished to disregard confessions they found to be coerced. Similar results have recently been reported in mock jury studies involving defendants who are minors (Redlich, Gheiti, & Quas, 2008; Redlich, Quas, & Gheiti, 2008).

This point concerning the power of confession evidence is bolstered by recent survey evidence indicating that although laypeople understand that certain interrogation tactics are psychologically coercive, they do not believe

that these tactics elicit false confessions (Leo & Liu, 2009). Archival analyses of actual cases also reinforce this point. When proven false confessors pleaded not guilty and proceeded to trial, the jury conviction rates ranged from 73% (Leo & Ofshe, 1998) to 81% (Drizin & Leo, 2004). These figures led Drizin and Leo to describe confessions as “inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt” (p. 959).

There are at least three reasons why people cannot easily identify as false the confessions of innocent suspects. First, generalized common sense leads people to trust confessions the way they trust other behaviors that counter self-interest. Over the years, and across a wide range of contexts, social psychologists have found that social perceivers fall prey to the fundamental attribution error—that is, they tend to make dispositional attributions for a person’s actions, taking behavior at face value, while neglecting the role of situational factors (Jones, 1990; Ross, 1977). Gilbert and Malone (1995) offered several explanations for this bias, the most compelling of which is that people draw quick and relatively automatic dispositional inferences from behavior and then fail to adjust or correct for the presence of situational constraints. Common sense further compels the belief that people present themselves in ways that are self-serving and that confessions must therefore be particularly diagnostic of guilt. Indeed, most people reasonably believe that they would never confess to a crime they did not commit and have only rudimentary understanding of the predispositional and situational factors that would lead someone to do so (Henkel, Coffman, & Dailey, 2008).

A second reason is that people are typically not adept at deception detection. We saw earlier that neither lay people nor professionals distinguish truths from lies at high levels of accuracy. This problem extends to judgments of true and false confessions. To demonstrate, Kassin, Meissner, and Norwick (2005) videotaped male prison inmates providing true confessions to the crimes for which they were incarcerated and concocting false confessions to crimes selected by the experimenter that they did not commit. When college students and police investigators later judged these statements from videotapes or audiotapes, the results showed that neither group was particularly adept, exhibiting accuracy rates that ranged from 42 to 64%—typically not much better than chance performance. These findings suggest people cannot readily distinguish true and false confessions and that law enforcement experience does not improve performance. This latter result is not surprising, as many of the behavioral cues that typically form part of the basis for training (e.g., gaze aversion, postural cues, and



grooming gestures) are not statistically correlated with truth-telling or deception (DePaulo et al., 2003).

On the assumption that “I’d know a false confession if I saw one,” there is a third reason for concern: Police-induced false confessions often contain *content* cues presumed to be associated with truthfulness. In many documented false confessions, the statements ultimately presented in court contained not only an admission of guilt but vivid details about the crime, the scene, and the victim that became known to the innocent suspect through leading questions, photographs, visits to the crime scene, and other secondhand sources invisible to the naïve observer. To further complicate matters, many false confessors state not just what they allegedly did, and how they did it, but *why*—as they self-report on revenge, jealousy, provocation, financial desperation, peer pressure, and other prototypical motives for crime. Some of these statements even contain apologies and expressions of remorse. To the naïve spectator, such statements appear to be voluntary, textured with detail, and the product of personal experience. Uninformed, however, this spectator mistakes illusion for reality, not realizing that the taped confession is scripted by the police theory of the case, rehearsed during hours of unrecorded questioning, directed by the questioner, and ultimately enacted on paper, tape, or camera by the suspect (see Kassir, 2006).

## RECOMMENDATIONS FOR REFORM

Confession is a potent form of evidence that triggers a chain of events from arrest, prosecution, and conviction, through post-conviction resistance to change in the face of exculpatory information. Recent DNA exonerations have shed light on the problem that innocent people, confident in the power of their innocence to prevail, sometimes confess to crimes they did not commit. Research has identified two sets of risks factors. The first pertains to the circumstances of interrogation, situational factors such as a lengthy custody and isolation, possibly accompanied by a deprivation of sleep and other need states; presentations of false evidence, a form of trickery that is designed to link the suspect to the crime and lead him or her to feel trapped by the evidence; and minimization tactics that lead the suspect and others to infer leniency even in the absence of an explicit promise. The second set of risk factors pertains to dispositional characteristics that render certain suspects highly vulnerable to influence and false confessions—namely, adolescence and immaturity; cognitive and intellectual impairments; and personality characteristics and mental illness.

In light of the wrongful convictions involving false confessions that have recently surfaced, as well as

advances in psychological research on interviewing, interrogations, and confessions, there are renewed calls for caution regarding confessions and the reform of interrogation practices not seen since the Wickersham Commission Report (1931) and U.S. Supreme Court opinion in *Miranda* (1966). Professionals from varying perspectives may differ in their perceptions of both the problems and the proposed solutions. Hence, it is our hope that the recommendations to follow will inspire a true collaborative effort among law enforcement professionals, district attorneys, defense lawyers, judges, social scientists, and policy makers to scrutinize the systemic factors that put innocent people at risk and devise effective safeguards.

## Electronic Recording of Interrogations

Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, *all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator*. Stated as a matter of requirement, such a policy evokes strong resistance in some pockets of the law enforcement community. Yet it has also drawn advocates from a wide and diverse range of professional, ideological, and political perspectives (e.g., American Bar Association, 2004; Boetig, Vinson, & Weidel, 2006; Cassell, 1996a; Drizin & Colgan, 2001; Geller, 1994; Gudjonsson, 2003; Leo, 1996c; Slobogin, 2003; Sullivan, 2004; The Justice Project, 2007).

In England, under the Police and Criminal Evidence Act of 1984, the mandatory requirement for tape-recording police interviews was introduced to safeguard the legal rights of suspects and the integrity of the process. At first resisted by police, this requirement has positively transformed the ways in which police interviews are conducted and evaluated. Over the years, the need for taping has pressed for action within the U.S. as well. In *Convicting the Innocent*, a classic study of wrongful convictions, Edwin Borchard (1932) expressed concern that police abuses during interrogations led to involuntary and unreliable confessions. His solution, utilizing the technology of the time, was to make “[phonographic records] [of interrogations] which shall alone be introducible in court” (pp. 370–371).

Throughout the twentieth century, other advocates for recording were less concerned with preventing false confessions and more concerned with increasing the accuracy of the justice system by eliminating the swearing contests between police officers and suspects over what occurred during the interrogation (Kamisar, 1977; Weisberg, 1961). Still others saw that recording interrogations held

tremendous benefits for law enforcement by discouraging note-taking and other practices that could inhibit suspects, helping police officers obtain voluntary confessions, nabbing accomplices, and protecting officers from false allegations of abuse (Geller, 1993; O'Hara, 1956). Despite these calls for recording, by the turn of the twentieth century only two states, by virtue of state Supreme Court decisions—Alaska (*Stephan v. State*, 1985) and Minnesota (*State v. Scales*, 1994)—required law enforcement officers to electronically record suspect interrogations. The pace of reform in this area, however, is picking up and once again a concern about false confessions seems to be the impetus. In the post-DNA age, and particularly in the past 5 years, as the number of wrongful convictions based on false confessions has continued to climb, concerns about the reliability of confession evidence have led to a renewed push for recording requirements (Drizin & Reich, 2004). As a result of statutes and court rulings, seven additional jurisdictions—Illinois, Maine, New Mexico, New Jersey, Wisconsin, North Carolina, and the District of Columbia—have joined Minnesota and Alaska, in requiring recordings of custodial interrogations in some circumstances (Robertson, 2007; Sullivan, 2004). In several other states, supreme courts have stopped short of requiring recording but either have issued strongly worded opinions endorsing recording—e.g., New Hampshire (*State v. Barnett*, 2002) and Iowa (*State v. Hajtic*, 2007)—or, in the case of Massachusetts, held that where law enforcement officers have no excuse for the failure to record interrogation, defendants are entitled to a strongly worded instruction admonishing jurors to treat unrecorded confessions with caution (*Commonwealth v. DiGiambattista*, 2004).

In addition to recent developments in state courts and legislatures, there is a growing movement among law enforcement agencies around the country to record interrogations voluntarily. Over the past 70 years, the idea has been anathema to many in law enforcement—including the FBI, which prohibits electronic recording, and John Reid & Associates, which used to vigorously oppose the practice of recording interrogations (Inbau et al., 2001; but see Buckley & Jayne's [2005] recent publication, *Electronic Recording of Interrogations*; for an historical review, see Drizin & Reich, 2004). Yet there are now signs that police opposition is thawing (e.g., Boetig et al., 2006). Several years ago, a National Institute of Justice study found that one-third of large police and sheriff's departments throughout the U.S. were already videotaping at least some interrogations or confessions and that their experiences with the practice were positive (Geller, 1993). A more recent survey of more than 465 law enforcement agencies in states that do not require electronic recording of interrogations has revealed that the practice is widespread. Without any legislative or judicial compulsion, police

departments in many states routinely record interviews and interrogations in major felony investigations. Without exception, they have declared strong support for the practice (Sullivan, 2004; Sullivan, Vail, & Anderson, 2008).

There are numerous advantages to a videotaping policy. To begin, the presence of a camera may deter interrogators from using the most egregious, psychologically coercive tactics—and deter frivolous defense claims of coercion where none existed. Second, a videotaped record provides trial judges (ruling on voluntariness) and juries (determining guilt) an *objective* and *accurate* record of the process by which a statement was taken—a common source of dispute that results from ordinary forgetting and self-serving distortions in memory. In a study that demonstrates the problem, Lamb, Orbach, Sternberg, Hershkowitz, and Horowitz (2000) compared interviewers' verbatim contemporaneous accounts of 20 forensic interviews with alleged child sex abuse victims with tape recordings of these same sessions. Results showed that more than half of the interviewers' utterances and one quarter of the details that the children provided did not appear in their verbatim notes. Even more troubling was that interviewers made frequent and serious source attribution errors—for example, often citing the children, not their own prompting questions, as the source of details. This latter danger was inadvertently realized by D.C. Detective James Trainum (2007) who—in an article entitled “I took a false confession – so don't tell me it doesn't happen!”—recounted a case in which a suspect who had confessed to him was later exonerated: “Years later, during a review of the videotapes, we discovered our mistake. We had fallen into a classic trap. We believed so much in our suspect's guilt that we ignored all evidence to the contrary. To demonstrate the strength of our case, we showed the suspect our evidence, and unintentionally fed her details that she was able to parrot back to us at a later time. It was a classic false confession case and without the video we would never have known” (see also Trainum, 2008). Similarly, Police Commander Neil Nelson, of St. Paul, Minnesota, said that he too once elicited a false confession, which he came to doubt by reviewing the interrogation tape: “You realize maybe you gave too much detail as you tried to encourage him and he just regurgitated it back” (Wills, 2005; quoted online by Neil Nelson & Associates; <http://www.neilnelson.com/pressroom.html>).

To further complicate matters of recollection, police interrogations are not prototypical social interactions but, rather, extraordinarily stressful events for those who stand accused. In a study that illustrates the risk to accurate retrieval, Morgan et al. (2004) randomly assigned trainees in a military survival school to undergo a realistic high-stress or low-stress mock interrogation. Twenty-four hours later, he found that those in the high-stress condition had

difficulty even identifying their interrogators in a lineup. In real criminal cases, questions constantly arise about whether rights were administered and waived, whether the suspect was cooperative or evasive, whether detectives physically intimidated the suspect, whether promises or threats were made or implied, and whether the details in a confession emanated from the police or suspect, are among the many issues that become resolvable (in Great Britain, as well, taping virtually eliminated the concern that police officers were attributing to suspects admissions that would later be disputed; see Roberts, 2007).

In recent years, Sullivan (2004, 2007) has tirelessly interviewed law enforcement officials from hundreds of police and sheriff's departments that have recorded custodial interrogations and found that they enthusiastically favored the practice. Among the collateral benefits they often cited were that recording permitted detectives to focus on the suspect rather than take copious notes, increased accountability, provided an instant replay of the suspect's statement that sometimes revealed incriminating comments that were initially overlooked, reduced the amount of time detectives spent in court defending their interrogation practices, and increased public trust in law enforcement. Countering the most common apprehensions, the respondents in these interview studies reported that videotaping interrogations did not prove costly or inhibit suspects from talking to police or incriminating themselves. Typical of this uniformly positive reaction, Detective Trainum (2007) notes: "When videotaping was first forced upon us by the D.C. City Council, we fought it tooth and nail. Now, in the words of a top commander, we would not do it any other way."

It is beyond the scope of this article to draft a model rule that would address such specific details as what conditions should activate a recording requirement, how the recordings should be preserved, whether exceptions to the rule should be made (e.g., if the equipment malfunctions, if the suspect refuses to make a recorded statement), and what consequences would follow from the failure to record (e.g., whether the suspect's statement would be excluded or admitted to the jury with a cautionary instruction). As a matter of policy, however, research does suggest that it is important not only that entire sessions be recorded, triggered by custodial detention, but that the camera adopt a neutral "equal focus" perspective that shows both the accused and his or her interrogators. In 20-plus years of research on illusory causation effects in attribution, Lassiter and his colleagues have taped mock interrogations from three different camera angles so that the suspect, the interrogator, or both were visible. Lay participants who saw only the suspect judged the situation as less coercive than those focused on the interrogator. By directing visual attention toward the accused, the camera can thus lead

jurors to underestimate the amount of pressure actually exerted by the "hidden" detective (Lassiter & Irvine, 1986; Lassiter, Slaw, Briggs, & Scanlan, 1992). Additional studies have confirmed that people are more attuned to the situational factors that elicit confessions whenever the interrogator is on camera than when the focus is solely on the suspect (Lassiter & Geers, 2004; Lassiter, Geers, Munhall, Handley, & Beers, 2001). Under these more balanced circumstances, juries make more informed attributions of voluntariness and guilt when they see not only the final confession but the conditions under which it was elicited (Lassiter, Geers, Handley, Weiland, & Munhall, 2002). Indeed, even the perceptions of experienced trial judges are influenced by variations in camera perspective (Lassiter, Diamond, Schmidt, & Elek, 2007).

### Reform of Interrogation Practices

In light of recent events, the time is ripe for police, district attorneys, defense lawyers, judges, researchers, and policymakers to evaluate current methods of interrogation. All parties would agree that the surgical objective of interrogation is to secure confessions from perpetrators but not from innocent suspects. Hence, the process of interrogation should be structured in theory and in practice to produce outcomes that are accurate, as measured by the observed ratio of true to false confessions. Yet except for physical brutality or deprivation, threats of harm or punishment, promises of leniency or immunity, and flagrant violations of a suspect's constitutional rights, there are no clear criteria by which to regulate the process. Instead, American courts historically have taken a "totality of the circumstances" approach to voluntariness and admissibility. Because *Miranda* does not adequately safeguard the innocent, we believe that the time is right to revisit the factors that comprise those circumstances.

As illustrated by the Reid technique and other similar approaches, the modern American police interrogation is, by definition, a guilt-presumptive and confrontational process—aspects of which put innocent people at risk. There are two ways to approach questions of reform. One is to completely reconceptualize this model at a macro level and propose that the process be converted from "confrontational" to "investigative." Several years ago, after a number of high-profile false confessions, the British moved in this direction, transitioning police from a classic interrogation to a process of "investigative interviewing." The Police and Criminal Evidence (PACE) Act of 1984 sought to reduce the use of psychologically manipulative tactics. In a post-PACE study, Irving and McKenzie (1989) found that the use of psychologically manipulative tactics had significantly declined—without a corresponding drop in the frequency of confessions. The post-PACE confession rate

is also somewhat higher in the UK than in the U.S. (Gudjonsson, 2003). In 1993, the Royal Commission on Criminal Justice further reformed the practice of interrogation by proposing the PEACE model described earlier (“Preparation and Planning,” “Engage and Explain,” “Account,” “Closure,” and “Evaluate”), the purpose of which is fact finding rather than confession. Observational research suggests that such investigative interviews enable police to inculcate offenders—and youthful suspects as well (Hershkowitz, Horowitz, Lamb, Orbach, & Sternberg, 2004; Lamb, Orbach, Hershkowitz, Horowitz, & Abbott, 2007)—by obtaining from them useful, evidence-generating information about the crime (for reviews, see Bull & Soukara, 2009; Williamson, 2006).

Similar techniques have been taught and employed in the U.S. as well, where Nelson (2007) reports from experience that it is highly effective. Recent laboratory research has also proved promising in this regard. In one series of experiments, interviewers more effectively exposed deceptive mock criminals when they strategically withheld incriminating evidence than when they confronted the suspects with that evidence (Hartwig et al., 2005, 2006). In an experiment using the Russano et al. (2005) cheating paradigm described earlier, Rigoni and Meissner (2008) independently varied and compared accusatorial and inquisitorial methods and found that the latter produced more diagnostic outcomes—lowering the rate of false confessions without producing a corresponding decrease in the rate of true confessions. Although more systematic research is needed, it is clear that investigative interviewing offers a potentially effective macro alternative to the classic American interrogation. Indeed, New Zealand and Norway have recently adopted the PEACE approach to investigative interviewing as a matter of national policy.

A second approach to the question of reform is to address specific risk factors inherent within a confrontational framework for interrogation. On the basis of converging evidence from actual false confession cases, basic principles of psychology, and forensic research, the existing literature suggests that certain interrogation practices alone and in combination with each other pose a risk to the innocent—whether they are dispositionally vulnerable or not. Focused in this way, but stopping short of making specific recommendations, we propose that the following considerations serve as a starting point for collaborative discussion.

#### *Custody and Interrogation Time*

As noted earlier, the human needs for belonging, affiliation, and social support, especially in times of stress, are a fundamental human motive. Prolonged isolation from significant others thus constitutes a form of deprivation that

can heighten a suspect’s distress and increase his or her incentive to escape the situation. Excessive time in custody may also be accompanied by fatigue and feelings of helplessness and despair as well as the deprivation of sleep, food, and other biological needs. The vast majority of interrogations last from 30 minutes up to 2 hours (Baldwin, 1993; Irving, 1980; Kassin et al., 2007; Leo, 1996b; Wald et al., 1967). Inbau et al. (2001) cautioned against surpassing 4 hours, and Blair (2005) argued that interrogations exceeding 6 hours are “legally coercive.” Yet research shows that in proven false confession cases the interrogations had lasted for an average of 16.3 hours (Drizin & Leo, 2004). Following PACE in Great Britain, policy discussions should begin with a proposal for the imposition of time limits, or at least flexible guidelines, when it comes to detention and interrogation, as well as periodic breaks from questioning for rest and meals. At a minimum, police departments should consider placing internal time limits on the process that can be exceeded—initially and at regular intervals thereafter, if needed—only with authorization from a supervisor of detectives.

#### *Presentations of False Evidence*

A second problem concerns the tactic of presenting false evidence, which is often depicted as incontrovertible, and which takes the form of outright lying to suspects—for example, about an eyewitness identification that was not actually made; an alibi who did not actually implicate the suspect; fingerprints, hair, or blood that was not actually found; or polygraph tests that they did not actually fail. In *Frazier v. Cupp* (1969), the U.S. Supreme Court reviewed a case in which police falsely told the defendant that his cousin (whom he said he was with), had confessed, which immediately prompted the defendant to confess. The Court sanctioned this type of deception—seeing it as relevant to its inquiry on voluntariness but not a reason to disqualify the resulting confession. Although some state courts have distinguished between mere false assertions, which are permissible, and the fabrication of reports, tapes, and other evidence, which are not, the Supreme Court has not revisited the issue.

From a convergence of three sources, there is strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them. These three sources are: (1) the aggregation of actual false confession cases, many of which involved use of the false evidence ploy; (2) one hundred-plus years of basic psychology research, which proves without equivocation that misinformation can substantially alter people’s visual perceptions, beliefs, motivations, emotions, attitudes, memories, self-assessments, and even certain physiological outcomes, as seen in



studies of the placebo effect; and (3) numerous experiments, from different laboratories, demonstrating that presentations of false evidence increase the rate at which innocent research participants agree to confess to prohibited acts they did not commit. As noted earlier, scientific evidence for the malleability of people's perceptions, decisions, and behavior when confronted with misinformation is broad and pervasive. With regard to a specific variant of the problem, it is also worth noting that the National Research Council Committee to Review the Scientific Evidence on the Polygraph (2003) recently expressed concern over the risk of false confessions produced by telling suspects they had failed the polygraph (see also Lykken, 1998).

Over the years, legal scholars have debated the merits of trickery and deception in the interrogation room (e.g., Magid, 2001; Slobogin, 2007; Thomas, 2007) and some law enforcement professionals have argued that lying is sometimes a necessary evil, effective, and without risk to the innocent (Inbau et al., 2001). To this argument, two important points must be noted. First, direct observations and self-report surveys of American police suggest that the presentation of false evidence is a tactic that is occasionally used (e.g., Feld, 2006a, 2006b; Kassin et al., 2007; Leo, 1996b). Some interrogators no doubt rely on this ploy more than others do. Yet in a position paper on false confessions, the Wisconsin Criminal Justice Study Commission (2007) concluded that "Experienced interrogators appear to agree that false evidence ploys are relatively rare" (p. 6). Second, it is instructive that in Great Britain, where police have long been prohibited from deceiving suspects about the evidence, relying instead on the investigative interviewing tactics described earlier, there has been no evidence of a decline in confession rates (Clarke & Milne, 2001; Gudjonsson, 2003; Williamson, 2006).

In light of the demonstrated risks to the innocent, we believe that the false evidence ploy, which is designed to thrust suspects into a state of inevitability and despair, should be addressed. The strongest response would be an outright ban on the tactic, rendering all resulting confessions per se inadmissible—as they are if elicited by promises, threats, and physical violence (such a ban currently exists in England, Iceland, and Germany; suspects are differently protected in Spain and Italy, where defense counsel must be present for questioning). A second approach, representing a relatively weak response, would involve calling for no direct action, merely a change of attitude in light of scientific research that will lead the courts to weigh the false evidence ploy more heavily when judging voluntariness and reliability according to a "totality of the circumstances."

Representing a compromise between an outright ban and inaction, we urge police, prosecutors, and the courts, in light of past wrongful convictions and empirical research,

to heighten their sensitivity to the risks that false evidence poses to the innocent suspect. One way to achieve this compromise would be to curtail some variants of the false evidence ploy but not others—or in the case of some suspects but not others. As noted earlier, some state courts have distinguished between mere false assertions and the fabrication of reports, tapes, photographs, and other evidence, the latter being impermissible. This particular distinction seems arbitrary. False evidence puts innocents at risk to the extent that a suspect is vulnerable (e.g., by virtue of his or her youth, naiveté, intellectual deficiency, or acute emotional state) and to the extent that the alleged evidence it is presented as incontrovertible, sufficient as a basis for prosecution, and impossible to overcome. By this criterion, which the courts would have to apply on a case-by-case basis, a confession produced by telling an adult suspect that his cousin had confessed, the ploy used in *Frazier v. Cupp* (1969), might well be admissible. Yet a confession produced by telling a traumatized 14-year-old boy that his hair was found in his murdered sister's grasp, that her blood was found in his bedroom, and that he failed an infallible lie detector test—the multiple lies presented to false confessor Michael Crowe—would be excluded (White, 2001).

#### *Minimization Tactics*

A third area of concern involves the use of minimization techniques (often called "themes," "scenarios," or "inducements") that can communicate promises of leniency indirectly through pragmatic implication. While American federal constitutional law has long prohibited the use of explicit promises of leniency (*Bram v. United States*, 1897; *Leyra v. Denno*, 1954; *Lynumn v. Illinois*, 1963), uses of minimization are less clear. There is some legal support for the proposition that implicit promises of leniency are also prohibited in federal constitutional law (White, 1997), although a majority of states hold that a promise of leniency is only one factor to be considered in determining whether a confession is involuntary (White, 2003).

Multiple sources support the proposition that implicit promises can put innocents at risk to confess by leading them to perceive that the only way to lessen or escape punishment is by complying with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and that prosecution is inevitable. These sources are: (1) the aggregation of actual false confession cases, the vast majority of which involved the use of minimization or explicit promises of leniency (Drizin & Leo, 2004; Leo & Ofshe, 1998; Ofshe & Leo, 1997a, 1997b; White, 2001); (2) basic psychological

research indicating, first, that people are highly responsive to reinforcement and make choices designed to maximize their outcomes (Hastie & Dawes, 2001), and second that people can infer certain consequences in the absence of explicit promises and threats by pragmatic implication (Chan & McDermott, 2006; Harris & Monaco, 1978; Hilton, 1995); and (3) experiments specifically demonstrating that minimization increases the rate at which research participants infer leniency in punishment and confess, even if they are innocent (Kassin & McNall, 1991; Klaver, Lee, & Rose, 2008; Russano et al., 2005).

In light of the demonstrated risks to the innocent, we believe that techniques of minimization, as embodied in the “themes” that interrogators are trained to develop, which communicate promises of leniency via pragmatic implication, should be scrutinized. Some law enforcement professionals have argued that minimization is a necessary interrogation technique (Inbau et al., 2001). As with the false evidence ploy, there are several possible approaches to the regulation of minimization techniques—ranging from the recommendation that no action be taken to an outright ban on minimization. Between these extreme positions one might argue that some uses of minimization but not others should be limited or modified.

Minimization techniques come in essentially three forms: those that minimize the *moral* consequences of confessing, those that minimize the *psychological* consequences of confessing, and those that minimize the *legal* consequences of confessing (Inbau et al., 2001; Ofshe & Leo, 1997a, 1997b). One possible compromise between the two extreme positions noted above would be to permit moral and psychological forms of minimization, but ban legal minimization that communicates promises of leniency via pragmatic implication. With this distinction in mind, interrogators would be permitted, for example, to tell a suspect that he or she will feel better after confession (psychological minimization) or that he or she is still a good person (moral minimization), but not that the legal consequences of his actions will be minimized if he confesses (e.g., as may be implied by self-defense and other themes). More research is thus needed to distinguish among the different tactics that interrogators are trained to use (e.g., the provocation, peer pressure, and accident scenarios), and the pragmatic inferences that these tactics lead suspects to draw concerning the consequences of confession.

### Protection of Vulnerable Suspect Populations

There is a strong consensus among psychologists, legal scholars, and practitioners that juveniles and individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure. Yet little action has been taken to modulate the methods by

which these vulnerable groups are questioned when placed into custody as crime suspects. More than 45 years ago, the 1962 President’s Panel on Mental Retardation questioned whether confessions from defendants with mental retardation should ever be admissible at trial (see Appelbaum & Appelbaum, 1994). In 1991, Fred Inbau wrote that “special protections must be afforded to juveniles and to all other persons of below-average intelligence, to minimize the risk of untruthful admissions due to their vulnerability to suggestive questioning” (1991, pp. 9–10). More recently, Inbau et al. (2001) advised against use of the false evidence ploy with youthful suspects or those with diminished mental capacity: “These suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement” (p. 429; also see Buckley, 2006).

It is uniformly clear to all parties that vulnerable suspect populations—namely, juveniles and people who are cognitively impaired or psychologically disordered—need to be protected in the interrogation room. In operational terms, we believe that there are two possible ways to protect these vulnerable populations. The first concerns the mandatory presence of an attorney. At least with regard to juveniles, a parent, guardian, or other interested adult is required in some states to protect young suspects who face interrogation. Yet research suggests that the presence of an interested adult does not increase the rate at which juveniles assert their constitutional rights because these adults, often passive, frequently urge their youths to cooperate with police—a tendency observed both in the U.S. (Grisso & Ring, 1979; Oberlander & Goldstein, 2001) and in the UK, where the law provides for access to an “appropriate adult” (Pearse & Gudjonsson, 1996). For this reason, juveniles—at least those under the age of 16 (at present, the research evidence is less clear when it comes to older adolescents)—should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role (see Gudjonsson, 2003).

As a second possible means of protection, law enforcement personnel who conduct interviews and interrogations should receive special training—not only on the limits of human lie detection, false confessions, and the perils of confirmation biases—but on the added risks to individuals who are young, immature, mentally retarded, psychologically disordered, or in other ways vulnerable to manipulation. In a survey of 332 Baltimore police officers, Meyer and Reppucci (2007) found that while respondents understood in general terms that adolescents lack maturity of judgment and are more malleable than adults, they did not by implication believe that juvenile suspects were at greater risk in the interrogation room. Hence, they reported using roughly the same Reid-like techniques with juveniles

as they do with adults (e.g., confrontation, repetition, refusal to accept denials, false evidence, minimization, and use of alternative questions). Interestingly, one-third of these respondents stated that police could benefit from special training with regard to the interrogation of juvenile suspects. In light of research described earlier, as well as Inbau et al.'s (2001) cautionary notes on the interrogation of minors and their heightened risk for false confession, we agree.

## Summary and Conclusion

In 1932, Edwin Borchard published *Convicting the innocent: Sixty-five actual errors of criminal justice*, in which several false confession cases were included. Addressing the question of how these errors were uncovered, he noted how “sheer good luck” played a prominent role and lamented on “how many unfortunate victims of error have no such luck, it is impossible to say, but there are probably many.” Today’s generation of post-conviction exonerations well illustrate the role that sheer good luck plays (e.g., as when DNA, long ago collected, was preserved; as when the true perpetrator finds a conscience and comes forward). With increased scientific attention to the problem of false confessions, and the reforms recommended in this article, we believe it possible to reduce the serendipitous nature of these discoveries and to increase both the diagnosticity of suspects’ statements and the ability of police, prosecutors, judges, and juries to make accurate decisions on the basis of these statements.

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## **The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation**

Saul M. Kassin and Katherine L. Kiechel

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THE SOCIAL PSYCHOLOGY OF FALSE CONFESSIONS:  
Compliance, Internalization, and Confabulation

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**Abstract**—An experiment demonstrated that false incriminating evidence can lead people to accept guilt for a crime they did not commit. Subjects in a fast- or slow-paced reaction time task were accused of damaging a computer by pressing the wrong key. All were truly innocent and initially denied the charge. A confederate then said she saw the subject hit the key or did not see the subject hit the key. Compared with subjects in the slow-pace/no-witness group, those in the fast-pace/witness group were more likely to sign a confession, internalize guilt for the event, and confabulate details in memory consistent with that belief. Both legal and conceptual implications are discussed.

In criminal law, confession evidence is a potent weapon for the prosecution and a recurring source of controversy. Whether a suspect's self-incriminating statement was voluntary or coerced and whether a suspect was of sound mind are just two of the issues that trial judges and juries consider on a routine basis. To guard citizens against violations of due process and to minimize the risk that the innocent would confess to crimes they did not commit, the courts have erected guidelines for the admissibility of confession evidence. Although there is no simple litmus test, confessions are typically excluded from trial if elicited by physical violence, a threat of harm or punishment, or a promise of immunity or leniency, or without the suspect being notified of his or her Miranda rights.

To understand the psychology of criminal confessions, three questions need to be addressed: First, how do police interrogators elicit self-incriminating statements (i.e., what means of social influence do they use)? Second, what effects do these methods have (i.e., do innocent suspects ever confess to crimes they did not commit)? Third, when a coerced confession is retracted and later presented at trial, do juries sufficiently discount the evidence in accordance with the law? General reviews of relevant case law and research are available elsewhere (Gudjonsson, 1992; Wrightsman & Kassin, 1993). The present research addresses the first two questions.

Informed by developments in case law, the police use various methods of interrogation—including the presentation of false evidence (e.g., fake polygraph, fingerprints, or other forensic test results; staged eyewitness identifications), appeals to God and religion, feigned friendship, and the use of prison informants. A number of manuals are available to advise detectives on how to extract confessions from reluctant crime suspects (Aubry & Caputo, 1965; O'Hara & O'Hara, 1981). The most popular manual is Inbau, Reid, and Buckley's (1986) *Criminal Interrogation and Confessions*, originally published in 1962, and now in its third edition.

After advising interrogators to set aside a bare, soundproof room absent of social support and distraction, Inbau et al. (1986) describe in detail a nine-step procedure consisting of various specific ploys. In general, two types of approaches can be distinguished. One is *minimization*, a technique in which the detective lulls the suspect into a false sense of security by providing face-saving excuses, citing mitigating circumstances, blaming the victim, and underplaying the charges. The second approach is one of *maximization*, in which the interrogator uses scare tactics by exaggerating or falsifying the characterization of evidence, the seriousness of the offense, and the magnitude of the charges. In a recent study (Kassin & McNall, 1991), subjects read interrogation transcripts in which these ploys were used and estimated the severity of the sentence likely to be received. The results indicated that minimization communicated an implicit offer of leniency, comparable to that estimated in an explicit-promise condition, whereas maximization implied a threat of harsh punishment, comparable to that found in an explicit-threat condition. Yet although American courts routinely exclude confessions elicited by explicit threats and promises, they admit those produced by contingencies that are pragmatically implied.

Although police often use coercive methods of interrogation, research suggests that juries are prone to convict defendants who confess in these situations. In the case of *Arizona v. Fulminante* (1991), the U.S. Supreme Court ruled that under certain conditions, an improperly admitted coerced confession may be considered upon appeal to have been nonprejudicial, or "harmless error." Yet mock-jury research shows that people find it hard to believe that anyone would confess to a crime that he or she did not commit (Kassin & Wrightsman, 1980, 1981; Sukel & Kassin, 1994). Still, it happens. One cannot estimate the prevalence of the problem, which has never been systematically examined, but there are numerous documented instances on record (Bedau & Radelet, 1987; Borchard, 1932; Rattner, 1988). Indeed, one can distinguish three types of false confession (Kassin & Wrightsman, 1985): *voluntary* (in which a subject confesses in the absence of external pressure), *coerced-compliant* (in which a suspect confesses only to escape an aversive interrogation, secure a promised benefit, or avoid a threatened harm), and *coerced-internalized* (in which a suspect actually comes to believe that he or she is guilty of the crime).

This last type of false confession seems most unlikely, but a number of recent cases have come to light in which the police had seized a suspect who was vulnerable (by virtue of his or her youth, intelligence, personality, stress, or mental state) and used false evidence to convince the beleaguered suspect that he or she was guilty. In one case that received a great deal of attention, for example, Paul Ingram was charged with rape and a host of satanic cult crimes that included the slaughter of newborn babies. During 6 months of interrogation, he was hypno-

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## False Confessions

tized, exposed to graphic crime details, informed by a police psychologist that sex offenders often repress their offenses, and urged by the minister of his church to confess. Eventually, Ingram "recalled" crime scenes to specification, pleaded guilty, and was sentenced to prison. There was no physical evidence of these crimes, however, and an expert who reviewed the case for the state concluded that Ingram had been brainwashed. To demonstrate, this expert accused Ingram of a bogus crime and found that although he initially denied the charge, he later confessed—and embellished the story (Ofshe, 1992; Wright, 1994).

Other similar cases have been reported (e.g., Pratkanis & Aronson, 1991), but, to date, there is no empirical proof of this phenomenon. Memory researchers have found that misleading postevent information can alter actual or reported memories of observed events (Loftus, Donders, Hoffman, & Schooler, 1989; Loftus, Miller, & Burns, 1978; McCloskey & Zaragoza, 1985)—an effect that is particularly potent in young children (Ceci & Bruck, 1993; Ceci, Ross, & Toglia, 1987) and adults under hypnosis (Dinges et al., 1992; Dywan & Bowers, 1983; Sheehan, Statham, & Jamieson, 1991). Indeed, recent studies suggest it is even possible to implant false recollections of traumas supposedly buried in the unconscious (Loftus, 1993). As related to confessions, the question is, can memory of one's own actions similarly be altered? Can people be induced to accept guilt for crimes they did not commit? Is it, contrary to popular belief, possible?

Because of obvious ethical constraints, this important issue has not been addressed previously. This article thus reports on a new laboratory paradigm used to test the following specific hypothesis: The presentation of false evidence can lead individuals who are vulnerable (i.e., in a heightened state of uncertainty) to confess to an act they did not commit and, more important, to internalize the confession and perhaps confabulate details in memory consistent with that new belief.

## METHOD

Participating for extra credit in what was supposed to be a reaction time experiment, 79 undergraduates (40 male, 39 female) were randomly assigned to one of four groups produced by a 2 (high vs. low vulnerability)  $\times$  2 (presence vs. absence of a false incriminating witness) factorial design.

Two subjects per session (actually, 1 subject and a female confederate) engaged in a reaction time task on an IBM PS/2 Model 50 computer. To bolster the credibility of the experimental cover story, they were asked to fill out a brief questionnaire concerning their typing experience and ability, spatial awareness, and speed of reflexes. The subject and confederate were then taken to another room, seated across a table from the experimenter, and instructed on the task. The confederate was to read aloud a list of letters, and the subject was to type these letters on the keyboard. After 3 min, the subject and confederate were to reverse roles. Before the session began, subjects were instructed on proper use of the computer—and were specifically warned not to press the "ALT" key positioned near the space bar because doing so would cause the program to crash and data to be lost. Lo and behold, after 60 s, the com-

puter supposedly ceased to function, and a highly distressed experimenter accused the subject of having pressed the forbidden key. All subjects initially denied the charge, at which point the experimenter tinkered with the keyboard, confirmed that data had been lost, and asked, "Did you hit the 'ALT' key?"

Two forensically relevant factors were independently varied. First, we manipulated subjects' level of *vulnerability* (i.e., their subjective certainty concerning their own innocence) by varying the pace of the task. Using a mechanical metronome, the confederate read either at a slow and relaxed pace of 43 letters per minute or at a frenzied pace of 67 letters per minute (these settings were established through pretesting). Two-way analyses of variance revealed significant main effects on the number of letters typed correctly ( $M_s = 33.01$  and  $61.12$ , respectively;  $F[1, 71] = 278.93$ ,  $p < .001$ ) and the number of typing errors made ( $M_s = 1.12$  and  $10.90$ , respectively;  $F[1, 71] = 38.81$ ,  $p < .001$ ), thus confirming the effectiveness of this manipulation.

Second, we varied the use of *false incriminating evidence*, a common interrogation technique. After the subject initially denied the charge, the experimenter turned to the confederate and asked, "Did you see anything?" In the false-witness condition, the confederate "admitted" that she had seen the subject hit the "ALT" key that terminated the program. In the no-witness condition, the same confederate said she had not seen what happened.

As dependent measures, three forms of social influence were assessed: compliance, internalization, and confabulation. To elicit *compliance*, the experimenter handwrote a standardized confession ("I hit the 'ALT' key and caused the program to crash. Data were lost") and asked the subject to sign it—the consequence of which would be a phone call from the principal investigator. If the subject refused, the request was repeated a second time.

To assess *internalization*, we unobtrusively recorded the way subjects privately described what happened soon afterward. As the experimenter and subject left the laboratory, they were met in the reception area by a waiting subject (actually, a second confederate who was blind to the subject's condition and previous behavior) who had overheard the commotion. The experimenter explained that the session would have to be rescheduled, and then left the room to retrieve his appointment calendar. At that point, the second confederate turned privately to the subject and asked, "What happened?" The subject's reply was recorded verbatim and later coded for whether or not he or she had unambiguously internalized guilt for what happened (e.g., "I hit the wrong button and ruined the program"; "I hit a button I wasn't supposed to"). A conservative criterion was employed. Any reply that was prefaced by "he said" or "I may have" or "I think" was not taken as evidence of internalization. Two raters who were blind to the subject's condition independently coded these responses, and their agreement rate was 96%.

Finally, after the sessions seemed to be over, the experimenter reappeared, brought the subjects back into the lab, re-read the list of letters they had typed, and asked if they could reconstruct how or when they hit the "ALT" key. This procedure was designed to probe for evidence of *confabulation*, to determine whether subjects would "recall" specific details to

fit the allegation (e.g., "Yes, here, I hit it with the side of my hand right after you called out the 'A' "). The interrater agreement rate on the coding of these data was 100%.

At the end of each session, subjects were fully and carefully debriefed about the study—its purpose, the hypothesis, and the reason for the use of deception—by the experimenter and first confederate. Most subjects reacted with a combination of relief (that they had not ruined the experiment), amazement (that their perceptions of their own behavior had been so completely manipulated), and a sense of satisfaction (at having played a meaningful role in an important study). Subjects were also asked not to discuss the experience with other students until all the data were collected. Four subjects reported during debriefing that they were suspicious of the experimental manipulation. Their data were excluded from all analyses.

## RESULTS AND DISCUSSION

Overall, 69% of the 75 subjects signed the confession, 28% exhibited internalization, and 9% confabulated details to support their false beliefs. More important, between-group comparisons provided strong support for the main hypothesis. As seen in Table 1, subjects in the slow-pace/no-witness control group were the least likely to exhibit an effect, whereas those in the fast-pace/witness group were the most likely to exhibit the effect on the measures of compliance ( $\chi^2[3] = 23.84, p < .001$ ), internalization ( $\chi^2[3] = 37.61, p < .001$ ), and confabulation ( $\chi^2[3] = 18.0, p < .005$ ).

Specifically, although 34.78% of the subjects in the slow-pace/no-witness group signed the confession, indicating compliance, not a single subject in this group exhibited internalization or confabulation. In contrast, the two independent variables had a powerful combined effect. Out of 17 subjects in the fast-pace/witness cell, 100% signed a confession, 65% came to believe they were guilty (in reality, they were not), and 35% confabulated details to support their false belief (via chi-square tests, the differences in these rates between the slow-pace/no-witness control group and fast-pace/witness group were significant at  $ps < .001, .001$ , and  $.005$ , respectively).

Additional pair-wise comparisons revealed that the presence of a witness alone was sufficient to significantly increase the rates of compliant and internalized confessions, even in the slow-pace condition ( $\chi^2[1] = 12.18, p < .005$ , and  $\chi^2[1] =$

16.39,  $p < .001$ ). There were no sex differences on any measures (i.e., male and female subjects exhibited comparable confession rates overall, and were similarly influenced by the independent variables).

The present study provides strong initial support for the provocative notion that the presentation of false incriminating evidence—an interrogation ploy that is common among the police and sanctioned by many courts—can induce people to internalize blame for outcomes they did not produce. These results provide an initial basis for challenging the evidentiary validity of confessions produced by this technique. These findings also demonstrate, possibly for the first time, that memory can be altered not only for observed events and remote past experiences, but also for one's own recent actions.

An obvious and important empirical question remains concerning the external validity of the present results: To what extent do they generalize to the interrogation behavior of actual crime suspects? For ethical reasons, we developed a laboratory paradigm in which subjects were accused merely of an unconscious act of negligence, not of an act involving explicit criminal intent (e.g., stealing equipment from the lab or cheating on an important test). In this paradigm, there was only a minor consequence for liability. At this point, it is unclear whether people could similarly be induced to internalize false guilt for acts of omission (i.e., neglecting to do something they were told to do) or for acts that emanate from conscious intent.

It is important, however, not to overstate this limitation. The fact that our procedure focused on an act of negligence and low consequence may well explain why the compliance rate was high, with roughly two thirds of all subjects agreeing to sign a confession statement. Effects of this sort on overt judgments and behavior have been observed in studies of conformity to group norms, compliance with direct requests, and obedience to the commands of authority. But the more important and startling result—that many subjects privately internalized guilt for an outcome they did not produce, and that some even constructed memories to fit that false belief—is not seriously compromised by the laboratory paradigm that was used. Conceptually, these findings extend known effects of misinformation on memory for observed events (Loftus et al., 1978; McCloskey & Zaragoza, 1985) and for traumas assumed to be buried in the unconscious (Loftus, 1993). Indeed, our effects were exhibited by college students who are intelligent (drawn from a population in which the mean score on the Scholastic Aptitude Test is over 1300), self-assured, and under minimal stress compared with crime suspects held in custody, often in isolation.

At this point, additional research is needed to examine other common interrogation techniques (e.g., minimization), individual differences in suspect vulnerability (e.g., manifest anxiety, need for approval, hypnotic susceptibility), and other risk factors for false confessions (e.g., blood alcohol level, sleep deprivation). In light of recent judicial acceptance of a broad range of self-incriminatory statements, increasing use of videotaped confessions at the trial level (Geller, 1993), and the U.S. Supreme Court's ruling that an improperly admitted coerced confession may qualify as a mere "harmless error" (*Arizona v. Fulminante*, 1991), further research is also needed to assess the lay jury's reaction to this type of evidence when presented in court.

**Table 1.** Percentage of subjects in each cell who exhibited the three forms of influence

Form of influence	No witness		Witness	
	Slow pace	Fast pace	Slow pace	Fast pace
Compliance	35 <sub>a</sub>	65 <sub>b</sub>	89 <sub>bc</sub>	100 <sub>c</sub>
Internalization	0 <sub>a</sub>	12 <sub>ab</sub>	44 <sub>bc</sub>	65 <sub>c</sub>
Confabulation	0 <sub>a</sub>	0 <sub>a</sub>	6 <sub>a</sub>	35 <sub>b</sub>

*Note.* Percentages not sharing a common subscript differ at  $p < .05$  via a chi-square test of significance.

## False Confessions

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**CAPACITY TO PROCEED**



# CAPACITY

By: Terri Johnson

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## STATUTES

- 7B-2401
  - Provisions of G.S. 15A-1001-1003 apply to all cases in which a juvenile is alleged to be delinquent. No juvenile committed under this section may be placed in a situation where the juvenile will come in contact with adults for any purpose.
- 15A-1001
  - Subsection a-No person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "Incapacity to proceed."
  - Subsection b-This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant.
- 15A-1002
  - Capacity may be raised at any time on motion of the prosecutor, defendant, defense counsel or the court.
  - The court shall hold a hearing. Parties may stipulate that defendant lacks capacity. Involuntary commitment may proceed.
  - Order of the court shall contain findings of fact to support its determination of defendant's capacity to proceed.
- 15A-1003
  - Judge upon additional hearing shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment.

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## CASES

- Dusky v. U.S., 362 U.S. 402 (1960).
- In re Gault, 387 U.S. 1 (1967).
- In Re I.R.T., 184 N.C. App. 579, 647 S.E.2d 129 (2007).
- J.D.B. v. North Carolina, 1315 S. Ct. 2394 (2011).
- Riggins v. Nevada, 504 U.S. 127 (1992).

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## ASSESSING YOUR CLIENT: WHAT TO LOOK FOR

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## JUVENILE PETITION

- Age
- Nature of the offense
- Location of the offense

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## MEETING WITH JUVENILE, PARENTS/GUARDIANS/CUSTODIANS

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>○ Demeanor and appearance</li> <li>○ Ability to discuss charges               <ul style="list-style-type: none"> <li>○ Language barrier vs. cognitive deficit</li> </ul> </li> <li>○ Prior mental health history               <ul style="list-style-type: none"> <li>○ Diagnoses-current or past</li> <li>○ Medication -current or past</li> </ul> </li> <li>○ Physical history               <ul style="list-style-type: none"> <li>○ Traumatic injuries</li> <li>○ Birth history</li> <li>○ Hospitalizations, surgeries</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>○ School records               <ul style="list-style-type: none"> <li>○ Grades</li> <li>○ IEP</li> <li>○ Behavior plans</li> <li>○ Suspensions</li> <li>○ Teachers notes</li> </ul> </li> <li>○ Social and family history               <ul style="list-style-type: none"> <li>○ Prior DSS involvement</li> <li>○ Family history of mental health, court involvement, etc.</li> <li>○ Parent/guardian/custodian observations and experience</li> </ul> </li> </ul> |
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## DISCOVERY

- Officers notes
- Statements of Juvenile, witnesses
- Obtain medical, psychological, school, DSS, Juvenile justice records

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## HOW TO REQUEST AN EVALUATION

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### ○ Local Forensic

- 1. AOC-CR-207A or B. Misdemeanors must use this form first.
- AOC-CR-208 A or B. Commitment to Central Regional after local forensic or charged with a felony and Central Regional is appropriate. But...Juveniles may not be placed in situation where the juvenile will come in contact with adults committed for any purpose. 7B-2401.

### ○ Private expert

- Motion and order to have juvenile evaluated
- Locate expert
  - Ask other attorneys, listserv
  - check previous training resources
  - Ask for Curriculum Vitae
  - Seek experts with experience dealing with Juveniles, possibly with any issues specific to your client (i.e. autism).
  - Expert professional code of conduct—evaluation should be completed by independent, unbiased expert—not one with pre-existing relationship with your client.
- Ex parte motion and order for expert
- AOC-G-309

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## RESULTS OF EVALUATION

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### CAPABLE OF PROCEEDING

- Parties can stipulate to capacity
- Defense can oppose finding and request own evaluation if started with local forensic.
- Request hearing
- If capable after hearing, note objection for record. Continue to object prior to adjudication and disposition.
- Utilize findings to influence disposition. Is juvenile already receiving necessary services allowing for dismissal at disposition? Possible disposition continued.

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### NOT CAPABLE OF PROCEEDING

- Prosecutor may take dismissal
  - "Hearing" based on the written report
  - Formal hearing
    - a. Lay witnesses and experts testify
    - b. Court may make inquiry of your client
    - c. Examiner's recommendations for your client. Can juvenile achieve capacity? Medications? See *Riggins v. Nevada*, 504 U.S. 127 (1992), in which the court decided whether a mentally ill person can be forced to take antipsychotic medication while they are on trial to allow the state to make sure they remain competent during the trial.
- If not capable, prepare for possible involuntary commitment, other placement
- 15A-1005 requires clerk to keep list of defendants who have been determined incapable and provide said list to senior resident superior court judge in his district at least semiannually.
- If committed, 15A-1004 requires reports to clerk on condition of defendant.
- If obtains capacity before dismissal, notification must be given to the clerk and hearing calendared pursuant to 15A-1007 for Court to determine capacity. If capacity to proceed is found, the matter shall be calendared for hearing at the earliest practicable time.
- 15A-1008. The court shall dismiss upon the earliest of the listed occurrences.
- Defendant will not gain capacity
  - Defendant has been substantially deprived of his liberty for a period of time equal or greater than the maximum term of imprisonment for the most serious charge.
  - expiration of five years from the date of determination of incapacity to proceed for misdemeanor charges or ten years for felony charges.

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## GENERAL PRACTICE ISSUES

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### ADAs' and JCCs' Disdain for Capacity Issues

- You're just trying to get charges dismissed
- They know to lie to avoid punishment, therefore they know right from wrong. If they lie/manipulate they must be competent.
- JCC has spent more time with Juvenile and knows them better than evaluator
- Juvenile is young and JCC expresses desire to obtain sentencing points for future commitment to YDC. ADA agrees and pursues prosecution despite evidence of mental health issues, lack of maturity, expert report of incapacity

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### JUDGES' REACTIONS

- What will we do with the juvenile if Court finds lacks capacity? Might commit juvenile or finds capacity because of lack of appropriate options
- Wasting Court's time and State's money
- It's just juvenile court....they can get mental health treatment on probation. That's what the Juvenile court is for.

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## RESOURCES FOR COUNSEL

### ○ Websites

- NC Indigent Defense Services, [www.ncids.org](http://www.ncids.org)
- National Juvenile Defender Center, [www.njdc.info](http://www.njdc.info)
- NC Juvenile Defender, [www.ncjuveniledefender.com](http://www.ncjuveniledefender.com)

### ○ Other attorneys, juvenile listserv

### ○ Publications:

- [Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice](#), Thomas Grisso
- DSM-IV, DSM-V

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## RESOURCES FOR COUNSEL: PSYCHOLOGISTS, OTHER PROFESSIONALS

### ○ Cindy Cottle, Ph.D.

6500 Creedmoor Rd., #101  
Raleigh, NC 27612  
919-827-2148  
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### ○ Gloria Morote, Ph.D.

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## CAPACITY

### I. STATUTES AND LIST OF CASES

#### A. 7B-2401

1. Provisions of G.S. 15A-1001-1003 apply to all cases in which a juvenile is alleged to be delinquent. No juvenile committed under this section may be placed in a situation where the juvenile will come in contact with adults for any purpose.

#### B. 15A-1001

1. Subsection a-No person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as “incapacity to proceed.”
2. Subsection b-This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant.

#### C. 15A-1002

1. Capacity may be raised at any time on motion of the prosecutor, defendant, defense counsel or the court.
2. The court shall hold a hearing. Parties may stipulate that defendant lacks capacity. Involuntary commitment may proceed.
3. Order of the court shall contain findings of fact to support its determination of defendant’s capacity to proceed.

#### D. 15A-1003

1. Judge upon additional hearing shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment.

#### E. CASES

1. Dusky v. U.S., 362 U.S. 402 (1960).
2. In re Gault, 387 U.S. 1 (1967).

3. In Re I.R.T., 184 N.C. App. 579, 647 S.E.2d 129 (2007).
4. J.D.B. v. North Carolina, 1315 S. Ct. 2394 (2011).
5. Riggins v. Nevada, 504 U.S. 127 (1992).

## II. ASSESSING CLIENT –WHAT TO LOOK FOR

### A. Juvenile Petition

1. Age
2. Nature of the offense
3. Location of the offense

### B. Meeting with Juvenile and Parents/Guardians/Custodians

1. Demeanor and appearance
2. Ability to discuss charges
  - a. Language barrier vs. cognitive deficit
3. Prior mental health history
  - a. Diagnoses-current or past
  - b. Medication -current or past
4. Physical history
  - a. Traumatic injuries
  - b. Birth history
  - c. Hospitalizations, surgeries
5. School records
  - a. Grades
  - b. IEP
  - c. Behavior plans
  - d. Suspensions
  - e. Teachers notes
6. Social and family history
  - a. Prior DSS involvement
  - b. Family history of mental health, court involvement, etc.
  - c. Parent/guardian/custodian observations and experience

### C. Discovery

1. Officers notes
2. Statements of Juvenile, witnesses
3. Obtain medical, psychological, school, DSS, Juvenile justice records

## III. HOW TO REQUEST EVALUATION

### A. Local Forensic



1. AOC-CR-207A or B. Misdemeanors must use this form first.
2. AOC-CR-208A or B. Commitment to Central Regional after local forensic or charged with a felony and Central Regional is appropriate. But...Juveniles may not be placed in situation where the juvenile will come in contact with adults committed for any purpose. 7B-2401.

B. Private expert

1. Motion and order to have juvenile evaluated
2. Locate expert
  - a. Ask other attorneys, listserv
  - b. check previous training resources
  - c. Ask for Curriculum Vitae
  - d. Seek experts with experience dealing with Juveniles, possibly with any issues specific to your client (i.e. autism).
  - e. Expert professional code of conduct—evaluation should be completed by independent, unbiased expert—not one with pre-existing relationship with your client. See Specialty Guidelines for Forensic Psychology at [www.apa.org](http://www.apa.org)
3. Ex parte motion and order for expert
4. AOC-G-309

IV. RESULTS OF EVALUATION

A. Capable of Proceeding

1. Parties can stipulate to capacity
2. Defense can oppose finding and request own evaluation if started with local forensic.
3. Request hearing on issue of capacity
4. If capable after hearing, note objection for record. Continue to object prior to adjudication and disposition.
5. Utilize findings to influence disposition. Is juvenile already receiving necessary services allowing for dismissal at disposition? Possible disposition continued.

B. Not capable of Proceeding

1. Prosecutor may take dismissal
2. "Hearing" based on the written report
3. Formal hearing
  - a. Lay witnesses and experts testify
  - b. Court may make inquiry of your client
  - c. Examiner's recommendations for your client. Can Juvenile achieve capacity? Medications? See *Riggins v. Nevada*, 504 U.S. 127 (1992), in which the court decided whether a mentally ill person can be forced to take antipsychotic medication while they are on trial to allow the state to make sure they remain competent during the trial.
  - d. If not capable, prepare for possible involuntary commitment, other placement

- e. 15A-1005 requires clerk to keep list of defendants who have been determined incapable and provide said list to senior resident superior court judge in his district at least semiannually.
- f. If committed, 15A-1004 requires reports to clerk on condition of defendant.
- g. If obtains capacity before dismissal, notification must be given to the clerk and hearing calendared pursuant to 15A-1007 for Court to determine capacity. If capacity to proceed is found, the matter shall be calendared for hearing at the earliest practicable time.
- h. 15A-1008 The court shall dismiss upon the earliest of the listed occurrences.
  - i. Defendant will not gain capacity
  - ii. Defendant has been substantially deprived of his liberty for a period of time equal or greater than the maximum term of imprisonment for the most serious charge.
  - iii. expiration of five years from the date of determination of incapacity to proceed for misdemeanor charges or ten years for felony charges.

## V. GENERAL PRACTICE ISSUES

- A. ADAs' and JCCs' disdain for capacity issues
  - 1. You're just trying to get charges dismissed
  - 2. They know to lie to avoid punishment, therefore they know right from wrong. If they lie/manipulate they must be competent.
  - 3. JCC has spent more time with Juvenile and knows them better than evaluator
  - 4. Juvenile is young and JCC expresses desire to obtain sentencing points for future commitment to YDC. ADA agrees and pursues prosecution despite evidence of mental health issues, lack of maturity, expert report of incapacity
- B. Judges' reactions
  - 1. What will we do with the juvenile if Court finds lacks capacity? Might commit juvenile or finds capacity because of lack of appropriate options
  - 2. Wasting Court's time and State's money
  - 3. It's just juvenile court....they can get mental health treatment on probation. That's what the Juvenile court is for.

## VI. RESOURCES FOR COUNSEL

### A. Websites

- 1. NC Indigent Defense Services, [www.ncids.org](http://www.ncids.org)
- 2. National Juvenile Defender Center, [www.njdc.info](http://www.njdc.info)
- 3. NC Juvenile Defender, [www.ncjuveniledefender.com](http://www.ncjuveniledefender.com)
- 4. American Psychological Association, [www.apa.org](http://www.apa.org)

B. Other attorneys, juvenile listserv

C. Psychologists, other professionals

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D. Publications

1. Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice, Thomas Grisso
2. DSM-IV, DSM-V

**§ 7B-2401. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.**

The provisions of G.S. 15A-1001, 15A-1002, and 15A-1003 apply to all cases in which a juvenile is alleged to be delinquent. No juvenile committed under this section may be placed in a situation where the juvenile will come in contact with adults committed for any purpose. (1979, c. 815, s. 1; 1998-202, s. 6.)

**SUBCHAPTER X. GENERAL TRIAL PROCEDURE.**

Article 56.

Incapacity to Proceed.

**§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.**

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant. (1973, c. 1286, s. 1.)

**§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.**

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1a) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence.

(1a) In the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing. The court may call any expert so appointed to testify at the hearing with or without the request of either party.

(2) At any time in the case of a defendant charged with a felony, the court may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed. If a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1a) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity. The sheriff shall return the defendant to the county when notified that the evaluation has been completed. The director of the facility

shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court. The report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(4) A presiding district or superior court judge of this State who orders an examination pursuant to subdivision (1a) or (2) of this subsection shall order the release of relevant confidential information to the examiner, including, but not limited to, the warrant or indictment, arrest records, the law enforcement incident report, the defendant's criminal record, jail records, any prior medical and mental health records of the defendant, and any school records of the defendant after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the hearing of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The records may be surrendered to the court for in camera review if surrender is necessary to make the required determinations. The records shall be withheld from public inspection and, except as provided in this subdivision, may be examined only by order of the court.

(b1) The order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed. The parties may stipulate that the defendant is capable of proceeding but shall not be allowed to stipulate that the defendant lacks capacity to proceed. If the court concludes that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(b2) Reports made to the court pursuant to this section shall be completed and provided to the court as follows:

(1) The report in a case of a defendant charged with a misdemeanor shall be completed and provided to the court no later than 10 days following the completion of the examination for a defendant who was in custody at the time the examination order was entered and no later than 20 days following the completion of the examination for a defendant who was not in custody at the time the examination order was entered.

(2) The report in the case of a defendant charged with a felony shall be completed and provided to the court no later than 30 days following the completion of the examination.

(3) In cases where the defendant challenges the determination made by the court-ordered examiner or the State facility and the court orders an independent psychiatric examination, that examination and report to the court must be completed within 60 days of the entry of the order by the court.

The court may, for good cause shown, extend the time for the provision of the report to the court for up to 30 additional days. The court may renew an extension of time for an additional 30 days upon request of the State or the defendant prior to the expiration of the previous extension. In no case shall the court grant extensions totaling more than 120 days beyond the time periods otherwise provided in this subsection.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14; 2013-18, s. 1.)

**§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.**

(a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

(b) The court may make appropriate orders for the temporary detention of the defendant pending that proceeding.

(c) Evidence used at the hearing with regard to capacity to proceed is admissible in the involuntary civil commitment proceedings. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 1; 1985, c. 589, s. 10; 1987, c. 596, s. 5.)

**§ 15A-1004. Orders for safeguarding of defendant and return for trial.**

(a) When a defendant is found to be incapable of proceeding, the trial court must make appropriate orders to safeguard the defendant and to ensure his return for trial in the event that he subsequently becomes capable of proceeding.

(b) If the defendant is not placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, appropriate orders may include any of the procedures, orders, and conditions provided in Article 26 of this Chapter, Bail, specifically

including the power to place the defendant in the custody of a designated person or organization agreeing to supervise him.

(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released. The court shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody. A report of the examination shall be provided pursuant to G.S. 15A-1002. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, and that charge has not been dismissed, the order must require that if the defendant is to be released from the custody of the hospital or other institution, he is to be released only to the custody of a specified law enforcement agency. If the original or supplemental orders do not specify to whom the respondent shall be released, the hospital or other institution may release the defendant to whomever it thinks appropriate.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Part 7 of Article 5 of Chapter 122C of the General Statutes, or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(e) The orders must require and provide for the return of the defendant to stand trial in the event that he gains capacity to proceed, unless the charges have been dismissed pursuant to G.S. 15A-1008, and may also provide for the confinement or pretrial release of the defendant in that event.

(f) The orders of the court may be amended or supplemented from time to time as changed conditions require. (1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 2; c. 460, s. 2; 1985, c. 589, s. 11; 2013-18, s. 2.)

#### **§ 15A-1005. Reporting to court with regard to defendants incapable of proceeding.**

The clerk of the court in which the criminal proceeding is pending must keep a docket of defendants who have been determined to be incapable of proceeding. The clerk must submit the docket to the senior resident superior court judge in his district at least semiannually. (1973, c. 1286, s. 1.)

#### **§ 15A-1006. Return of defendant for trial upon gaining capacity.**

If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, has been determined by the institution or individual having custody to have gained capacity to proceed, the individual or institution shall provide written notification to the clerk in the county in which the criminal proceeding is pending. The clerk shall provide written notification to the district attorney, the defendant's attorney, and the sheriff.

The sheriff shall return the defendant to the county for a supplemental hearing pursuant to G.S. 15A-1007, if conducted, and trial and hold the defendant for a supplemental hearing and trial, subject to the orders of the court entered pursuant to G.S. 15A-1004. (1973, c. 1286, s. 1; 2013-18, s. 3.)

**§ 15A-1007. Supplemental hearings.**

- (a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for trial, in accordance with G.S. 15A-1004(e) and G.S. 15A-1006, the clerk shall notify the district attorney. Upon receiving the notification, the district attorney shall calendar the matter for hearing at the next available term of court but no later than 30 days after receiving the notification. The court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.
- (b) The court may hold a supplemental hearing any time upon its own determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.
- (c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met.
- (d) If the court determines in a supplemental hearing that a defendant has gained the capacity to proceed, the case shall be calendared for trial at the earliest practicable time. Continuances that extend beyond 60 days after initial calendaring of the trial shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance. (1973, c. 1286, s. 1; 2013-18, s. 4.)

**§ 15A-1008. Dismissal of charges.**

- (a) When a defendant lacks capacity to proceed, the court shall dismiss the charges upon the earliest of the following occurrences:
  - (1) When it appears to the satisfaction of the court that the defendant will not gain capacity to proceed.
  - (2) When as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged.
  - (3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges.
- (b) A dismissal entered pursuant to subdivision (2) of subsection (a) of this section shall be without leave.
- (c) A dismissal entered pursuant to subdivision (1) or (3) of subsection (a) of this section shall be issued without prejudice to the refiling of the charges. Upon the defendant becoming capable of proceeding, the prosecutor may reinstitute proceedings dismissed pursuant to



subdivision (1) or (3) of subsection (a) of this section by filing written notice with the clerk, with the defendant, and with the defendant's attorney of record.

(d) Dismissal of criminal charges pursuant to this section shall be upon motion of the prosecutor or the defendant or upon the court's own motion. (1973, c. 1286, s. 1; 2013-18, s. 5.)

### PRACTICAL TIPS FOR ATTORNEYS ON USING CAPACITY

1. Meet with client as soon as possible after appointment to case.
2. Take time to get to know client, establish rapport and trust. (See interview tips and information about what information to look for in the interview)
3. Observe client and family members.
4. After talking with client, interview family and other interested parties and obtain as much detailed information as possible.
5. Get releases signed for records.
6. Obtain and review discovery, including written statements and audio/video recordings of statements.
7. Decide if there is competency to proceed, capacity to proceed, or capacity limited to suppression issue.
8. If so, file appropriate motions for evaluations.  
¾ Evaluations should be completed by a competent, experienced evaluator knowledgeable about juvenile capacity. The evaluator must be skilled at doing culturally sensitive assessments of adolescent development. Mental health professionals qualified to diagnose mental disorders in adults are not necessarily qualified to identify adolescent developmental disabilities or mental illness. Be particularly attentive to qualifications of mental health examiners and the quality of their evaluations. You may need to obtain an order for the court to pay for a specific examiner who is qualified to do these types of evaluations in children. An expert witness will be helpful in explaining the research and its implications in juvenile court.
9. Gather complete records from the Department of Social Services, Schools, Medical records, Mental Health and Developmental Disability records, Substance Abuse records, Department of Juvenile Justice records, any psychological or psychiatric testing, including IQ tests, Special education records and IEP's, any written or oral statements made by the juvenile, any audio or video recording of interviews, investigator notes of all officers involved in interviewing, investigating, or transporting the juvenile, detention records, case management records, and

any other agency or program involved with the juvenile that may be relevant. You may need court orders to obtain some records.

10. Provide records to the evaluator.

11. Go over the statements and any audio or video recordings with a fine tooth comb, paying close attention to the interrogation environment, tone of voice, verbal and non verbal communication between the juvenile and the officers, terms used, and observations of the juvenile's reactions.

12. File a written motion to suppress with an affidavit and request that a pre-trial hearing be set.

13. Consider putting together a memorandum of law to provide to the court, as well as copies of case law and research articles on this issue.

14. Be specific and detailed in laying out the circumstances for the judge that show that this was NOT a voluntary, knowing, or intelligent waiver.

15. Prepare for the hearing and subpoena witnesses. Use records and have copies for the court when helpful

16. Prepare your expert. The expert will need to be able to explain the research in simple layman terms and how it applies in this particular case.

17. Decide whether or not you will put the juvenile on the stand and if so, prepare him for what to expect in the courtroom.

18. Be prepared for adverse reactions from the Court and from court personnel. Be prepared to hear such comments as;

“If you do this, you will open up the floodgates.”

“Are you going to raise capacity in every case?”

“This is just juvenile court, this court is about treatment and not punitive.”

“The child needs to accept consequences for his actions and this is a door to services”

“Why are you trying to make this court like adult court?”

“This is just a delay tactic.”,

“This is a waste of court time and money.”

Some suggested responses:

“It is our job as juvenile defenders to ensure that the most vulnerable in our society are given every protection allowed under the Constitution.”

“Justice naturally requires that we assure accuracy. It would be unfair to the alleged victims and to the courts if this child made statements that were inaccurate and the real suspects went unpunished because we assumed that the statements were true.”

Keep the court focused on this individual child and their individual circumstances.

19. Just because a child says they understand does not make it true.
20. The ability to read does not equal understanding.
21. The law presumes that children under the age of 18 are not capable of deciding about medical treatment, entering into binding legal contracts, or operating automobiles. Why then do we assume that they are capable of understanding complicated legal concepts and waive their constitutional rights?
22. When involved in the suppression hearing, be sure to flesh out all of the details that add up to the totality of the circumstances. Most officers have not been trained on how to interview children. They are focused on obtaining a confession in order to prove their theory of the case and are trained in using adult tactics. Focus on what they did not pick up on and what they did not do as well as what they said and did in the interrogation of the child. Keep the focus on the fact that this was a “child” and not an adult.
23. If the juvenile client takes the witness stand, keep the child focused on how they felt and what their perception was of the interrogation. You want the judge to see through the eyes of the child.
24. If the judge denies the motion to suppress, continue to object for the record so that you do not waive the issue at trial and preserve the issue for appeal.

### EVALUATING THE CASE FOR CAPACITY/MOTION TO SUPPRESS QUICK GUIDELINES

We first look at the following:

- 1) the developmental stage of the child-client, including cognitive ability, socialization, and emotional maturity,
- 2) the medical status of the juvenile-mental and physical,
- 3) the personal history of the juvenile, including life experiences, family background and medical history,
- 4) the juvenile’s ability to communicate and articulate reason,
- 5) the juvenile’s individual decision making process and how he has been influenced, and
- 6) the juvenile’s ability to understand consequences

Then we turn to the interrogation itself and dissect what happened:

## GUIDING QUESTIONS FOR INTERVIEWS WITH THE CHILD-CLIENT

1. Get the child's full name, age, date of birth, social security number, and contact information.
2. Who lives in the home? Who are the family members and how to contact them?
3. What neighborhood does the family reside and how long have they lived there?
4. What is the family situation? What is the nature of the child's relationship with his biological parents? Are there other family members involved with this child? Have there been family issues that have impacted this child?
5. What school does the child attend? What grade? Has the child attended other schools?
6. Is the child-client placed in any special education classes? If so, is there a current IEP(Individualized Education Plan) in place?
7. Has the child ever been evaluated through the school system? When and by whom? Was there an IQ test?
8. Has the child been diagnosed with a learning disability? Or developmental disability? Has anyone else in the family ever been diagnosed?
9. How are the child-client's grades? Have they been retained in any grades? If so, what was the reason?
10. What is the child's reading level? Comprehension?
11. How extensive is the child's vocabulary?
12. Has the family had any concerns about the child's performance at school?
13. Has the child ever received any mental health services? Where and when?
14. Has there been a mental health diagnosis? Does the child take medication? What medication and when is it taken? Was the child taking the medication when being questioned?
15. How old was the child when she started taking the medication and received a diagnosis?
16. Has the child ever used any substances, such as drugs or alcohol? When and how often? Was the child using a substance around the time that she was questioned?
17. Has there ever been previous involvement with law enforcement? When and where? What happened previously?
18. Is the child-client on probation or have they ever had any involvement with the Department of Juvenile Justice?
19. Has the child had any previous involvement in the court system at all?
20. Has there ever been any Social Services involvement?
21. Has the child ever been a victim of abuse or neglect?
22. Has the child ever witnessed violence?
23. Has this child ever experienced a traumatic event? Has there been anything that would impact the child's development?
24. Where does the child receive medical care? Has the child ever had any medical problems? Has there ever been any type of brain injury or trauma?
25. Has the child received any other services, including any case management or community based services?
26. Who supervises the child-client? Does the child-client follow rules?

27. What are the client's associations? Friends? Involvements? Role Models?
  28. Who influences the child-client?
  29. What does the child-client do when not in school?
  30. What are the child-client's aspirations?
  31. What does the child-client enjoy?
  32. What are the child-client's responsibilities?
  33. Who does the child-client trust?
  34. How have life experiences influenced the client?
  35. How mature does the child client behave?
  36. What independence has the child-client demonstrated?
  37. Is the child-client overly compliant or overly-agreeable?
  38. Is the child-client naïve?
  39. Does the child-client exercise insight?
  40. Does the child-client exercise judgment?
  41. Has the child-client demonstrated an ability to weigh alternatives and make a decision?
  42. Is the child-client slow to digest information?
  43. Is the child-client able to stay focused in a conversation for a lengthy period of time?
  44. How is the child-client's concentration and attention span?
  45. Does the child-client exhibit deficits in memory, attention, or reality testing?
  46. What are the child-client's attributes? Strengths? Weaknesses?
  47. Can the child-client participate and assist his attorney in this process?
  48. Has the child-client demonstrated understanding about the process?
  49. Can the client express a reasoned preference?
- Questions to have in mind when analyzing capacity to waive Miranda Rights
50. Was the juvenile "in custody"?
  51. Would a reasonable person have felt free to stop the questioning and leave?
  52. Where did the interrogation take place?
  53. What was the child feeling? View from the child's perspective?
  54. What was the length of detention and duration of interrogation?
  55. Did the police communicate the belief that the juvenile was a suspect and did that belief influence the juvenile's perception of the situation?
  56. What was the nature of the interrogation? Was it aggressive? Informal? Mentally or physically intimidating?
  57. Was it a coercive environment? If so, what made it coercive?
  58. Was the juvenile free to end the questioning by leaving or asking the police to leave?
  59. Did the questioning end with the juvenile's arrest?
  60. Did the juvenile ask for a parent or other interested person to be present?
  61. If the juvenile could not be expected to assert his right to call his mother/father/legal guardian, how could the juvenile assert the right to stop the questioning?
  62. Was the location isolated?
  63. Was the interview one-sided?
  64. Was the juvenile ever told that if he or she did not cooperate, they would be locked

up or charged with more serious offenses?

65. Did the police fabricate evidence, lie, or use any other psychological force?

66. Was there discussion of any leniency or release to parent if the juvenile talked?

67. What was the emotional state of the juvenile?

68. What was the emotional state of the officer?

69. Were there raised voices and banging on the table?

70. Did the juvenile cry?

71. Did the juvenile show signs of fear or anxiety?

72. Did the police use the parents to convince the juvenile to make a statement?

73. How did the mother react to seeing the child? Would the juvenile talk so that the mother would not get upset?

74. Were the Miranda warnings explained in developmentally appropriate terms, not just read or recited in rote fashion?

75. Were tactics such as manipulation, rewards, or intimidation used in the interrogation to elicit a confession, like used with adults?

76. Was the interrogation videotaped or audiotaped in its entirety? Were any questions asked or statements made that are not taped?

77. Were threats or bribes used to elicit a statement?

78. Was the child physically deprived during interrogation?

79. Does the officer tell the child that they are a friend or that they want to help?

80. Is the officer having the child confirm statements made by the officer?

81. How does the juvenile feel about law enforcement? What are the family's feelings toward law enforcement? How does the community react towards law enforcement?

82. Did the juvenile feel pressured to make a statement?

83. Did the juvenile understand the significance and consequences of the waiver?

84. Did the juvenile make a statement as a result of coercion?

85. Does the statement lead to discovery of evidence unknown to the police?

86. Does the statement include identification of highly unusual elements of the crime not made public?

87. Does the statement include accurate descriptions of mundane details of the crime or crime scene not easily guessed and not publicized?

88. What terms were used by the officers?

89. What were the exact words said by the juvenile?

90. Would the juvenile admit to false allegations to protect someone out of loyalty? Or because of a sense that it is wrong to snitch and the right thing to take the blame?

91. Does the juvenile have difficulty disagreeing with authority figures?

92. Did the juvenile make a statement out of desperation to go home and avoid the uncomfortable situation?

93. Observe video and audio recordings.

94. Make observations of what is said verbally and how both the officer and juvenile behave non verbally.

95. Write out examples from the recording to demonstrate to the Court coercion, leading, lack of understanding, frustration, and reactions, etc...

## INTERVIEW SHEET OF JUVENILE CLIENT

Next Court Date:\_\_\_\_\_ Date File Opened:\_\_\_\_\_

Judge Assigned:\_\_\_\_\_ Attorney Assigned:\_\_\_\_\_

Today's Date:\_\_\_\_\_

SS#:\_\_\_\_\_

Driver's License:\_\_\_\_\_

FULL

NAME:\_\_\_\_\_

Alias:\_\_\_\_\_

DOB:\_\_\_\_\_

Age:\_\_\_\_\_ Sex:\_\_\_\_\_ Race:\_\_\_\_\_ Place of birth:\_\_\_\_\_

CURRENT ADDRESS:\_\_\_\_\_

MAILING ADDRESS(if different):\_\_\_\_\_

PHONE

NUMBERS:\_\_\_\_\_

Who live with?\_\_\_\_\_

Physical and Mental Problems and

Medications:\_\_\_\_\_

Attend School?\_\_\_\_\_ Where?\_\_\_\_\_

Grades?\_\_\_\_\_

Suspensions or Discipline

Reports:\_\_\_\_\_

Employment/ Future Plans?\_\_\_\_\_

FAMILY INFORMATION:

Father's Name and Contact Information(home and  
work)\_\_\_\_\_

Mother's Name and Contact Information(home and  
work)\_\_\_\_\_

Other

Family/Friends:\_\_\_\_\_ -

Social Worker:\_\_\_\_\_

Court Counselor:\_\_\_\_\_

Therapist:\_\_\_\_\_

Any other community services:\_\_\_\_\_

Date arrested/served:\_\_\_\_\_

Who served?\_\_\_\_\_

Did give an oral statement? \_\_\_\_\_

Sign a rights form? \_\_\_\_\_

Did sign any statements? \_\_\_\_\_

Was anyone else charged with you? \_\_\_\_\_

What are you charged with? \_\_\_\_\_

Does any other attorney represent you? \_\_\_\_\_

Do you have any other charges? \_\_\_\_\_

Are you now on probation? \_\_\_\_\_

Have you ever been in court before for any reason? \_\_\_\_\_

For \_\_\_\_\_

what? \_\_\_\_\_

FACTUAL DETAILS OF CURRENT  
CHARGES: \_\_\_\_\_

OTHER INFO. OR  
ISSUES: \_\_\_\_\_

Interviewer: \_\_\_\_\_ Date: \_\_\_\_\_



## Authorization for Release of Confidential Records and Information

To: \_\_\_\_\_

Re: \_\_\_\_\_

DOB: \_\_\_\_\_

SSN: \_\_\_\_\_

I, \_\_\_\_\_, DOB: \_\_\_\_/\_\_\_\_/20\_\_\_\_, SSN: \_\_\_\_\_, do hereby certify that I am the **PARENT/GUARDIAN** of \_\_\_\_\_ and I consent to the release of \_\_\_\_\_ records and the release of any and all information pertaining to him or her which is considered personal and confidential, including but not limited to the following: juvenile court, probation, police, Department of Juvenile Justice, educational, medical and dental, psychiatric/psychological, foster care, employment, military, social/personal and child protection.

The above listed information is to be released in order to provide legal representation to \_\_\_\_\_.

You are authorized to release this information to the following individuals:

**Insert name here or assigns**

**Organization/Agency/Firm name and address**

I understand that this information is personal and private and that I am not required to release this information. I certify that I have the legal authority to provide this consent and hereby waive the privilege of confidentiality as to these records and authorize you to make full disclosure to the above named people. Since these records are personal and confidential, however, I specifically request that you not release them to anyone else.

I understand that my permission to release this information may be cancelled at any time except when the information has already been released. My permission to release this information will expire when my child is no longer represented by the **Insert Name/ Firm Name**, unless otherwise revoked.

Signed: \_\_\_\_\_

Relationship: **Parent/Guardian**

Date: \_\_\_\_\_

Witnessed: \_\_\_\_\_

### SAMPLE HIPAA AUTHORIZATION FORM

Patient's Full Name

Patient's Social Security Number/Medical Record Number

Address

Patient's Date of Birth

City, State Zip Code

Patient's Telephone Number

I hereby authorize use or disclosure of protected health information about me as described below.

1. The following specific person/class of person/facility is authorized to use or disclose information about me:  
\_\_\_\_\_
2. The following person (or class of persons) may receive disclosure of protected health information about me:  
\_\_\_\_\_

His/her/its Name

Address

City, State Zip Code

3. The specific information that should be disclosed is (please give dates of service if possible):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**UNLESS YOU SIGN HERE, NO INFORMATION ABOUT ALCOHOL/SUBSTANCE ABUSE, HIV/AIDS, OR MENTAL HEALTH WILL BE DISCLOSED:**

**YES, DISCLOSE THIS INFORMATION \*** \_\_\_\_\_

**NO, DO NOT DISCLOSE THIS INFORMATION \*** \_\_\_\_\_

4. I understand that the information used or disclosed may be subject to re-disclosure by the person or class of persons or facility receiving it, and would then no longer be protected by federal privacy regulations.
5. I may revoke this authorization by notifying \_\_\_\_\_ in writing of my desire to revoke it. However, I understand that any action already taken in reliance on this authorization cannot be reversed, and my revocation will not affect those actions.
6. My purpose/use of the information is for \_\_\_\_\_.
7. This authorization expires on \_\_\_\_\_, 200\_\_\_\_, OR upon occurrence of the following event that relates to me or to the purpose of the intended use or disclosure of information about me: \_\_\_\_\_.

**FEES FOR COPIES: Federal and state laws permit a fee to be charged for the copying of patient records. This facility has contracted with HealthPort to make copies. You may be required to pre-pay for the copies; if not, then your copies will be mailed along with an invoice.**

**THIS FORM MUST BE FULLY COMPLETED BEFORE SIGNING – note that signature is required in two places.\***

\_\_\_\_\_  
Signature of Individual\*  
(The person about whom the information relates)  
OR, if applicable –

\_\_\_\_\_  
Date of Individual's Signature

\_\_\_\_\_  
Date of Birth or  
Social Security Number

\_\_\_\_\_  
Signature of Guardian\* or  
Personal Representative of Patient's Estate

\_\_\_\_\_  
Date of Guardian's/Personal  
Representative's Signature

\_\_\_\_\_  
Description of Authority to Act  
for the Individual

*A copy of this completed, signed and dated form must be given to the Individual or other signator.*

#### Official Use Only

\_\_\_\_\_  
Received

\_\_\_\_\_  
Processed By

\_\_\_\_\_  
Log #

**REQUEST FOR RELEASE OF DEPARTMENT OF JUVENILE JUSTICE FILE**

TO: \_\_\_\_\_, Chief Court Counselor

FROM: \_\_\_\_\_, Attorney for the Juvenile

RE: \_\_\_\_\_, Juvenile

CASE: \_\_\_\_ J \_\_\_\_

Pursuant to North Carolina General Statutes §7B-3001(c), please make available the above-referenced juvenile's file maintained by your office so that the undersigned attorney may review and/or copy the file in order to provide legal representation for the juvenile. The file should include the following documents and information:

- Family background information;
- Any report made by any individual or group involving the juvenile or the juvenile's family's social, medical, psychological, psychiatric, or education status;
- Any interviews made by the court counselor;
- Any information regarding the juvenile's prior record in any and all districts in the State of North Carolina, including but not limited to a print out of the juvenile's NCJOIN file;
- Any other information gathered regarding the juvenile

Please let me know when the file will be made available. Thank you for your cooperation in this matter.

\_\_\_\_\_, Assistant Public Defender  
Defender District \_\_\_\_\_

STATE OF NORTH CAROLINA  
\_\_\_\_\_ COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO.

STATE OF NORTH CAROLINA

v.

\_\_\_\_\_ A JUVENILE

)  
)  
) MOTION FOR RELEASE OF  
) DEPARTMENT OF JUVENILE JUSTICE  
) FILE  
)

NOW COMES the Juvenile, by and through his counsel, and respectfully moves this Honorable Court, pursuant to N.C. Gen. Stat. § 7B-3001(c) and Article I of the North Carolina Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, for an Order allowing him to inspect and copy his file as maintained by the Department of Juvenile Justice in order to assist counsel in the preparation of his defense.

As grounds for this Motion, the Juvenile alleges:

1) He is indigent and is represented in this matter by appointed counsel. The Juvenile is 12 years of age.

2) He was charged through petitions with injury to real property, misdemeanor larceny, two counts of communicating threats, simple assault, malicious conduct by a prisoner, assault on a government employee, disorderly conduct at school, and assault on a government officer.

3) On \_\_\_\_\_, the matter was before the Court on a hearing regarding the juvenile's capacity to proceed to trial. The Court found that the Juvenile had capacity to proceed and suggested that counsel attempt to resolve the matter. Counsel had and continues to have concerns regarding the Juvenile's capacity. However, the juvenile entered a transcript of admission to Assault on a Government Official, Assault on a Government Employee and misdemeanor Larceny. The matter was continued to \_\_\_\_\_ for disposition.

4) The Juvenile is in the custody of \_\_\_\_\_ County Department of Social

Services and has previously had a diversion plan with the Iredell County Department of Juvenile Justice. The juvenile is receiving numerous services and has received numerous services from these agencies for approximately two years.

5) The juvenile carries a number of mental health diagnoses including PTSD, mood disorder, ADHD, conduct disorder and borderline intellectual functioning. The juvenile is on numerous medications including Desmopressin (for enuresis), Intuniv, Tenex, Melatonin, Geodon, Zoloft, Miralax, and Ditropan. His cognitive functioning is estimated to be on a Kindergarten/First Grade level.

6) Pursuant to N.C. Gen. Stat. §7B-3001, the juvenile is entitled to "examine and obtain copies of the Division [Department of Juvenile Justice] records and files concerning a juvenile without an order of the court." However, Counsel is informed and believes it is the policy of the Department of Juvenile Justice locally that said documents will not be provided to counsel. In fact, it is policy that dispositional recommendations are frequently withheld from counsel in Juvenile matters until the day of the scheduled disposition.

7) The Juvenile is entitled to a hearing on disposition to assure him of his rights under the North Carolina Constitution, Article I, Sections 14, 23, and 27 as well as his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. These rights include that of effective assistance of counsel, to be confronted by the witnesses against him and to obtain witnesses in his favor, to present a defense, to due process, to equal protection, and to **individual, reliable sentencing.**

Wherefore, the Juvenile, requests this Honorable Court enter an Order authorizing him to obtain copies of the Juvenile's file maintained by the Department of Juvenile Justice. It is further requested that the Department of Juvenile Justice provide Counsel with a copy of the

recommendations for disposition no later than seven (7) days prior to the date of the scheduled disposition hearing.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_

Attorney for Juvenile

STATE OF NORTH CAROLINA  
\_\_\_\_\_ COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO. 1

IN THE MATTER OF \_\_\_\_\_ )  
A JUVENILE ) ORDER

This motion came on to be heard upon motion of the attorney for the Juvenile and was heard by the undersigned District Court Judge and for good cause shown and detailed in the Juvenile's Motion, it is ORDERED, ADJUDGED and DECREED as follows:

1. Counsel for the Juvenile is authorized inspect and obtain copies of the Juvenile's file and records maintained by the Department of Juvenile Justice including, but not limited to:

- a. Family background information;
- b. Any report made by any individual or group involving the juvenile or the juvenile's family's social, medical, psychological, psychiatric, or education status;
- c. Any interviews made by the court counselor;
- d. Any information regarding the juvenile's prior record in any and all districts in the State of North Carolina, including but not limited to a print out of the juvenile's NCJOIN file;
- e. Any other information gathered regarding the juvenile

2. That the Dispositional recommendations regarding the Juvenile be provided to counsel no less than seven (7) days prior to the date of hearing.

This the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
District Court Judge Presiding

STATE OF NORTH CAROLINA  
[ ] COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO. [ ]

STATE OF NORTH CAROLINA )  
 )  
 v. )  
 )  
 [\_\_\_\_, A JUVENILE] )

MOTION AND ORDER TO  
DETERMINE CAPACITY

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court to grant him a competency determination. In support of said motion the Juvenile states the following:

#### **BACKGROUND**

1. On [date], the Juvenile was charged with [CHARGE], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].
2. Juvenile's counsel, [name of counsel], was assigned to represent him on [date].
3. On [DATE] at approximately [TIME], Counsel visited JS at the home of his grandmother.
4. Throughout the interview, JS seemed very distracted and preoccupied and appeared unable to concentrate. While Counsel was interviewing JS and explaining the pending charges to him, JS was inattentive and at times appeared confused. When she asked JS to read the police report with her, JS refused and asked her to read it to him. While Counsel read the police report, JS did not pay attention but instead looked away and fidgeted with his hands and with nearby objects. *Id.*
5. There were several times during their meeting when Counsel had to insist that JS focus on her instead of watching television. During their conversations, when Counsel repeatedly asked JS to look into her eyes, he refused, responding, "I can't do it!" *Id.*



6. After interviewing JS, Counsel had serious questions about his ability to comprehend and understand on a rational level, as JS had persistently exhibited an extreme lack of concern, motivation, and appreciation for the ramifications of his decisions and actions.  
*Id.*
7. That same evening, Counsel spoke with JS's grandmother who told her that JS has an IQ of 68 and that he is considered borderline mentally-retarded. His grandmother also stated that JS has been diagnosed with attention-deficit hyperactivity disorder (ADHD) and is prescribed medication for the condition. *Id.*
8. His grandmother told Counsel that JS attends school regularly but has been suspended several times for disrupting the class and "acting out" with his teachers. JS has told his grandmother that he often finds it impossible to control his actions and that he isn't always aware of what is going on around him. *Id.*
9. As a result of the foregoing, Counsel has grave concerns about JS's capacity to fully understand the charges pending against him. Counsel questions whether JS is capable of understanding these charges and assisting her in his defense. Counsel therefore requests an evaluation to determine her client's ability to proceed with this case.

### **ARGUMENT**

10. As set out in G.S. § 15A-1001(a) and as noted in *State v. McCoy*, 303 N.C. 1 (1981), the test of a defendant's mental capacity to stand trial is whether "by reason of mental illness or defect, he is unable to understand the nature and object of the proceedings against him, to comprehend his situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. *See also State v. McRae*, 139 N.C. App. 387 (2000) (trial court erred in not conducting competency hearing).

11. Therefore, as a result of her observations of and interactions with JS, and supported by the information provided by his grandmother, counsel contends that a psychological assessment of JS is necessary to determine whether JS has the capacity to proceed.

WHEREFORE, the Juvenile prays that this Honorable Court:

- A. Grant him an assessment before proceeding with the charges brought against him.
- B. Grant him any other mental or psychological evaluations that are deemed just and proper for effective defense in this case.

This the [ ] day of [ ], [ ].

---

[Attorney]  
[Address]  
[City, State, Zip]  
[Telephone Number]

\* \* \* \* \*

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the \_\_\_\_\_ day of \_\_\_\_\_ [YEAR].

---

[ATTORNEY]

STATE OF NORTH CAROLINA  
[ ] COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO. \_\_\_\_\_

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER TO DETERMINE CAPACITY
	)	
[JS, a Juvenile]	)	

This matter coming before the undersigned district court judge for hearing on the Juvenile’s Motion to Determine Competency, upon good cause shown, the Court finds as follows:

On [DATE], the Juvenile was charged with [CHARGES], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].

- 1. The Juvenile is represented by [ATTORNEY].
- 2. For good cause shown, the Court has found that the Juvenile should be evaluated for competency before proceeding to adjudication.
- 3. Pursuant to the Motion to Determine Competency filed in this case on [DATE], the Court finds that the Juvenile is in need of a psychological assessment to determine whether he has the capacity to proceed to adjudication.

Therefore, it is ordered that the Juvenile be so evaluated.

This the [ ] day of [ ], [ ].

\_\_\_\_\_  
[JUDGE]  
District Court Judge

STATE OF NORTH CAROLINA  
IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO. \_\_\_\_\_

STATE OF NORTH CAROLINA

v.

\_\_\_\_\_ A JUVENILE

)  
) MOTION TO SET ASIDE ADMISSION &  
) MOTION FOR DISMISSAL OR  
) DEFERRED DISPOSITION  
)

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court to set aside the admission entered by the juvenile on or about \_\_\_\_\_, 2017 for lack of capacity. In the alternative, the Juvenile, by and through counsel, requests this Honorable Court to enter a dismissal or to defer disposition in this case for a period of six months, pursuant to N.C. Gen. Stat. § 7B-2501(d). The Juvenile requests that his family/guardian/custodian be given the opportunity to implement and oversee his punishment, so that such punishment may be tailored to his individual needs, and so that the resources of the Juvenile Justice System may be preserved for children of greater need. In support of said motion, the Juvenile states the following:

1. On \_\_\_\_\_, 2017 and \_\_\_\_\_, 2017, petitions were filed against the Juvenile alleging Malicious conduct by a prisoner, Assault on a Government Employee, Disorderly Conduct at School, Assault on a Government Officer, two counts of Communicating Threats, Injury to Real Property, Misdemeanor Larceny and Simple Assault.
2. That at the time of the alleged offenses on or about \_\_\_\_\_, 2016, the Juvenile (who was 11 years of age at the time) was taken to the \_\_\_\_\_ Unit (psychiatric unit) at \_\_\_\_\_ Hospital where he was involuntarily committed for approximately one month. Upon his release from \_\_\_\_\_ Hospital, the Juvenile was placed in a

psychiatric residential treatment facility (PRTF). On or about \_\_\_\_\_, 2017, the Juvenile was “stepped down” to an IAFI (Intensive Alternative Family Treatment) placement. The Juvenile has been in the custody of \_\_\_\_\_ County Department of Social Services since on or about \_\_\_\_\_, 2014 and has been in approximately seven (7) different places inclusive of psychiatric placements.

3. That, at his first two court appearances on \_\_\_\_\_, 2017 and \_\_\_\_\_, 2017, the Juvenile was not coherent and his social worker, \_\_\_\_\_, indicated to counsel that he has an IEP and, although he is in the sixth grade, he functions on a kindergarten/first grade level. He has multiple mental health diagnoses including PTSD, ADHD, mood disorder, conduct disorder and borderline intellectual functioning. At the initial court dates, social worker \_\_\_\_\_ indicated that the Juvenile was on numerous medications including Cogentin, Desmopressin, Intuniv, Tenex, Melatonin, Geodon, Zoloft and Miralax. Social Worker \_\_\_\_\_ indicated that the Juvenile did not understand his circumstances and suggested a capacity evaluation.
4. Counsel requested a capacity evaluation and the State agreed to utilize the services of Dr. \_\_\_\_\_, Ph.D. to complete said evaluation. Dr. \_\_\_\_\_ completed her evaluation and indicated in a report to the Court that the Juvenile lacked capacity to proceed. See attached exhibit A.
5. On \_\_\_\_\_, 2017, the matter was set for a capacity hearing wherein Dr. \_\_\_\_\_ testified that the Juvenile’s sense of time is impaired in that he lacks a clear time perspective, that the Juvenile has a full-scale IQ of 52 which is below 99.9% of other Juveniles his same age. Dr. \_\_\_\_\_ further testified that the Juvenile’s medication dosages exceed what she has seen prescribed for adults.

6. That Social Worker \_\_\_\_\_ testified that the Juvenile is manipulative and lies to avoid consequences. She testified that she believed the Juvenile understands the difference between right and wrong but agreed with Dr. \_\_\_\_\_ in that she did not believe the Juvenile understood the court process. Juvenile Court Counselor \_\_\_\_\_ testified that the Juvenile is manipulative and cited as an example that the Juvenile indicated that his mother had punched his sister in the face, beaten the Juvenile and a sibling, used drugs, cut his stomach and threatened to kill the Juvenile and his siblings and had lots of bad people in her home. The Juvenile, according to Mr. \_\_\_\_\_'s testimony, made these statements in a meeting to discuss the Juvenile returning home. A review of the Juvenile's abuse/neglect/dependency file indicates that, in fact, the Juvenile's mother was using drugs, having inappropriate individuals around the Juveniles, had punched a sibling in the face and beaten the Juvenile and a sibling with the metal buckle of a belt and a broomstick. The Juvenile and a sibling were documented to have numerous bruises and cuts and this Juvenile was observed to have marks on his abdomen. The Juvenile was adjudicated neglected through a stipulation on or about \_\_\_\_\_, 2014. See attached Exhibit B. His mother was charged and convicted of misdemeanor child abuse.

7. The Court, on \_\_\_\_\_, 2017, relying on testimony by Social Worker \_\_\_\_\_ and Court Counselor \_\_\_\_\_ found that the Juvenile had capacity and, in a conference with Counsel and the Assistant District Attorney at the bench, suggested that the parties attempt to resolve the matter. Counsel advised the Court that it would be unlikely that the Juvenile could complete a transcript of admission. Nevertheless, the State proposed an arrangement for Counsel to discuss with the Juvenile. The Juvenile,

Counsel, Social Worker \_\_\_\_\_ and the Juvenile's mother then spoke for a length of time around 45 minutes to an hour and, after significant coaching with the Juvenile a transcript was signed and entered. The Juvenile indicated to the Court "I understand everything" and was adjudicated delinquent for Assault on a Government Official, Assault on a Government Employee and Misdemeanor Larceny. Nevertheless, Counsel had concerns regarding the Juvenile's capacity and believes that the Juvenile did not fully comprehend his situation at the time of entry of the admission. Counsel continues to have concerns regarding the Juvenile's capacity.

8. Pursuant to N.C. Gen. Stat. § 7B-2401 and § 15A-1001 "No person may be tried, convicted, **sentenced or punished** [emphasis added] for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." Further, pursuant to N.C. Gen. Stat. § 15A-1002, capacity may be raised at any time on motion of the prosecutor, defendant, defense counsel or the court.
9. The Juvenile is now a \_\_\_\_\_ year old boy who resides in an IAFT placement through the \_\_\_\_\_ County Department of Social Services. The Juvenile has a history of mental health issues as enumerated above. He has an IEP which allows for grade modification, a person-centered plan, and attends a Day Treatment Program. He is enrolled in \_\_\_\_\_ ministries, a program providing tutoring, athletics and Bible Study. He is enrolled in weekly mental health therapy and has a psychiatrist who manages his medications through \_\_\_\_\_. His current treatment goals are to decrease impulsive behaviors, refrain from aggression and to learn to express

emotions in a healthy way. The Juvenile's mother is ordered to participate in his therapy and to have contact with the Juvenile three times per week pursuant to the abuse/neglect/dependency Court Order. See attached Exhibit C. The juvenile has a court appointed guardian ad litem pursuant to orders in \_\_\_\_\_ County File Number \_\_\_\_\_.

10. The Juvenile is now before this Court for the very first time. His behavior, which included expressing suicidal thoughts, resulted in a one month long involuntary commitment followed by placement in a PRTF and extensive changes in his medications.
11. The Juvenile, through a diversion plan, was recommended to complete 30 hours of community service due to the misdemeanor larceny. The juvenile was able to complete approximately one half of those hours before being discharged from the program due to his mental health hospitalization.
12. There are no services offered or recommended by the Department of Juvenile Justice that are not already being utilized by the Department of Social Services in providing for and meeting the rehabilitative needs of the Juvenile.
13. Pursuant to N.C. Gen. Stat. § 7B-2501(d), at a dispositional hearing, the "court may dismiss the case, or continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative or through some other plan approved by the court." Further, N.C. Gen. Stat. § 7B-2506 allows the Court to "require that a juvenile be supervised in the juvenile's own home **by the department of social services in the juvenile's county**, a juvenile court counselor, or other personnel as may be available to the court, subject to



conditions applicable to the parent, guardian or custodian or the juvenile as the judge may specify” [emphasis added].

**WHEREFORE**, the Juvenile, by and through Counsel, prays for the following relief:

1. That the admission and adjudication entered on \_\_\_\_\_, \_\_\_\_\_ be set aside based upon the Juvenile’s lack of capacity at the time of entry of the admission and adjudication; or, in the alternative;
2. That the Court enter a dismissal or deferred disposition pursuant to N.C. Gen. Stat. § 7B-2501(d);
3. For such other and further relief as the Court may deem just and proper.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_

Attorney for Juvenile

\* \* \* \* \*

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for \_\_\_\_\_ County by deposit of said copy with \_\_\_\_\_ Assistant District Attorney.

This the \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_

Attorney for Juvenile

# **IMPLICIT BIAS**

## Boxes, Survival and Our Better Angels

James Drennan  
August, 2017

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### Your Job

- As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES  
North Carolina Rules of Professional Conduct of the North Carolina State Bar

- Competent Representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Rule.1.1 Competence  
North Carolina Rules of Professional Conduct of the North Carolina State Bar

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### Why This Matters



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It's about "GOOD PEOPLE"



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And its universal



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From The NCCALJ Final Report:

*"Ask citizens what they want from a court system and an immediate answer is likely to be "fairness." A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision."*

*Does that include advocates' decisions?*

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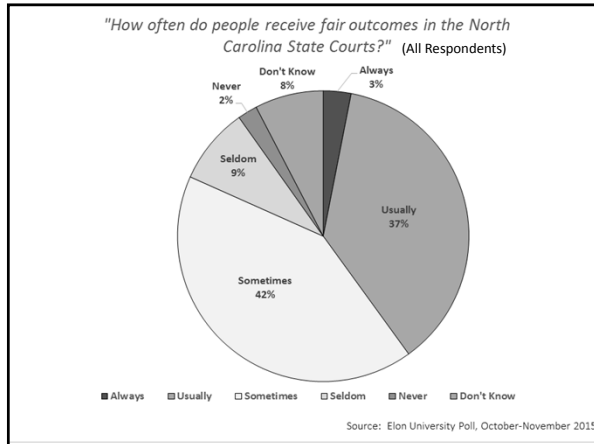
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Many of Your Decisions As Advocate Are Discretionary

Between "have to"

AND

Can't

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**Questions For An Advocate**

TRIAGE

Is the evidence favoring the client credible? (*weak case*)

Do I think a judge or jury will find them "worthy"?

Do any of my interactions discourage a client from trusting me? (*body language, facial expressions*)

Will I accept without strenuous argument a greater punishment for some clients? (*perceived dangerousness*)

Do I "go the mat" for this client?

Do I believe the client?

See Richardson and Goff, 'Implicit Bias in Public Defender Triage', 122 YALE L.J. 2626 (2013)

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### What People Are Saying or Thinking

For example, many of our anti-discrimination policies focus on finding the bad apples who are explicitly prejudiced. In fact, the serious discrimination is implicit, subtle and nearly universal. Both blacks and whites subtly try to get a white partner when asked to team up to do an intellectually difficult task. In computer shooting simulations, both black and white participants were more likely to think black figures were armed. In emergency rooms, whites are pervasively given stronger painkillers than blacks or Hispanics. Clearly, we should spend more effort rigging situations to reduce universal, unconscious racism.

David Brooks,  
New York Times  
January 11, 2013

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### Perceptions of Fairness

- In a 2016 Gallup Survey 46% of whites believed that blacks are treated less fairly in a variety of community interactions. That was up from 37% who had that perception in 2004.
- In that same period, the percentage of blacks who had that perception remained largely unchanged at 84%.
- Implications for the courts? Besides racial groups, what other clusters of people might have perceptions and/or the reality of being treated unfairly?

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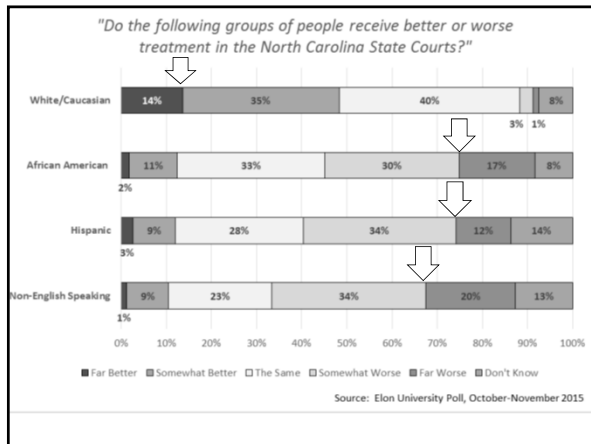
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"Maybe we now realize the way a racial bias can infect us even when we don't realize," he said. "So that we are guarding against not racial slurs but also going against the subtle impulse to call Johnny back for a job interview but not Jamal. Barack Obama, June 26, 2015

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"Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract the *unconscious prejudices* and disguised animus that escape easy classification as disparate treatment."

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V INCLUSIVE COMMUNITIES PROJECT, INC., ET AL, p. 17  
July 27, 2015.

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And in Art: From the Whitney 2017  
Exhibition of Modern American Art



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From the *What* To the *How*



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Areas of Research Into Decision  
Making--Heuristics

- Anchoring
- Confirmation Bias
- Recency
- Availability
- Stereotypes and classification
  - Employment
  - Police shootings
  - Public defenders caseloads
  - Sentencing
  - Medical treatments

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## How We Think Matters



Vs.




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*"The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why. . .*

Daniel Kahneman

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Automatic Processing and Interference:  
Read the Word

**BLUE BLACK GREEN**  
**YELLOW RED BLUE**  
**RED BLACK GREEN**

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Say the Color of the Square


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Automatic Processing and Interference:  
Say the Color of the Word

**BLACK BLACK GREEN**  
**YELLOW BLUE RED**  
**RED COLORS! BLUE**

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What You See Is Not All There IS



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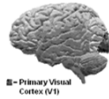
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You Don't See With Your Eyes, Only



PLUS



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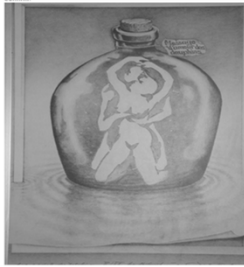
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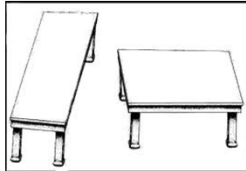
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Which Table is Longer?



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## In Case You Don't Believe Me




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## Can You Read This?

- I cunnoat blveiee I aulacly uesdnatnrd waht I am rdanieg. Aoccdnrig to rsccheearch at Cmabrigde Uinervtisy, it deosn't mtttaer in waht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit pclae. The rset can be a taotl mses and you can sitll raed it wouthit a porbelm. Tihs is bcuseae the huamn mnid deos not raed ervey lteter by istlef, but the wrod as a wlohe.

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## You Don't See With Your Eyes, Only



PLUS




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And You Always FILL IN THE GAPS



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Survival Is Job One, So Give Me Some Boxes



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## Two Problems With Automatic Thinking

- Classification, association, and stereotype
- The quicker you decide, the more automatic it is
- So what we flavor our classification system with matters

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## The Dilemma

- We all have human brains, hard-wired to make rapid decisions making survival more likely . .



Human

- . . . But fairness requires a brain more concerned with accuracy than survival.




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You have no control over what your brain does first.

You have a choice about what happens next.

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## It's not Hopeless



**We are  
what we  
repeatedly  
do.**  
- Aristotle

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## Don't have a Dream




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Consciously take note of  
differences  
(and similarities, too). ↓

Increased risk of in-  
group bias

Increased risk of out-  
group bias

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## Us and Them

When faced with inconsistent information

- We sometimes revise our beliefs

-BUT-

- We are more likely to create a subgroup category (an “exception”) thus leaving our belief intact




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## Think about your thinking.

Make a conscious effort --engage in an intentional thought process.




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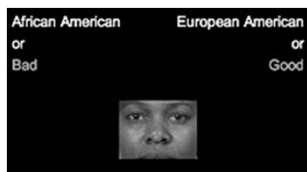
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Implicit Association

Test

[www.implicit.harvard.edu/implicit](http://www.implicit.harvard.edu/implicit)

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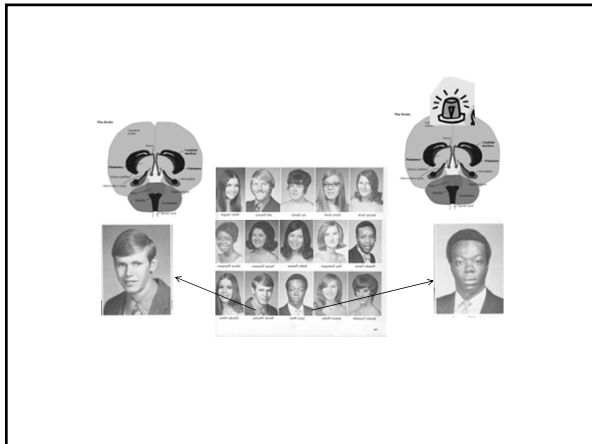
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**Consciously confront stereotypes.**

- IAT [www.implicit.harvard.edu/implicit](http://www.implicit.harvard.edu/implicit)
- “Reverse” the parties?
- Seek images and relationships that defy stereotypes

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**Take your time.**

- Are interactions with some groups or types of people usually longer? Shorter? Why?




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### When it matters, avoid autopilot

Hurried

Tired

Upset

Stressed



Angry

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### Good Habits Help

Develop  
capacity to  
focus attention

Avoid decisional fatigue.

Resist  
shortcuts



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**Make a conscious effort to wait  
until all facts are present before  
judging; i.e. do what we tell  
jurors to do every day**



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**Maximize  
accountability.**

- Ask a colleague to observe
- Get staff input
- Look for patterns in your decisions.



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## Keep Learning



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**Engage in constant vigilance.**

People with low-prejudiced beliefs are assisted by reminding themselves or being reminded by others of those beliefs.



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**Best Individual Advice**

- Intention
- Attention
- Effort
- Take your time
- Recognize that we all need to improve

\*Credit to Professor Jack Glaser, Goldman School of Public Policy, UC Berkeley.

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### It's Also a System Issue

- Acknowledge the importance of minimizing bias as an institutional goal
- Educate
- Think about processes
- Structure decisions—e.g., sentencing, bonds
- Create checklists
- Promote an inclusive environment
- Ensure diversity in appointments, images, etc. on system projects

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### *It's Also A System Issue*

- Provide officials the resources (ex. time) to minimize automatic processing decisions in important matters
- Promote personal and systemic accountability
- Learn from other disciplines—medical review panels, mortality reviews, etc.
- Promote mentorships to provide honest feedback
- Develop measures and collect the data

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### It's not really new

- (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, **except by the lawful judgment of his equals or by the law of the land.**
- + (40) To no one will we sell, to no one **deny or delay right or justice.**

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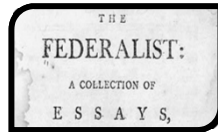
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### Or Ever Finished

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.



No. 51

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### May It Be So

*'when again touched, as surely they will be, by the better angels of our nature.'*




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### In other words, don't give




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To people who deserve



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## Decision-making and Fairness References

Drennan/School of Government, UNC

June 2017

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2. *Implicit Bias, A Primer for Courts*, Jerry Kang, National Center for State Courts (2009) available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>, a website with other reference materials as well
3. *Project Implicit® Web site*: <http://projectimplicit.net/>
4. *A review of Implicit Bias research, 2016*. Kirwan Institute on Race and Ethnicity, Ohio State University. <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf>

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## Implicit Bias in the Courtroom

Jerry Kang  
 Judge Mark Bennett  
 Devon Carbado  
 Pam Casey  
 Nilanjana Dasgupta  
 David Faigman  
 Rachel Godsil  
 Anthony G. Greenwald  
 Justin Levinson  
 Jennifer Mnookin



### ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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For their research assistance, we thank Jonathan Feingold and Joshua Neiman.

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## INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge<sup>1</sup> who seek to answer these difficult questions in accordance with behavioral realism.<sup>2</sup> Our general goal is to educate those in the legal profession who are

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1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.

2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.<sup>3</sup> We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

---

*Bias and the Law*, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of “critical realism,” “situationism,” and the “law and mind sciences.” See Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

## I. IMPLICIT BIASES

### A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.<sup>4</sup> We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.<sup>5</sup> We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.<sup>6</sup> The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.<sup>7</sup>

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.<sup>8</sup> A *stereotype* is an association between a concept (again, in this case a social group) and a trait.<sup>9</sup> Although interconnected, attitudes and stereotypes

4. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).

5. See generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

6. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

7. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

8. In both common and expert usage, sometimes the word “prejudice” is used to describe a negative attitude, especially when it is strong in magnitude.

9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word “stereotype,” the correlation between social group and trait is far from perfect. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),<sup>10</sup> have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).<sup>11</sup>

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10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, *see* Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.<sup>12</sup> Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.<sup>13</sup>

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data<sup>14</sup> on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),<sup>15</sup> large in magnitude (as compared to standardized measures of explicit bias),<sup>16</sup> dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. See Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).

13. This D score, which ranges from -2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. See, e.g., Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.

14. The most prominent dataset is collected at PROJECT IMPLICIT, <http://projectimplicit.org> (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.

15. Lane, Kang & Banaji, *supra* note 10, at 437.

16. Cohen's *d* is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's *d*, on various stereotypes and attitudes range from medium to large. See Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. See *id.* at 474-75 tbl.1.



separate mental constructs),<sup>17</sup> and predicts certain kinds of real-world behavior.<sup>18</sup> What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.<sup>19</sup> Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.<sup>20</sup> In the psychology journals, John Jost and colleagues responded to sharp criticism<sup>21</sup> that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.<sup>22</sup> Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.<sup>23</sup> In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.<sup>24</sup>

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

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17. See Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, in ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).
  18. See Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
  19. See Kang & Lane, *supra* note 2, at 473–90; see also David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).
  20. See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).
  21. See, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).
  22. See, e.g., John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).
  23. See *id.*
  24. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of  $r=0.24$ , whereas explicit attitude scores had correlations at an average of  $r=0.12$ . See *id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

## B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.<sup>25</sup> In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels “explicit” and “implicit” as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one’s explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent’s conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

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25. See generally Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.<sup>26</sup>

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called “structural.” Other names include “institutional” or “societal.” These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.<sup>27</sup> In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian’s biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. See, e.g., Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. See, e.g., Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for \$10 or a cheeseburger for \$3. Unfortunately, she has only \$5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.<sup>28</sup> To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

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28. See, e.g., GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); JOHN POWELL & RACHEL GODSIL, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why “implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization”).

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.<sup>29</sup>

## II. TWO TRAJECTORIES

### A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,<sup>30</sup> implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

#### 1. Police Encounter

*Blackness and criminality.* If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.<sup>31</sup> These biases could contribute to the substantial racial disparities that have been widely documented in policing.<sup>32</sup>

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29. See Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).

30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.

31. Devon W. Carbado, *(E)racizing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).

32. See, e.g., Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 USA

Since the mid-twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.<sup>33</sup> Those biases persist today, as measured by not only explicit but also implicit instruments.<sup>34</sup>

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.<sup>35</sup> When participants are subliminally primed<sup>36</sup> with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.<sup>37</sup> In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.<sup>38</sup> Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.<sup>39</sup> The research suggests both that

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Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. See generally Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).
34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; see also John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).
35. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).
36. The photograph flashed for only thirty milliseconds. *Id.* at 879.
37. See *id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.
38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. See *id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).
39. See *id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?<sup>40</sup> Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."<sup>41</sup>

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

*Shooter bias.* The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks<sup>42</sup> and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.<sup>43</sup>

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. See Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's *d*=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's *d*=0.31. See Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.<sup>44</sup> If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.<sup>45</sup> Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.<sup>46</sup> Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.<sup>47</sup> Correll also found comparable amounts of shooter bias in African American participants.<sup>48</sup> This suggests that negative attitudes toward African Americans are not what drive the phenomenon.<sup>49</sup>

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.<sup>50</sup> In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).

45. *Id.* at 1317.

46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. See, e.g., Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).

47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.

48. *See id.* at 1324.

49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. See Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).

50. See E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).



most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.<sup>51</sup>

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that “[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias.”<sup>52</sup> By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.<sup>53</sup> It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

## 2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors’ charging decisions.<sup>54</sup>

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51. See Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).

52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, “at virtually every stage of pre-trial negotiation, whites are more successful than non-whites.” Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: “It’s a feeling, ‘You’ve got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.<sup>55</sup> Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.<sup>56</sup> At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.<sup>57</sup>

While these studies are suggestive, other studies find no disparate treatment.<sup>58</sup> Moreover, this kind of statistical evidence does not definitively tell us that biases

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person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; see also Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. See Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. See Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), available at <http://www.protectcivilrights.org/pdf/reports/justice.pdf> (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); see also Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. See, e.g., Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,<sup>59</sup> might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.<sup>60</sup> Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.<sup>61</sup> That said, there is no reason to

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59. See Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that “chronic egalitarians” who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that “similarly situated individuals of a different race were not prosecuted.” *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.<sup>62</sup> And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.<sup>63</sup> They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below<sup>64</sup>—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

### 3. Trial

#### a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

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62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. See Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. See *infra* Part II.B.

both verdicts and sentencing.<sup>65</sup> The magnitude of the effect sizes were measured conservatively<sup>66</sup> and found to be small (Cohen's  $d=0.092$  for verdicts,  $d=0.185$  for sentencing).<sup>67</sup>

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,<sup>68</sup> then an effect size of Cohen's  $d=0.095$  would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.<sup>69</sup>

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.<sup>70</sup> Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

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65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results ( $p>0.05$ ) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf> (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size  $d$  values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, "Race Salience" in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.<sup>71</sup>

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about “the precise psychological processes through which the influence of race occurs in the legal context.”<sup>72</sup> Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be “unintentional and even non-conscious processes.”<sup>73</sup>

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.<sup>74</sup> The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant’s guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.<sup>75</sup>

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question “How guilty is the defendant?” The guilt mean score was  $M=66.97$  for

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71. See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and  $M=56.37$  for light skin, with 100 being “definitely guilty.”<sup>76</sup> Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants’ weighing of the evidence or assessment of guilt.<sup>77</sup> More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.<sup>78</sup> Moreover, their recollections did not correlate with their judgments of guilt.<sup>79</sup> Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).<sup>80</sup> They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.<sup>81</sup> More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.<sup>82</sup> On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).<sup>83</sup> In sum, a subtle change

76. See *id.* at 337 (confirming that the difference was statistically significant,  $F=4.40$ ,  $p=0.034$ ,  $d=0.52$ ).

77. *Id.* at 338.

78. This finding built upon Levinson’s previous experimental study of implicit memory bias in legal decisionmaking. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).

79. Levinson & Young, *supra* note 20, at 338.

80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).

81. *Id.* at 204. For the attitude IAT,  $D=0.21$  ( $p<0.01$ ). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT,  $D=0.18$  ( $p<0.01$ ). *Id.* at 204 n.83.

82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total “evidence evaluation” score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence =  $88.58 + 5.74 \times BW + 6.61 \times GI + 9.11 \times AI + e$  (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score;  $e$  stands for error). *Id.* at 206. In normalized units, the implicit stereotype  $\beta=0.25$  ( $p<0.05$ ); the implicit attitude  $\beta=0.34$  ( $p<0.01$ ); adjusted  $R^2=0.24$ . See *id.* at 206 nn.93–95.

83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

#### b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,<sup>84</sup> deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.<sup>85</sup> Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.<sup>86</sup>

84. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

86. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges ( $N=85$ ) showed an IAT effect  $M=216$  ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges ( $N=43$ ) showed a small bias  $M=26$  ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. See *id.*



Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.<sup>87</sup> That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.<sup>88</sup>

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,<sup>89</sup> the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.<sup>90</sup>

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

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87. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. See Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at  $p=0.07$ . See *id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. See *id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.<sup>91</sup>

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.<sup>92</sup> Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves “whatever else, make sure not to treat the Black defendants worse”) than Black judges (who may think “give the benefit of the doubt to Black defendants”). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges’ motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges’ behavior.

#### 4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,<sup>93</sup> and Black defendants are subject disproportionately to the death penalty.<sup>94</sup>

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91. *Id.* at 1220 n.114.

92. *See id.* at 1223.

93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).

94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview*,

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

*Probation officers.* In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as “Harlem” or “dreadlocks.” This subliminal priming led the officers to recommend harsher sentencing decisions.<sup>95</sup> As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.<sup>96</sup> But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

*Afrocentric features.* Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida<sup>97</sup> and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.<sup>98</sup> The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.<sup>99</sup> In other words, White and Black defendants were sentenced without discrimination based on race. According to the

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*With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. See Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery’s. See Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). See *id.* at 1206 (providing numerical count of judges’ prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing “to arrive at a presentation time that would allow the primes to be detectable but not identifiable.” Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. See Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. See *id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.<sup>100</sup>

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.<sup>101</sup> How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.<sup>102</sup>

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.<sup>103</sup> If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.<sup>104</sup> If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

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Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

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100. *Id.* at 677.

101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. See Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. See *id.* at 385.

102. See Blair et al., *supra* note 97, at 677–78.

103. See *id.* at 678 (hypothesizing that “perhaps an equally pernicious and less controllable process [is] at work”).

104. See *id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.<sup>105</sup>

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).<sup>106</sup> For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is  $r=0.1$  at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.<sup>107</sup> To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

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105. See Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. See Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action'*, 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, [http://faculty.washington.edu/agg/UCLA\\_PULSE.simulation.xlsx](http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx) (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from  $r=0.1$  to  $r=0.2$ , which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, see *supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases<sup>108</sup> and 70 thousand federal criminal cases.<sup>109</sup> And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.<sup>110</sup>

## B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual<sup>111</sup> bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.<sup>112</sup> Second, after exhausting necessary administrative remedies,<sup>113</sup> the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. See ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), available at <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>.

109. See Rachlinski et al., *supra* note 86, at 1202.

110. See Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. See *id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action “because of” the plaintiff’s “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. See 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,<sup>114</sup> implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

### 1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a “but-for” sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably “because of” a protected characteristic, such as race or sex.<sup>115</sup> But our objective here is not to engage the doctrinal<sup>116</sup> and philosophical questions<sup>117</sup> of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.<sup>118</sup> Although those questions are critically important, our

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114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists’ ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as “social framework” evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been “several dozen testing studies” in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).<sup>119</sup> These studies consistently reveal typical “net rates of discrimination” that range from 20–40 percent.<sup>120</sup> In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed “agentic,” worse than an

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whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 (“The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision.”); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendancy of “Social Frameworks,”* 94 VA. L. REV. 1715, 1719 (2008) (“[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes ‘social framework’ evidence.”). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) (“Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.”).

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant’s work environment and asking that witness whether each of those particular attributes exists.

119. See Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), available at [http://www.bendickegan.com/pdf/Sent\\_to\\_JSI\\_Feb\\_27\\_2010.pdf](http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf).

120. *Id.* (manuscript at 15).



equally agentic man.<sup>121</sup> When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hireable than the equally agentic male.<sup>122</sup> Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.<sup>123</sup> Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)<sup>124</sup> did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.<sup>125</sup>

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.<sup>126</sup> These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back “Emily” more often than “Lakisha.”<sup>127</sup> Less attention has been paid to Dan-Olof Rooth’s extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.<sup>128</sup> Rooth has found these correlations

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121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled “androgynous”—they also demonstrated the characteristics of interdependence and cooperation. *Id.*
  122. The difference was  $M=2.84$  versus  $M=3.52$  on a 5 point scale ( $p<0.05$ ). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*
  123. *See id.* at 753–54.
  124. The agentic stereotype was captured by word stimuli such as “independent,” “autonomous,” and “competitive.” The communal stereotype was captured by words such as “communal,” “cooperative,” and “kinship.” *See id.* at 750.
  125. *See id.* at 756 ( $r=-0.49$ ,  $p<0.001$ ). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.
  126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.
  127. *Id.* at 992.
  128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.<sup>129</sup>

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.<sup>130</sup> We do, however, wish briefly to highlight lines of research—variously called “constructed criteria,” “shifting standards,” or “casuistry”—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.<sup>131</sup> Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff’s case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning<sup>132</sup> in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.<sup>133</sup> One candidate’s profile signaled *book smart*, the other’s profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is “the process through which we assimilate information in a self-serving manner.” *Id.* at 1029.

133. See Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.<sup>134</sup> Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.<sup>135</sup>

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.<sup>136</sup> Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."<sup>137</sup>

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.<sup>138</sup> In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.<sup>139</sup>

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).<sup>140</sup> By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.<sup>141</sup> In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

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134. See *id.* ( $M=8.27$  with education versus  $M=7.07$  without education, on a 11 point scale;  $p=0.006$ ;  $d=1.02$ ).

135. See *id.* ( $M=6.21$  with family traits versus  $5.08$  without family traits;  $p=0.05$ ;  $d=0.86$ ).

136. Michael I. Norton et al., *Casistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).

137. *Id.* at 820.

138. *Id.* at 821.

139. *Id.*

140. *Id.*

141. *Id.*

experiments, in the context of race and college admissions.<sup>142</sup> In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.<sup>143</sup> To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).<sup>144</sup> After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

[t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.<sup>145</sup>

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142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POLY & L. 36, 42 (2006).

143. *Id.* at 44.

144. *See id.*

145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.<sup>146</sup>

## 2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.<sup>147</sup> Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."<sup>148</sup>

Starting with *Bell Atlantic Corp. v. Twombly*,<sup>149</sup> which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,<sup>150</sup> which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.<sup>151</sup> Second, courts must decide on the plausibility of the claim based on the information before them.<sup>152</sup> In *Iqbal*, the Supreme Court held that

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146. See generally TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).

147. 355 U.S. 41 (1957).

148. *Id.* at 45–46.

149. 550 U.S. 544 (2007).

150. 129 S. Ct. 1937 (2009).

151. *Id.* at 1951.

152. *Id.* at 1950–52.

because of an “obvious alternative explanation”<sup>153</sup> of earnest national security response, purposeful racial or religious “discrimination is not a plausible conclusion.”<sup>154</sup>

How are courts supposed to decide what is “Twom-bal”<sup>155</sup> plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>156</sup>

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.<sup>157</sup>

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.<sup>158</sup> According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).

154. *Id.* at 1952.

155. See *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10-4038-MWB, 2011 WL 5547159, at \*1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as “Twom-bal”).

156. *Iqbal*, 129 S. Ct. at 1940.

157. These schemas also reflect cultural cognitions. See generally Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

158. See Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.<sup>159</sup> When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.<sup>160</sup>

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.<sup>161</sup> If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?<sup>162</sup> This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."<sup>163</sup> They also found that those operating under the illusion gave more stereotype-consistent answers.<sup>164</sup> In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

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159. See John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).

160. See *id.* at 24–25, 27–29.

161. See Yzerbyt et al., *supra* note 158.

162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. See *id.* at 50.

163. See *id.* at 51 ( $M=5.07$  versus 10.13;  $p<0.003$ ).

164. See *id.* ( $M=9.97$  versus 6.30, out of 1 to 20 point range;  $p<0.006$ ).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person.”<sup>165</sup> Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff’s claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge’s schemas. Just as Yzerbyt’s illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.<sup>166</sup> More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

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165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. See *id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.



to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.<sup>167</sup> She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).<sup>168</sup> By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.<sup>169</sup> Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.<sup>170</sup> He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.<sup>171</sup> These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

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167. See *id.* at 591–93.

168. See *id.* at 630 tbl.D.

169. See *id.*

170. See Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.

171. See *id.* at 36 tbl.1 ( $p < 0.000$ ).

other hand, the judge still has to make a judgment call on whether any “genuine dispute as to any material fact”<sup>172</sup> remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).<sup>173</sup>

### 3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

#### a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

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172. FED R. CIV. P. 56(a).

173. See, e.g., Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373> (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non-civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.<sup>174</sup>

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.<sup>175</sup> Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,<sup>176</sup> standards of injustice,<sup>177</sup> and collective guilt.<sup>178</sup> Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);<sup>179</sup> they thought less harm was done by slavery;<sup>180</sup> and, as a result, they felt less collective guilt compared to other White students who identified less with America.<sup>181</sup> In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).<sup>182</sup>

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).

175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.

176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.

177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.

178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*

179. *See id.* at 772 tbl.1 ( $r=0.26, p<0.05$ ).

180. *See id.* ( $r=-0.23, p<0.05$ ).

181. *See id.* ( $r=-0.21, p<0.05$ ). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.

182. The manipulation was successful. *See id.* at 773 ( $p<0.05, d=0.54$ ).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.<sup>183</sup> In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

#### b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

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183. In standards for injustice,  $M=2.60$  versus 3.39; on judgments of harm,  $M=5.82$  versus 5.42; on collective guilt,  $M=6.33$  versus 4.60. All differences were statistically significant at  $p=0.05$  or less. See *id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.<sup>184</sup> When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.<sup>185</sup> Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.<sup>186</sup>

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT  $D=0.45$ ),<sup>187</sup> this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ( $r=0.32$ ,  $p<0.01$ ), likeability ( $r=0.31$ ,  $p<0.01$ ), and hireability ( $r=0.26$ ,  $p<0.05$ ).<sup>188</sup> These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT  $D=1$ ) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

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184. See, e.g., Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. See Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. See *id.* at 892–99 (describing method and procedure, and identifying attorney names as “William Cole” or “Sung Chang”).

187. See *id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT  $D=0.62$ ). See *id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.<sup>189</sup>

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.<sup>190</sup> Jurors also feel accountable<sup>191</sup> to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

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189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.

190. See *infra* text accompanying notes 241–245.

191. See, e.g., Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

### III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.<sup>192</sup> Effort is not always sufficient, but it ought to count for something.

#### A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?<sup>193</sup> One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

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192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non-English speaking people receive equal treatment. The appearance of fairness is a serious problem. See NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf). The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).
193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.<sup>194</sup> One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.<sup>195</sup> By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.<sup>196</sup>

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.<sup>197</sup> Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).<sup>198</sup> In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.<sup>199</sup>

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

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194. See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. See *id.* at 651.

196. See *id.* at 651–53.

197. See Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

198. See Rachlinski et al., *supra* note 86, at 1227.

199. See Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").



videos, simulations, or even imagination and which does not require direct face-to-face contact?<sup>200</sup> Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.<sup>201</sup> These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.<sup>202</sup>

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.<sup>203</sup> Situating African Americans in a positive setting produced lower implicit bias scores.<sup>204</sup>

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.<sup>205</sup> But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect  $M=78\text{ms}$  versus  $174\text{ms}$ ,  $p=0.01$ ) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). See generally Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. See Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.<sup>206</sup> Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.<sup>207</sup>

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.<sup>208</sup> Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

## B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.<sup>209</sup>

### 1. Judges

#### a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"<sup>210</sup> relative to other judges attending the same conference. That is, obviously, mathematically impossible.

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206. See Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).

207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).

208. See Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).

209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).

210. See Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.<sup>211</sup> Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled “Gary” or the candidate profile labeled “Lisa” for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.<sup>212</sup> Half the participants were primed to view themselves as objective.<sup>213</sup> The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.<sup>214</sup> But those who were manipulated to think of themselves as objective evaluated the male candidate higher ( $M=5.06$  versus  $3.75$ ,  $p=0.039$ ,  $d=0.76$ ).<sup>215</sup> Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective ( $M=3.12$  versus  $1.94$ ,  $p=0.023$ ,  $d=0.86$ ).<sup>216</sup> In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. See Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. See *id.* at 209. The participants were drawn from a lay sample (not just college students).

214. See *id.* at 210–11 ( $M=3.24$  for male candidate versus  $4.05$  for female candidate,  $p=0.21$ ).

215. See *id.* at 211.

216. See *id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. See *id.*

that others are biased but we ourselves are not.<sup>217</sup> In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.<sup>218</sup> After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.<sup>219</sup> By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.<sup>220</sup> These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

#### b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.<sup>221</sup> Social psychologists generally agree that motivation is an important determinant of checking biased behavior.<sup>222</sup> Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.<sup>223</sup>

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

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217. See generally Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).

218. See Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. See *id.* at 575.

219. See *id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. See *id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way,  $p=0.01$ . See *id.*

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).

222. See Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude-Behavior Processes*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

223. See Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.<sup>224</sup> The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.<sup>225</sup> It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.<sup>226</sup> Before and after watching the documentary, participants were asked to what extent they thought “a judge’s decisions and court staff’s interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups.”<sup>227</sup> Before viewing the documentary, approximately 16 percent chose “rarely-never,” 55 percent chose “occasionally,” and 30 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 20 percent chose “occasionally,” and 79 percent chose “most-all.”<sup>228</sup>

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose “rarely-never,” 45 percent chose “occasionally,” and 45 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 14 percent chose “occasionally,” and 84 percent

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224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. See PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), available at <http://www.ncsc.org/IBReport>.

226. The program was broadcast on the Judicial Branch’s cable TV station and made available streaming on the Internet. See *The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), <http://www2.courtinfo.ca.gov/cjer/aocvtv/dialogue/neuro/index.htm>.

227. See CASEY ET AL., *supra* note 225, at 12 fig.2.

228. See *id.*

chose “most-all.”<sup>229</sup> These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments<sup>230</sup> support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, “I will apply the course content to my work.” In California, 90 percent (N=60) reported that they agreed or strongly agreed.<sup>231</sup> In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.<sup>232</sup> Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.<sup>233</sup> In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

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229. *Id.* at 12 fig.3.

230. Comments included: “raising my awareness of prevalence of implicit bias,” “enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same,” and “greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested.” *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program’s applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: “concerted effort to be aware of bias,” “I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination,” “Simply trying to think things through more thoroughly,” “Reading and learning more about other cultures,” and “I have made mental notes to myself on the bench to be more aware of the implicit bias and I’ve re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part.”

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

### c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.<sup>234</sup> But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,<sup>235</sup> which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.<sup>236</sup>

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234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. See generally Saaed A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. See Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. See Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. See *id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. See *id.* at 589; see also David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

#### d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;<sup>237</sup> Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.<sup>238</sup> These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

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237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q.J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").



to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

## 2. Jurors

### a. Jury Selection and Composition

*Individual screen.* One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.<sup>239</sup> Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

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239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that “the IAT’s properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension.” See Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.<sup>240</sup>

*Jury diversity.* Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about “those people” rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.

I pass these thoughts onto you in the hope that the jury system can some day be improved.<sup>241</sup>

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries<sup>242</sup> to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people’s willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.<sup>243</sup> Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POLY REV. 65, 68–71 (2008).

243. The juries labeled “diverse” featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.<sup>244</sup> In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.<sup>245</sup>

Given these benefits,<sup>246</sup> we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.<sup>247</sup> Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.<sup>248</sup> In addition, we encourage consideration of restoring a 12-member jury size as “the most effective approach” to maintain juror representativeness.<sup>249</sup>

#### b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

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244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. See Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. See *id.* at 82–88 (summarizing theoretical and empirical literature).

247. See Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. See, e.g., Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.<sup>250</sup>

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

I pledge \*\*\* :

I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.<sup>251</sup>

He also gives a specific jury instruction on implicit biases before opening statements:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), available at <http://www.youtube.com/watch?v=ge7i60GuNRg>.

251. Mark W. Bennett, *Jury Pledge Against Implicit Bias* (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>252</sup>

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.<sup>253</sup> Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

You must follow certain rules while conducting your deliberations and returning your verdict:

\* \* \*

Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. See, e.g., Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.<sup>254</sup> That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

### c. Encourage Category-Conscious Strategies

*Foreground social categories.* Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.<sup>255</sup>

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.<sup>256</sup>

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

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254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. See *supra* notes 70–71.

256. See Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.<sup>257</sup> But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.<sup>258</sup>

*Engage in perspective shifting.* Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.<sup>259</sup> Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.<sup>260</sup> In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."<sup>261</sup> By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.<sup>262</sup> More important, these changes in implicit bias, as measured by reaction time instruments,

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257. See Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); see also *id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. See *id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of  $M=0.43$ , whereas those in the control showed a bias of  $M=0.80$ . Experiment two involved the essay, in which participants in the perspective-taking condition showed  $M=0.01$  versus  $M=0.49$ . See *id.* at 1031. Experiment three used the standard IAT. See *id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,<sup>263</sup> and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.<sup>264</sup>

### CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

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263. *See id.* at 1035.

264. *See id.* at 1037.





Race & Ethnic Fairness in the Courts

# Implicit Bias

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## A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and  
Ethnic Fairness of America's State Courts

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#### ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit [www.ncsconline.org/ref](http://www.ncsconline.org/ref).

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# Implicit Bias: A Primer

## Schemas and Implicit Cognitions (or “mental shortcuts”)

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that’s happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a “chair.” Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category “chair.” Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are [implicit](#).

## Implicit Social Cognitions (or “thoughts about people you didn’t know you had”)

What is interesting is that schemas apply not only to objects (e.g., “chairs”) or behaviors (e.g., “ordering food”) but also to human beings (e.g., “the elderly”). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have [implicit](#) cognitions that help us walk and drive, we have [implicit social cognitions](#) that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include [stereotypes](#), which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include [attitudes](#), which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term “[implicit bias](#)”

includes both [implicit stereotypes](#) and [implicit attitudes](#).

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly “colorblind” (or gender-blind, ethnicity-blind, class-blind, etc.) way?

### **Asking about Bias (or “it’s murky in here”)**

One way to find out about [implicit bias](#) is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a “willing and able” problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The

experiments go on and on. And recall that by definition, [implicit biases](#) are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

### **Implicit measurement devices (or “don’t tell me how much you weigh, just get on the scale”)**

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure [stereotypes](#) and [attitudes](#), without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. ([Von Hippel 1997](#); Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. ([Phelps 2000](#)).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17” screen laptop with 2GB memory and 3 USB ports, versus a 15” laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question “How much would you pay for an extra USB port?” Recently, social cognitionists have adapted this methodology by creating “bundles” that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid \$160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid \$150,000 in Chicago for Mr. Jones? ([Caruso 2009](#)).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the [Implicit Association Test](#) (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race [attitude](#) test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of [implicit bias](#). [If the description is hard to follow, try an IAT yourself at [Project Implicit](#).]

## **Pervasive implicit bias (or "it ain't no accident")**

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the [stereotype](#) of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of [implicit bias](#), are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an [implicit attitude](#) in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, [implicit biases](#) are [dissociated](#) from [explicit](#) biases. In other words, they are related to but differ sometimes substantially from [explicit](#) biases--those [stereotypes](#) and [attitudes](#) that we expressly self-report on surveys. The best understanding is that [implicit](#) and [explicit](#) biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

## Real-world consequences (or “why should we care?”)

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of [implicit bias](#) predict an individual’s behaviors or decisions? Do milliseconds really matter? (Chugh 2004). If, for example, well-intentioned people committed to being “fair and square” are not influenced by these [implicit biases](#), then who cares about silly video game results?

There is increasing evidence that [implicit biases](#), as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- [implicit bias](#) predicts the rate of callback interviews (Rooth 2007, based on [implicit stereotype](#) in Sweden that Arabs are lazy);
- [implicit bias](#) predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- [implicit bias](#) predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- [implicit bias](#) predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- [implicit bias](#) predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);

- [implicit bias](#) predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- [implicit bias](#) predicts voting behavior in Italy (Arcari 2008);
- [implicit bias](#) predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying [implicit bias](#) find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of 14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, [implicit bias IAT](#) scores better predict behavior than [explicit](#) self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of [implicit biases](#) with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

## Malleability (or “is there any good news?”)

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that [implicit biases](#) are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on [explicit attitudes](#) but also [implicit](#) ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
  - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased [implicit stereotypes](#) of women. ([Blair et al. 2001](#)).
  - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased [implicit bias](#) against Blacks. (Dasgupta & Greenwald 2001).
  - Contact with female professors and deans decreased [implicit bias](#) against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between [implicit bias](#) and discriminatory behavior.
  - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. ([Goldin & Rouse 2000](#)).
  - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender

discrimination in hiring a police chief. (Uhlmann & Cohen 2005).

- In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical [stereotypes](#) from the media ([Kang 2005](#)).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

### **The big picture (or "what it means to be a faithful steward of the judicial system")**

It's important to keep an eye on the big picture. The focus on [implicit bias](#) does not address the existence and impact of [explicit](#) bias--the [stereotypes](#) and [attitudes](#) that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all [explicit](#) and [implicit biases](#) were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we



should still strive to take all forms of bias seriously, including [implicit bias](#).

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of [implicit](#) and [explicit](#) biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.



# Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

## Attitude

An attitude is “an association between a given object and a given evaluative category.” R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also [stereotype](#).

## Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect “common sense” based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a

transparent explanation of “the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view.” Kristin Lane, Jerry Kang, & Mahzarin Banaji, [Implicit Social Cognition and the Law](#), 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

## Dissociation

Dissociation is the gap between [explicit](#) and [implicit](#) biases. Typically, [implicit](#) biases are larger, as measured in standardized units, than [explicit](#) biases. Often, our [explicit](#) biases may be close to zero even though our [implicit biases](#) are larger.

There seems to be some moderate-strength relation between [explicit](#) and [implicit biases](#). See Wilhelm Hofmann, [A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures](#), 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation  $r=0.24$  after analyzing 126 correlations). Most scientists reject the idea that [implicit biases](#) are the only “true” or “authentic” measure; both [explicit](#) and [implicit](#) biases contribute to a full understanding of bias.

## Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also [implicit](#).

## Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also [explicit](#).

## Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the “E” key on the left side of the keyboard, or “I” on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as “joy” or “agony”. A person with a negative [implicit](#) attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

## Implicit Attitudes

“[Implicit](#) attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or

unfavorable feeling, thought, or action toward social objects.” Anthony Greenwald & Mahzarin Banaji, [Implicit social cognition: attitudes, self-esteem, and stereotypes](#), 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also [attitude](#); [implicit](#).

## Implicit Biases

A bias is a departure from some point that has been marked as “neutral.” Biases in [implicit stereotypes](#) and [implicit attitudes](#) are called “implicit biases.”

## Implicit Stereotypes

“[Implicit](#) stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category” Anthony Greenwald & Mahzarin Banaji, [Implicit social cognition: attitudes, self-esteem, and stereotypes](#), 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our [implicit stereotypes](#) and may not endorse them upon self-reflection. See also [stereotype](#); [implicit](#).

## Implicit Social Cognitions

Social cognitions are [stereotypes](#) and [attitudes](#) about social categories (e.g., Whites, youths, women). [Implicit](#) social cognitions are [implicit stereotypes](#) and [implicit attitudes](#) about social categories.

## Stereotype

A stereotype is an association between a given object and a specific attribute. An example is “Norwegians are tall.” Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also [attitude](#).

## Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an [attitude](#) or [stereotype](#)
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

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# **CASE LAW UPDATE**

## Juvenile Law Update

2017 Juvenile Defender Conference

Assistant Professor LaToya Powell

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## Recent Appellate Decisions

*State v. Saldierna*

Handout pp. 9-10, 11

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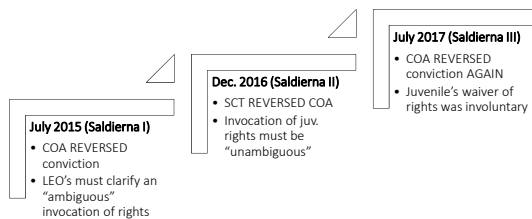
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## Procedural History




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## Facts

- 16 y.o., Spanish-speaking juvenile with 8<sup>th</sup> Grade education
- He could write in English but struggled to read or understand it as spoken
- Interrogated at police station following arrest
- LEO gave him *Miranda* waivers in English and Spanish
- But, LEO read only the English version
- Juvenile signed & initialed the English version
- He then asked "Um, can I call my mom?"
- LEO gave him a cell phone but he did not reach his mother
- LEO resumed the interrogation, and then he confessed
- Trial court denied juvenile's Motion to Suppress




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## Saldierna I (2015)

**Issue:** Did the juvenile invoke his statutory right to have a parent present under G.S. 7B-2101(a)?

Court of Appeals held:

- Maybe
- LEO had duty to clarify juvenile's "ambiguous" statement before proceeding
  - Right to parental presence under G.S. 7B-2101 is different than *Miranda* rights
  - Juveniles are more vulnerable during custodial interrogation (*J.D.B. v. NC*)
  - LEO's must proceed with "great caution"

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## Saldierna II (2016)

**Issue:** Did the juvenile invoke his statutory right to have a parent present under G.S. 7B-2101(a)?

NC Supreme Court held:

- **No. Reversing COA decision**
- Invocation of *Miranda* rights must be "unambiguous" and officers have no duty to clarify a juvenile's ambiguous request
  - *Davis v. U.S.* – "Maybe I should talk to a lawyer"
  - *State v. Golphin* – Defendant said "he didn't want to say anything about the jeep. He did not know who it was or he would have told us"
- *Miranda* framework applies to juvenile rights under G.S. 7B-2101(a)

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## Is Saldierna's rule consistent with J.D.B.?

*J.D.B. v. N.C. – kids are different and LEO's cannot ignore this "commonsense reality"*

### J. Beasley's dissenting opinion:

- J's request to call mom was an unambiguous invocation of his rights
- Statement was clear enough for "a reasonable officer" to understand
- Adult "standard expects far too much of the typical juvenile being held in police custody"
- Majority's opinion is inconsistent with "greater protection" provided by G.S. 7B-2101

See blog post at On the Civil Side *"A Juvenile's Request for a Parent During Custodial Interrogation Must be Unambiguous"*

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## Saldierna III (2017)

Issue on remand to COA: Did the juvenile knowingly, willingly, and understandingly waive his rights?

Court of Appeals held:

- No.
- Voluntariness depends on totality of the circumstances
  - No evidence of prior experience with law enforcement
  - Due to his age, intellectual functioning, and language barriers, he likely did not understand his rights
  - Thus, he could not voluntarily waive them
  - And, juvenile's request to call mom after signing a waiver showed his uncertainty

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## Saldierna III (2017)

### Key Language About Written Waivers

- *"We decline to give any weight to recitals, like the juvenile rights waiver form signed by defendant, which merely formalized constitutional requirements."*
- *"To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but in fact."*

❖ On 8/3/17, the State of NC filed a motion for temporary stay, which was granted by the NC S. Ct.

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## Recent Appellate Decisions

*State v. Watson*

Handout p. 13

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## State v. Watson



**Held:** 16 y.o. juvenile's failure to initial box indicating he was waiving the right to have a lawyer or parent present was not an invocation of his rights.

- Evidence supported trial court's finding that juvenile erroneously initialed the wrong box on the waiver of rights form.
- His mom was not present and he did not ask to contact her.

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## Recent Appellate Decisions

*In the Matter of T.K.*

Handout p. 10

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## Facts

- Juvenile was assaulted at school by another student
- Prior to the assault, he sought help from a school counselor
- The counselor heard him use "profanity" after the assault
- He was charged with simple affray and disorderly conduct
- The disorderly conduct petition was not signed by a JCC or marked as "Approved for Filing"




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## In re T.K.

**Held:** A juvenile petition that is neither signed nor marked as "Approved for Filing" is insufficient to confer subject matter jurisdiction.

Decision of Court Counselor Regarding the Filing of the Petition	
<input checked="" type="checkbox"/> 1. Approved for Filing <input type="checkbox"/> 2. Not Approved for Filing <input type="checkbox"/> a. Closed <input type="checkbox"/> b. Diverted and Retained	Date _____ Time <input type="checkbox"/> AM <input type="checkbox"/> PM Name Of Court Counselor Giving Telephonic Approval _____ Name And Title Of Person Receiving Telephonic Approval _____ Signature Of Person Receiving Telephonic Approval _____
Date _____ Signature Of Court Counselor _____	
Post-Diversion Approval For Filing Of Petition	
<input type="checkbox"/> Approved for Filing Date _____	Signature Of Court Counselor _____
<small>AOC-J-310, Side Two, Rev. 10/08          © 2008 Administrative Office of the Courts</small>	

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## In re T.K.

- Court relied on precedent in abuse & neglect cases
  - *In re Green*
- Declined to extend *In re D.S.*
  - Signature and approval requirements for petition are different than timelines
  - Relate to Juvenile Code's purpose – "to provide an effective system of intake services for the screening and evaluation of complaints." G.S. 7B-1500.
  - JCC's signature and approval are the only indication on the face of a petition that a complaint was properly screened and evaluated.

❖The State's PDR, filed June 16, 2017, is currently pending.

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## In re T.K.

### School to Prison Pipeline case?

- See J. Stroud's concurring opinion
- Discussed insufficiency of the evidence of disorderly conduct
- Questions why the petition was filed
- Highlights the need for policy addressing school-based referrals to court

See blog post at On the Civil Side "*In the Matter of T.K.: Does a Student's Use of Profanity in the Hallway Constitute Disorderly Conduct at School?*"

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## Recent Appellate Decisions

*In re D.E.P.*

Handout p. 11

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## In re D.E.P.

**Held:** A trial court is not required by G.S. 7B-2512 to make findings of fact addressing each of the G.S. 7B-2501(c) factors.

3. a. The juvenile's delinquency history points are: \_\_\_\_\_ (based on #1 and #2 above).
- b. The juvenile's delinquency history level is ☐ low (0-1 point) ☐ medium (2-3 points) ☐ high (4+ points).
4. The court received and considered ☒ predisposition report ☒ risk assessment ☒ needs assessment and incorporates the contents of the ☒ predisposition report ☒ risk assessment ☒ needs assessment by reference. (If the report is incorporated, a copy of the report **MUST** be attached to the order.)
5. Other Findings: (Continue on attached pages if necessary. State any findings regarding the seriousness of the offense(s); the need to hold the juvenile accountable; the importance of protecting the public; the degree of the juvenile's culpability; the juvenile's rehabilitative and treatment needs; and available and appropriate resources.) \_\_\_\_\_

Written Findings on G.S. 7B-2501(c) factors go here . . . *maybe*

- ☐ 6. The juvenile has received a Level 3 disposition previously. G.S. 7B-2508(d).
- ☐ 7. The juvenile has been adjudicated for a minor offense and has four or more prior offenses of delinquency as defined in G.S. 7B-2508(g).

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## Conflicting Lines of Cases

### *IN RE V.M.*, 211 N.C. APP. 389 (2011)

▪ **"We have previously held"** that trial court must make findings referencing G.S. 7B-2501(c) factors

1. Seriousness of the offense
2. Need to hold juvenile accountable
3. Importance of protecting public
4. Juvenile's degree of culpability
5. Juvenile's rehabilitative and treatment needs

### *IN RE D.E.P.*, \_ N.C. APP. \_ (FEB. 7, 2017)

▪ Court stated that it did not overrule *V.M.*

- *V.M.*'s holding is based on a mischaracterization of *In re Ferrell*
- Neither *Ferrell* nor *V.M.* directly decides this issue
- Thus, court stated no conflict exists

## When a conflict exists

- Earlier precedent controls
  - *In re Appeal from Civil Penalty*, 324 N.C. 373 (1989)
  - *State v. Jones*, 358 N.C. 473 (2004)
- Courts should continue to make G.S. 7B-2501(c) findings until NC S. Ct. resolves issue

See blog post at On the Civil Side "N.C. Court of Appeals: Disposition Orders Do Not Require Written Findings on G.S. 7B-2501(c) Factors"

## In re D.E.P.

**Held:** Trial court did not abuse its discretion in ordering a Level 3 Commitment.

- juvenile had multiple probation violations
- the trial court continued him on probation several times
- the trial court warned the juvenile at his last probation hearing that he would be sent to training school for the next VOP

## Recent Appellate Decisions

*In re S.A.A.*

Handout p. 13

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## In re S.A.A.

- 13-year-old Orange Co. middle school student
- Went trick-or-treating on Halloween night in Southern Village
- Several kids were wearing "glow gloves" with fluorescent liquid
- The juvenile rubbed glowing liquid from his glove on trees, signs, and other kids
- Two girls accused juvenile of touching their "boobs"
- Juvenile denied allegations but admitted wiping the liquid on their shoulders
- Juvenile was charged with simple assault and sexual battery (x2)

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## In re S.A.A.

**Held:** The State presented insufficient evidence of "sexual purpose" to prove sexual battery.

- Sexual battery requires sexual contact "for the purpose of sexual arousal, sexual gratification, or sexual abuse"
- With children, sexual purpose may not be inferred from the act itself
- Requires "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting"
- Such evidence did not exist in this case

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## Recent Appellate Decisions

Unpublished cases addressing Subject-Matter Jurisdiction

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## Subject Matter Jurisdiction

**Held:** The trial court lacks subject matter jurisdiction when a juvenile petition is improperly amended and fails to allege the adjudicated offense.

- *In re T.Z.J.* – petition improperly amended from 1<sup>st</sup> degree statutory sex offense to indecent liberties between children (Handout p. 14)
- *In re M.A.P.* – petition charged assault inflicting serious injury but trial court adjudicated juvenile delinquent for simple affray (Handout pp. 15-16)
- *In re S.M.M.* – petition charged possession of a schedule I controlled substance but juvenile entered an admission to possession of drug paraphernalia (Handout p. 18)

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## Juvenile Justice Reinvestment Act “Raise the Age”

S.L. 2017-57

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## Juvenile Age Increase

### Effective Dec. 1, 2019

- Under amended G.S. 7B-1501(7), "delinquent juvenile" includes 16 and 17-year-olds who commit crimes or infractions or indirect contempt by a juvenile, but it **excludes motor vehicle offenses**
- Juveniles are excluded from juvenile court under amended G.S. 7B-1604:
  1. on or after the juvenile's 18th birthday
  2. after the juvenile has been transferred to and convicted in superior court for a prior offense
  3. after the juvenile has been **convicted of a felony or misdemeanor, including motor vehicle offenses, in district or superior court**

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## Maximum Age of Jurisdiction

### Effective Dec. 1, 2019

- For 16-year-olds, until age 19
- For 17-year-olds, until age 20

Beyond maximum age of jurisdiction,

- Court has indefinite jurisdiction over felonies and related misdemeanors to conduct PC and transfer hearings and either transfer the case to superior court or dismiss the petition

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## Expedited Transfer for 16 & 17 yr olds

### Effective Dec. 1, 2019

- For Class A-G felonies, transfer is mandatory upon:
  - notice of an indictment, or
  - a finding of probable cause after notice and a hearing
- For Class H or I felonies, transfer requires a transfer hearing

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## Juvenile Gang Suppression

### Effective Dec. 1, 2019

- Requires JCC's to begin conducting gang assessments during intake
- Results of the gang assessment must be kept in court counselor's record
- New definitions of "*criminal gang*," "*criminal gang activity*," & "*criminal gang member*" in new G.S. 7B-2508.1
- Requires enhancement of juvenile's disposition level, if court finds offense was committed as part of criminal gang activity

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## Greater Protections for Victims

### Effective Oct. 1, 2017

- Must receive notification of filing decision, reasons for the decision, and whether matter was closed, diverted, or retained
- Must also notify victim of right to have prosecutor review filing decision under amended G.S. 7B-1704 and G.S. 7B-1705
- Under new G.S. 143B-806(b)(14a), DACJ must develop system for informing victims about status of pending complaints and right to review the filing decision

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## Greater Law Enforcement Access to Information

### Effective Oct. 1, 2017

- DJJ must begin tracking "**consultations with law enforcement**" that do not result in the filing of a petition. See amended 7B-3001(a)
- JCC's must share with LEO's information related to juvenile's delinquency record & consultations with LEO's:
  - Upon request
  - When it is for the purpose of assisting officers during the investigation of an incident that could lead to the filing of a complaint
- But, new G.S. 7B-3001(a1) does not allow access to records
- Information must remain confidential

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## Jwise Access

### Effective July 1, 2017

- By July 1, 2018, AOC must expand access to Jwise to include prosecutors and juvenile defense attorneys
- Access is limited to records related to juvenile delinquency proceedings
- AOC must also develop statewide inquiry access for Jwise users

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## School-Justice Partnerships

### Effective July 1, 2017

- New G.S. 7A-343(9g) authorizes the Director of the AOC to prescribe policies and procedures for statewide implementation of school-justice partnerships
- For the purpose of reducing in-school arrests, out-of-school suspensions, and expulsions

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## Training for Law Enforcement

### Effective July 1, 2017

- New juvenile justice training requirements for both entry-level LEO's and veterans
- To be developed by NC Criminal Justice Education and Training Standards Commission and the NC Sheriffs' Education and Training Standards Commission in conjunction with DACJJ

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## Juvenile Jurisdiction Advisory Committee

### Effective July 1, 2017

- 21-member committee within DACJJ will study and plan for the implementation
- Interim report due to the General Assembly by March 1, 2018
- Final report by January 15, 2023
- **The committee must include the Honorable Eric J. Zogry**

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## Questions?

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## 2016-2017 JUVENILE DELINQUENCY UPDATE

### Recent Legislation and Appellate Decisions

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## Part 1: Recently Enacted Legislation

### **S.L. 2017-57 (S 257)** – **2017 State Budget / Juvenile Justice Reinvestment Act**

The Juvenile Justice Reinvestment Act, included in the 2017 state budget, increases the age of juvenile court jurisdiction to include crimes committed by 16 and 17-year-olds, except for motor vehicle offenses, and expedites transfer to adult court for 16 and 17-year-olds who commit Class A-G felonies. The Act also makes several other changes to the Juvenile Code, which are summarized below.

#### *Definitions*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Delinquent Juvenile** – As defined by amended G.S. 7B-1501(7) and amended G.S. 143B-805(6), the term “delinquent juvenile” includes 16 and 17-year-olds who commit crimes or infractions, excluding motor vehicle offenses, or indirect contempt by a juvenile as defined by G.S. 5A-31. Amended G.S. 143B-805(6) also includes indirect contempt by a juvenile as a delinquent offense for juveniles who are under 16, consistent with G.S. 7B-1501(7).
- **Victim** – New G.S. 7B-1501(27a) defines a “victim” as an individual or entity against whom a crime or infraction has been committed by a juvenile when there are reasonable grounds that the allegations are true. For purposes of Article 17 (screening of complaints), a “victim” also includes the parent, guardian, or custodian of a victim who is under 18.

#### *Juvenile Court Jurisdiction*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Offenses committed before age 16** – Under amended G.S. 7B-1601(b) and (c), jurisdiction continues until age 18, unless terminated earlier by the court or the Juvenile Code provides otherwise. If a disposition cannot be entered before the juvenile turns 18, the court retains jurisdiction to conduct probable cause and transfer hearings and either transfer the case to superior court or dismiss the petition.
- **Offenses committed at age 16** – Under new G.S. 7B-1601(b1) and (c1), jurisdiction continues until age 19, unless terminated earlier by the court or the Juvenile Code provides otherwise. If a disposition cannot be entered before the juvenile turns 19, the court retains jurisdiction to conduct probable cause and transfer hearings and either transfer the case to superior court or dismiss the petition.
- **Offenses committed at age 17** – Under new G.S. 7B-1601(b1) and (c1), jurisdiction continues until age 20, unless terminated earlier by the court or the Juvenile Code provides otherwise. If a disposition cannot be entered before the juvenile turns 20, the court retains jurisdiction to conduct probable cause and transfer hearings and either transfer the case to superior court or dismiss the petition.
- **Continuing jurisdiction over felonies and related misdemeanors** – Under new G.S. 7B-1601(d1), after a juvenile reaches age 19 (for offenses committed at age 16) or age 20 (for offenses committed at age 17), the juvenile court’s original jurisdiction over felonies and related misdemeanors continues indefinitely for the sole purpose of conducting

probable cause and transfer hearings and either transferring the case to superior court or dismissing the petition.

- **Adult Prosecution** – Under amended G.S. 7B-1604, a juvenile must be prosecuted as an adult for all offenses committed (1) on or after the juvenile's 18th birthday, (2) after the juvenile has been transferred to and convicted in superior court for a prior offense, and (3) after the juvenile has been convicted of a felony or misdemeanor, including motor vehicle offenses, in district or superior court.

*Probable Cause and Transfer to Superior Court*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Probable Cause Hearing** – Amended G.S. 7B-2202 provides that a probable cause hearing is required for all felonies committed by a juvenile at age 13 or older, except for cases subject to mandatory transfer by indictment under new G.S. 7B-2200.5. When transfer is not mandatory, the court may proceed to a transfer hearing or set a date for that hearing after a finding of probable cause. The juvenile is entitled to at least 5 days notice of the transfer hearing.
- **Transfer of 13, 14, and 15-year-olds** – Amended G.S. 7B-2200 provides that a transfer hearing is required to transfer jurisdiction to superior court for a felony committed by a juvenile at age 13, 14, or 15, except for Class A felonies which are subject to mandatory transfer upon a finding of probable cause.
- **Transfer of 16 and 17-year-olds** – New G.S. 7B-2200.5 creates an expedited process to transfer jurisdiction to superior court for certain felonies committed by 16 and 17-year-olds.
  - Transfer to superior court is mandatory for a Class A-G felony committed by a juvenile at the age of 16 or 17 after (1) notice that an indictment has been filed, or (2) the court enters a finding of probable cause after notice and a hearing.
  - Transfer to superior court for a Class H or I felony committed by a juvenile at the age of 16 or 17 requires notice, a finding of probable cause, and a transfer hearing.
- **Pre-Trial Release** – Amended G.S. 7B-2603(b) removes language regarding procedures for the pre-trial release and detention of juveniles who appeal from an order transferring jurisdiction to superior court. The statute now provides that any detention of the juvenile pending release shall be in accordance with G.S. 7B-2204.
- **Sex Offender Registration** – Amended G.S. 14-208.6B provides that registration requirements for juveniles who are transferred to superior court and convicted of a sexually violent offense or an offense against a minor as defined in G.S. 14-208.6 are applicable when transfer occurs pursuant to either G.S. 7B-2200 or new G.S. 7B-2200.5.

*Disposition*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Dispositional Alternatives** – Amended G.S. 7B-2506 sets new age limits for certain dispositional alternatives.
  - G.S. 7B-2506(1), which authorizes out of home placement options for juveniles, including placement of the juvenile in the custody of a county department of social services, is now applicable to any juvenile who is under the age of 18.
  - G.S. 7B-2506(2), which authorizes a court to excuse a juvenile from compliance with the compulsory school attendance law, is applicable only to juveniles who are under the age of 16.
- **Delinquency History Level** – Amended G.S. 7B-2507 provides for including prior criminal convictions in determining a juvenile’s delinquency history level. Prior misdemeanor and felony convictions are assigned the same number of points as prior delinquency adjudications of the same class of offense. Other conforming changes provide that the rules regarding multiple prior delinquency adjudications obtained in one court session, classification of prior adjudications from other jurisdictions, and proof of prior adjudications also apply to prior convictions.
- **Commitment to YDC**
  - *Offenses committed before age 16* – Under new G.S. 7B-2513(a1), the previous age limits for a juvenile’s maximum commitment term are applicable to offenses committed by a juvenile prior to age 16.
  - *Offenses committed at age 16* – New G.S. 7B-2513(a2) provides that a commitment term for an offense committed at age 16 may not exceed the juvenile’s 19th birthday.
  - *Offenses committed at age 17* – New G.S. 7B-2513(a3) provides that a commitment term for an offense committed at age 17 may not exceed the juvenile’s 20th birthday.
  - *Maximum Commitment* – New G.S. 7B-2513(a4) sets forth the existing rule that a juvenile’s maximum commitment term may not exceed the maximum adult sentence for the same offense unless the Division determines that the commitment should be extended to continue a plan of care or treatment, as provided by G.S. 7B-2515.
- **Notification of Extended Commitment**
  - *Offenses committed before age 16* – G.S. 7B-2515(a) was amended to make the existing rules requiring written notice of an extended commitment applicable only to offenses committed by a juvenile prior to age 16.
  - *Offenses committed at age 16* – New G.S. 7B-2515(a1) requires that written notice of an extended commitment must be provided to the juvenile and the juvenile’s parent, guardian, or custodian at least 30 days before the end of the maximum commitment period or 30 days before the juvenile’s 19th birthday. The notice must include the proposed additional commitment period, the basis for the proposed extended commitment, and the plan for future care or treatment.
  - *Offenses committed at age 17* – New G.S. 7B-2515(a2) requires that written notice of an extended commitment must be provided to the juvenile and the juvenile’s parent, guardian, or custodian at least 30 days before the end of the maximum commitment period or 30 days before the juvenile’s 20th birthday. The

notice must include the proposed additional commitment period, the basis for the proposed extended commitment, and the plan for future care or treatment.

- **Right to Review Hearing** – Upon notice of a proposed extended commitment pursuant this section, the juvenile and the juvenile’s parent, guardian, or custodian may request review by the court.

### *Juvenile Gang Suppression*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Gang Assessment** – Amended G.S. 7B-1702 requires a juvenile court counselor to conduct a gang assessment during the evaluation of a complaint to determine whether it should be filed as a juvenile petition. Section 16D.4.(ff), which became effective on July 1, 2017, directs the Division of Adult Correction and Justice to develop a gang assessment instrument in consultation with the administrator of the GangNET database maintained by the NC State Highway Patrol, and with other entities, if deemed necessary.
- **Gang Assessment Results** – Amended G.S. 7B-3001(a) provides that the juvenile court counselor’s record must contain the results of the gang assessment.
- **Enhancement of Disposition Level** – New G.S. 7B-2508(g1) creates an exception to the disposition chart set out in G.S. 7B-2508(f) which requires that a juvenile’s disposition level be increased one level higher than provided for by the chart when the court finds that the adjudicated offense was committed as part of criminal gang activity, as defined by new G.S. 7B-2508.1.
- **Criminal Gang Activity Definitions** – New G.S. 7B-2508.1 creates the following definitions which apply to Article 25 of the Juvenile Code:
  - **Criminal gang** – New G.S. 7B-2508.1(1) defines the term “criminal gang” as any ongoing association of three or more persons, whether formal or informal, that (1) engages in criminal or delinquent acts as one of its primary activities and (2) shares a common name, identification, or other distinguishing characteristics such as signs, symbols, tattoos, graffiti, or attire. The term does not include an association of three or more persons who are not engaged in criminal gang activity.
  - **Criminal gang activity** – New G.S. 7B-2508.1(2) defines the term “criminal gang activity” to include the commission of, attempted commission of, or solicitation, coercion, or intimidation of another person to commit (1) any NC Controlled Substances Act offense or (2) any criminal offense under Chapter 14 of the General Statutes, excluding certain enumerated offenses, when either of the following conditions is met:
    - The offense is committed with the intent to benefit, promote, or further the interests of a criminal gang or increase a person’s own standing within a criminal gang.
    - The participants in the offense are identified as criminal gang members acting individually or collectively to further any purpose of a criminal gang.
  - **Criminal gang member** – New G.S. 7B-2508.1(3) defines the term “criminal gang member” as any person who meets three or more of the nine criteria set forth in the statute.



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*Transportation of Juveniles*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Transportation to Juvenile Facilities** – New G.S. 143B-806(b)(20) grants authority to the Secretary of the Division of Adult Correction and Juvenile Justice to provide for the transportation to and from State or local juvenile facilities of any person under the jurisdiction of juvenile court.

*Felony Notification of Schools*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Notification of Transfer to Superior Court** – Amended G.S. 7B-3101(a)(2) provides that a juvenile court counselor must provide verbal and written notification to the principal of the juvenile's school if the juvenile's case is transferred to superior court under new G.S. 7B-2200.5.
- **Destruction of Records** – Amended G.S. 115C-404(a) requires a principal who receives confidential juvenile records under G.S. 7B-3100 to destroy them upon notification that the student's case has been transferred to superior court under G.S. 7B-2200 or new G.S. 7B-2200.5 (previously under G.S. 7B-2200).

*Contempt by a Juvenile*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Definition** – Amended G.S. 5A-31(a) provides that contempt by a juvenile may be committed by any juvenile who is at least 6, not yet 18 (previously 16), and has not been convicted of any crime in superior court.
- **Criminal or Civil Contempt by Adults** – Amended G.S. 5A-34(b) provides that criminal and civil contempt procedures set forth in Articles 1 and 2 of Chapter 5A apply to minors who (1) are married or otherwise emancipated or (2) have been previously convicted in superior court of any offense. The amendment removed language which previously made criminal and civil contempt procedures applicable to minors who are 16 or older.

*Contributing to the Delinquency, Abuse, or Neglect of a Minor*

*(effective December 1, 2019, and applicable to offenses committed on or after that date)*

- **Applicability** – Amended G.S. 14-316.1 makes the offense applicable to persons who are at least 18 (previously 16).

*Victim's Rights*

*(effective October 1, 2017, and applicable to complaints filed on or after that date)*

- **Notification of Filing Decision** – Amended G.S. 7B-1703(c) requires a juvenile court counselor to provide written notification to both complainants and victims (previously only complainants) of a decision not to file a complaint as a juvenile petition. The notification must include specific reasons for the decision, whether or not legal sufficiency was found, and whether the matter was closed or diverted and retained. The notification also must inform the complainant and victim of the right to have the decision reviewed by a prosecutor.

- **Request for Review by Prosecutor** – Amended G.S. 7B-1704 makes conforming changes to provide that the procedure for requesting review of a juvenile court’s filing decision applies to both complainants and victims (previously complainants only).
- **Prosecutor’s Review and Decision** – Amended G.S. 7B-1705 makes conforming changes to provide that a prosecutor’s review of a court counselor’s filing decision must include conferences with the complainant, victim, and juvenile court counselor (previously complainant and juvenile court counselor only). A prosecutor also must notify both the complainant and the victim of his or her decision at the conclusion of the review.
- **Victim’s Access to Information** – New G.S. 143B-806(b)(14a) grants authority to the Secretary of the Division of Adult Correction and Juvenile Justice to develop and administer a system to inform victims and complainants about the status of pending complaints and the right to request review under G.S. 7B-1704 of a juvenile court counselor’s decision not to file a complaint.

### *Law Enforcement Access to Information*

*(effective October 1, 2017)*

- **Consultations with Law Enforcement** – Amended G.S. 7B-3001(a) provides that the juvenile court counselor’s record must include the juvenile’s delinquency record and consultations with law enforcement that do not result in the filing of a juvenile petition. \*\*A separate amendment to G.S. 7B-3001(a) also requires the inclusion of a gang assessment as part of this record.
- **Disclosure of Information to Law Enforcement** – New G.S. 7B-3001(a1) authorizes juvenile court counselors to share with law enforcement officers, upon request, information related to a juvenile’s delinquency record or prior consultations with law enforcement for the purpose of assisting officers during the investigation of an incident that could lead to the filing of a complaint. Law enforcement officers may not obtain copies of juvenile records and must maintain the confidentiality of information shared and keep it separately from other law enforcement records, as required by G.S. 7B-3001(b).

### *Electronic Records*

*(effective July 1, 2017)*

- **JWise Access** – Section 16D.4.(y) of the Act requires that by July 1, 2018, the Administrative Office of the Courts (AOC) must expand access to JWise, the automatic electronic information management system for juvenile courts, to include prosecutors and juvenile defense attorneys. Such access must be limited to examining electronic records related to juvenile delinquency proceedings and does not include records related to abuse, neglect, and dependency or termination of parental rights cases. Section 16D.4.(z) requires that by July 1, 2018, the AOC must also develop statewide inquiry access for JWise users that corresponds to the access to juvenile court records authorized by Chapter 7B.

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*School-Justice Partnerships*  
(effective July 1, 2017)

- **Statewide Implementation** – New G.S. 7A-343(9g) authorizes the Director of the AOC to prescribe policies and procedures for chief district court judges to establish school-justice partnerships in collaboration with local law enforcement agencies, local boards of education, and local school administrative units for the purpose of reducing in-school arrests, out-of-school suspensions, and expulsions.

*Juvenile Justice Training for Law Enforcement Officers and Sheriffs*  
(effective July 1, 2017)

- **Entry-level Training** – New G.S. 17C-6(a)(2)(b) and new G.S. 17E-4(a)(2)(b) provide that the minimum standards for entry-level employment established by the NC Criminal Justice Education and Training Standards Commission and the NC Sheriffs' Education and Training Standards Commission must include education and training on juvenile justice issues. The minimum standards must include education and training regarding (1) the handling and processing of juvenile matters for referrals, diversion, arrests, and detention; (2) best practices for handling incidents involving juveniles; (3) adolescent development and psychology; and (4) promoting relationship building with youth as a key to delinquency prevention.
- **In-Service Training** – New G.S. 17C-6(a)(14)(b) and new G.S. 17E-4(a)(11)(b) provide that the minimum standards for in-service training established by both Commissions must include training on juvenile justice issues that includes the same information required for entry-level employment.
- **Instructor Certification** – Amended G.S. 17C-6(a)(15) and amended G.S. 17E-4(a)(12) authorize both Commissions to establish minimum standards for certification of instructors for the entry-level and in-service juvenile justice training for criminal justice officers and sheriffs.
- **Consultation with Juvenile Justice** – Section 16D.4.(dd) directs both Commissions to work with the Division of Adult Correction and Juvenile Justice to establish juvenile justice training.

*Juvenile Jurisdiction Advisory Committee*  
(effective July 1, 2017)

- Sections 16D.4.(kk) through 16D.4.(ss) provide for the establishment of a 21-member Juvenile Jurisdiction Advisory Committee within the Division of Adult Correction and Juvenile Justice to plan for the implementation of these changes. Appointments to the Advisory Committee must be made no later than October 1, 2017. The Advisory Committee must submit an interim report to the General Assembly by March 1, 2018, and must submit a final report by January 15, 2023.

**S.L. 2017-158 (H 236)** – NC AOC Omnibus Bill  
(effective July 21, 2017)

- The Act amends G.S. 7B-3000(d) to authorize the destruction of electronic and mechanical recordings of juvenile hearings pursuant to a court order entered after the time for appeal has expired with no appeal having been taken or pursuant to a retention

schedule approved by the Director of the Administrative Office of the Courts and the Department and Natural and Cultural Resources.

**S.L. 2017-186 (S 344) – Consolidation of Divisions of Adult Correction and Juvenile Justice**  
(effective December 1, 2017)

- New G.S. 143B-630 establishes the Division of Adult Correction and Juvenile Justice within the Department of Public Safety, and new G.S. 143B-800 establishes the Juvenile Justice Section within that division to exercise the powers and duties previously performed by the Division of Juvenile Justice. The act makes conforming changes to numerous statutes to reflect the organizational structure. (*summary by John Rubin*)

**Part 2: Recent Published North Carolina Appellate Court Decisions**

*State v. Saldierna*, \_\_ N.C. App. \_\_ (July 18, 2017).

Held: Vacated, Reversed, and Remanded.

The juvenile, age 16, was arrested for his alleged involvement in recent burglaries of Charlotte area homes. The arresting officers took him to a police station where a detective provided him with copies of a Juvenile Waiver of Rights Form in both English and Spanish and read the English version to him. The juvenile initialed the waiver on the English version of the form but then immediately asked, “Um, can I call my mom,” and the interrogating officer allowed the juvenile to use her cell phone. The juvenile was unable to reach his mother and returned to the booking area where the interrogation resumed. During the interrogation, he confessed. The juvenile moved to suppress his confession on the ground that it was obtained in violation of his rights under *Miranda* and G.S. 7B-2101, which the trial court denied.

- **Waiver of Rights.** On remand from the NC Supreme Court’s decision in *State v. Saldierna*, \_\_ N.C. \_\_, 794 S.E.2d 474 (2016), the Court of Appeals reversed the trial court’s order denying the juvenile’s motion to suppress and vacated his convictions because the waiver of his statutory and constitutional rights during a custodial interrogation was involuntary. Because the juvenile’s waiver of rights was not made knowingly, willingly, and understandingly, the trial court erred by denying the juvenile’s motion to suppress. Emphasizing that “the totality of the circumstances must be carefully scrutinized” when evaluating waivers by juveniles, the court concluded that the trial court’s findings lacked such scrutiny. Also, the trial court’s findings that the juvenile understood the interrogating officer’s questions and statements regarding his rights were not supported by the evidence. The juvenile was 16-years-old with an 8th grade education and his primary language was Spanish. Although he could write in English, he had difficulty reading it and understanding it as spoken. The interrogation occurred in the booking area of the Justice Center in the presence of three officers, and there was no evidence the juvenile had any prior experience with law enforcement officers or understood the consequences of speaking with them. Also, the transcript of the recorded interrogation contains several “unintelligible remarks or non-responses by defendant” which do not confirm that he understood what was being asked. Despite the “express written waiver” form executed by the juvenile, the court declined to “give any weight to recitals, like the juvenile rights waiver form signed by defendant, which merely formalized constitutional requirements.” The court explained,

[t]o be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but *in fact*. It should be unequivocal and unassailable when the subject is a juvenile. The fact that the North Carolina legislature recently raised the age that juveniles can be questioned without the presence of a parent from age fourteen to age sixteen is evidence the legislature acknowledges juveniles' inability to fully and voluntarily waive essential constitutional and statutory rights.

Furthermore, the juvenile's request to call his mother immediately after signing the waiver stating that he was giving up his rights "shows enough uncertainty, enough anxiety on the juvenile's behalf, so as to call into question whether, under all the circumstances present in this case, the waiver was (unequivocally) valid."

*In re T.K.*, \_\_ N.C. App. \_\_, 800 S.E.2d 463 (May 16, 2017).

*\*On June 16, 2017, the State filed a petition for discretionary review in the N.C. Supreme Court. Held: Vacated and Dismissed.*

In a disorderly conduct case, the adjudication was reversed where the petition was not signed by a juvenile court counselor nor marked as "Approved for filing."

- Subject Matter Jurisdiction.** A petition alleging delinquency that does not include the signature of a juvenile court counselor (or other appropriate State representative) and the language "Approved for Filing" fails to invoke the trial court's subject matter jurisdiction. The legislature, by enacting the Juvenile Code, imposed specific requirements that must be satisfied before a district court obtains jurisdiction in juvenile cases. G.S. 7B-1703(b) provides that before a juvenile petition alleging delinquency may be filed, it must contain the signature of a juvenile court counselor, the date, and the words "Approved for Filing." No prior cases have addressed whether the signature and "Approved for Filing" language are prerequisites to jurisdiction in a delinquency case. However, the court held in *In re Green*, 67 N.C. App. 501 (1984), that the trial court lacked subject matter jurisdiction over a petition alleging abuse and neglect where the petition was not signed and verified by the petitioner, as required by the Juvenile Code. Based upon this precedent, the petition in this case was fatally defective and failed to invoke subject matter jurisdiction. The court declined to extend the holding of *In re D.S.*, 364 N.C. 184 (2010), to recognize the noncompliance with the signature and "Approved for Filing" language as non-jurisdictional errors. *D.S.* held that the timelines imposed by G.S. 7B-1703(b) for filing a juvenile petition are not prerequisites to subject matter jurisdiction. However, extending *D.S.* in this context would conflict with a statutory purpose of the Juvenile Code – "to provide an effective system of intake services for the screening and evaluation of complaints." G.S. 7B-1500. The court counselor's signature and approval of the petition is the only indication on the face of a petition that a complaint was properly screened and evaluated.
- Concurring Opinion.** The concurring opinion found that even if the petition was not fatally defective, the adjudication and disposition orders would need to be reversed because there was no evidence of disorderly conduct. The juvenile was the victim of an assault by another student who walked up to him and punched him the face as he stood in the hallway waiting for school to begin. The juvenile fell to the floor and unsuccessfully tried to stand as the other student kept punching him but threw one or two punches at his attacker before school officials broke up the fight. A behavioral specialist, who witnessed

the entire incident, escorted the juvenile to his office and heard him utter “profanity” as they walked down the hallway. When he instructed the juvenile to stop “cursing,” he stopped. The adjudication of delinquency was based entirely on this use of “profanity.” However, there is no evidence that anyone other than the behavioral specialist heard the profanity or of the particular words the juvenile used. Disorderly conduct at school under G.S. 14-288.4(a)(6) requires both an intent to cause a disturbance and an actual disturbance of school instruction. Here, the juvenile’s “profanity” was a response to an attack by another student, not an intent to disturb the educational process, and no actual disturbance occurred. Moreover, both the adjudication and disposition orders failed to contain the necessary findings required by the Juvenile Code.

*In re D.E.P.*, \_\_\_ N.C. App. \_\_\_, 796 S.E.2d 509 (Feb. 7, 2017).

The trial court was not required by G.S. 7B-2512 to make findings of fact that addressed each of the G.S. 7B-2501(c) factors and did not abuse its discretion in ordering a Level 3 commitment based on the juvenile’s repeated violations of probation.

Held: Affirmed.

- Disposition Order Findings.** The court held that prior appellate decisions finding reversible error based on a trial court’s failure to make written findings on the G.S. 7B-2501(c) factors resulted from a mischaracterization of the holding in *In re Ferrell*, 162 N.C. App. 175 (2004), and subsequent repetition of this error. In *Ferrell*, the court set aside the portion of a disposition order that transferred custody of the juvenile from his mother to his father. The opinion in *Ferrell* cited the requirements of G.S. 7B-2501(c) and G.S. 7B-2512 in finding that the disposition order contained insufficient findings to support the transfer of custody. However, *Ferrell* did not involve any consideration of the court’s determination of the appropriate disposition level nor did it discuss the extent to which a disposition order must reference the factors set out in G.S. 7B-2501(c). Nonetheless, in a later published opinion, *In re V.M.*, 211 N.C. App. 389, 391-92 (2011), the court reversed a disposition order, stating “we have previously held that the trial court is required to make findings demonstrating that it considered the [G.S.] 7B-2501(c) factors in a dispositional order[,]” and cited *Ferrell* as the relevant authority. The court noted that although this mischaracterization of *Ferrell* has been repeated in several cases, *Ferrell* did not actually decide the issue of the trial court’s duty to make findings referencing the G.S. 7B-2501(c) factors, nor did *V.M.* As a result, the court concluded that its decision does not overrule any decision of a prior panel of the Court of Appeals. Finally, although the trial court was not required to make written findings that referenced all of the factors in G.S. 7B-2501(c), the trial court’s findings indicated that it did in fact consider these factors.
- Level 3 Commitment Order.** The trial court did not abuse its discretion in entering a Level 3 Disposition and Commitment Order where the evidence showed the juvenile had multiple probation violations, the trial court continued him on probation several times, and the trial court had warned the juvenile at his last probation violation hearing that if he failed to comply with probation again, he would be sent to training school.



*State v. Saldierna*, \_\_ N.C. \_\_, 794 S.E.2d 474 (Dec. 21, 2016).

Held: Reversed.

The Supreme Court reversed the decision of the Court of Appeals in *State v. Saldierna*, \_\_ N.C. App. \_\_, 775 S.E.2d 326 (2015), which held that the trial court erred by denying the juvenile's motion to suppress his incriminating statement.

- **Invocation of Juvenile Rights.** The 16-year-old defendant's request to call his mother at the beginning of the police interrogation was not a clear invocation of his right to consult a parent or guardian before being questioned. After the interrogating officer read defendant his *Miranda* and juvenile warnings, defendant initialed and signed a Juvenile Waiver of Rights form indicating that he desired to answer questions without a lawyer, parent, or guardian present. He then asked, "Um, can I call my mom," and the interrogating officer allowed defendant to use her cell phone to make the call. Defendant did not reach his mother but spoke to someone else and then returned to the booking area where the interrogation resumed. During the interrogation, defendant confessed. The trial court denied defendant's motion to suppress his statement on grounds that it was obtained in violation of his *Miranda* rights and his juvenile rights under G.S. 7B-2101. The Court of Appeals reversed the trial court's order, concluding that although the defendant's request to call his mother was ambiguous, interrogating officers had a duty to clarify whether the juvenile was invoking his statutory rights before proceeding with the interrogation. Reversing the Court of Appeals, the Supreme Court noted that a juvenile's statutory right to parental presence during a custodial interrogation is analogous to the constitutional right to counsel. In *Davis v. United States*, 512 U.S. 452 (1994), the U.S. Supreme Court held that in order to invoke the right to counsel during an interrogation, the defendant must do so unambiguously and officers have no duty to clarify ambiguous statements. The N.C. Supreme Court has previously applied *Davis* to an interrogation involving a juvenile defendant and concluded that law enforcement officers were not required to cease questioning when the defendant made an ambiguous statement implicating his right to remain silent. See *State v. Golphin*, 352 N.C. 364 (2000). Thus, the *Davis* analysis applies to juvenile interrogations, and without an unambiguous, unequivocal invocation of the juvenile's statutory rights, officers have no duty to ask clarifying questions or cease questioning. Here, the defendant simply asked to call his mother and gave no indication that he wanted her present for his interrogation. Therefore, defendant's statutory rights were not violated. Because the Court of Appeals erroneously determined that defendant's rights were violated, it did not consider whether defendant knowingly, willingly, and understandingly waived his rights, as required by G.S. 7B-2101(d) for defendant's confession to be admissible. Therefore, the case was remanded to the Court of Appeals to consider the validity of defendant's waiver.
- **Dissent.** In her dissent, Justice Beasley found that the juvenile's request to call his mother was an unambiguous invocation of his statutory right to have a parent present during custodial interrogation. Assuming the request was ambiguous, she agreed with the conclusion of the Court of Appeals that officers must ask clarifying questions when a juvenile is attempting to invoke his or her rights, noting that children are more vulnerable during interactions with the police due to their immaturity and inability to fully understand their rights. Her dissent also emphasized that the legislature attempted to afford juveniles greater protection in G.S. 7B-2101(a)(3) than the rights afforded by

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*Miranda*, and thus, *Miranda* precedent should not control the analysis related to a juvenile's right to have a parent present.

[\*In re S.A.A.\*](#), \_\_ N.C. App. \_\_, 795 S.E.2d 602 (Dec. 20, 2016).

Held: Vacated in part and remanded.

In a simple assault and sexual battery case, the trial court erred by denying the juvenile's motion to dismiss the sexual battery petitions for insufficient evidence of a sexual purpose. The 13-year-old juvenile was adjudicated delinquent for two counts each of simple assault and sexual battery for approaching two girls on Halloween night and draping his arms around their shoulders in order to rub a glowing liquid on their shirts. One of the girls testified the juvenile touched her "boobs" over her sweatshirt.

- **Issue Preservation.** The juvenile's argument regarding the insufficiency of the evidence was not properly preserved because his attorney did not move to dismiss at the close of all the evidence. However, because the court concluded there was insufficient evidence to support the sexual battery adjudication, it invoked Rule 2 to review the merits of the appeal to prevent manifest injustice.
- **Sufficiency of the Evidence.** The state presented insufficient evidence that the juvenile touched the girls' breasts for a sexual purpose. When children are involved, the purpose cannot be inferred from the act itself. There must be "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting." In this case, the juvenile was 13-years old, the girls were both 11, and all three attended the same middle school. The juvenile denied ever touching the girls' breasts, which was corroborated by a witness. The incident occurred on a public street around numerous other juveniles who were trick or treating and acting "crazy," as kids might be expected to do on Halloween night. Also, no evidence suggested that the juvenile made any remarks to the girls on that night or on previous occasions to suggest that he had a sexual motivation for touching them.

[\*State v. Watson\*](#), \_\_ N.C. App. \_\_, 792 S.E.2d 171 (Oct. 18, 2016).

Held: Affirmed.

In an attempted robbery case, the trial court did not err by denying the 16-year-old defendant's motion to suppress statements he made to a police officer outside the presence of his parent.

- **Invocation of Juvenile Rights.** After executing an arrest warrant, officers placed defendant in custody and transported him to a local precinct where he was interrogated by a police detective. Prior to interrogating defendant, the detective read defendant his *Miranda* and juvenile rights from a "Juvenile Waiver of Rights" form. The bottom of the form contained two separate checkboxes specifying either that the juvenile elected to answer questions: (1) in the presence of a lawyer, parent, guardian, or custodian, or (2) without a lawyer, parent, guardian, or custodian present. In the first checkbox, the detective filled in the name of defendant's mother as the person who was present with defendant during the questioning. No blank spaces were filled in the second checkbox which contained the waiver of rights. The juvenile placed his initials beside each right listed on the form and next to the first checkbox, erroneously indicating that his mother was present. The appellate court found there was evidence to support the trial court's findings of fact that defendant did not request the presence of his mother and that his initial beside the first checkbox was merely an error. These findings support the trial



court's conclusion that defendant did not invoke his right to have his mother present during questioning. The court also rejected defendant's argument that the trial court erred by denying his motion to suppress because the detective failed to clarify an ambiguous invocation of his statutory right to have a parent present, as required by [\*State v. Saldierna\*](#), \_\_ N.C. App. \_\_, 775 S.E.2d 326, *disc. review allowed*, 368 N.C. 356 (2015). Because the Court of Appeals' decision in *Saldierna* was currently pending review by the N.C. Supreme Court pursuant to the state's petition for discretionary review, the issue is still unsettled. Moreover, the court found that *Saldierna* is inapplicable because defendant did not make a statement, ambiguous or otherwise, invoking his right to have a parent present in this case.

### Part 3. Recent Unpublished North Carolina Appellate Court Decisions

[\*In re T.Z.J.\*](#), \_\_ N.C. App. \_\_ (July 18, 2017) (unpublished).

Held: Vacated.

- **Subject Matter Jurisdiction.** The trial court lacked subject matter jurisdiction to enter an adjudication of delinquency where the petition was improperly amended to charge a different offense. The petition originally alleged the juvenile committed first-degree statutory sexual offense, in violation of G.S. 14-27.4(a)(1). However, the trial court allowed the State to amend the petition to allege indecent liberties between children, in violation of G.S. 14-202.2, which is not a lesser-included offense of first-degree statutory sexual offense. Therefore, the amendment was improper and the court lacked jurisdiction to adjudicate the juvenile delinquent on the amended charge. The juvenile's failure to object did not waive the defect because he could not consent to subject matter jurisdiction.

[\*In re R.M.\*](#), \_\_ N.C. App. \_\_ (April 18, 2017) (unpublished).

The juvenile appealed his adjudications of delinquency for committing two counts of robbery with a dangerous weapon. Following the adjudication hearing, the trial judge announced her findings in open court but did not include those findings in a written adjudication order.

Held: Vacated and remanded.

- **Adjudication Order Findings.** G.S. 7B-2411 requires the trial court to enter a written order stating that the allegations have been proven beyond a reasonable doubt, the date of the offense, the misdemeanor or felony classification of the offense, and the date of the adjudication. The Court of Appeals has previously held that the failure of the adjudication order to state findings that were made "beyond a reasonable doubt," although stated in open court, requires remand. *In re J.J., Jr.*, 216 N.C. App. 366, 372 (2011). Because the trial judge in this case announced her findings orally but did not enter a written order which contained those findings, the adjudication order was vacated and remanded for the entry of a new order.

[\*In re R.A.S.\*](#), \_\_ N.C. App. \_\_ (March 7, 2017) (unpublished).

The juvenile, a high school student, appealed his adjudication of delinquency for committing a sexual battery based on allegations that he touched and rubbed the victim's chest and buttocks without her permission in the high school band's locker room.

Held: Vacated.

- **Sexual Battery Allegations.** The trial court lacked subject matter jurisdiction where the juvenile petition failed to name the alleged victim of the sexual battery. A juvenile petition serves the same function as a criminal indictment and must allege every element of an offense with sufficient specificity to notify the accused of the charged conduct. Pursuant to G.S. 15-144.2(a), an indictment or petition alleging a sex offense must contain the victim's name in order to be valid. In this case, the petition alleged only that the juvenile "touch[ed] *the victim's* breast" but did not include her name, initials, or any other identification. By failing to name the victim, the petition was fatally defective, and thus, failed to evoke the court's jurisdiction. *See In re M.S.*, 199 N.C. App. 260 (2009) (vacating first-degree sexual offense adjudication because the petition failed to allege the name of the child victim).

*In re J.M.C.*, \_\_ N.C. App. \_\_ (Nov. 15, 2016) (unpublished).

The juvenile was adjudicated delinquent for committing an assault with a deadly weapon inflicting serious injury resulting from an altercation at a bar in which he stabbed the victim.

Held: Affirmed in part; remanded in part; dismissed in part.

- **Motion to Dismiss/Identity of Perpetrator.** The state presented sufficient evidence that the juvenile was the perpetrator of the offense. A detective initially identified the juvenile after viewing a videotape from the bar where the incident occurred. The victim also viewed the videotape on the night of the incident and identified the juvenile as his attacker and again identified the juvenile in court. The juvenile's attorney argued that the "unreliable witness testimony" was from a video that did not show the attacker's face and the victim had been drinking alcohol on the night of the incident. The juvenile also presented four alibi witnesses who testified the juvenile was at home asleep during the incident. The Court of Appeals rejected these arguments noting that, in a motion to dismiss, all contradictions are resolved in favor of the state.
- **Disposition Order Findings.** The trial court's disposition order failed to include written findings demonstrating that it considered the factors set forth in G.S. 7B-2501(c). Although the pre-printed findings demonstrated the trial court considered the first factor, the seriousness of the offense, the order did not show the court considered factors two through five. The court left the "Other Findings" section, which is designated for findings on the G.S. 7B-2501(c) factors, blank. Even though the order incorporated the predisposition report, risk assessment, and needs assessment, those reports were not attached to the disposition order and could not be considered by the appellate court.
- **Release Pending Appeal.** The court dismissed the juvenile's argument regarding the trial court's failure to order his release pending appeal or enter compelling reasons for denying release because the juvenile failed to give notice of appeal from that order.

*In re M.A.P.*, \_\_ N.C. App. \_\_ (Sept. 20, 2016) (unpublished).

The 12-year-old juvenile was part of a crowd of approximately twenty students who surrounded a 13-year-old boy, as he walked home from school. After exchanging combative words with the juvenile, the boy punched the juvenile in the face and the two began fighting. The boy ultimately ran across the street in an attempt to escape, but another person in the crowd followed him and knocked him to the ground. After he fell, several others began kicking him in the back and head. The boy conceded at the hearing that the juvenile did not hit him again after he ran across the

street. After the attack, he was diagnosed with a “severe concussion” and had several bruises and scrapes on his back, knees, arms and neck, and bumps on the back of his head. The juvenile was charged with assault inflicting serious injury. At the adjudication hearing, the trial court granted the juvenile’s motion to dismiss the assault based on insufficient evidence that the juvenile inflicted serious injury. However, the trial court adjudicated the juvenile delinquent for committing a simple affray.

Held: Vacated.

- **Appellate Jurisdiction.** The court had jurisdiction to hear the appeal even though the juvenile did not give oral notice of appeal and filed a written notice of appeal three months *before* the trial court entered its adjudication and disposition orders. G.S. 7B-2602 provides that notice of appeal must be given “in open court at the time of the hearing or in writing within 10 days after entry of the order.” Consistent with *State v. Oates*, 366 N.C. 264 (2012), which addressed the timeframe for giving notice of appeal in criminal cases under N.C. R. App. P. 4(a), the Court held that written notice of appeal in a juvenile delinquency case may be filed at any time between the date of the rendition of the order and the tenth day after entry of the order. Therefore, the juvenile had from the date of the hearing until ten days after the adjudication and disposition orders were entered in which to file a written notice of appeal.
- **Subject Matter Jurisdiction.** The trial court lacked jurisdiction to enter an adjudication of delinquency for an offense not charged in the petition. Simple affray is not a lesser-included offense of assault inflicting serious injury. The elements of assault inflicting serious injury, pursuant to G.S. 14-33(c)(1), are: (1) the commission of an assault on another, which (2) inflicts serious bodily injury. The common law offense of simple affray is defined as (1) a fight between two or more persons, (2) in a public place, (3) so as to cause terror to members of the public. Therefore, the petition failed to allege a simple affray and the trial court lacked jurisdiction over that offense.

*In re G.R.*, \_\_ N.C. App. \_\_ (July 19, 2016) (unpublished).

A juvenile petition was filed alleging the juvenile, age 15, was in possession of a schedule VI controlled substance, marijuana. At the beginning of the adjudication hearing, the juvenile’s attorney made a motion to continue because she had not discussed the facts of the case with the juvenile. The trial court denied the motion and proceeded to hear evidence. A state park ranger testified that he stopped the juvenile for walking a dog without a leash and smelled marijuana as he approached. He also testified the juvenile consented to a search and admitted to possession of a partially burned marijuana cigarette and an entire marijuana cigarette located on the ground within the juvenile’s “lungeable area.” During cross-examination, the juvenile’s attorney merely reiterated the ranger’s testimony and failed to probe into the ranger’s ability to communicate with the juvenile given that the juvenile required an interpreter at trial. Counsel also did not move to suppress the juvenile’s confession which was obtained without *Miranda* warnings nor did she move to dismiss for insufficiency of the evidence or make a closing argument. Based on these and other alleged errors, the juvenile argued on appeal that he was denied his Sixth Amendment right to counsel.

Held: Dismissed Without Prejudice.

- **Ineffective Assistance of Counsel.** The court dismissed without prejudice the juvenile’s claim of ineffective assistance of counsel to allow the juvenile to file a motion for appropriate with the trial court. An ineffective assistance of counsel claim may be

decided on the merits by the appellate court when the cold record reveals that no further investigation is required. Here, the appellate court could not determine from the cold record whether counsel's performance fell below an objective standard of reasonableness, in part because portions of the transcript were labeled as "inaudible." The questions raised by the available portions of the transcript also required further investigation.

*In re A.O.A.*, \_\_ N.C. App. \_\_ (July 19, 2016) (unpublished).

Based on a tip that the juvenile brought pills to school, school officials searched his backpack and found a cigarette lighter and a device that was partially covered in burnt aluminum foil which was believed to be a "marijuana bong." The juvenile was charged with possession of drug paraphernalia in violation of G.S. 90-113.22. At the adjudication hearing, both the assistant principal and school resource officer testified that the device was a homemade bong used for smoking marijuana, and the device was admitted into evidence along with the cigarette lighter. However, the state presented no evidence of whether the device contained residue of marijuana or any other controlled substance. The juvenile moved to dismiss based on insufficient evidence that he possessed the device with the intent to use it in connection with a controlled substance. The motion was denied.

Held: Vacated.

- **Possession of Drug Paraphernalia.** The trial court erred by denying the juvenile's motion to dismiss because the state failed to present sufficient evidence of the "crucial element" of intent to use the device in connection with a controlled substance. Possession of drug paraphernalia requires proof that the juvenile (1) knowingly, (2) possessed drug paraphernalia, and (3) used or intended to use that paraphernalia in connection with a controlled substance. Here, the evidence showed only that a device that allegedly falls under an item explicitly listed as drug paraphernalia in G.S. 90-113.21(a)(12) was found in the juvenile's possession and an officer testified that the device was used to inhale marijuana. However, there was no evidence the juvenile admitted he used the device to inhale marijuana, that the juvenile or anyone else in his proximity possessed marijuana, that the device contained marijuana residue or another controlled substance, that the device was found in proximity to other drug paraphernalia, or that the juvenile appeared to be under the influence of marijuana. The speculative opinion testimony of the officer and assistant principal that the device was used to smoke marijuana raised no more than mere suspicion or conjecture regarding how the juvenile intended to use the device.

*In re A.S.*, \_\_ N.C. App. \_\_ (July 19, 2016) (unpublished).

The 13-year-old juvenile was charged in a juvenile petition with assaulting a child under 12. Upon defense counsel's motion, the court continued the adjudication hearing, indicating that it would be "the only continuance." At the second hearing date, defense counsel again requested a continuance, raising concerns about the juvenile's capacity to proceed. The trial court denied the motion. Defense counsel renewed the motion for a capacity evaluation citing the juvenile's IEP and academic testing as evidence of his cognitive deficits. The trial court again denied the motion and subsequently adjudicated the juvenile delinquent.

Held: Affirmed.

- **Motion for Capacity Evaluation.** The trial court did not abuse its discretion in denying the juvenile's motion to continue for the purpose of seeking a capacity evaluation of the

juvenile. G.S. 15A-1002(b) requires the court to conduct a hearing when a juvenile's capacity to proceed is questioned but no particular procedure is mandated. The hearing requirement is satisfied as long as the record shows the juvenile "is provided an opportunity to present any and all evidence he or she is prepared to present." Here, the procedural hearing requirement was met because the juvenile's attorney presented all the evidence he was prepared to present prior to the court ruling on the motion.

- **Finding of Capacity to Proceed.** The trial court did not abuse its discretion in finding the juvenile was capable of proceeding without further evaluation where defense counsel failed to present evidence that the juvenile lacked the capacity to proceed. The burden rests on the juvenile to establish mental incapacity. Here, rather than present evidence that the juvenile was or likely was incapable of proceeding, counsel expressed that she wanted to consider the issue further. Although the attorney made arguments regarding the motion to continue and provided the juvenile's IEP and psychological evaluation from school, nothing in these documents indicated the juvenile lacked the capacity to proceed.

*In re N.J.D.*, \_\_ N.C. App. \_\_ (July 5, 2016) (unpublished).

The juvenile was adjudicated delinquent for simple assault and received a Level 1 disposition placing her on probation for six months and ordering her to pay \$500.00 in restitution.

Held: Affirmed in part; Vacated and Remanded in part.

- **Disposition Order Findings.** The trial court's disposition order failed to include findings demonstrating that it considered the factors set forth in G.S. 7B-2501(c). The court made no specific written findings addressing these factors. Even though the order incorporated the predisposition report, risk assessment, and needs assessment, those documents addressed only the juvenile's rehabilitative and treatment needs and were silent as to the other four factors.

*In re S.M.M.*, \_\_ N.C. App. \_\_ (June 21, 2016) (unpublished).

A juvenile petition alleged the juvenile committed possession of peyote, a schedule I controlled substance, in violation of G.S. 90-95(a)(3). However, the juvenile entered an admission to possession of drug paraphernalia under G.S. 90-113.22.

Held: Vacated.

- **Subject Matter Jurisdiction.** The trial court lacked jurisdiction to accept the juvenile's admission and enter an adjudication of delinquency for an offense not charged in the petition. Possession of drug paraphernalia is not a lesser-included offense of the charged offense because it contains an essential element – *i.e.*, drug paraphernalia – that is not an element of possession of a schedule I controlled substance. The juvenile's admission did not waive the defect because she could not consent to subject matter jurisdiction.

*In re P.R.*, \_\_ N.C. App. \_\_ (June 7, 2016) (unpublished).

The juvenile, an Eighth grader, was adjudicated delinquent for disorderly conduct at school following a fight with another student in the cafeteria. The juvenile did not initiate the fight, but upon being struck by the other student, he grabbed the student's shirt and pushed him away and spit tobacco at him. A teacher who observed the incident testified that his view was obstructed because approximately thirty students stood up to watch and began "cheering on the fight." He also stated that the fight "changed the atmosphere" in the cafeteria.

Held: Affirmed.



- **Disorderly Conduct.** The trial court properly denied the juvenile’s motion to dismiss the petition for disorderly conduct. The evidence showed that the juvenile’s physical altercation with another student diverted the attention of teachers assigned to observe approximately 200 students in the cafeteria when they were forced to abandon their positions in the cafeteria to break up the fight and to speak to the SRO about the incident. Even though the disruption did not take the teachers away from classroom instruction, a “substantial interference” may be established when a teacher is “away from his assigned duties for at least several minutes.” Therefore, evidence was sufficient to show the juvenile’s conduct substantially interfered with the operation of the school. The evidence also established that the juvenile acted intentionally because, instead of walking away from the fight, the juvenile engaged in intentional conduct that disturbed the peace by continuing the fight.
- **Self Defense.** The court rejected the juvenile’s argument that even if he caused a substantial interference, he was justified in acting in self-defense. A self-defense claim requires a showing that the juvenile “was without fault in provoking, engaging in, or continuing a difficulty with another.” Here, the juvenile continued the fight by grabbing the other student’s shirt. Also, assuming, arguendo, that North Carolina were to recognize self-defense as an affirmative defense to a disorderly conduct charge, the state still presented substantial evidence of each element of the offense.

In re C.D.L., \_\_ N.C. App. \_\_ (May 17, 2016) (unpublished).

The juvenile was adjudicated delinquent for communicating threats where he told the assistant principal (AP), “I really want to hit you right now,” after refusing to go to in-school suspension. The AP testified he believed the threat was “plausible” based on prior dealings with the juvenile for his aggressive behavior. Another school official who intervened to try to de-escalate the situation testified that the juvenile addressed the AP “loudly with an aggressive posture” and gave him a “threatening stare.”

Held: Affirmed.

- **Communicating Threats.** The trial court properly denied the juvenile’s motion to dismiss. Although the juvenile’s statement was phrased in terms of what he *wanted* to do rather than what he *would* do, the context within which he delivered the statement negated any suggestion that it was hypothetical and indicated a present intention to act on the threat. The evidence showed the juvenile made the threat while he was extremely angry and presented himself to the AP in an aggressive and threatening manner. His actions were forceful enough to draw the attention of another school official and the AP found the threat to be plausible. This evidence was sufficient to show that, under the circumstances, a reasonable person would have believed the juvenile was likely to carry out the threat.

In re T.L.M., \_\_ N.C. App. \_\_ (May 10, 2016) (unpublished).

The juvenile was committed to YDC based on a probation violation following his adjudication for felony larceny of a motor vehicle. The Level 3 disposition order contained only a single written finding of fact that stated, “the court finds that all community resources due to the juvenile’s defiant behavior have been exhausted.” On appeal, the juvenile argued the trial court’s order contained inadequate findings.

Held: Affirmed.

- **Disposition Order Findings.** The trial court did not abuse its discretion in ordering a Level 3 disposition. Citing prior unpublished opinions, the appellate court concluded that it could look beyond the written findings in the order to determine whether the trial court complied with G.S. 7B-2501(c). Here, the trial court's order indicated receipt of a predisposition report and risk and needs assessments which were incorporated by reference. The transcript of the hearing also contained remarks by the juvenile court counselor and trial judge. After reviewing the order and the reports incorporated therein as a whole, together with the transcript, the court found the trial court addressed all five factors included in G.S. 7B-2501(c).

*In re C.A.G.*, \_\_ N.C. App. \_\_ (May 3, 2016) (unpublished).

The juvenile, an 8<sup>th</sup> grader, was adjudicated delinquent for two counts of sexual battery for inappropriately touching a female classmate between her legs, above her waist, and over her breast while the two worked together in class. Another girl, who was working with them, noticed the juvenile's hand underneath the victim's desk and that the victim looked upset and nervous. After class, the victim reported the incident to her mother and school officials at which time she was very upset and crying. At the hearing, the State relied on a theory of constructive force based on both girls' testimony regarding the victim's fearful and nervous reaction to the juvenile touching her.

Held: Reversed

- **Issue Preservation.** The juvenile's argument regarding the insufficiency of the evidence was not properly preserved because his attorney did not move to dismiss at the close of all the evidence. Although counsel vigorously argued for dismissal during closing statements, counsel did not argue specifically that there was insufficient evidence of force, which was the argument raised on appeal. However, the court elected to review the juvenile's argument pursuant to Rule 2 to prevent "manifest injustice."
- **Sexual Battery.** The trial court erred by denying the juvenile's motion to dismiss the petition for sexual battery under G.S. 14-27.33 because the State failed to prove the element of force required for that offense. The state relied on a theory of constructive force, which requires proof of either actual or threatened physical harm which reasonably induces fear, fright, or coercion of the victim. Such threats may be implied when there is a special relationship between the offender and victim (*e.g.*, parent/child) that induces fear in the victim. Here, there was no special relationship between the juvenile and victim and the state presented no evidence of any threats, actual or implied, that placed the victim in fear of physical harm. Citing its prior decision in *In re T.W.*, 221 N.C. App. 193 (2012), the court also noted that "a juvenile's preying on another child's fear of exposure is insufficient to prove constructive force."

*In re J.L.A.I.*, \_\_ N.C. App. \_\_ (March 15, 2016) (unpublished).

The juvenile, age 14, was adjudicated delinquent for committing injury to personal property causing damage in excess of \$200 by damaging a motorized scooter with a metal pipe. The trial court placed the juvenile on probation for six months, ordered him to comply with a curfew and community service, and ordered him to pay restitution in an amount to be determined by the district attorney's office within 30 days of the disposition.

Held: Reversed and Remanded

- **Issue Preservation.** The juvenile’s argument regarding the insufficiency of the evidence was not properly preserved because his attorney did not move to dismiss at the close of all the evidence. However, the court elected to review the argument pursuant to Rule 2 because the juvenile simultaneously asserted a claim of ineffective assistance of counsel.
- **Injury to Personal Property.** There was insufficient evidence to prove the juvenile committed a Class 1 misdemeanor under G.S. 14-160(b), which requires (1) the willful and wanton injury of another’s personal property and (2) damage in excess of \$200.00. The State presented sufficient evidence that the juvenile’s act was “willful and wanton” where he acted intentionally and with “indifference to the rights and safety of others.” However, the State presented no evidence that the damage exceeded \$200.00. A letter obtained after the hearing showing that the victim was charged \$300.00 for repairs was irrelevant since it was not admitted into evidence at the hearing. Thus, the juvenile should have been adjudicated delinquent for the Class 2 misdemeanor under G.S. 14-160(a), which does not require proof of the damage amount. The court reversed and remanded for entry of adjudication and disposition orders on the lesser offense.
- **Ineffective Assistance of Counsel.** The juvenile’s attorney provided ineffective assistance of counsel by failing to move for a dismissal at the close of all the evidence. The attorney’s performance was deficient because there is a reasonable probability that the court would have granted the motion to dismiss had it been made. The deficient performance prejudiced the juvenile, since the State failed to present evidence to support an essential element of the offense.
- **Restitution.** The juvenile owed “no restitution” since the disposition order required the DA’s Office to determine the amount of restitution within 30 days of the disposition date and stated that “no restitution is owed” if the State failed to do so. The only evidence regarding the amount of restitution was a handwritten letter delivered to the DA’s Office sometime after the hearing stating that a repairman charged the victim \$300.00 to repair the scooter. However, the letter was deficient because no evidence in the record established either that the letter was received within 30 days of the disposition or that the DA’s Office made an independent determination that \$300.00 was the appropriate amount of restitution.

*In re A.L., Jr.*, \_\_ N.C. App. \_\_ (March 15, 2016) (unpublished).

The juvenile was adjudicated delinquent for committing a simple assault against his father.

Held: Affirmed

- **Victim’s Reputation for Violence.** The trial court properly excluded evidence of the victim’s purported reputation for violence where the juvenile presented no evidence that he acted in self-defense. Evidence of a victim’s reputation for violence is not relevant unless the evidence tends to show the assault was committed in self-defense. The trial court properly sustained the State’s objection to cross-examination of the victim regarding his reputation for violence because no evidence had been introduced to establish that the juvenile acted in self-defense. Also, the trial court did not preclude the juvenile’s attorney from questioning the victim regarding his reputation at a later time.
- **Ineffective Assistance of Counsel.** The juvenile’s attorney did not provide ineffective assistance of counsel by failing to present evidence to support the juvenile’s claim of self-defense. The juvenile testified on his own behalf and conceded that his father (the victim)



accurately described the assault when he testified for the State, and the juvenile's testimony did not establish self-defense.

- **Adjudication Order Findings.** The trial court made sufficient findings of fact in the adjudication order which included the minimum requirements of G.S. 7B-2411 and the following findings which were proven beyond a reasonable doubt: "The above juvenile was found responsible to the charge of simple assault during a hearing. The charge of communicating a threat was dismissed by the court, and he admitted to his probation violation."

*In re D.B.*, \_\_ N.C. App. \_\_ (March 15, 2016) (unpublished).

The juvenile, age 15, was adjudicated delinquent for resisting a public officer, a "minor" offense under G.S. 7B-2508(a). At the disposition hearing, the juvenile's attorney objected to a Level 3 disposition and moved for a continuance to allow the juvenile's mother to develop an alternative plan that did not involve commitment to YDC. The trial court denied the motion to continue and entered a Level 3 disposition of commitment to a YDC, pursuant to G.S. 7B-2508(g) which authorizes a Level 3 disposition for a "minor" offense when the juvenile has "four or more prior offenses."

Held: Affirmed

- **Motion to Continue.** The trial court did not abuse its discretion in denying the juvenile's motion to continue where the motion was not based on any of the purposes set forth in G.S. 7B-2406. A continuance is not mandatory when requested by the juvenile, and the trial court complied with G.S. 7B-2406 by considering the juvenile's best interests.
- **Four or More "Prior Offenses."** The evidence was sufficient to prove the juvenile had "four or more prior offenses" within the meaning of G.S. 7B-2508(g) where the four prior offenses were listed in the predisposition report and a prior order included in the settled record showed that the juvenile had previously stipulated to the existence of those same prior offenses. *Author's Note:* The opinion uses the terms "prior offense" and "prior adjudication" interchangeably. However, a prior offense as used in G.S. 7B-2508(g) is defined differently than a prior adjudication under G.S. 7B-2507(a).
- **Disposition Order Findings.** The trial court did not abuse its discretion in ordering a Level 3 disposition. The trial court considered the juvenile's "whole life," the program options at YDC, and the juvenile's need for closure and found that he had a "high" delinquency history level with 11 points. These considerations and findings indicate the court considered the factors in G.S. 7B-2501(c) and entered a Level 3 disposition to best serve the needs of the juvenile and the public.

*In re J.L.H.*, \_\_ N.C. App. \_\_ (March 1, 2016) (unpublished).

The juvenile was adjudicated delinquent for cyberstalking after he sent derogatory text messages to a behavior specialist at his school.

Held: Affirmed in part; Vacated and Remanded in part.

- **Best Evidence Rule.** The juvenile failed to show that the trial court committed plain error by allowing the victim to testify about the content of derogatory text messages he allegedly received from the juvenile. The appellate court found that the admission of the victim's testimony violated the best evidence rule in G.S. 8C-1, Rule 1002 because the State did not introduce authenticated written copies of the actual text messages. However, the juvenile failed to object to this evidence and was required to show that its admission

amounted to plain error. Because the juvenile made no showing that upon objection, the State could not have supplied properly authenticated text messages, the admission of the victim's testimony was not plainly erroneous.

- **Motion to Dismiss.** The juvenile failed to preserve the issue of the sufficiency of the evidence. The court declined to invoke Rule 2 to suspend the rules and review the issue because after reviewing the record, it concluded there was sufficient evidence to support the adjudication.
- **Delegation of Authority.** The disposition order was vacated on two grounds: (1) the court made no findings in the blank space provided on the disposition form for additional findings addressing the G.S. 7B-2501(c) factors and the court's statement in open court that it had read and adopted DJJ's recommendations provided in the predisposition report did not satisfy the requirements of the statute; and (2) the trial court impermissibly delegated its authority to the court counselor by ordering that: "said juvenile be placed at the multipurpose group home in Winton, NC for a period not to exceed 240 days if recommended by the court counselor."

*In re K.S.D.*, \_\_ N.C. App. \_\_ (January 5, 2016) (unpublished).

The juvenile, a high school student, was adjudicated delinquent for disorderly conduct at school.

Held: Affirmed.

- **Disorderly Conduct.** The trial court properly denied the juvenile's motion to dismiss the petition for disorderly conduct. The evidence showed that the juvenile arrived five or ten minutes late to his math class, shouted profanities at his teachers, and was removed from class by the assistant principal and school resource officer. The juvenile's math teacher testified that he had to stop teaching class to call for the administrators and then explain to them what happened, which took his attention away from the class for several minutes. The school administrators stopped performing various administrative duties to address the situation, and the assistant principal testified that "the educational environment is gone" when a student disrespects a teacher in this manner. This evidence was sufficient to show the juvenile's conduct substantially interfered with the operation of the school.