RELIABLE JUSTICE: ADVANCING THE TWOFOLD AIM OF ESTABLISHING GUILT AND PROTECTING THE INNOCENT

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I. INTRODUCTION

Justice Sutherland instructed several decades ago that "the twofold aim of [the law] is that guilt shall not escape or innocence suffer."[1] He condemned "improper methods calculated to produce a wrongful conviction," while lauding "every legitimate means to bring about a just one."[2] Few will find reason to quarrel with these sentiments. Justice can miscarry in different ways. Other than the actual perpetrator, "everyone benefits, and no one loses when innocent parties are spared conviction and . . . the [true offender is] brought to justice."[3] With these modest premises at its core, this article attempts to cast a somewhat different light on the traditional domain of wrongful conviction scholarship and policy. Examining three pre-trial practices that can be critical determinants of guilt or innocence—police investigative policies, eyewitness identification procedures, and the interrogation of crime suspects[4]—it encourages broadening the focus on wrongful convictions to encompass reliable justice, a perspective grounded in the dual objectives of fairly and accurately determining both guilt and innocence. It invokes the metaphorical veil of ignorance to sketch a process designed to facilitate agreement about policies that work an appropriate balance between the objectives of bringing the guilty to justice while sparing

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[1] Berger v. United States, 295 U.S. 78, 88 (1935).

[2] *Id.* In the case before the Court, the Assistant United States Attorney who represented the government at trial and secured the defendant's conviction for conspiracy to utter counterfeit notes engaged in multiple improprieties in his examination of witnesses and his closing argument. *See id.* at 79–80.

[3] James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1631 (2012/2013). *See generally* Frank R. Baumgartner et al., *The Mayhem of Wrongful Liberty Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 ALB. L. REV. 1263, 1264, 1274–75 (2017/2018) (discussing the repercussions of wrongful convictions on victims and exonerated persons).

[4] *See, e.g.*, Acker, *supra* note 3, at 1644, 1654–55, 1663–64.

the innocent from injustices.

Criminal justice is rife with the vocabulary and imagery of institutionalized battle. The call to arms is not subtle. War has formally been declared on crime.[5] The criminal code delineates the encampments of allies and enemies, of law-abiding citizens and offenders.[6] The police represent "the foot soldiers of an ordered society"[7] and criminals are their "quarry."[8] The rules of engagement in the courts dictate that prosecutors "may strike hard blows," although not "foul ones."[9] For their part, defense lawyers are to "champion"[10] their clients' cause so that criminal trials do not devolve into "a sacrifice of unarmed prisoners to gladiators."[11] The advocates clash in the "heat-of-battle" conducted within the adversarial system.[12] In criminal cases, "the resources of government are pitted

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[5] *See* Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), http://time.com/3746059/war-on-crime-history/.

[6] *See* Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140, 163 (2018) ("In this sense, criminal law does create a kind of order – a sorting of people into criminals and everyone else.").

[7] *See* Roberts v. Louisiana, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting). In this vein, consider the following portion of the argument delivered by Dallas County Assistant District Attorney Doug Mulder in asking the jury that had convicted Randall Dale Adams of the capital murder of police officer Robert Wood to sentence Adams to death. *See* RANDALL DALE ADAMS ET AL., ADAMS V. TEXAS 125–26 (1991). The jury did impose a death sentence, although the Supreme Court subsequently vacated it because potential jurors were improperly excused for cause owing to their views about capital punishment. *See* Adams v. Texas, 448 U.S. 38, 50–51 (1980). Adams, the subject of the film, *The Thin Blue Line*, produced by Errol Morris, was exonerated years later. *See* Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES (June 25, 2011), https://www.nytimes.com/2011/06/26/us/26adams.html.

> Officer Robert Wood . . . "died as a soldier fighting a war against crime. . . . Police officers go out and they detect crime, they apprehend and arrest criminals. And I guess it could be said that they are the front lines in this war against crime. . . . You know, being a soldier in this war on crime is not looked upon with the same patriotic fervor that there once was. There is no ribbons or ticker tape parade, generals don't come home and run for President. But you see, the dead are buried just the same. The war goes on.
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> We are a nation of laws, a country of laws, a state of laws. We have laws that are designed to protect the citizenry. Our laws in turn are enforced and protected by that thin blue line of men and women who daily risk their lives by walking into the jaws of death, sometimes to walk back out again and sometimes to perish."

ADAMS, *supra*, at 125–26 (alteration in original).

[8] *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966) (quoting FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

[9] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[10] *See* Sandoval v. Rattikin, 385 U.S. 901, 902 (1966) (Fortas, J., dissenting); Douglas v. California, 372 U.S. 353, 356 (1963).

[11] *See* United States v. Cronic, 466 U.S. 648, 657 (1984) (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

[12] *See* Commonwealth v. D'Amato, 526 A.2d 300, 310 (Pa. 1987); *see also* United States v. Decoster, 624 F.2d 196, 296 (D.C. Cir. 1976) ("The real battle for equal justice . . . must be waged in the trenches of the trial courts."); State v. Medina, 604 A.2d 197, 204 (N.J. Super. Ct.

against those of the individual," with much at stake for both sides.[13]

The adversarial alignments familiar to case-specific prosecution and adjudication can be counterproductive at the level of policy formulation, producing stalemates, unsatisfactory compromises, and outcomes that favor power over reason.[14] Reforms designed to guard against wrongful convictions naturally focus on the objective of protecting the innocent.[15] As such, they risk being construed as serving the exclusive agenda of the defense community.[16] When evaluated through the lens of adversarial justice, strategies promoted by organizations and litigants that aim to minimize wrongful convictions can almost reflexively be resisted as threatening to undermine the objective of holding the guilty accountable.[17] Conversely, staunch defenders of the innocent fall into an analogous trap when they oppose measures designed to ferret out and punish the guilty on the assumption that such initiatives must necessarily weaken safeguards against wrongful convictions.[18]

App. Div. 1992) ("[P]rosecutors cannot be expected to do battle in the adversarial ring with two hands tied behind their backs.").

[13] *See* United States v. Salemo, 81 F.3d 1453, 1458–59 (9th Cir. 1996).

[14] *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 64, 84, 85 (1998).

[15] *See* ROBERT J. NORRIS, EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT 164–65 (2017).

[16] *See id.* at 186 ("Despite the fact that the innocence movement promotes ideas that have fairly wide appeal, there is still some element of choosing sides and allegiances. . . . [I]nnocence advocates are generally lumped together with the defense community . . . .").

[17] *See* D. Michael Risinger, *Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 764 (2007).

[18] *See id.* at 763.

> People who think about the problem of wrongful conviction often fall into two camps, which we might label Paleyites and Romillists. Paleyites, whom I have named after . . . the 18th-century proto-utilitarian the Rev. William Paley, believe that, even though it is wrong to convict an innocent person, such convictions not only are inevitable in a human system, but represent the necessary social price of maintaining sufficient criminal law enforcement to provide an appropriate level of security for the public in general. . . . Paleyites tend to be conservative, in the sense that any changes to current ways of conducting the criminal justice process, proposed for their supposed effect on protecting the innocent, will be presumed so counterproductive in their effect on convicting the guilty that they will be opposed.
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> Romillists, whom I have named after the early 19th-century reformist Sir Samuel Romilly, have such a horror of convicting the innocent that they are willing to propose many changes to whatever system exists, on the ground that such changes in our way of criminal law enforcement will better protect the innocent. In so doing, it may be that some of the proposals might make the conviction of the truly guilty more difficult, perhaps significantly so. Whatever the actual effect, the Paleyites can be counted on to find the potential effect abhorrent, . . . while the Romillists in turn will label the Paleyites . . . indifferent to the plight of the convicted innocent, with knee jerk opposition to reform.

Id. at 763–64.

The concept of reliable justice capitalizes on a mutuality of interests.[19] Embracing more than avoiding wrongful convictions, it contemplates the accurate determination of both guilt and innocence, consistent with other shared notions of justice.[20] In truth, the diverse stakeholders in criminal justice—law enforcement, prosecutors, the defense bar, crime victims, the accused, and the public at large—have far more in common than whatever differences otherwise separate them. They stand to benefit from a process that allows commonalities of interest to overcome adversarial barriers and facilitates the crafting of policies that reliably and fairly identify criminal offenders while guarding against the arrest, prosecution, conviction, and punishment of the innocent.

II. TENSIONS, TRADE-OFFS, AND THEIR RESOLUTION: INVOKING THE VEIL OF IGNORANCE

The dual objectives within criminal justice of convicting the guilty and safeguarding the innocent are sometimes in tension, if not conflict.[21] Problems can surface when one goal is unduly subordinated to the other.[22] Plumbing the right balance between "the social disutility of convicting an innocent man . . . [and] the disutility of acquitting someone who is guilty" will often be controversial.[23] The redoubtable English jurist Sir William Blackstone famously posited that "the law holds, that it is better that ten guilty persons escape than that one innocent suffer."[24] The Blackstone ratio bears the interpretation that an inverse relationship, or a zero-sum trade-off must surely exist between the two unwelcome outcomes.[25] But this need not be the case.[26] In particular, rules that effectively maximize

[19] *See* JOHN RAWLS, A THEORY OF JUSTICE 39–40 (rev. ed. 1999).

[20] *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 13–14 (2012); James L. Robertson, *Variations on A Theme by Posner: Facing the Factual Component of the Reliability Imperative in the Process of Adjudication*, 84 MISS. L.J. 471, 594–95, 636 (2015).

[21] *See* Ronald J. Allen & Larry Laudan, *Why Do We Convict as Many Innocent People as We Do?: Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 80 (2008).

[22] *See* Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1105 (2010/2011) [hereinafter Clark, *Blackstone*].

[23] *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[24] 4 WILLIAM BLACKSTONE, COMMENTARIES *352, http://avalon.law.yale.edu/18th_century/blackstone_bk4ch27.asp. *See also* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) ("The ratio 10:1 has become known as the 'Blackstone ratio.'").

[25] *See* Clark, *Blackstone*, *supra* note 22, at 1105.

[26] *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134 (2008) ("[W]e can reduce the number of wrongful convictions without sacrificing too many convictions of the

factual reliability are equally capable of discerning innocence and guilt, and thus of serving the twin goals of justice simultaneously and without favor.[27]

Even so, nettlesome questions remain. For instance, disagreements will arise about which policies will, in fact, promote reliable fact finding, and whether policies thus designed will operate neutrally to identify both the guilty and innocent, without compromising either determination.[28] Concerns will be voiced about whether implementing reforms will be cost-effective and feasible, mindful of resource limitations and competition from a host of other pressing social concerns.[29] Moreover, some outcome trade-offs are inevitable. Criminal justice policies must respect and occasionally prioritize values other than getting at the truth. Examples abound in contexts such as exclusionary rules that help safeguard privacy[30] and other constitutional rights,[31] in the recognition of various

guilty. Indeed, . . . those goals are not inherently contradictory; rather, they are quite complementary.").

[27] *See* SIMON, *supra* note 20, at 14 ("In determining which [criminal justice system] procedures ought to be considered 'best practice,' one ought to think through the implications of the proposed reform for both false convictions and false acquittals. Contrary to widely held beliefs, criminal justice reform is not always a zero-sum game in which reducing one type of error necessarily increases the opposite one.").

[28] *See* JOSEPH PETERSON ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 122 (2010); Risinger, *supra* note 17, at 789.

[29] *See* Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 58 (2008) ("The idealist may balk at the notion that we should decide whether to adopt criminal justice reforms based on something as crass as how much they will cost. . . . Unfortunately, legislators face demands for public expenditures on pressing issues like child welfare, poverty, the elderly, public education, environmental protection, and a host of other critically important social needs. If innocence reformers want to succeed in the political realm, they should provide legislators with more than proposals for change; they should also provide legislators with the data on the financial impact of those proposed changes."). *But see* Scott v. Illinois, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting) ("The apparent reason for the Court's adoption of the 'actual imprisonment' standard for all misdemeanors is concern for the economic burden that an 'authorized imprisonment' standard might place on the States. But, with all respect, that concern is both irrelevant and speculative. This Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments."). *See generally Scott*, 440 U.S. at 372–73 (declining to extend the rule adopted in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), requiring court-appointed counsel to be provided to indegent defendants in misdemeanor cases resulting in incarceration to misdemeanor cases not resulting in incarceration, in part because "any extension [of *Argersinger*] would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.").

[30] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654–55, 657 (1961) (applying exclusionary rule to states as remedy for violation of Fourth Amendment right against unreasonable searches and seizures).

[31] *See, e.g.*, Gilbert v. California, 388 U.S. 263, 272 (1967) (requiring exclusion of out-of-court line-up identification made in violation of accused's Sixth Amendment right to the assistance of counsel).

evidentiary privileges,[32] and in achieving finality in resolving cases.[33] Opinions will differ about the appropriate calculus for assigning weight to and balancing interests that conflict with finding the truth and holding accountable individuals who violate the law.[34] Nor will choosing between procedures that reduce the risk of committing one kind of error while increasing the risk of committing a countervailing one always be straightforward.

Insulating decisions from biases that are grounded in self-interest or achieving a pre-ordained result is a starting point for fair-mindedness, although it can be difficult to accomplish in practice. We are skeptical, with good cause, upon learning that studies touted as demonstrating the efficacy and safety of a newly developed drug were conducted by the pharmaceutical company that manufactured it,[35] or that a public opinion poll reporting attitudes about gun ownership and gun control was commissioned by an organization litigating an important Second Amendment case.[36] In the Hobbesian tradition, self-interest is such a dominant motivating force that to avert the civil strife that would prevail in a state of nature, people must cede authority to a powerful, and even despotic sovereign capable of maintaining order.[37] The institutionalized egoism endemic to adversarial justice is similarly at odds with neutral policy formulation.[38] Decisions made within systems of justice are highly

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[32] *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)) (recognizing federal psychotherapist-patient privilege); Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (recognizing and applying federal attorney-client privilege); *Trammel*, 445 U.S. at 53 (recognizing federal spousal-privilege for witness spouse).

[33] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.").

[34] *See* Thomas Weigend, *Should We Search for the Truth, and Who Should Do It*, 36 N.C. J. INT'L L. & COM. REG. 389, 393–94 (2011).

[35] *See, e.g.*, Order in Preparation for Conference, *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-1596, 2008 U.S. Dist. LEXIS 124982, at *96–97 (E.D.N.Y. July 2, 2008).

[36] *Cf. Election Central: Assessing Public Opinion Polls*, CONST. RIGHTS FOUND., http://www.crf-usa.org/election-central/public-opinion-polls.html (last visited Nov. 24, 2018) ("[P]olls conducted by groups with an obvious interest in the results should be held suspect until proven otherwise.").

[37] *See* THOMAS HOBBES, LEVIATHAN 376 (C.B. Macpherson ed. 1968) (1651); Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMP. L. 609, 634 (2017); Gregory B. Sadler, *Reason as Danger and Remedy for the Modern Subject in Hobbes'* Leviathan, 35 PHIL. & SOC. CRITICISM 1099, 1100 (2009).

[38] *Cf.* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009) (noting that in the adversarial system it

consequential, and the parties who make and are affected by them are rarely disinterested in the outcomes.[39] Power imbalances typically characterize the principals' relations.[40] Equitable resolution of the ideological and pragmatic disagreements which arise among stakeholders, as they inevitably will, must overcome these challenges.

Various strategies are available to dampen the influence of competing vested interests and enhance the potential for evenhanded, principled decision-making. One approach is epitomized by the dilemma confronting two individuals who have inherited a plot of land and seek to divide it in a way that each finds acceptable.[41] A tried and true solution is allowing one to draw the lines that will establish ownership, and giving the other the option of choosing which parcel to claim for his or her own.[42] This process seemingly works well enough when two people's interests are at stake, but it is less clear how three or more parties with divergent interests, as will frequently occur in the criminal justice context, could take advantage of something like it to resolve their differences.

The British philosopher John Rawls has described a decision-making process that is calculated to neutralize self-centered interests, including those entertained by multiple parties.[43] The strategy involves cloaking participants within a metaphorical veil of ignorance.[44] Rawls envisioned this protocol as being useful to enable parties to generate consensus about essential principles of social justice.[45] The process is equally well-suited to encouraging agreement about fair-minded criminal justice policies. Rawls explained:

> The idea . . . is to set up a fair procedure so that any principles agreed to will be just. . . . Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to

is difficult for a prosecutor to view the facts as a neutral party).

[39] *See id.*

[40] *See id.* at 871.

[41] *See, e.g.*, Erica Klarreich, *The Mathematics of Cake Cutting*, SCI. AM. (Oct. 13, 2016), https://www.scientificamerican.com/article/the-mathematics-of-cake-cutting/.

[42] *See id.*

[43] *See* JOHN RAWLS, A THEORY OF JUSTICE 118 (rev. ed. 1999).

[44] *See id.* at 11.

[45] *See id.* "Our topic . . . is that of social justice. For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." *Id.* at 6.

> their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.
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> It is assumed, then, that . . . no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.[46]

We thus might imagine a large conference table around which are assembled individuals representing prominent stakeholders in matters of criminal justice: crime victims, the police, prosecutors, defense lawyers, judges, legislators, and community members.[47] They have come together to construct essential rules to govern the criminal justice process, spanning the front end through the back. Before they begin, they are stripped of their allegiance to the perspective they held before being seated behind the veil of ignorance. They will not know if they will be a victim, a police officer, or a suspect, a prosecutor or a defense lawyer, a judge or a legislator, or a concerned member of the general public when the veil is lifted. Their pre-existing, narrowly circumscribed interests have effectively been neutralized. Focused on reaching agreement about procedures designed to optimize fair and accurate fact-finding, they are positioned to begin mapping the common ground of reliable justice.

[46] *Id.* at 118.

[47] *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 248890, RESTORATIVE JUSTICE SYMPOSIA SUMMARY 3 (1998); *The Criminal Justice System*, NAT'L CTR. VICTIMS CRIME, http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system (last visited Nov. 24, 2018). A seat at the table is not expressly reserved for criminal offenders, although they obviously are interested in and affected by the functioning of justice systems. Offenders arguably should be disqualified by dint of their unwillingness to abide by the criminal law, the rules comprising a core component of the group's eventual work product. Yet they have not lost standing entirely. They are members of the broader community, which also includes their family members, former offenders, and others interested in the reach of criminal laws, the adjudication process, criminal punishment, and other issues with which violators are directly concerned. Of course, some individuals identified as offenders will have been wrongly convicted.

III. RELIABLE JUSTICE: POLICE INVESTIGATION, EYEWITNESS IDENTIFICATION, AND INTERROGATION

A. Police Investigations and Arrest Decisions

When a crime is reported (and many crimes are not)[48] and further investigation is required (which is not always the case),[49] that task is entrusted to law enforcement agencies and their personnel.[50] Reported crimes frequently remain unsolved.[51] In 2016, fewer than half (45.6%) of violent crimes known to the police and fewer than one out of five (18.3%) property crimes known to the police were "cleared" by arrest or related means.[52] Further attrition then occurs. Between 1986 and 2006, conviction rates following arrest varied, ranging between 56% and 71% for murder and non-negligent manslaughter,[53] to between 12% and 26% for aggravated assault.[54] From the

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[48] *See* John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (Mar. 1, 2017), http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/ ("In 2015, . . . 47% of the violent crimes and 35% of the property crimes tracked by the Bureau of Justice Statistics were reported to the police.").

[49] *See* SIMON, *supra* note 20, at 8.

[50] *See id.* at 21; *The Criminal Justice System*, *supra* note 47.

[51] *See* Gramlich, *supra* note 48.

[52] *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2016: OFFENSES CLEARED 2 (2017), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances.pdf.

> In the UCR [Uniform Crime Report] Program, a law enforcement agency reports that an offense is cleared by arrest, or solved for crime reporting purposes, when three specific conditions have been met. The three conditions are that at least one person has been: [a]rrested[,] [c]harged with the commission of the offense[,] [t]urned over to the court for prosecution (whether following arrest, court summons, or police notice).
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> . . . .
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> In certain situations, elements beyond law enforcement's control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can clear the offense *exceptionally* . . . [by meeting four criteria]: The agency must have: [i]dentified the offender[, g]athered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution[, i]dentified the offender's exact location so that the suspect could be taken into custody immediately[, e]ncountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.

Id. at 1–2.

Clearance rates were as follows in 2016 for different offenses: murder and non-negligent manslaughter—59.4%; aggravated assault—53.3%; rape (revised definition)—36.5%; robbery—29.6%; larceny-theft—20.4%; motor vehicle theft—13.3%; burglary—13.1%. *Id.* at 2–3.

[53] *See* ELISE HANSELL ET AL., THE CRIME FUNNEL 7 fig. 3 (2016), http://roseinstitute.org/wp-content/uploads/2016/05/28-April-Crime-Funnel-Natl-Report.pdf.

[54] *Id.* at 17 fig.13. Conviction rates over the 1986-2006 period ranged between 45%-70% for rape, 38%-46% for robbery, and 36%-45% for burglary. *Id.* at 10 fig.13, 13 fig.9, 21 fig.17.

perspective of reliable justice, the winnowing between reported crimes, arrests, and convictions is desirable to the extent it is explained by unfounded reports or involves individuals not responsible for crimes actually committed.[55] It is undesirable when it means that guilty offenders are not properly held accountable.[56]

A police officer's decision to make a felony arrest generally requires no warrant, is largely discretionary, and of course must be supported by probable cause.[57] Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[58] It "is not a high bar."[59] The arrest decision is momentous in its own right, and it carries potentially profound implications downstream in the criminal justice process. Once arrested, an individual can be taken into custody, booked, fingerprinted,[60] and jailed for up to forty-eight hours before being brought before a judge or magistrate for an independent probable cause determination.[61] If unable to meet conditions of release, the arrestee may remain jailed pending a prosecutor's review of a complaint, a formal charging decision, and further judicial proceedings, possibly enduring through ultimate disposition of the charges.[62] The decision to make an arrest not only activates the machinery of the criminal justice process, but can color later decisions made by prosecutors and others, operating in a manner akin to a self-fulfilling prophecy of guilt.[63] By the same

[55] *See* Findley, *supra* note 26, at 146–47.

[56] *See* Findley, *supra* note 26, at 146.

[57] *See* Payton v. New York, 445 U.S. 573, 590 (1980) (holding that absent exigent circumstances, the police may not enter a suspect's home without a warrant to make an arrest); United States v. Watson, 423 U.S. 411, 416–17 (1976) (recognizing police authority to make warrantless felony arrests based on probable cause).

[58] District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)).

[59] *Wesby*, 138 S. Ct. at 586 (quoting Kaley v. United States, 571 U.S. 320, 338 (2014)); *see also* Maryland v. Pringle, 540 U.S. 366, 371, 372 (2003) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)) (finding probable cause for occupant of car who denied possession of drugs when drugs discovered in glove compartment).

[60] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323, 354–55 (2001) (finding no Fourth Amendment barrier to custodial arrest for an offense not punishable by incarceration).

[61] *See* Cty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[62] *See* United States v. Salerno, 481 U.S. 739, 742 (1987); Bell v. Wolfish, 441 U.S. 520, 536–37 (1979). *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 10 (1979) ("[T]wice as many people were sent to jail prior to trial than after trial."); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ ("If . . . bail is set so high that the client is detained, the defense lawyer has only modest opportunities, within the limited visiting hours and other arduous restriction imposed by most jails, to interview her client and find out his version of the facts.").

[63] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292–93 (2006); *see also* ANTHONY W. BATTS ET AL., POLICING AND WRONGFUL CONVICTIONS 7 (2014), https://www.ncjrs.gov/pdffiles1/nij/24632

token, a decision not to make an arrest tips the individual and systemic consequences in the opposite direction, away from accountability for criminal wrongdoing.[64]

Arrest decisions are often made under difficult circumstances.[65] Some arise in the "rapidly unfolding and often dangerous situations on city streets."[66] Others, even absent such immediacy, will nevertheless be challenging in light of community and institutional pressures to identify and arrest perpetrators, and will be hampered by sparse, ambiguous, or conflicting information and evidence, as well as resource constraints.[67] Not surprisingly, police investigations and arrest decisions are not infallible.[68] Some errors will be rooted in cognitive processes which are necessary to make sense of the world with a modicum of efficiency and generally are salutary, but which also can generate flawed conclusions.[69] The reliability of arrest decisions will be enhanced to the extent that those tendencies are recognized and checks are put in place to help guard against their compromising law enforcement officers' reasoning and conclusions.

8.pdf ("Dror . . . refers to . . . the 'biasing snowball effect,' where knowing one piece of evidence can often prejudice and contaminate another line of evidence. This is particularly relevant to police work because it is usually the first point of contact in the criminal justice system and all later stages feed off the information gathered in a police investigation."); MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 211– 12 (2017) ("Tunnel vision can produce a snowball effect in cases of wrongful conviction, where an initial, single piece of errant evidence gives rise to what appears to be an overwhelming case by the time of trial.").

[64] *See* INT'L ASS'N OF CHIEFS OF POLICE, DEP'T OF JUSTICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS xiii (2013), https://www.bja.gov/publications/iacp-wrongful_convictions_summit_report.pdf.

[65] *See, e.g.*, Andrew E. Taslitz, *Police are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 46 (2010) ("[S]tress tends to magnify heuristics' power, and police officers confronting suspects are in just such stressful situations.").

[66] Terry v. Ohio, 392 U.S. 1, 10, 30 (1968) ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons."). The Court later clarified that *Terry* requires "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'" to justify a brief investigative stop. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting *Terry*, 399 U.S. at 30); *see also* Navarette v. California, 572 U.S. 393, 397 (2014) ("These principles apply with full force to investigative stops based on anonymous tips."). *See* Taslitz, *supra* note 65, at 47, for a thorough discussion of factors and decisional processes that can lead to more and less reliable determinations of reasonable suspicion and probable cause by police officers.

[67] *See* SIMON, *supra* note 20, at 21; *see also* INT'L ASSOC. OF CHIEFS OF POLICE, *supra* note 64, at 5–6 ("This pressurized environment can make cases more vulnerable to wrongful conviction.").

[68] *See, e.g.*, *Woman Gets $7.7M in False Arrest Case*, CHI. TRIB. (June 13, 2008), https://www.chicagotribune.com/news/ct-xpm-2008-06-13-0806130382-story.html.

[69] *See* Taslitz, *supra* note 65, at 40–46.

The police, in common with prosecutors, defense lawyers, judges, and others who confront decisions within and outside of systems of justice, are prone to tunnel vision, which has been described as "a natural human tendency" comprising a "'compendium of common heuristics and logical fallacies,' . . . that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'"[70] Still, a tunnel is a tunnel, and in the more encompassing frame of reliable justice, a premature assessment of innocence and its corresponding tendencies to foreclose further investigation and cause the police to interpret information as negating culpability is similarly problematic.[71] Fueling tunnel vision is a psychological mechanism known more formally as confirmation bias.[72] As the name implies, confirmation bias leads observers to seek and construe evidence in ways that are consistent with, or confirm, a pre-existing expectation.[73]

The disposition to quickly latch onto a belief about a suspect's guilt (or innocence) and then selectively search for and filter information to support that belief has the clear potential to lead a police investigation astray and produce an erroneous arrest (or non-arrest) decision.[74] Confirmation bias arises naturally and often presents itself subconsciously.[75]

It thus can easily defy recognition and be difficult to guard against and counter.[76] Motivational factors common to policing exacerbate the problems.[77] The institutional role of law enforcement officers is

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[70] *See* Findley & Scott, *supra* note 63, at 292.

[71] *See, e.g.*, *id.* at 302–03.

[72] *See id.* at 307–08.

[73] *See* SIMON, *supra* note 20, at 22–23. Simon has described problems related to tunnel vision as stemming from "the potential stickiness of the focal hypotheses." *Id.* at 22. He explains that:

> [I]ncoming evidence is evaluated in a manner that conforms to the person's extant beliefs. . . . [Confirmation] bias is defined as the "inclination to retain, or a disinclination to abandon, a currently favored hypothesis" . . . . Researchers have also identified the reciprocal *disconfirmation bias*, by which evidence that is incompatible with one's prior beliefs is judged to be weak and thus unlikely to disrupt them.

Id. at 23.

[74] *See* Findley & Scott, *supra* note 63, at 316.

[75] *See id.* at 309.

[76] *See* Cynthia M. Ho, *Drugged Out: How Cognitive Bias Hurts Drug Innovation*, 51 SAN DIEGO L. REV. 419, 442 (2014).

[77] *See* Karl Ask & Pär Anders Granhag, *Motivational Sources of Confirmation Bias in Criminal Investigations: The Need for Cognitive Closure*, 2 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 43, 46 (2005).

not that of impartial referee.[78] Rather, the police are "engaged in the often competitive enterprise of ferreting out crime."[79] As such, confirmation bias can operate within an environment suffused with departmental norms that reward arrests[80] and promote and reinforce an us-against-them attitude with respect to identifying and apprehending lawbreakers.[81] Comparable recognition is not likely when an officer simply refrains from arresting an innocent suspect after a crime is reported.[82] The differential motivation and lack of objectivity can combine with tunnel vision to infuse a pro-arrest bias into an investigator's decision-making.[83]

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[78] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948).

[79] *Id.*; *see* SIMON, *supra* note 20, at 32.

[80] *See* Allison T. Chappell et al., *The Organizational Determinants of Police Arrest Decisions*, 52 CRIME & DELINQ. 287, 289 (2006); *cf.*, Jennifer Kastner, *SDPD Officer Blows Whistle on "Rewards for Arrests" Program*, ABC NEWS (Mar. 15, 2018, 4:43 AM) https://www.10news.com/news/team-10/san-diego-police-officer-blows-whistle-on-rewards-for-arrests-program ("[A] newly unveiled program . . . reports to reward officers for making more narcotics arrests. . . . 'It's a reward system.'"). *But see* R. Stickney & Wendy Fry, *SDPD Chief: Drug Enforcement Incentive Program "Was Never Authorized,"* NBC NEWS (Mar. 16, 2018, 10:09 AM), https://www.nbcsandiego.com/news/local/San-Diego-Police-Incentive-Program-Drug-Arrests-477108433.html.

[81] *See* SIMON, *supra* note 20, at 28–29; Taslitz, *supra* note 65, at 42–43 ("An officer asked to 'get this scumbag,' for example, may be primed to focus only on indicators of the 'scumbag's' guilt. An officer asked in a more dispassionate manner to pursue leads combined with a more open-minded local law enforcement culture might see more of the evidence on both sides of the question of whether a specific individual committed a particular crime.").

[82] *Cf.* Taslitz, *supra* note 65, at 52 ("[M]otivations affecting what we perceive and how we interpret perceptions arise *before* we have any information, before we observe, remember, and plan. Motivated reasoning thus encourages selective perception and memory . . . .").

[83] *See* SIMON, *supra* note 20, at 31–32; Taslitz, *supra* note 65, at 52. Although a police officer's motivation to build a case against a suspect who is presumed to be responsible for a crime can contribute to selectively in searching for and interpreting evidence confirming guilt, cases also clearly can be affected by officers' decisions and actions in collecting evidence that are free from any biasing tendencies. For example, in *Arizona v. Youngblood*, the police failed to refrigerate clothing worn by the child victim of a sexual assault, causing potentially important biological evidence to degrade to the extent analysis of it was precluded under techniques then available. *See* Arizona v. Youngblood, 488 U.S. 51, 54–55 (1988). Although the mishandled evidence could have excluded the defendant (Larry Youngblood) as the source of the material, the Supreme Court ruled that absent a showing of bad faith by the police in failing to preserve the evidence, Youngblood's Due Process rights were not violated. *Id.* at 58. Chief Justice Rehnquist's majority opinion explained that:

> [R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. Concurring in the judgment, Justice Stevens likewise highlighted the police's absence of motivation to prejudice a suspect as important in rejecting Youngblood's Due Process claim:

> [A]t the time the police failed to refrigerate the victim's clothing, and thus negligently lost

Herein lies the value of the perspective gained behind the veil of ignorance. Participants will not know if, when the veil is lifted, they are fated to be decorated police officers, innocent suspects, victims of crime, or citizens concerned about justice but not as directly affected by its administration. The inclination to yield to partisanship must necessarily dissipate when participants might be cast either as one of "us" or one of "them." Likewise, any consciously held temptations to prioritize clearing a case through arrest at the expense of short-circuiting a search for the truth[84] should largely disappear. Of course, certain problems that plague criminal investigations, including those attributed to the previously described common psychological tendencies and institutional and cultural norms, will not be eliminated through rational discourse.[85] Such difficulties can at least be appraised more objectively, and strategies to guard against them developed, by pursuing principled decisions unencumbered by pre-existing vested interests.

Several recommendations have been made to minimize potential sources of error and enhance the accuracy of police investigations.[86] Whether they would likely be effective, feasible, entail excessively weighty countervailing costs, and operate with appropriate sensitivity to the risk of making false positive (arresting innocent persons) and false negative (failing to arrest guilty persons) errors would be subject to resolution through discussion under the envisioned veil of ignorance. Concrete proposals regarding these matters have focused on fostering greater awareness of tunnel vision

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> potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police—who were still conducting an investigation—and to the prosecutor—who would later bear the burden of establishing guilt beyond a reasonable doubt—than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Id. at 59 (Stevens, J., concurring).

Years later, when technological advances allowed DNA testing of the degraded semen deposit on the victim's clothing, the analysis excluded Larry Youngblood and identified another man, Walter Cruise (who later pled guilty to the offense), as the source. *See* Acker, *supra* note 3, at 1640; Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 243–44 (2008).

[84] The most egregious examples would include police corruption leading to the arrest, prosecution and conviction of innocent persons. *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1137–38 (2013).

[85] *See* Findley & Scott, *supra* note 63, at 371; Ho, *supra* note 76, at 442; Taslitz, *supra* note 65, at 52.

[86] *See, e.g.*, GODSEY, *supra* note 63, at 215; INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 64, at 6; Findley & Scott, *supra* note 63, at 370.

and underlying decisional biases, and equipping individual police officers and their organizations with mechanisms to counter those tendencies and increase the reliability of criminal investigations.[87] Those measures include:

- Education and training about tunnel vision, confirmation bias, and related psychological phenomena that can contribute to prematurely focusing on a suspect or hypothesis, failing to consider alternative possibilities, and potentially lead to skewed and flawed decision-making.[88] Particular recommendations include explaining the underlying causes of the operative psychological processes and reliance on narratives, role playing, and case studies to enhance understanding.[89]
- The use of checklists based on best practices during the course of investigations,[90] not to be followed so rigidly as to automatically negate the judgment of experienced police officers,[91] but as a safeguard against improvident shortcuts and a way to highlight risk factors for making wrongful arrests.[92]
- Making as complete of a record as possible of witness interviews, evidence considered, leads pursued, and other relevant information,[93] both inculpating and exculpatory.[94]
- Reliance on institutionalized techniques designed to encourage discussion, debate, consideration of alternative possibilities, and pointed questioning of the preliminary hypotheses that guide an investigation; in short, creating and supporting a culture of “reflective

[87] *See, e.g.*, GODSEY, *supra* note 63, at 215; INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 64, at 6; Findley & Scott, *supra* note 63, at 370.
[88] *See* GODSEY, *supra* note 63, at 215; INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 64, at 6; Findley & Scott, *supra* note 63, at 370.
[89] *See* Findley & Scott, *supra* note 63, at 373; Taslitz, *supra* note 65, at 50.
[90] *See* BATTS ET AL., *supra* note 63, at 18; INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 64, at 10, 11.
[91] *See* Taslitz, *supra* note 65, at 54–55.
[92] *See* INT’L ASS’N OF CHIEF OF POLICE, *supra* note 64, at 10.
[93] *See* SIMON, *supra* note 20, at 48.
[94] *See* Findley & Scott, *supra* note 63, at 385–86.

skepticism"[95] or systematic devil's advocacy[96] as investigations unfold.

- Careful monitoring and oversight of investigations by supervisors (or other officers) not directly involved in them,[97] including a review process designed to reveal erroneous steps taken so they can be used prospectively as learning instruments.[98]

It seems unlikely that measures designed to enhance the reliability of police investigations and arrest decisions would meet with principled objection.[99] Nevertheless, concerns could well arise about the availability of resources and personnel to advance the envisioned procedures.[100] This prospect is particularly likely because resources

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[95] *See* Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 HOFSTRA L. REV. 451, 458 (2016). In particular, Reichart advocates that criminal investigators rely on "'rounds,' which is a clinical method designed to expand options and see problems from other perspectives." *Id.* at 465. The process is summarized as follows:

> Rounds are regularly conducted as a way for students and practitioners in many professions to present challenging situations to their peers in a structured fashion. The structure prevents jumping directly to a solution from a problem prematurely, before relevant facts have been identified and the problem has been diagnosed as clearly as possible. In a legal context, rounds often begin with the presentation of a challenging circumstance. This is followed by factual questions posed by the rest of the group. During this segment, participants are prohibited from diagnosing the problem or offering solutions. This limitation curbs the tendency to make assumptions about the presenter's issue based on participants' past experiences. Once fact gathering—the crucial and often longest part of rounds—is completed, participants move to problem diagnosis. The presenter is often surprised to learn that his or her peers have completely different diagnoses of the problem. Next, comes question flooding, where each participant poses a single question about the issue presented. No response is permitted to these questions. This is meant to spur thinking about a variety of issues. Question flooding is followed by problem solving, where participants suggest possible solutions. Rounds conclude with a review of whether and how the discussion was useful to the presenter and the group as a whole.

Id. at 465–66.

[96] *See* SIMON, *supra* note 20, at 45; INT'L ASS'N OF CHIEF OF POLICE, *supra* note 64, at 9–10.

[97] *See* INT'L ASS'N OF CHIEF OF POLICE, *supra* note 64, at 11; Findley & Scott, *supra* note 63, at 381.

[98] *See* BATTS ET AL., *supra* note 63, at 15–16; SIMON, *supra* note 20, at 45.

[99] *Cf.* DARREL W. STEPHENS, POLICE DISCIPLINE: A CASE FOR CHANGE 5 (June 2011), https://www.ncjrs.gov/pdffiles1/nij/234052.pdf ("Citizens also expect that the police will be held accountable for the manner in which they use their authority and that any misconduct will be dealt with appropriately.").

[100] *See* INT'L ASSOC. OF CHIEF OF POLICE, *supra* note 64, at 6 ("Thorough investigations, critical for eliminating wrongful arrests and convictions, are expensive. Many jurisdictions do not have the appropriate budget for the number of officers or detectives needed for each case, or the most advanced equipment and technology needed for investigations. . . . While uniform standards in addressing wrongful convictions would be a welcomed step, consideration must be given to the agencies that may not have the necessary resources to implement these recommendations. Sharing resources with neighboring jurisdictions or establishing a

devoted to this end could deplete those needed elsewhere, compromising other tasks that the police are expected to fulfill, or causing other social programs to suffer.[101] These and related issues presumably would be prime matters for discussion, and for resolution, behind the metaphorical veil of ignorance.

B. Eyewitness Identification

Attempted eyewitness identifications are an important component of many criminal investigations.[102] Identification evidence can be powerfully probative of guilt, yet also can be fraught with reliability problems and thus directly contribute to wrongful arrests and convictions.[103] The Innocence Project reports that eyewitness misidentifications were a contributing factor in 70% (252/358) of the wrongful convictions exposed by DNA analysis through mid-year 2018.[104] The National Registry of Exonerations, a roster of known exonerations since 1989 with cases in addition to those in which DNA evidence played a role, identifies mistaken witness identification as a factor in 29% (669/2294) of the wrongful convictions reported through mid-year 2018.[105] The wide disparity between the two sources about the regularity of identification errors owes to the Innocence Project's exclusive focus on DNA-based exonerations, which overwhelmingly involve sexual assault cases and thus are especially likely to hinge on identification testimony.[106] The National Registry of Exonerations includes a much lower proportion of cases

statewide fund to create funding equity among jurisdictions can be implemented to provide a foundational platform for reform in this area.").

[101] *See, e.g.*, Thompson, *supra* note 29, at 63.

[102] Thomas D. Albright & Jed S. Rakoff, *Preface* to NAT'L RES. COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION xiii (2014).

[103] *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 245 (2012) (quoting United States v. Wade, 388 U.S. 218, 228 (1967)) ("We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that 'the annals of criminal law are rife with instances of mistaken identification.'").

[104] *See Eyewitness Misidentification,* INNOCENCE PROJECT, https://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited Nov. 29, 2018).

[105] *See Browse Cases: Detailed View*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=MWID&FilterValue1=8%5FMWID (last visited Nov. 29, 2018).

[106] *See* JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY 12–16 (2011); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530–31 (2005); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 932–33 (2008).

in which innocent persons were convicted of sexual assault.[107]

The impersonal statistics describing the incidence of wrongful convictions, in which one or more eyewitnesses misidentified an innocent person, must not obscure the intensity of the life-altering experiences of the individuals arrested, prosecuted, convicted, and punished in these cases.[108] Alfred Hitchcock's iconic docudrama *The Wrong Man*—which was based on a real prosecution grounded on erroneous identification testimony—grippingly conveys the chilling nature of this plight.[109] Yet the failure to identify the true perpetrators of crimes also is profoundly distressing. New crimes committed and victims claimed by the actual offenders who benefit from erroneous and failed identifications compound the toll of human suffering and the original miscarriage of justice associated with the arrest and conviction of innocents.[110] The tenets of reliable justice

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[107] Approximately 14% (321/2294) of the exonerations listed by the National Registry of Exonerations through mid-year 2018 were linked to sexual assault convictions. *Browse Cases: Detailed View*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Crime&FilterValue1=8%5FSexual%20Assault (last visited Nov. 29, 2018). In contrast, approximately 77% (279/363) of the exonerations reported by the Innocence Project through mid-year 2018 related to convictions for sex crimes. *The Cases*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#sex-crimes,exonerated-by-dna (last visited Nov. 29, 2018).

[108] *See, e.g.*, Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 475–76 (2014). One study has concluded that non-intentional eyewitness misidentification of a defendant is a causal factor in contributing to wrongful convictions, helping distinguish cases ending in an erroneous guilty verdict from "near miss[es]," defined as cases "when an innocent defendant is arrested, indicted, and/or prosecuted, but his case is either dismissed prior to trial or he is acquitted at trial." *See id.* at 476. Intentional misidentifications by a purported eyewitness did not appear to play a causal role in generating wrongful convictions. The researchers explained:

> Misidentifications as a whole did not differ appreciably between erroneous convictions and near misses. However, when we distinguished intentional misidentifications from honestly mistaken misidentifications, the difference became statistically significant, with honest mistakes predicting erroneous convictions and intentional misidentifications associated with near misses. Although it may seem counterintuitive, a lying witness may actually be easier for police and prosecutors to detect with further investigation than one who is honestly mistaken.

Id. at 499.

[109] *See* Herbert Brean, *A Case of Identity*, LIFE, June 29, 1953, at 97, 107 (describing case of Christopher Emmanuel ("Manny") Balestrero); Lou Lumenick, *A Case of Mistaken Identity Ruined This Man's Life—And Inspired Hitchcock*, N.Y. POST (Feb. 7, 2016), https://nypost.com/2016/02/07/a-case-of-mistaken-identity-ruined-this-mans-life-and-inspired-hitchcock/; Sabrina Negri, *I Saw, Therefore I Know? Alfred Hitchcock's* The Wrong Man *and the Epistemological Potential of the Photographic Image*, FILM CRITICISM (Feb. 2017), https://quod.lib.umich.edu/f/fc/13761232.0041.107/—i-saw-therefore-i-know-alfred-hitchcocks-the-wrong-man?rgn=main;view=fulltext.

[110] *See* Steven E. Clark et al., *Legitimacy, Procedural Justice, Accuracy, and Eyewitness*

contemplate procedures that maximize accuracy in eyewitness identifications, mindful of both corollary justice principles and practical feasibility.[111] Simple adherence to the minimal constitutional standards announced by the Supreme Court falls short of these ideals.[112]

The Supreme Court's important eyewitness identification decisions in *United States v. Wade*,[113] *Gilbert v. California*,[114] and *Stovall v. Denno*[115]—the "*Wade* trilogy"—were decided in 1967, more than a half-century ago. The rulings in *Wade* and *Gilbert,* recognizing that defendants have a Sixth Amendment right to counsel at post-indictment line-ups, were largely eviscerated five years later in *Kirby v. Illinois*.[116] In *Kirby*, the justices ruled that suspects' right to counsel is limited to the "critical stages" of criminal prosecutions,[117]

Identification, 8 UC IRVINE L. REV. 41, 57–58 (2018); *see, e.g.*, Acker, *supra* note 3, at 1649–52 (describing wrongful convictions for sexual assault based partially on eyewitness misidentifications of Arthur Whitfield and Julius Ruffin in separate cases in Virginia, while the true perpetrator, Aaron Doxie, III, remained at liberty to commit additional crimes).

[111] *See* Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal* Case, 42 CONN. L. REV. 435, 442–43 (2009).

[112] *See* Richard A. Wise et al., *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 818–19 (2007) [hereinafter Wise et al., *Tripartite Solution*].

[113] United States v. Wade, 388 U.S. 218, 236–38, 240 (1967) (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964)) (holding that a defendant who appears in a post-indictment line-up has a 6th Amendment right to the presence of counsel and that a witness to a line-up conducted in the absence of counsel will be allowed to make an in-court identification of the defendant only if the prosecution proves by clear and convincing evidence that the in-court identification is not tainted by the previous line-up viewing).

[114] Gilbert v. California, 388 U.S. 263, 273 (1967) (announcing a *per se* rule excluding witnesses' testimony about making an out-of-court identification of the defendant (e.g., after viewing a line-up) when the identification procedure takes place in violation of the defendant's 6th Amendment right to counsel).

[115] Stovall v. Denno, 388 U.S. 293, 300, 301–02 (1967) (declining to give retroactive application to *Wade* and *Gilbert* in challenge to identification procedures raised on habeas corpus review of state court conviction, and announcing Due Process test for admissibility of identification testimony: whether the lineup was so unnecessarily suggestive so as to give rise to a substantial probability of misidentification).

[116] *See* Kirby v. Illinois, 406 U.S. 682 (1972).

[117] *See id.* at 690 (quoting Simmons v. United States, 390 U.S. 377, 382–83 (1968)) ("In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: 'The rationale of those cases was that an accused is entitled to counsel at any "critical stage of the *prosecution*," and that a post-indictment lineup is such a "critical stage." We decline to depart from that rationale today by imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever."). Justice Stewart's plurality opinion further explained that the Sixth Amendment right to counsel only applies "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. In dissent, Justice Brennan complained that "*Wade* and *Gilbert*, of course, happened to involve post-indictment

thereby excluding the great majority of line-ups and show-up identifications, which typically occur earlier during police investigations.[118] The Court subsequently held in *United States v. Ash*[119] that even during a case's critical stages, suspects have no constitutional right to the presence of counsel when the police use photo arrays to conduct identifications.[120] And in 1977, a decade after the *Wade* trilogy, the justices ruled in *Manson v. Brathwaite*[121] that law enforcement officers' use of unnecessarily suggestive identification procedures does not require the suppression of identification testimony.[122] Rather, identification testimony remains

confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance." *Id.* at 704 (Brennan, J., dissenting).

[118] Specific information about the relative frequency of pre- and post-critical stage identification procedures is sparse because data regarding eyewitness identification procedures generally are not regularly collected. *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 21. Nevertheless, "a safe assumption is that preindictment showups, at which the right to counsel does not attach per Kirby, greatly outnumber postindictment showups." Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515, 523 n.53 (2008). "[T]he vast majority of lineups are conducted before the return of an indictment or the filing of formal charges . . . ." David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 268 (2010).

[119] United States v. Ash, 413 U.S. 300 (1973).

[120] *See id.* at 324–25 (quoting United States v. Wade, 388 U.S. 218, 227 (1967)). Most identifications are likely to at least begin with the presentation of photos or computer-generated composites of suspects rather than involving individuals displayed in a lineup. *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 458–59 (2012) (police in most jurisdictions no longer use live lineups and instead rely on photo arrays); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups,* 1 PSYCHOL. PUB. POL'Y & L. 765, 784 (1995) (citing results of study suggesting that 73% of identifications involve photospreads, compared to 27% which involve lineups).

[121] Manson v. Brathwaite, 432 U.S. 98 (1977).

[122] *See id.* at 116. In dissent, Justice Marshall, joined by Justice Brennan, argued for a *per se* rule of exclusion of identification testimony when the police unnecessarily used suggestive procedures. Such a rule, he argued, "both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods." *See id.* at 127 (Marshall, J., dissenting). In addition, and of particular relevance to the reliable justice theme developed in this article, he maintained that:

> [I]mpermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law . . . For if the police and the public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.
>
> For these reasons, I conclude that adoption of the per se rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection.

admissible if it passes a threshold test of reliability, determined by a trial court's assessment of:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.[123]

The voluminous body of psychological research centering on identification witnesses' perception, memory, and recall that was stimulated in part by the Court's decision in *Brathwaite*[124] casts significant doubt on whether application of the *Brathwaite* factors can be trusted to block jurors from hearing unreliable identification testimony.[125] But the Supreme Court has never embraced that goal as its mandate. After being fully apprised about contemporary research findings in 2012, the justices remained insistent in *Perry v. New Hampshire* that jurors, and not judges in their admissibility decisions, have primary responsibility for determining the reliability of questionable identification testimony.[126] The identification at

Id. at 127–28 (Marshall, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting)).

[123] *See Manson*, 432 U.S. at 114.

[124] *See* State v. Henderson, 27 A.3d 872, 892 (N.J. 2011) ("Virtually all of the scientific evidence . . . emerged after *Manson*. . . . During the 1970s, when the Supreme Court decided *Manson*, researchers conducted some experiments on the malleability of human memory. But according to expert testimony, that decade produced only four published articles in psychology literature containing the words 'eyewitness' and 'identity' in their abstracts. By contrast, the Special Master estimated that more than two thousand studies related to eyewitness identification have been published in the past thirty years."); State v. Lawson, 291 P.3d 673, 685 (Or. 2012) ("Since 1979 . . . there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification.").

[125] *See, e.g.*, Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 18 (2009); *see also* Benjamin Wiener, Comment, *Revisiting the* Manson *Test: Social Science as a Source of Constitutional Interpretation*, 16 U. PA. J. CONST. L. 861, 869–70 (2014) ("Justice Sotomayor . . . observe[d :] The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.").

[126] *See* Perry v. New Hampshire, 565 U.S. 228, 245 (2012).

> Our unwillingness to enlarge the domain of due process . . . rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence.

issue in *Perry* occurred under suggestive circumstances that had not been arranged by the police.[127] Justice Ginsburg's majority opinion concluded that absent improper state action, a Due Process analysis had no mooring, nor would the deterrence rationale of *Brathwaite* and related decisions be served by excluding identification evidence.[128] The opinion underscored that eyewitness identification testimony occupies no different status than other brands of evidence.[129]

> The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. . . . Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," . . . have we imposed a constraint tied to the Due Process Clause.[130]

> We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.

Id.

[127] *See id.* at 234–36. A police officer entered the apartment of the witness who had reported seeing a man stealing items from cars in the apartment parking lot and asked the witness for a detailed description of the man. *See id.* at 234. The witness then pointed out her apartment window and identified the defendant, who was standing in the parking lot next to a police officer. *Id.* Approximately one month later, the witness was unable to pick out the defendant's picture from a photo array. *Id.* However, she was permitted to testify at the defendant's trial about the identification she had made from her apartment. *See id.* at 236.

[128] *See id.* at 241–42. "We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures . . . ." *Id.* at 232–33.

[129] *See id.* at 244–45.

> Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. . . .
>
> . . . .
>
> We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. . . . We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Id.

[130] *Id.* at 237 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

A sizeable gap thus exists between the minimal Due Process test governing the admissibility of eyewitness identification evidence and more demanding standards predicated on maximizing factual reliability. Various reforms have been recommended and have been implemented in several jurisdictions to narrow that gap.[131] For example, in 2014, a committee assembled by the National Academy of Sciences issued a report recommending several "best practices for the law enforcement community" to improve the accuracy of eyewitness identifications.[132] In addition to endorsing that the police receive specific training in relevant matters,[133] the recommendations included:

- Using double-blind lineup and photo array procedures, meaning that neither the officer administering the procedure nor the participating witness knows the identity of the actual suspect, as opposed to the included fillers.[134] This safeguard is considered important to ensure that the officer does not consciously or subconsciously communicate cues that would suggest to the witness whom the guilty party is.[135] In the event that it would be difficult to involve an officer who does not know the suspect's identity, alternatives such as inserting photos in files and shuffling them before they are presented to the witness are suggested.[136]

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[131] *See* Wiener, *supra* note 125, at 870–73.

[132] IDENTIFYING THE CULPRIT, *supra* note 102, at 105–19.

[133] *See id.* at 105. Training would focus on "vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols." *Id.* at 106.

[134] *See id.* at 106.

[135] *See id.* at 26, 106.

[136] *See id.* at 24–25, 106–07; *see also* Margaret Bull Kovera & Andrew J. Evelo, *The Case for Double-Blind Lineup Administration*, 23 PSYCHOL. PUB. POL. & L. 421, 429–30 (2017) (discussing double-blind administration of line-ups and photo arrays); Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 L. & HUM. BEHAV. 70, 79 (2009) (finding that double-blind administrations yield better information about the guilt of the identified suspect); Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 365–66 (2006) (discussing how double-blind administration limits post-identification feedback); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 629–30 (2006) [hereinafter Wells, *Systemic Reforms*] (discussing how double-blind administration prevents investigators from inadvertently influencing witnesses); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 627 (1998) [hereinafter Wells et al., *Recommendations for Lineups*] (recommending, among other rules, that the investigator should not know which person in a lineup or photospread is the suspect).

- Giving witnesses standardized instructions, including that "the perpetrator may or may not be in the photo array or lineup and that the criminal investigation will continue regardless of whether the witness selects a suspect."[137] These instructions are intended to help negate the assumption that the actual perpetrator necessarily is present in a lineup or represented in a photo array and hence that the witness should select someone.[138]
- Witnesses' statements indicating their degree of confidence in making an identification should be recorded contemporaneously with their first identification attempt.[139] The timing is important because events that take place after the initial identification procedure—such as repeated viewings of the suspect, conversations with others, media accounts, preparing for and testifying in pretrial proceedings—can bolster (or diminish) witnesses' confidence in the accuracy of their identification, which in turn can influence the measure of faith judges and jurors place on witnesses' accounts.[140]
- The identification process should be video-recorded.[141] In this way, a record will be available to help identify strengths and weaknesses of identification procedures, preserve witnesses' initial expressions of confidence in making attempted identifications, and memorialize

[137] IDENTIFYING THE CULPRIT, *supra* note 102, at 107.

[138] *See* Wells, *Systemic Reforms*, *supra* note 136, at 625; Wells et al., *Recommendations for Lineups*, *supra* note 136, at 629–30 (recommending as well that the officer administering the lineup or showup should not know who the actual suspect is); *see also* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 31–32 (1999) [hereinafter NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE] (recommending additional instructions, including one emphasizing that clearing the innocent from suspicion is just as important as identifying guilty).

[139] *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 108.

[140] *See* Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 119 (2002); Nancy K. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCHOL. PUB. POL'Y & L. 1, 9 (2014) [hereinafter Steblay et al., *Post Identification Feedback*]; Wells, *Systemic Reforms*, *supra* note 136, at 631; Wells et al., *Recommendations for Lineups*, *supra* note 136, at 635–36; John T. Wixted et al., *Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, 70 AM. PSYCHOLOGIST 515, 522 (2015); *see generally* Wells et al., *Recommendations for Lineups*, *supra* note 136, at 619–23 (surveying empirical studies of witness confidence, timing of a witness's confidence statement, and juror reactions to witness confidence).

[141] IDENTIFYING THE CULPRIT, *supra* note 102, at 108.

other factors that may be helpful in assessing reliability.[142]

These recommendations do not exhaust the proposals that have been made to enhance the reliability of identifications. Others include establishing a minimum number of fillers to round out a lineup or photo array (normally, at least five fillers are suggested, thus, completing a "six pack" including the actual suspect);[143] that the fillers should be chosen to resemble the witness's verbal description of the perpetrator, with the caveat that the actual suspect should not stand out by being too different in appearance from the fillers;[144] that identifications should take place as soon as practicable following the witness's viewing the perpetrator (to avoid memory decay and interference);[145] that when two or more witnesses viewed

[142] *See, e.g.*, Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 803–04 (2012); Kovera & Evelo, *supra* note 136, at 433. *But see* Wells et al., *Recommendations for Lineups*, *supra* note 136, at 640 (noting positive aspects of video recording identification procedures but stopping short of formally recommending video recording because of potential drawbacks).

[143] *See* James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1289 (2010); *see also* NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 138, at 29, 30 (recommending a minimum of five fillers for photo arrays and a minimum of four fillers for lineups); SIMON, *supra* note 20, at 83 (suggesting the use of five or more fillers); Wise et al., *Tripartite Solution*, *supra* note 112, at 858–59 (noting benefits of increasing size of lineups and photo arrays beyond five or six); Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Law Enforcement Components All Dep't Prosecutors 1 (Jan. 6, 2017), https://www.justice.gov/file/923201/download (recommending at least five fillers in photo arrays).

[144] *See, e.g.*, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 138, at 29–30; SIMON, *supra* note 20, at 83; Wells, *Systematic Reforms*, *supra* note 136, at 624; Wells & Quinlivan, *supra* note 125, at 7; Wise et al., *Tripartite Solution*, *supra* note 112, at 859; Memorandum from Sally Q. Yates, *supra* note 143, at 1–2 (involving photo arrays). Some researchers have cautioned that the fillers and suspect should not resemble each other too closely and that there is questionable empirical support for the proposition that the fillers should fit the verbal description provided by the witness rather than resemble the suspect. *See* Molly B. Moreland & Steven E. Clark, *Eyewitness Identification: Research, Reform, and Reversal*, 5 J. APPLIED RES. MEMORY & COGNITION 277, 279, 280, 281 (2016); Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 PERSP. PSYCHOL. SCI. 238, 243, 254 n.10 (2012) [hereinafter Clark, *Costs and Benefits*].

[145] *See* SIMON, *supra* note 20, at 83. For the effects of memory decay and interference on identification, *see generally* IDENTIFYING THE CULPRIT, *supra* note 102, at 69–70, 98–99 (describing limits of vision and memory on eyewitness identifications); Kenneth A. Deffenbacher, *Estimating the Impact of Estimator Variables on Eyewitness Identification: A Fruitful Marriage of Practical Problem Solving and Psychological Theorizing*, 22 APPLIED COGNITIVE PSYCHOL. 815, 820–21, 822 (2008) (recognizing that stress and high anxiety affect memory and witness identification); Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL. APPLIED 139, 147–48 (2008) (confirming that longer retention intervals reduce face

the perpetrator, they should make their attempted identifications separately;[146] arranging for multiple presentations of the same suspect to identifying witnesses should be avoided;[147] and that when multiple suspects are involved, only one should be included in each lineup or photo array that is viewed.[148]

One issue that continues to defy consensus is whether simultaneous or sequential presentation of the choices offered to witnesses in lineups and photo arrays is the preferred procedure.[149] With the simultaneous display method, witnesses view all persons in a lineup or all photos in an array at the same time when deciding whether they can identify anyone.[150] In contrast, with the sequential method, only one person or one photo is presented at a time.[151] Witnesses are asked as each person or photo is displayed whether they can make an identification.[152] They consequently must make an "absolute judgment" (yes, no, or don't know) about whether they can identify the individual they are viewing as the perpetrator of the crime.[153] A concern regarding the simultaneous method is that witnesses may be tempted to make a "relative judgment," selecting the individual from the presented options who most closely resembles

recognition memory); Wells & Quinlivan, *supra* note 125, at 14 (discussing how intervening information negatively affects memory).

[146] *See, e.g.*, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 138, at 27; Memorandum from Sally Q. Yates, *supra* note 143, at 4 (involving photo arrays).

[147] *See, e.g.*, Wells & Quinlivan, *supra* note 125, at 8.

[148] *See, e.g.*, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 138, at 29; SIMON, *supra* note 20, at 83; Wells, *Systematic Reforms*, *supra* note 136, at 623; Wise et al., *Tripartite Solution*, *supra* note 112, at 857–58; Memorandum from Sally Q. Yates, *supra* note 143, at 1 (involving photo arrays).

[149] Thus, the 1999 U.S. Department of Justice Report, *Eyewitness Evidence: A Guide for Law Enforcement*, provided guidelines for both approaches but took no position on which should be used. *See* NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 138, at 33–34. The 2014 National Academy of Sciences report on eyewitness identification and the 2017 U.S. Justice Department memorandum detailing procedures for conducting photo arrays similarly declined to recommend one format over the other. *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 118 ("[C]an we draw definitive conclusions about which lineup procedure (sequential or simultaneous) is preferable? At this point, the answer is no."); Memorandum from Sally Q. Yates, *supra* note 143, at 8 ("Until additional research is conducted, . . . it is not possible to say conclusively whether one identification method [*i.e.*, sequential or simultaneous] is better than the other. . . . For this reason, this document does not take a position on which procedure should be used.").

[150] *See* Wells, *Systematic Reforms*, *supra* note 136, at 625; Shirley N. Glaze, Note, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 L. & PSYCHOL. REV. 199, 200 (2007).

[151] *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 749 (2007).

[152] *See* Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394, 396 (2006); Wells, *Systematic Reforms*, *supra* note 136, at 625.

[153] *See* Wells, *Systematic Reforms*, *supra* note 136, at 625; Wells et al., *Recommendations for Lineups*, *supra* note 136, at 617.

their recollection of the perpetrator.[154] An identification based on a relative judgment—that the person chosen from the presented options is the one closest in appearance to the perpetrator—can be importantly different from deciding whether anyone matches the witness's memory of the perpetrator.[155] An erroneous relative judgment will inevitably result in an innocent person being identified if the true culprit is not in the lineup.[156]

Researchers have produced evidence that witnesses are somewhat more likely to make different kinds of identification errors depending on whether the simultaneous or sequential presentation method is used.[157] If a suspect placed in a lineup is the true perpetrator of the crime under investigation, witnesses can make an accurate identification (a true positive) or erroneously fail to make an identification (a false negative).[158] A false negative can involve the failure to make any identification or it might mean that the witness has selected an innocent filler (because the police know that fillers are innocent, this result is far less consequential than the erroneous selection of an innocent suspect).[159] If the suspect is not the true

[154] *See* Epstein, *supra* note 151, at 749; Glaze, *supra* note 150, at 201; Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1, 13–14 (2005); Wells & Seelau, *supra* note 120, at 768.

[155] *See* Wells & Seelau, *supra* note 120, at 768, 769.

[156] *See* Wells, *Systematic Reforms*, *supra* note 136, at 618–19; Wells et al., *Recommendations for Lineups*, *supra* note 136, at 613–14; Wells & Seelau, *supra* note 120, at 769.

[157] *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 82. Calculating the error rates associated with the different methods is not as straightforward as it might appear. Some researchers prefer an analysis that relies on two factors: "discriminability" (the extent to which a technique truly improves memory-based discrimination) and the observer's "response criterion or response bias" (reflecting the degree of confidence or level of certainty the observer requires to make an identification). Receiver Operating Characteristics (ROC) analysis is a technique that evaluates lineup procedures according to how they affect discrimination in isolation from response bias. *Id.* at 83. Some researchers believe the ROC analysis is preferable, but it has generated controversy. *See, e.g.*, Gary L. Wells et al., *ROC Analysis of Lineups Does Not Measure Underlying Discriminability and has Limited Value*, 4 J. APPLIED RES. MEMORY & COGNITION 313, 313 (2015); Gary L. Wells et al., *ROC Analysis of Lineups Obscures Information That is Critical for Both Theoretical Understanding and Applied Purposes*, 4 J. APPLIED RES. MEMORY & COGNITION 324, 324–25 (2015); John T. Wixted & Laura Mickes, *Evaluating Eyewitness Identification Procedures: ROC Analysis and its Misconceptions*, 4 J. APPLIED RES. MEMORY & COGNITION 318, 320 (2015); John T. Wixted & Laura Mickes, *ROC Analysis Measures Objective Discriminability for any Eyewitness Identification Procedure*, 4 J. APPLIED RES. MEMORY & COGNITION 329, 329 (2015).

[158] *See* Nancy Steblay et al., *Eye Witness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523, 530 (2003) [hereinafter Steblay et al., *Police Showup and Lineup*].

[159] *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 77; Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. & HUM. BEHAV. 459, 463 (2001) [hereinafter Steblay et al., *Sequential and Simultaneous Lineup*].

perpetrator, witnesses can erroneously identify the suspect as the offender (a false positive) or correctly refrain from making an identification (a true negative).[160] A true positive identification enhances the likelihood that a guilty criminal will be convicted, and a true negative identification lessens the chance that an innocent person will suffer a wrongful conviction.[161] A false negative increases the likelihood that a guilty person will go free, while a false positive heightens the risk that an innocent person will be convicted.[162]

Studies by and large conclude that when sequential procedures are used (and when the officer overseeing the identification is "blind," that is, unaware who the true suspect is or does not know when the true suspect is presented to the witness), there is a reduction in false positive identifications (the erroneous selection of an innocent person) but also an increase in false negative outcomes (the erroneous failure to select a guilty person).[163] With simultaneous procedures, studies generally suggest that more correct identifications will be made of guilty suspects but more incorrect identifications will be made of innocent ones.[164] These results owe in

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[160] *See* Steblay et al., *Police Showup and Lineup*, *supra* note 158, at 531.

[161] *See* SIMON, *supra* note 20, at 52.

[162] *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 77; SIMON, *supra* note 20, at 52.

[163] *See* Steblay et al., *Police Showup and Lineup*, *supra* note 158, at 525, 533; *cf.* Dawn McQuiston-Surrett et al., *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 PSYCHOL. PUB. POL'Y & L. 137, 143, 148 ("Because of the limited investigation on this important topic, there is a need for further research addressing claims that blind testing is an essential aspect of the [sequential lineup] procedure.").

[164] *See* Steblay et al., *Sequential and Simultaneous Lineup*, *supra* note 159, at 463. In a meta-analysis of laboratory studies, the researchers reported accuracy results for sequential and simultaneous identification procedures under conditions when the target suspect (i.e., the true culprit) was present in the lineup and when the target suspect was not present. *See id.* at 460–61, 462. When the target was present, the true culprit was correctly identified 35% of the time for the sequential method compared to 50% for the simultaneous method. *Id.* at 463 tbl.1. When the target was absent, an identification was correctly rejected 72% of the time when the sequential method was used (and a filler was erroneously identified 28% of the time), and an identification was correctly rejected 49% of the time with the simultaneous method (and a filler was erroneously identified 51% of the time). *See id.*; *see also* McQuiston-Surrett, *supra* note 163, at 138–39 ("[W]hen perpetrator-present and -absent data are separated [sequential lineups] are superior only when the perpetrator is absent . . . ."). One prominent field study (that is, a study based on actual police lineups rather than laboratory studies conducted under controlled conditions) concluded that sequential lineups had a higher error rate in terms of innocent fillers being selected (9.2%) than simultaneous lineups (2.8%). *See* SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES, 38–39, 61 (2006); Sheri H. Mecklenburg et al., *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 L. & HUM. BEHAV. 22, 22 (2008) [hereinafter Mecklenburg et al., *Illinois Field Study*]. Other researchers have raised methodological issues with this study that call its conclusions into question. Zack L. Winzeler, Comment, *Whoa, Whoa, Whoa . . . One at a Time: Examining the Responses to the Illinois Study on Double-Blind Sequential Lineup Procedures*, 2008 UTAH L. REV. 1595, 1607 (2008). One

part to the sequential method reducing the likelihood that witnesses will rely on relative judgment when making an identification.[165] In addition, witnesses appear to use a different "criterion setting," or confidence threshold for making an identification under the different procedures.[166] More confidence tends to be required before witnesses make a positive identification—they are less likely to hazard a guess or make a tenuous identification—when the sequential method is employed than when subjects are viewed simultaneously.[167]

The location of the criterion setting has implications for the different types of identification errors that can be made.[168] A higher certainty threshold (associated with sequential presentations) reduces the likelihood that witnesses will erroneously identify innocent suspects.[169] At the same time, however, it causes witnesses to be more likely to refrain from identifying truly guilty individuals who are present in a lineup or photo array.[170] A lower criterion setting (associated with the simultaneous method) causes witnesses to have less hesitation to make an identification.[171] This results in a higher likelihood that guilty persons will be selected, but it also increases the odds that more innocent suspects will erroneously be identified.[172]

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potential confounding factor pointed out is that the sequential lineups were conducted using double-blind procedures, while the simultaneous lineups were conducted using non-blind procedures. *See* Mecklenburg, *Illinois Field Study, supra,* at 23. It further appears that in the Illinois field study some witnesses were asked to make lineup identifications after they already had viewed photo arrays including suspects and it is unclear which identification response was used in the study. *See* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 L. & HUM. BEHAV. 3, 4–5 (2008); Nancy K. Steblay, *What We Know Now: The Evanston Illinois Field Lineups*, 35 L. & HUM. BEHAV. 1, 2–3 (2010); Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 L. & HUM. BEHAV. 6, 8–9 (2008); Winzeler, *supra*, at 1608–09.

[165] *See* Steblay et al., *Police Showup and Lineup*, *supra* note 158, at 524–25.

[166] *See* Tim Curran et al., *Conflict and Criterion Setting in Recognition Memory*, 33 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 2, 2 (2007); Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 395 (2006); Gary L. Wells, *Eyewitness Identification: Probative Value, Criterion Shifts, and Policy Regarding the Sequential Lineup*, 23 CURRENT DIRECTIONS PSYCHOL. SCI. 11, 14 (2014) [hereinafter Wells, *Probative Value*].

[167] *See* Klobuchar et al., *supra* note 166, at 395; Malpass, *supra* note 152, at 397; Wells, *Probative Value*, *supra* note 166, at 14.

[168] *See* IDENTIFYING THE CULPRIT, *supra* note 102, at 77, 87; Wells, *Probative Value*, *supra* note 166, at 14.

[169] *See* Klobuchar et al., *supra* note 166, at 395; Wells, *Probative Value*, *supra* note 166, at 14.

[170] *See* Klobuchar et al., *supra* note 166, at 395.

[171] *See* Moreland & Clark, *supra* note 144, at 279; Wells, *Probative Value*, *supra* note 166, at 12.

[172] *See* Klobuchar et al., *supra* note 166, at 388; Malpass, *supra* note 152, at 402; Wells, *Probative Value*, *supra* note 166, at 12.

The choice between relying on simultaneous or sequential presentations thus can be controversial. Complications arise, in part, because the choice of presentation methods affects the likelihood that different identification outcomes will be accurate or erroneous.[173] The choice is further complicated because different weight can be assigned to the benefits and costs associated with the range of possible outcomes, for instance, the importance of correctly identifying guilty offenders compared to the seriousness of mistakenly identifying innocent suspects.[174] Other proposed eyewitness identification reforms may additionally involve resource and logistical considerations.[175] Both empirical and normative assessments thus will be relevant to informing decisions about implementing identification procedure reforms, the former concerning administrative matters and the likelihood that specific measures will promote accurate identifications or risk causing misidentifications or non-identifications, and the latter involving the weight assigned to the different possible outcomes.[176]

Decision-makers behind the veil of ignorance thus will have to confront several issues regarding eyewitness identification evidence. Focusing on factual reliability, they might first carefully evaluate the available evidence in an attempt to reach agreement about what procedures are most likely to enhance and diminish the risk that witnesses will make different kinds of identification errors. They will have to grapple with value judgments to decide the relative importance of different outcomes—accurate identifications of guilty suspects, erroneous identifications of innocent suspects, the correct exclusion of innocent suspects, the erroneous exclusion of guilty suspects, and non-identifications.[177] They must determine the circumstances under which identification testimony should and should not be admissible as evidence and consider measures designed to enhance fact-finders' evaluation of the reliability of the testimony that is admitted.

With respect to the admissibility of identification testimony, for example, they might revisit the central issue presented in *Manson v. Brathwaite*: whether identifications made after the police use

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[173] *See* Klobuchar et al., *supra* note 166, at 388; Malpass, *supra* note 152, at 402.

[174] For extended discussion, *see* Malpass, *supra* note 152, at 399 tbl.1.

[175] *See* Clark, *Blackstone*, *supra* note 22, at 1129; Clark, *Costs and Benefits*, *supra* note 144, at 252; Klobuchar et al., *supra* note 166, at 406; Moreland & Clark, *supra* note 144, at 282; Thompson, *supra* note 29, at 58; Wells, *Systematic Reforms*, *supra* note 136, at 632.

[176] *See* Clark, *Costs and Benefits*, *supra* note 144, at 248; Malpass, *supra* note 152, at 415.

[177] *See* Malpass, *supra* note 152, at 399 tbl.1.

unnecessarily suggestive procedures should be *per se* inadmissible or whether, as the Court decided, they instead should be admitted into evidence if deemed sufficiently reliable.[178] Or they might return to the issue considered in *Perry v. New Hampshire*: whether state action, such as law enforcement's arranging for an identification, is required prior to a court ruling on the admissibility of identification testimony.[179] They might consider the adequacy of the *Brathwaite* criteria to assess threshold reliability[180] and what balancing test should inform admissibility decisions.[181]

Beyond resolving admissibility issues, decision-makers should determine how to assist fact-finders in evaluating the appropriate weight to afford identification evidence. Liberated from the partisanship that characterizes the adversarial process, participants concerned with reliable justice should seek measures that favor crediting testimony that is most likely to be accurate, rather than its propensity to support a particular verdict (guilty or not guilty). Considerations might include the adequacy of direct and cross-examination to illuminate the strengths and weaknesses of identification testimony, the benefits and costs of allowing expert testimony about the estimator and system variables that can influence the reliability of identification evidence,[182] and the

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[178] *See* Manson v. Brathwaite, 432 U.S. 98, 109, 114 (1977) (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)). State courts in some jurisdictions have opted for a rule of *per se* exclusion when identification procedures are unnecessarily suggestive, relying on state constitutional or other independent grounds. *See, e.g.*, Commonwealth v. Johnson, 650 N.E.2d 1257, 1264–65 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981). *But see* State v. Dubose, 699 N.W.2d 582, 584 (Wis. 2005) (citing Stovall v. Denno, 388 U.S. 293 (1967)).

[179] *See* Perry v. New Hampshire, 565 U.S. 228, 232–33 (2012). *See, e.g.*, Commonwealth v. Johnson, 45 N.E.3d 83, 93 (Mass. 2016); State v. Lawson, 291 P.3d 673, 688 (Or. 2012) (citing *Perry*, 565 U.S. at 248); State v. Chen, 27 A.3d 930, 932 (N.J. 2011).

[180] *See, e.g.*, Young v. State, 374 P.3d 395, 405 (Alaska 2016); *Lawson*, 291 P.3d at 684–85; State v. Henderson, 27 A.3d 872, 918 (N.J. 2011) (citing State v. Madison, 536 A.2d 254, 262 (N.J. 1988)) (regarding the *Brathwaite* factors, three of which rely on the witness's self-reported information (degree of confidence in the identification, degree of attention at the original viewing, and the opportunity to view at the time of the crime) and thus are all the more problematic). *But see* Wixted et al., *supra* note 140, at 515, 524 (arguing that witness's statement of confidence at time of identification procedure is significantly related to reliability of identification).

[181] *See, e.g.*, State v. Dickson, 141 A.3d 810, 855–56 (Conn. 2016) (holding witness's first-time identification of defendant, made at trial, is unduly suggestive and hence inadmissible absent good reason justifying); Commonwealth v. Crayton, 21 N.E.3d 157, 172 (Mass. 2014) (same); *Lawson*, 291 P.3d at 694 (citing State v. O'Key, 899 P.2d 663, 688 (Or. 1995) (placing burden on prosecution to establish threshold reliability).

[182] *See, e.g.*, Commonwealth v. Walker, 92 A.3d 766, 786 (Pa. 2014) (citing State v. Clopten, 2009 UT 84, ¶ 22, 223 P.3d 1103); *Clopten*, 2009 UT at ¶ 32; Angela M. Jones et al., *Comparing the Effectiveness of* Henderson *Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?*, 13 J. EXPERIMENTAL CRIMINOLOGY 29, 33 (2017).

potential value of jury instructions.[183]

C. Interrogation

Confessions are powerful evidence of guilt.[184] If they have been obtained lawfully and are trustworthy, using admissions of guilt to support prosecution and conviction for crimes is certainly welcome within the framework of reliable justice.[185] On the other hand, precisely because they are such powerful evidence of guilt, confessions that are not trustworthy (that are false admissions of complicity in a crime) can rapidly snowball and result in wrongful convictions.[186] In one study involving 125 cases of known false confessions, roughly thirty-five percent (N=44) of the individuals who had falsely implicated themselves were convicted, including nine cases that culminated in death sentences and ten in sentences of life imprisonment.[187] Confession evidence can be particularly damning when presented to juries, capable of being even more persuasive than exculpatory DNA evidence.[188]

The challenge, as in other contexts, is to capitalize on the evidentiary value of lawfully-obtained and reliable confessions while simultaneously guarding against the production and use of false confessions. False confessions played a role in 12.2% (287/2357) of the wrongful conviction cases reported by the National Registry of

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[183] *See, e.g.*, *Young*, 374 P.3d at 428; Commonwealth v. Gomes, 22 N.E.3d 897, 905–06 (Mass. 2015); *Henderson*, 27 A.3d at 915; People v. Boone, 91 N.E.3d 1194, 1204 (N.Y. 2017) (jury instructions regarding cross-racial identifications); *Identification: Out-of-Court Identification Only*, N.J. CTS. 2 (July 19, 2012), https://www.njcourts.gov/attorneys/assets/criminalcharges/idoutct.pdf; *Statement of the Supreme Judicial Court on the Model Jury Instructions on Eyewitness Identification*, COMMONWEALTH MASS. (Nov. 16, 2015), https://www.mass.gov/info-details/statement-of-the-supreme-judicial-court-on-the-model-jury-instructions-on-eyewitness.

[184] *See* STEVEN G. BRANDL, CRIMINAL INVESTIGATION 201 (4th ed. 2018).

[185] *See, e.g.*, 18 U.S.C. § 3501(a) (2012).

[186] *See* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 333–34 (2009).

[187] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 951–52, 953 tbl. 8 (2004). Approximately sixty percent of the false confessors were screened out by police or prosecutors prior to trial, and about five percent of those who proceeded to trial were acquitted. *See id.* at 950–51. In another study, researchers who used a sample of cases described as "near misses" of wrongful convictions, meaning defendants were charged with crimes but not convicted, concluded that false confessions were not a statistically significant factor in distinguishing the near misses from cases of wrongful convictions. *See* Gould et al., *supra* note 108, at 477, 489 tbl. 2.

[188] *See* Sara C. Appleby & Saul M. Kassin, *When Self-Report Trumps Science: Effects of Confessions, DNA, and Prosecutorial Theories on Perceptions of Guilt*, 22 PSYCHOL. PUB. POL'Y & L. 127, 137 (2016) (noting differential impact of confession and DNA evidence depending on prosecutors' contextual arguments); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 407 (2015) [hereinafter Garret, *Contaminated*].

Exonerations through August 8, 2018,[189] and in 28.6% (104/363) of the DNA-based exonerations reported by the Innocence Project.[190] Various determinants, some involving the characteristics of the suspect being questioned (dispositional factors), and others relating to how interrogations are conducted (situational factors), contribute to the production of false confessions.[191]

Juveniles,[192] as well as intellectually disabled[193] and mentally ill individuals,[194] are apt to be especially vulnerable to the pressures of interrogation and compliant when confronted by authority figures, including the police, and hence particularly at risk of making false

[189] *See Detailed Cases*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=FC&FilterValue1=8%5FFC (filter False Confession) (last visited Nov. 10, 2018).

[190] *See The Cases*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#false-confessions-or-admissions,exonerated-by-dna (filter Contributing Causes of Convictions; False confessions or Admissions) (last visited Nov. 12, 2018).

[191] *See* Deborah Davis & Richard A. Leo, *Overcoming Judicial Preferences for Person-Versus Situation-Based Analyses of Interrogation-Induced Confessions*, 38 J. AM. ACAD. PSYCHIATRY & L. 187, 191–92 (2010).

[192] Professor Brandon Garrett identified forty cases in which DNA evidence was instrumental in exonerating wrongfully convicted individuals and reported that thirteen of the false confession cases (thirty-three percent) involved juveniles. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1054, 1064 (2010) [hereinafter Garret, *Substance*]. Many others have reported that juveniles are overrepresented in known false confession cases. *See, e.g.*, State v. Jerrell C.J. (*In re* Jerrell C.J.), 2005 WI 105, ¶¶ 104–05, 283 Wis. 2d 145, 699 N.W.2d 110 (Abrahamson, J., concurring); Allison D. Redlich & Saul M. Kassin, *Police Interrogation and False Confessions: The Inherent Risk of Youth*, *in* CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 275, 280 (Bette L. Bottoms et al. eds., 2009); Drizin & Leo, *supra* note 187, at 944; Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 151, 155 (2003); *see also* J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) ("[The risk of false confessions] is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile."); Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner, at 21–22, J.D.B. v. North Carolina, 564 U.S. 261 (2011) (No. 09-11121) (collecting empirical studies that "illustrate the heightened risk of false confessions from youth.").

[193] In *Atkins v. Virginia*, while declaring the death penalty unconstitutional when imposed on intellectually disabled (or "mentally retarded") offenders, Justice Kennedy's majority opinion observed that "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty' is enhanced . . . by the [possibility of false confessions" by intellectually disabled individuals. *See* Atkins v. Virginia, 536 U.S. 304, 320 (2002) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). *See, e.g.*, Drizin & Leo, *supra* note 187, at 971; Garrett, *Substance*, *supra* note 192, at 1064 ("Seventeen or forty-three percent of the forty DNA exonerees who falsely confessed were mentally ill, mentally retarded, or borderline mentally retarded.") (footnote omitted); Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confession*, 70 STAN. L. REV. 643, 645 (2018).

[194] *See, e.g.*, Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness*, 17 PSYCHOL. PUB. POL'Y & L. 394, 398 (2011); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. & HUM. BEHAV. 79, 81 (2010) [hereinafter Redlich et al., *Self-Reported*]; Drizin & Leo, *supra* note 187, at 973; Garrett, *Substance*, *supra* note 192, at 1064.

admissions of guilt.[195] Yet, individuals not sharing these distinguishing characteristics are also liable to give false confessions.[196] The interrogation tactics employed by the police, while often successful in securing confessions from the guilty, can induce innocent people to accept responsibility for crimes as well.[197] The courts have long recognized that police interrogation practices can produce false confessions.[198] The problem was highlighted in Chief Justice Warren's opinion in *Miranda v. Arizona*,[199] which focused extensively on the interrogation methods described in leading police manuals.[200]

One of the most widely utilized police interrogation techniques, discussed in *Miranda* and still used currently, is the Reid technique, named after John Reid, a former Chicago police officer and polygrapher.[201] Reid helped popularize the method, which was

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[195] *See* Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 66 (2017); Bruce Vielmetti, *Juveniles Prone to False Confessions, Experts Say*, MILWAUKEE J. SENTINEL (Sept. 30, 2013), http://archive.jsonline.com/news/crime/juveniles-prone-to-false-confessions-experts-say-b99110452z1-225905041.html/; *cf.* Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confessions*, PSYCHIATRIC SERVS., Jan. 2004, at 19 ("Although research has suggested that many contemporary police interrogation tactics implicitly convey threats and promises, no research has been done, and there have been few contested legal cases to determine whether mentally ill persons are more likely to perceive implicit threats and promises as explicit statements, which would be illegal for police to utter when interrogating suspects.").

[196] *See* James MacDonald, *The Psychology Behind False Confessions*, JSTOR DAILY (Apr. 6, 2018), https://daily.jstor.org/the-psychology-behind-false-confessions/.

[197] *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 248 (1991).

[198] *See* Culombe v. Connecticut, 367 U.S. 568, 582–83 (1961). The English exclusionary rule, pertaining to extra-judicial confessions and the requirement that they must be proven to be the product of free choice, is attributed by Wigmore as "the sole purpose of assuring the reliability of evidence. There can be no doubt, of course, that the fear of false confessions played a large part in the adoption of the rule." *Id.* at 583 n.25 (citing Rex v. Warickshall (1783), 1 Leach 263, 264, 168 Eng. Rep. 234, 235).

[199] Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966) ("Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. . . . In two other instances, similar events had occurred."). The reference to the 1964 New York confessions to murder and rape concerned the case of George Whitmore, Jr. *See* SELWYN RAAB, JUSTICE IN THE BACK ROOM 233–34 (1967); Paul Vitello, *George Whitmore, Jr., Who Falsely Confessed to 3 Murders in 1964, Dies at 68*, N.Y. TIMES (Oct. 15, 2012), https://www.nytimes.com/2012/10/16/nyregion/george-whitmore-jr-68-dies-falsely-confessed-to-3-murders-in-1964.html.

[200] *Miranda*, 384 U.S. at 448.

[201] *See id.* at 449 n.9; FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS vii, viii (5th ed. 2013); Hayley M.D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 L. & HUM. BEHAV. 270, 273, 274 (2016) (finding that among 340 law enforcement

conceived in 1942 by Northwestern Law School Professor Fred Inbau.[202] The Reid method begins with an "interview," a relatively benign, unstructured, non-accusatory exchange initiated by a police investigator which is principally conducted to establish rapport and gather information from a suspect.[203] It shifts to an "interrogation," which is accusatory and designed to elicit a (truthful) confession, only if the investigating officer, relying on both the contents of the interview conversation and non-verbal behavioral cues, makes the preliminary determination that the suspect is indeed guilty.[204]

Then, with the suspect effectively isolated from contact with others, nine steps for securing a confession are outlined.[205] The fundamentals of the technique include the police maintaining their belief in the suspect's guilt and rebuffing protests to the contrary.[206]

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officers enrolled in two programs offered by the FBI National Academy in Quantico, Virginia, approximately 56% received training in the Reid technique, which was the most common type of interrogation training reported).

[202] *See* INBAU ET AL., *supra* note 201, at vii; Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 532 (2010); Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. FOR SOC. JUST. 301, 301–02 (2017). John Reid's 1955 interrogation of Darrel Parker, which resulted in Parker's confession and subsequent conviction for murdering his wife in Nebraska, helped establish Reid's reputation as an innovator in interrogation techniques. Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKER (Dec. 9, 2013), https://www.newyorker.com/magazine/2013/12/09/the-interview-7. Parker recanted his confession the day after he gave it. *Id.* A federal court later found that his confession was involuntary. Parker v. Sigler, 413 F.2d 459, 466 (8th Cir. 1969), *vacated*, Sigler v. Parker, 396 U.S. 482, 484 (1970) (per curiam). Pursuant to an agreement, the state paroled him rather than relitigate the voluntariness of Parker's confession and he was released from prison in 1970. Starr, *supra* note 202. He later was pardoned and received $500,000 in compensation after it was revealed that another man had confessed to the crime. *Id.*

[203] INBAU ET AL., *supra* note 201, at 3–4.

[204] *Id.* at 5–6, 101 ("The fact that an interrogation is conducted means that the investigator believes that the suspect has not told the truth during nonaccusatory questioning."). The process that precedes and helps determine whether an interrogation will ensue is known as the Behavior Analysis Interview (BAI). *Id.* at 154.

[205] *Miranda*, 384 U.S. at 449–50 (emphasis in original) ("The officers are told by the [police training] manuals that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows: 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'"). *See* INBAU ET AL., *supra* note 201, at 43, 187–89.

[206] *Miranda*, 384 U.S. at 450 ("To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the

This accusatory posture is coupled with minimization and maximization ploys which, respectively, are presented to reduce or negate the suspect's perceived culpability by suggesting mitigating circumstances or excuses for the conduct in question,[207] and underscoring the strength of the case confirming guilt, thus intimating that denials are futile.[208]

Mindful that police-induced false confessions have contributed to hundreds of known wrongful convictions, yet also that truly guilty offenders will often resist self-incrimination absent a measure of (lawful) psychological manipulation, proponents of reliable justice would seek to evaluate the drawbacks and benefits of tactics such as those used in the Reid method of interrogation.[209] They would also explore whether alternative approaches exist that entail a reduced risk of false confessions without compromising the goal of securing truthful admissions.[210] One concern regarding the Reid technique is its reliance on investigators' judgments about suspects' linguistic and non-verbal behavioral cues during interviews as indicia of deception or guilt (the Behavior Analysis Interview).[211] This preliminary

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reasons why the subject committed the act, rather than court failure by asking the subject whether he did it."). *See also* INBAU ET AL., *supra* note 201, at 188 ("Step 1 involves a direct, positively presented confrontation of the suspect with a statement that he is considered to be the person who committed the offense.").

[207] *Miranda*, 384 U.S. at 450 ("The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society."); INBAU ET AL., *supra* note 201, at 211 ("Reduce the [s]uspect's [f]eeling of [g]uilt by [m]inimizing the [m]oral [s]eriousness of the [o]ffense"). *See* INBAU ET AL., *supra* note 201, 209–37; Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 18 (2010) [hereinafter Kassin et al. (2010)]; Christopher E. Kelly et al., *A Taxonomy of Interrogation Methods*, 19 PSYCHOL. PUB. POL'Y & L. 165, 166 (2013) [hereinafter Kelly et al., *A Taxonomy of Interrogation Methods*] ("Minimization is based on principles of friendliness and attempts to gain a subject's cooperation by minimizing the seriousness of the offense. It includes techniques like expressing sympathy and providing excuses that lessen the subject's culpability."), for a general discussion of minimization techniques.

[208] *See* Allyson J. Horgan et al., *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCHOL., CRIME & L. 65, 66 (2012); Kassin et al. (2010), *supra* note 207, at 12 ("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."); Kassin & McNall, *supra* note 197, at 247; Kelly et al., *A Taxonomy of Interrogation* Methods, *supra* note 207, at 166 ("[M]aximization seeks to emphasize the seriousness of the offense and intimidate the subject. Maximization includes techniques like directly accusing the subject, disallowing denials, and bluffing or lying about evidence.").

[209] *See* Kassin et al. (2010), *supra* note 207, at 27–28; *See e.g.*, GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 115–16 (2003).

[210] *See* Kassin et al. (2010), *supra* note 207, at 31.

[211] INBAU ET AL., *supra* note 201, at 154; *see* Saul M. Kassin & Gisli H. Gudjonsson, *The*

assessment is important because it helps determine whether an accusatory interrogation will follow that is calculated to produce an incriminating admission.[212] However, the Behavior Analysis Interview appears to be grounded largely on guesswork.[213] Studies suggest that even the most highly skilled law enforcement officers are able to accurately detect deception from behavioral and linguistic cues roughly 65% to 70% of the time.[214] Many investigators fare little better than chance, yet commonly have unwarranted confidence in their capabilities.[215] Wrong guesses not only can lead to prematurely focusing on a suspect and curtailing other investigative efforts (i.e., tunnel vision), but also will expose innocent suspects to the pressures of interrogation, enhancing the threat of false confessions and wrongful convictions.[216]

Interrogators bent on securing a confession may be inclined to press relentlessly ahead with their questioning, hoping that the suspect eventually will break and admit guilt.[217] While this strategy may elicit an incriminating statement, it also is risky.[218] Abnormally long interrogation sessions can heighten the risk of inducing false confessions.[219] One study of known false confession cases found that interrogation sessions producing the admissions averaged 16.3 hours (for cases in which duration information was available), in contrast to typical police interrogations, which rarely exceed two hours.[220] The Reid technique also has been criticized for being insufficiently

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[212] *See* Kassin, *The Psychology of Confessions*, *supra* note 211, at 36–37.

[213] *See* Brent Snook et al., *The Next Stage in the Evolution of Interrogations: The PEACE Model*, 18 CANADIAN. CRIM. L. REV. 219, 222 (2014).

[214] *See* Paul Ekman et al., *A Few Can Catch a Liar*, 10 PSYCHOL. SCI. 263, 264–65 (1999) (describing a study on the accuracy of law enforcement groups to determine when an individual is lying, finding, on average, that federal officers could catch a lie 73% of the time, sheriff's, 66.7% of the time, and deception-interested clinical psychologists, could catch a lie 67.5% of the time).

[215] *See* SIMON, *supra* note 20, at 131; Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230 (2006); Gallini, *supra* note 202, at 570–72; Maria Hartwig & Charles F. Bond, *Lie Detection from Multiple Cues: A Meta-Analysis*, 28 APPLIED COGNITIVE PSYCHOL. 661, 661 (2014); Snook et al., *supra* note 213, 224–26; Aldert Vrij et al., *A Cognitive Approach to Lie Detection: A Meta-Analysis*, 22 LEGAL & CRIMINOLOGICAL PSYCHOL. 1, 1 (2017).

[216] *See* ACKER & REDLICH, *supra* note 106*,* at 174.

[217] *See* GUDJONSSON, *supra* note 209, at 34.

[218] *See id.* at 34–36 (outlining the impacts of a coerced false confession); Drizin & Leo, *supra* note 187, at 948.

[219] *See* Drizin & Leo, *supra* note 187, at 948; Saul M. Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 39, 44 (2010) [hereinafter Kassin et al., *Interviewing Suspects*].

[220] Drizin & Leo, *supra* note 187, at 948.

sensitive to juveniles and others who are particularly vulnerable to acquiescing to pressure and falsely confessing.[221]

One alternative approach[222] to questioning individuals about suspected criminal activity, which by design is non-confrontational and thus conspicuously different from the Reid technique, is known as the PEACE method,[223] a mnemonic for Preparation and Planning,[224] Engage and Explain,[225] Account,[226] Closure,[227] and Evaluate.[228] The PEACE method was developed in England and has been implemented there, in Wales, and in other countries.[229] The

[221] The most recent edition of the manual presenting the Reid method, does offer brief cautionary notes about using certain interrogation techniques on juveniles. *See* INBAU ET AL., *supra* note 201, at 255 ("[I]ntroducing fictitious evidence which implicates the suspect in the crime . . . should be avoided when interrogating a youthful suspect with low social maturity or a suspect 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 if the police tell them evidence clearly indicates they committed the crime."). However, for the most part, the Reid method contemplates that young persons over the age of ten can be subjected to the same interrogation techniques as adults. *See* Cleary & Warner, *supra* note 201, at 280. Commentators have observed that juveniles are unusually prone to succumb to the pressures associated with the Reid method and thus are at risk of falsely confessing. *See, e.g.*, Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 25 (2013); Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 911 (2017); Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1729–30 (2017).

[222] Diverse methodologies exist for questioning suspects in different contexts. *See* Kelly et al., *A Taxonomy of Interrogation Methods*, *supra* note 207, at 165 (identifying over 70 interrogation techniques).

[223] *See* Ray Bull, *Preface* to INVESTIGATIVE INTERVIEWING, at vii (Ray Bull ed. 2014); GUDJONSSON, *supra* note 209, at 53; REBECCA MILNE & RAY BULL, INVESTIGATIVE INTERVIEWING: PSYCHOLOGY AND PRACTICE 158–65 (1999).

[224] GUDJONSSON, *supra* note 209, at 53 ("Interviewers are taught to properly prepare and plan for the interview and formulate aims and objectives."); MILNE & BULL, *supra* note 223, at 159–61; Snook et al., *supra* note 213, at 230.

[225] GUDJONSSON, *supra* note 209, at 53 ("The purpose of the interview is explained to the interviewee, the persons present are introduced, the caution is administered to the suspect, rapport is established and the officers engage the person in conversation."); MILNE & BULL, *supra* note 223, at 161–62; Snook et al., *supra* note 213, at 230.

[226] Officers elicit an account from the interviewee, employing a "Cognitive Interview" approach with cooperative suspects, and a "Conversation Management" approach when cooperation is lacking. GUDJONSSON, *supra* note 209, at 53; MILNE & BULL, *supra* note 223, at 162–64; Snook et al., *supra* note 213, at 230.

[227] Officers conclude an interview by "summarizing the main points from the interview and providing the suspect with the opportunity to correct or add anything." GUDJONSSON, *supra* note 209, at 53; MILNE & BULL, *supra* note 223, at 164; Snook et al., *supra* note 213, at 230.

[228] When the interview is finished an evaluation is made of the information that has been obtained and how it affects the investigation. A further objective is to evaluate the interviewers' performance. GUDJONSSON, *supra* note 209, at 53; MILNE & BULL, *supra* note 223, at 164–65; Snook et al., *supra* note 213, at 230.

[229] *See* COLIN CLARKE & REBECCA MILNE, NATIONAL EVALUATION OF THE PEACE INVESTIGATIVE INTERVIEWING COURSE i (2001), https://so-fi.org/wp-content/uploads/peaceinterviewcourse.pdf ("[B]y the time this evaluation [of PEACE training] started about 70% of officers

approach also has attracted proponents in the United States.[230] Its "focus [is] on information gathering rather than obtaining a confession *per se* (i.e. reliably establishing the facts), non-coercive interviewing and accurate recording of the interview."[231] The method originated in the wake of wrongful convictions in the United Kingdom involving false confessions produced by aggressive police interrogation,[232] and its non-confrontational approach seeks to minimize those risks. Yet, it is fair to ask whether the presumed benefits are offset by costs in the form of failing to secure incriminating statements from the guilty.[233]

The comparative efficacy of accusatory interrogation methods, such as the Reid technique, and information-gathering interviews, as represented by the PEACE approach, in eliciting truthful disclosures continues to be investigated.[234] Preliminary assessments generally suggest that more of value is likely to be learned through information-gathering approaches, which also are superior in guarding against false confessions.[235] Subjects tend to be more

in England and Wales had been trained.").

[230] *See* Bull, *Preface* to INVESTIGATIVE INTERVIEWING, *supra* note 223, at vii; Cleary & Warner, *supra* note 201, at 274, 280; Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1161–62 (2017); Mary Schollum, *Bringing PEACE to the United States: A Framework for Investigative Interviewing*, THE POLICE CHIEF, Nov. 2017, at 30, 35.

[231] GUDJONSSON, *supra* note 209, at 54 (emphasis in original). *See also* Kelly et al., *A Taxonomy of Interrogation Methods*, *supra* note 207, at 166 ("Britain's PEACE model . . . is based upon rapport, respect, and prohibits the use of deception and psychological manipulation on the part of the operator. It is often referred to as a 'fact-finding' mission that does not presume guilt, but instead uses open-ended questions to discern the truth."); Snook et al., *supra* note 213, at 230 ("Under the PEACE model, the term 'interrogation' is intentionally replaced with the term 'investigative interview' as the approach is based on a humane and ethical philosophy. In direct contrast to accusatorial approaches, interviewers are taught to collect information before making decisions, which is more akin to hypothesis testing in science. The role of interviewers who utilize PEACE is that of objective fact finders as they are taught to be open-minded, not to attempt to detect deception through behavioural cues, and not to lie or use psychologically coercive tactics to manipulate interviewees.").

[232] *See* GUDJONSSON, *supra* note 209, at 52–53.

[233] *See id.* at 620 ("The style and culture of interviewing is very different in the USA than it is in England. . . . There is undoubtedly a fear among the American judiciary and some academics that if the police were not able to exert pressure and trickery during interrogation there would be a significant reduction in the confession rate and an enormous social cost. How realistic this fear is remains to be seen.").

[234] *See, e.g.*, Christian A. Meissner et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions,* THE CAMPBELL COLLABORATION 30 (Sept. 1, 2012), https://campbellcollaboration.org/media/k2/attachments/Meissner_Interview_Interrogation_Review.pdf [hereinafter Meissner et al., *Interview and Interrogation Methods*].

[235] Kate A. Houston et al., *Psychological Processes Underlying True and False Confessions*, *in* INVESTIGATIVE INTERVIEWING, *supra* note 223, at 32; Kassin et al., *Interviewing Suspects*, *supra* note 219, at 47; Kozinski, *supra* note 202, at 334; Christian A. Meissner et al., *Improving*

forthcoming when investigators are able to establish and maintain rapport, and information-gathering techniques may have greater potential than confrontational approaches to elicit accurate memories, produce verifiable information, and reveal deception.[236]

An influential white paper on police-induced confessions, prepared by leading researchers in 2010, has illuminated a number of issues that might profitably be explored behind the veil of ignorance in the quest to promote reliable justice with respect to interrogation practices.[237]

1. Electronic Recording of Interrogation Sessions

Through legislation, court order, or official policy directive, at least twenty-four states, the District of Columbia, and the federal government require law enforcement officers to electronically record interrogation sessions under specified circumstances, typically involving designated serious crimes and applying to questioning that takes place in police stations or other places of detention.[238] While not a panacea, nor even a direct check on conduct that can produce false or involuntary confessions, recording interrogation sessions may discourage abuses and at a minimum preserve the best evidence of what transpired so that judges and juries can make more informed assessments about the voluntariness and reliability of statements that are elicited.[239]

the Effectiveness of Suspect Interrogations, 11 ANN. REV. L. & SOC. SCI. 211, 220–21 (2015) [hereinafter Meissner et al., *Improving Suspect Interrogations*]; Snook et al., *supra* note 213, at 233; Aldert Vrij et al., *Psychological Perspectives on Interrogation*, 12 PERSP. ON PSYCHOL. SCI. 927, 946 (2017) [hereinafter Vrij et al., *Psychological Perspectives*]; Meissner et al., *Interview and Interrogation Methods*, *supra* note 234, at 34.

[236] Christopher E. Kelly et al., *The Dynamic Nature of Interrogation*, 40 L. & HUM. BEHAV. 295, 306 (2016); Meissner et al., *Improving Suspect Interrogations*, *supra* note 235, at 225; Vrij et al., *Psychological Perspectives*, *supra* note 235, at 946.

[237] Kassin et al. (2010), *supra* note 207, at 4, 25.

[238] *See id.* at 25–27; Thomas J. Sullivan, *Compendium: Electronic Recording of Custodial Interrogations*, NAT'L ASS'N OF CRIM. DEF. LAW. INC. 7–8 (Aug. 17, 2016), https://www.nacdl.org/electronicrecordingproject [hereinafter Sullivan (2016)] (listing the laws of each state pertaining to electronic recording of custodial interrogations); *see, e.g.*, D.C. CODE § 5-116.01(a)(1) (2018); N.Y. CRIM. PROC. LAW § 60.45(3)(a) (McKinney 2018); Garrett, *Contaminated*, *supra* note 188, at 416–17; *False Confessions or Admissions*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited Nov. 15, 2018); Michael S. Schmidt, *In Policy Change, Justice Dept. to Require Recording of Interrogations*, N.Y. TIMES (May 22, 2014), https://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recording-interrogations.html.

[239] *See* Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U. L. REV. 905, 944–45 (2016); Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1319 (2008); Saul M. Kassin et al., *Does Video Recording Alter the Behavior of Police During Interrogation? A Mock Crime-and-Investigation*

Many law enforcement agencies, including ones that initially resisted or were skeptical about recording interrogation sessions, have endorsed the practice, reporting that suspects rarely are discouraged from talking even when they are aware they are being recorded, and citing benefits such as being able to revisit details that might not have been considered important early in an investigation, allowing investigators to dispense with note-taking, and helping them forestall and refute claims of mistreating a suspect or misrepresenting what was said.[240] Nevertheless, these views are not universally shared, and even when recording is practiced, important implementation issues must be resolved.[241]

It is widely accepted that the entirety of interrogation sessions, and not simply suspects' incriminating admissions, should be recorded.[242] Otherwise, it may be impossible to determine whether a statement has been contaminated by details supplied by the police, and other matters critical to evaluating the reliability and voluntariness of confessions will be lost.[243] Researchers have recommended that when interrogations are video-recorded, a camera angle that provides a frontal view of both the suspect and the interrogator should be used to help ensure that visual cues relating to possible coercive or intimidating influences are not lost.[244]

Exceptions to recording requirements are commonly recognized, including suspects' unwillingness to be recorded, equipment malfunctions, inadvertent errors made by the police, and others.[245] Different consequences might result from unexcused failures to record interrogation sessions. Under existing laws, the suppression

Study, 38 L. & HUM. BEHAV. 73, 74 (2014).

[240] *See* Thomas P. Sullivan, *Electronic Recordings of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127–28 (2005) [hereinafter Sullivan (2005)]; Feld, *supra* note 221, at 27; THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 7, https://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf (last visited Nov. 15, 2018).

[241] *See* Sullivan (2005), *supra* note 240, at 1131.

[242] *Id.* at 1127; THE JUSTICE PROJECT, *supra* note 240, at 3.

[243] *See* Garrett, *Substance*, *supra* note 192, at 1053; William Douglas Woody, *Lowering the Bar and Raising Expectations: Recent Court Decisions in Light of the Scientific Study of Interrogation and Confession*, 17 WYO. L. REV. 419, 432 (2017); THE JUSTICE PROJECT, *supra* note 240, at 3.

[244] *See* Philip S. Gutierrez, *You Have the Right to [Plead Guilty]: How We Can Stop Police Interrogators from Inducing False Confessions*, 20 S. CAL. REV. L. & SOC. JUST. 317, 345 (2011); Kassin et al. (2010), *supra* note 207, at 25; Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400, 440–41 (2012).

[245] *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.45(3)(c) (McKinney 2018); UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT §§ 5–10 (NAT'L CONF. OF COMM'N ON UNIF. STATE LAWS 2010).

of statements from evidence ordinarily is not required.[246] Instead, trial judges and juries typically may be invited to make negative inferences about the voluntariness or reliability of admissions that have not been preserved electronically.[247]

2. Interrogation Models: Confrontational vs. Information-Gathering

Echoing the central premise of reliable justice, the authors of the 2010 white paper on police-induced confessions observed that:

> 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.[248]

In keeping with this principle, a fundamental policy decision requires choosing between a confrontational interrogation technique, as represented by the guilt-presumptive Reid method and its objective of obtaining confessions, and an information-gathering technique, as typified by the PEACE approach and its emphasis on structured interviewing to elicit a complete factual account from individuals being questioned.[249] Several other general interrogation models and specific questioning strategies exist.[250] Both empirical (focusing on efficacy and the production of accurate and false confessions) and normative (emphasizing fairness and guarding against governmental overreaching) considerations can be expected to inform reliable justice decisions about which overarching philosophy should govern police interrogation practices.[251]

3. Interrogation Tactics

Both confrontational and information-gathering interrogation models aspire to elicit truthful admissions and avoid false confessions, but operationally they assign different weight to those

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[246] *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.45(3)(b).
[247] *See, e.g.*, *id.*; UNIF. ELEC § 13; Taslitz, *supra* note 244, at 417–19.
[248] Kassin et al. (2010), *supra* note 207, at 27.
[249] *See id.* at 27–28.
[250] *See* Kelly et al., *A Taxonomy of Interrogation* Methods, *supra* note 207, at 165.
[251] *See id.*

outcomes.[252] The Reid method instructs that after an investigator becomes "reasonably certain"[253] about a suspect's guilt, the ensuing shift from "interview" to "interrogation" marks the beginning of an accusatory process,[254] which actively seeks to persuade[255] the suspect to admit guilt.[256] Such tactics are bottomed on the premise that "[d]eceptive suspects are not likely to offer admissions against self-interest unless they are convinced that the investigator is certain of their guilt."[257] This approach has the demonstrable potential to misfire and induce innocent suspects to succumb to the high-pressure tactics and falsely confess. Information-gathering approaches also value securing truthful confessions,[258] but their reliance on non-accusatory questioning is premised in substantial part on dampening the risk of false confessions.[259]

Rather than adopting the purest form of either confrontational or

[252] *See* Meissner et al., *Interview and Interrogation Methods*, *supra* note 235, at 33–34.

[253] INBAU ET AL., *supra* note 201, at 5.

[254] "*An interrogation is accusatory*." *Id.* at 5 (emphasis in original).

[255] "*An interrogation involves active persuasion*." *Id.* (emphasis in original).

[256] The protocol cautions that "[*t*]*he purpose of an interrogation is to learn the truth*. A common misperception exists in believing that the purpose of an interrogation is to elicit a confession." *Id.* at 5 (emphasis in original). Elsewhere, however, the authors of the Reid interrogation manual "recommend that the investigator initiate the interrogation with a direct statement indicating absolute certainty in the suspect's guilt." *Id.* at 193. An innocent suspect presumably "will offer behaviors helpful in identifying his truthfulness." *Id.* If doubts are raised about whether the working presumption of guilt waylays the search for the truth, "[t]he investigator should explain that, based on all the available evidence, he formed an opinion that the suspect was involved in committing the crime and knew from experience that persuasion would be necessary to learn the truth." *Id.* Thus, "the interrogation begins by the investigator telling the suspect that there is no doubt as to his involvement in the crime." *Id.*

[257] *Id.* at 5.

[258] Existing research suggests that the information-gathering PEACE method of questioning is unlikely to produce a reduction in truthful confessions, and may be superior in eliciting information than more confrontational methods. *See* GUDJONSSON, *supra* note 209, at 45; Jacqueline R. Evans et al., *Obtaining Guilty Knowledge in Human Intelligence Interrogations: Comparing Accusatorial and Information-Gathering Approaches with a Novel Experimental Paradigm*, 2 J. APPLIED RES. MEMORY & COGNITION 83, 84 (2013); Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 36 (2011); Kassin et al., *Interviewing Suspects*, *supra* note 219, at 47; Christian A. Meissner et al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 460 (2014).

[259] *See, e.g.*, Houston et al., *supra* note 235, at 32 ("Research assessing the efficacy of . . . accusatorial techniques . . . suggests that they increase the likelihood of false confessions. . . . Alternative methods of interviewing, for example information-gathering approaches popular in countries such as the UK, Norway, Australia, and New Zealand, have proven effective at gaining truthful and complete accounts from suspects (and witnesses) when compared to standard US interview protocols. . . . [R]esearch in our laboratory suggests that information-gathering approaches may be effective principally because they highlight internal psychological mechanisms that promote true confessions while simultaneously reducing external social pressures associated with false confessions.").

information-gathering tactics, possible middle grounds exist to balance the goals of producing truthful confessions and avoiding false admissions.[260] For example, when police use confrontational tactics to secure confessions, they may rely on different forms of deception,[261] such as misrepresenting that a witness or presumed collaborator has implicated the suspect,[262] or falsely claiming that fingerprint evidence[263] or the results of a polygraph exam or another test establish the suspect's guilt.[264] While generally considered lawful,[265] as well as effective to persuade some guilty offenders to give up the ghost and confess, these same tactics can induce innocents to falsely

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[260] *See* Kelly et al., *A Taxonomy of Interrogation* Methods, *supra* note 207, at 175.

[261] *See* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 35–37 (1992) ("Manipulation and deception have replaced force and direct coercion as the strategic underpinnings of information-gathering techniques that police now employ during criminal investigations.").

[262] *See* Frazier v. Cupp, 394 U.S. 731, 737 (1969). The petitioner, Martin Frazier, confessed to a killing after the police officer questioning him "told him, falsely, that [his cousin Jeffrey Lee] Rawls had been brought in and that he had confessed." *Id.* at 737. Frazier previously had admitted to being with Rawls on the night of the killing. *See id.* Among other matters raised, Frazier challenged the admissibility of his confession, arguing that that the ruse rendered it involuntary. *See id.* at 739. The Court rejected the argument: "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances,' and on the facts of this case we can find no error in the admission of petitioner's confession." *Id.* (quoting Clewis v. Texas, 386 U.S. 707, 708 (1967)).

[263] *See* Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (per curiam). Carl Mathiason confessed after the officer questioning him told him that the police believed he was involved in the burglary under investigation "and (falsely stated that) defendant's fingerprints were found at the scene." *Id.* The Supreme Court concluded that Mathiason was not in custody and hence the police were not required to advise him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Mathiason*, 429 U.S. at 495. The per curiam opinion further observed that:

> The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

Id. at 495–96.

[264] *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1168 (2001); Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612–13 (2006).

[265] The courts have generally upheld deceptive interrogation tactics, although a minority have drawn the line at allowing the police to fabricate documentary material while questioning suspects, reasoning that it might inadvertently find its way into evidence and be regarded as genuine. *See* State v. Cayward, 552 So. 2d 971, 973 (Fla. Dist. Ct. App. 1989) (citing Frazier v. Cupp, 394 U.S. 731, 739 (1969)); State v. Patton, 826 A.2d 783, 805 (N.J. Super. Ct. App. Div. 2003). *But see* State v. Kelekolio, 849 P.2d 58, 74 (Haw. 1993); Lincoln v. State, 882 A.2d 944, 958–59 (Md. Ct. Spec. App. 2005); *see also* Slobogin, *supra* note 230, at 1172–73 (speculating that courts might bar admitting fabricated evidence as it might confuse the jury).

confess.[266]

Alternative approaches could be adopted rather than flatly prohibiting such deception,[267] or simply considering the use of false evidence as one factor in assessing the voluntariness and hence the admissibility of a confession.[268] For example, rules could create a presumption of inadmissibility when certain tactics are used,[269] or prohibit only specific types of false evidence ploys,[270] or outlaw ruses which pose an unacceptably high risk of eliciting an unreliable confession in light of particular suspects' characteristics.[271]

Compromise positions might similarly be explored regarding the police's reliance on minimization tactics to induce confessions, for example, by prohibiting overtures that carry an implicit promise of leniency, while continuing to allow themes diminishing moral or psychological culpability.[272] In light of the wealth of research evidence demonstrating the vulnerability of juveniles and individuals with intellectual disabilities and psychological disorders to make false confessions,[273] special protections such as requiring the presence of counsel or an interested adult[274] could be provided when

[266] *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 794–95 (2006); Kassin et al. (2010), *supra* note 207, at 14; Rinat Kitai-Sangero, *Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence*, 54 SAN DIEGO L. REV. 611, 630 (2017).

[267] *See Cayward*, 552 So. 2d at 973 (citing *Frazier*, 394 U.S. at 739). *But see* Kozinski, *supra* note 202, at 342 ("A strong case can be made that police should not be allowed to extract confessions during interrogations by lying to suspects.").

[268] "The fact that the police misrepresented" that Frazier's cousin, Rawls, had confessed and implicated Frazier, which led Frazier to confess, "is, while relevant, insufficient in our view to make this otherwise voluntary confession admissible. These cases must be decided by viewing the 'totality of the circumstances.'" *Frazier*, 394 U.S. at 739 (quoting Clewis v. Texas, 386 U.S. 707, 708 (1967)).

[269] *See* Katie Wynbrandt, Comment, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 558 (2016).

[270] *See, e.g.*, *Cayward*, 552 So. 2d at 974; Wynbrandt, *supra* note 269, at 559; Andrea Reed, Note, *The Use of False DNA Evidence to Gain a Confession During Interrogation Is Classic Coercion: Why Such Coerced Confessions Should Not Be Admissible in a Criminal Trial*, 104 KY. L.J. 747, 749 (2016).

[271] *See* Kassin et al. (2010), *supra* note 207, at 30.

[272] *See* Gutierrez, *supra* note 244, at 342–43; Kassin et al. (2010), *supra* note 207, at 30.

[273] *See* Gutierrez, *supra* note 244, at 341–43; Kassin et al. (2010), *supra* note 207, at 30; *see also In re* Elias V., 188 Cal. Rptr. 3d 202, 204, 227 (Cal. Ct. App. 2015) (ruling that confession of a 13-year-old boy was involuntary and reviewing literature regarding susceptibility of juveniles to falsely confess, with particular concerns expressed regarding the Reid method of interrogation); Kozinski, *supra* note 202, at 319 (expressing concern for susceptible juvenile and mentally impaired persons when Reid technique is used).

[274] *See, e.g.*, Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689, 707–08 (2012) (advocating for improved protection of vulnerable suspects, including juveniles); Kassin et al. (2010), *supra* note 207, at 30 (expressing doubt, however, about efficacy of "interested adults" to safeguard the interests of juveniles who undergo police

those populations are questioned, and specially trained police officers could be enlisted to conduct those interrogations.[275] Another potential reform meriting consideration is placing presumptive limits on the duration of interrogation sessions to help protect suspects from falsely confessing owing to fatigue or becoming worn down by relentless questioning.[276]

In common with the conduct of police investigations and eyewitness identification procedures, numerous challenges will confront decision-makers who seek to promote and balance the twin aims of reliable justice in the context of police interrogation practices.

IV. BEYOND THE VEIL OF IGNORANCE

Discussions taking place behind the hypothetical veil of ignorance focus on substantive criminal justice policy issues.[277] Not knowing their status after the veil is lifted—whether they are fated to be accused of crime or a victim of it; destined to abide by, break, enforce, or enact the law; whether they will prosecute, defend, or adjudicate cases; or occupy the role of disinterested members of the public—participants must strive to reach agreement about measures that strike the right balance between facilitating the prosecution and conviction of the guilty while also protecting innocents from miscarriages of justice.[278] The challenges confronting adherents of reliable justice thus includes transforming the envisioned hypothetical decisional process into a model that functions in a world lacking veils of ignorance.[279] They then must secure enactment of the proposed reforms.

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interrogation, and advocating that attorneys or a professional advocate be provided, at least to juveniles younger than the age of sixteen).

[275] *See* Kassin et al. (2010), *supra* note 207, at 30.

[276] *See id.* at 28 (proposing time limits or flexible guidelines regarding the length of interrogations, with periodic breaks for rest and meals); Kozinski, *supra* note 202, at 339–40 (advocating that adults should not be subjected to more than four hours of custodial interrogation (and that vulnerable suspects should not be questioned more than two hours), and that if further questioning is required a break of at least twenty-four hours should be provided).

[277] *See* RAWLS, *supra* note 43, 11.

[278] *Id.* at 13, 122 (drawing a reasonable inference that the vulnerable would include wrongly convicted innocents).

[279] *See* Robert J. Norris et al., "*Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1352 n.352 (2010/2011) (outlining the essential elements of a hypothetical decisional process); *see also* JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 5 (2008) (documenting the real-life formation of North Carolina's decisional process).

A. The Decisional Process

Innocence commissions or analogous bodies have been created in several states to promulgate and recommend safeguards against wrongful convictions.[280] The composition of these bodies perhaps comes the closest in the real world to achieving the mix of perspectives accomplished via the metaphorical veil of ignorance. The members of these commissions are deliberately drawn from diverse backgrounds and sectors of the justice and larger communities in an attempt to ensure that multiple views will be represented and duly considered as policy recommendations are fashioned.[281] For example, the thirty-one-member North Carolina Actual Innocence Commission, convened in 2002 by the Chief Justice of the North Carolina Supreme Court,[282] included:

> an executive director, the State Attorney General, the Director of the State Bureau of Investigation, the Secretary of Crime Control and Public Safety, an associate supreme court justice, superior court judges, legislative representatives, prosecutors, sheriffs, police chiefs, deputies in law enforcement, defense attorneys, victim advocates, law professors, and private attorneys.[283]

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[280] *See* Norris et al., *supra* note 279, at 1350, 1355. *See also*, Brandon Hamburg, *Legally Guilty, Factually Innocent: An Analysis of Post-Conviction Review Units*, 25 S. CAL. REV. L. & SOC. JUST. 183, 209 (2016); Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89, 108 (2009); Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 536 (2012); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1046–47 (2010); Sabra Thomas, Comment, *Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent*, 52 HOUS. L. REV. 1037, 1062–63 (2015), for further discussion of innocence commissions and analogous bodies.

[281] *See, e.g.*, Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 651 (2004).

[282] *See id.* at 648, 650–51.

[283] *Id.* at 651. Similarly, the New York State Justice Task Force, commissioned by former New York Court of Appeals Chief Judge Jonathan Lippman in 2009, includes:

> prosecutors, defense attorneys, judges, law enforcement personnel, legal scholars, legislative representatives, executive branch officials, forensic experts and victim advocates . . . . The differing institutional perspectives of the various Justice Task Force members create a deliberative process that will take into account the complex challenges presented both by the examination of wrongful convictions, and by the evaluation of various proposals and recommendations that will be intended to address the occurrence of wrongful convictions in this state.

Participants must be committed to reliable justice ideals. Professor Jon Gould, who was instrumental in forming the Innocence Commission for Virginia (ICVA), a rare non-governmental body convened to consider justice system reforms and guard against wrongful convictions, aptly described this philosophy while explaining his involvement.[284] He further explained:

> I routinely work with judges, police officers, and prosecutors. I *want* to see them succeed. We all should wish the same. Criminals should be caught, prosecuted, convicted, and punished.
>
> Implicit in that wish is the presumption that the criminal justice system should accurately distinguish between the innocent and guilty. The conviction of an innocent person has serious implications, not only for the defendant who suffers a severe loss of freedom and civil rights, but also for society at large. As the ICVA explained,
>
>> Every time a crime occurs and the justice system convicts the wrong person, the truly guilty person remains at large, free to inflict more damage on the community. Victims, who have a right to see their victimizers punished, suffer when the criminal justice system convicts the innocent, and suffer again if the true perpetrator is apprehended and the victims must relive the crime through another trial.
>
> Taxpayers must foot the bill for incarcerating and then compensating the innocent suspect, not to mention the costs of reopening a case to seek the actual perpetrator. In the process, the public may come to doubt the legitimacy of the justice process.[285]

With members representing diverse perspectives in place, who are committed to the ideology of reliable justice, the work can begin to

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Mission Statement, N.Y. ST. JUST. TASK FORCE, http://www.nyjusticetaskforce.com/mission.html (last visited Nov. 17, 2018).

[284] *See* GOULD, *supra* note 279, at ix–x, 5.

[285] *Id.* at 8 (emphasis in original).

identify problem areas, contemplate possible solutions and policy reforms, and attempt to achieve consensus about recommendations for a path forward.[286] A decisional process resembling "sentinel event review[s]" offers an attractive model.[287] As described in a National Institute of Justice report, a sentinel event is "a bad outcome that no one wants repeated and that signals the existence of underlying weaknesses in the system."[288] Sentinel event reviews have been utilized in several contexts outside of criminal justice.[289] For example, when medical patients are mistreated or suffer harm while undergoing hospital procedures, or when airplane accidents occur, concerted efforts are made by investigative bodies to determine the source of errors with a particular eye toward identifying potential fundamental or root causes, in contrast to focusing on the mistakes of individual actors or other idiosyncratic contributing factors.[290] The emphasis is on diagnosing and correcting deep-seated systemic flaws to prevent recurrent mishaps, rather than ascribing case-specific blame.[291]

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[286] *See id.* at 10.

[287] *See* U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, NCJ 247141, MENDING JUSTICE: SENTINEL EVENT REVIEWS 1 (2014), https://www.ncjrs.gov/pdffiles1/nij/247141.pdf [hereinafter NAT'L INST. OF JUSTICE].

[288] *Id.* at 1. *See NIJ's Sentinel Events Initiative*, NAT'L INST. OF JUSTICE, https://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx (last visited Nov. 17, 2018).

> When bad things happen in a complex system, the cause is rarely a single act, event or slip-up. More often, bad outcomes are "sentinel events." A sentinel event is a significant negative outcome that:
> - Signals underlying weaknesses in the system or process.
> - Is likely the result of compound errors.
> - May provide, if properly analyzed and addressed, important keys to strengthening the system and preventing future adverse events or outcomes.

Id.

[289] *See, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 287, at 1 (discussing the role of sentinel event reviews in the fields of medicine and aviation).

[290] *See* James M. Doyle, *Learning from Error in the Criminal Justice System: Sentinel Event Reviews*, *in* NAT'L INST. OF JUSTICE, *supra* note 287, at 3 [hereinafter Doyle, *Sentinel Event Reviews*]; Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 98 (Sept.-Oct. 2002).

[291] *See* Doyle, *Sentinel Event Reviews*, *supra* note 287, at 4.

> Many fields facing high-risk incidents have responded to the dangers exposed by known errors by developing —
> - The consistent practice of an all-stakeholder, nonblaming, forward-looking examination of known errors and other sentinel events, and
> - The means for mobilizing and sharing the lessons of sentinel events in an ongoing conversation among practitioners, researchers and policymakers.

Decision-makers intent on promoting reliable justice would have no need to wait to react to specific cases of wrongful conviction or other justice system errors to be faithful to the sentinel event review model.[292] Indeed, "[s]entinels stand watch. They are the first to see threats, and they sound a warning *before* those threats can do harm."[293] There is no shortage of warning signals regarding miscarriages of justice, and there would be no shortage of agenda items for discussion in criminal justice sentinel reviews. Reformers have focused on sources of error that spawn wrongful convictions for decades.[294] For example, Yale Law School Professor Edwin Borchard's seminal volume, *Convicting the Innocent*, which highlighted many of the same concerns confronting criminal justice today, was published in 1932.[295] Although many leading problems that put innocents at risk are well known, effective systemic responses too often have remained elusive.[296] "The problem . . . is not identifying which reforms are necessary, but rather getting system buy-in on their implementation."[297]

B. Implementation

DNA-based exonerations and the rise of the Innocence Movement have opened a "new window of opportunity" for implementing

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Id. at 3. *See also* James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 128–29 (2010) [hereinafter Doyle, *Learning from Error*] (explaining that sentinel events are errors that illuminate hidden flaws in the system); James M. Doyle, *Orwell's Elephant and the Etiology of Wrongful Convictions*, 79 ALB. L. REV. 895, 896 (2015/2016) ("No individual evidence-based exploration of the criminal justice system is likely to minimize the frequency of miscarriages of justice unless it takes place within a general etiology of wrongful conviction that recognizes the reciprocal impacts of the system's components."); Beatriz Aguirre, Note, *Beyond Bad Apples: Adopting Sentinel Event Reviews in Nevada's Criminal Justice System*, 18 NEV. L.J. 1059, 1062 (2018) ("[T]ragedies are often the result of multiple actors, policies, and external factors. They signal larger, systemic failures in the justice system that only come into light after a 'sentinel event.'").

[292] *See* Doyle, *Sentinel Event Reviews*, *supra* note 287, at 9 (explaining that the sentinel event model is an organizational accident approach that makes errors easier to detect and correct).

[293] *Id.* at 3 (emphasis added).

[294] *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 5–6 (1932).

[295] *See Introduction* to BORCHARD, *supra* note 294, at v.

[296] *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 826 (2010); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 216 (2005).

[297] GODSEY, *supra* note 63, at 215.

criminal justice reforms designed to prevent wrongful convictions.[298] The framework of reliable justice enlarges the scope of reform efforts, encompassing miscarriages of justice in the additional form of having guilty offenders escape arrest, prosecution, and punishment.[299] An important step toward achieving the enactment of measures resulting from the reliable justice decisional process is to foster among policymakers a genuine sense of commitment to the twin aims of ensuring both "that guilt shall not escape or innocence suffer."[300] Agreement about the dual objectives is important to preempt the ideological skirmishing between pro-prosecution and pro-defense camps that can bring gridlock to reform efforts.[301]

One way, certainly not the best, of generating momentum to act on needed reforms is to capitalize on public outcries in the aftermath of tragedies befalling the wrongly accused or the harms suffered by the victims of the true perpetrators' additional crimes when justice has miscarried. For example, the Texas legislature dramatically expanded criminal defendants' entitlement to discovery following revelations that prosecutorial suppression of exculpatory evidence helped produce Michael Morton's wrongful conviction for his wife's murder, causing him to spend nearly a quarter of a century in prison before being exonerated.[302] Eyewitness identification reforms and other safeguards, as well as enhanced compensation for the wrongfully convicted, were enacted in Texas after DNA analysis revealed that Tim Cole, who died in prison while serving a twenty-five-year sentence for rape, was innocent of that crime.[303] Action taken to prevent new injustices in the wake of those that already

[298] Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 337 (2002); *see also* Robert J. Norris, *Framing DNA: Social Movement Theory and the Foundations of the Innocence Movement*, 33 J. CONTEMP. CRIM. JUST. 26, 27 (2017) (noting the success of DNA-based exonerations).

[299] *See* George Gascón, *Using Sentinel Events to Promote System Accountability*, *in* NAT'L INST. OF JUST., *supra* note 287, at 42.

[300] Berger v. United States, 295 U.S. 78, 88 (1935).

[301] *Cf.* Risinger, *supra* note 17, at 763–64, 768 (demonstrating that parties on opposite side of the issue will only come together to address issues within the justice system when they can agree on fundamental principles underlying criminal justice).

[302] *See* TEX. CRIM. PROC. CODE ANN. art. 39.14 (West 2017); Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 409 (2015).

[303] *See* James R. Acker, *Snake Oil with a Bite: The Lethal Veneer of Science and Texas's Death Penalty*, 81 ALB. L. REV. 759, 799–800 (2017/2018); Peter A. Chickris & Mykal J. Fox, *Present Danger: Preventing Wrongful Convictions by Resolving Critical Issues Within Texas's Criminal Justice System*, 52 S. TEX. L. REV. 365, 367–68 (2011); Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. 687, 688 (2010); John Shaw, Note & Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 594, 610–11, 799–800 (2011).

have occurred is commendable, but is too little, too late for the erroneous convictions and the failed arrests and prosecutions of the guilty that already have taken their toll and might have been prevented had reforms been enacted earlier.

Because systems of justice are so highly fragmented and so many different actors are involved, the accountability that attaches to errors and inefficiencies in other contexts—such as when an operation goes awry in a hospital, or an airplane crashes, or a corporation's balance sheet plunges from profits to losses—may be difficult to assign when justice fails.[304] The diffusion of responsibility occasioned by the lack of accountability for criminal justice errors and oversights predictably dampens the impetus for change.[305] A fundamental challenge lies in cultivating cultural norms that include a sincere commitment to the goals of reliable justice among lawmakers, law enforcement officers, and criminal justice actors who administer the laws.[306]

The work of the police, prosecutors, defense attorneys, and judges who administer criminal justice is carried out in more than 3,100 counties throughout the United States.[307] This work is largely local in nature.[308] Exclusively top-down criminal justice reforms are not

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[304] *See* GODSEY, *supra* note 63, at 317; Doyle, *Sentinel Event Reviews*, *supra* note 287, at 139.

[305] *See, e.g.*, GODSEY, *supra* note 63, at 317 ("[A]ctors in the [criminal justice] system don't have to respond to market demands. In the private sector, if an airplane crashes, or a product is defective and causes injuries, or a hasty business decision costs the company millions of dollars, market pressures require the company to take steps to ensure that such risks are minimized in the future. . . . But actors in the criminal justice system—police officers, prosecutors, judges, and so on—don't have to respond to a market in the same way. They operate in a stilted environment, where those injured by their actions—the wrongfully convicted—are not consumers of their product. They don't need to fix or tweak anything to induce those they've injured—the innocents—to come back and buy again. . . . Actors in the criminal justice system are almost never held accountable for their actions as are players in other facets of the professional world."); Doyle, *Sentinel Event Reviews*, *supra* note 287, at 139 ("The criminal justice system's fractured structure presents a more serious challenge [to enacting change than many other organizations]. Responsibility is divided across many agencies, each having a distinct bureaucratic identity, history, and ideology.").

[306] *See* Findley & Scott, *supra* note 63, at 397 ("[P]erhaps the most important factor [to mitigate the effects of tunnel vision] . . . is one that cannot be prescribed merely by rule: creating and sustaining an ethical organizational and professional culture. An ethical organizational or professional culture is more than just the sum of doctrine, rules, policies, procedures, and training programs. Such a culture—among police, prosecutors, defense counsel, and the judiciary—is one that treats wrongful arrest, prosecution, and conviction with utmost seriousness. . . . Where there is a strong ethical culture, police investigators, prosecutors, defense attorneys, and judges do not take shortcuts in cases where it might lead them away from the truth.").

[307] FRANK BAUMGARTNER ET AL., DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 119 (2018) (noting that 3,143 counties exist within the United States).

[308] *See generally* Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, 51 L. & SOC'Y REV.

apt to be as effective as initiatives that include the actors charged with implementing them.[309] Local reform efforts to enhance the quality of justice may be provoked by, but need not await jurisdiction-wide mandates, such as those originating through legislation or judicial decision.[310] For example, numerous police departments throughout the country implemented video-recording of interrogations well before or in the absence of state laws requiring them to do so.[311] Change is made more likely by the involvement of influential "insiders"—people whose political ties, institutional affiliations, or recognized community leadership carry a commensurate measure of weight.[312] Enlisting local criminal justice actors and community leaders to work actively, and locally, to improve the administration of justice, should be a priority in advancing systemic reform efforts.

Issues of crime and justice are frequently value-laden and hence prone to divisive posturing and politicization.[313] Issue framing is an

313, 330 (2017) (noting significant inter-county differences in provision of counsel for indigents in New York State); Thomas W. Church, Jr., *Examining Local Legal Culture*, 10 AM. BAR FOUND. RES. J. 449, 505–07 (1985) (describing different workgroup norms among courtroom actors in different localities); Kathleen Currul-Dykeman, *Domestic Violence Case Processing: A Matter of Local Legal Culture*, 17 CONTEMP. JUST. REV. 250, 251 (2014) ("The norms that arise from the courts' daily business are passed down over the years. Court workgroup members internalize and rely on these norms for they create a consistent way to manage cases efficiently."); Jan Doering, *"Afraid of Walking Home from the 'L' at Night?" The Politics of Crime and Race in Racially Integrated Neighborhoods*, 64 SOC. PROBS. 277, 79 (2017) (examining the importance of local politics on issues of crime and race); Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L. J. 259, 263–64 (2016) (discussing wide variation among counties in administration of capital punishment laws); Thomas D. Stucky, *Local Politics and Violent Crime in U.S. Cities*, 41 CRIMINOLOGY 1101, 1101 (2003) (examining the effect of local political factors on violent crime in more than 950 cities).

[309] *See* NEAL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF *MIRANDA* 230 (1971); Stephen L. Wasby, *The United States Supreme Court's Impact: Broadening Our Focus*, 49 NOTRE DAME L. REV. 1023, 1032 (1974).

[310] *See* Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 380, 382–83 (2016) (discussing variation among jurisdictions in implementing eyewitness identification reforms, and noting the apparent efficacy of combining systemic measures and local implementation).

[311] *Compare* Sullivan (2016), *supra* note 240, 7–8 (listing states which are required to record custodial interrogations) *with* Thomas P. Sullivan, *Police Experiences with Custodial Interrogations*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS (2004), http://mcadams.posc.mu.edu/Recording_Interrogations.pdf, at appx. A (listing departments that have policies to record custodial interrogations).

[312] *See* GOULD, *supra* note 279, at 232 ("The most successful change agents were those considered to be 'insiders' in the criminal justice system, particularly people who were networked with others in the legal or political communities, who commanded a high professional reputation, and who often were perceived as being conservative.").

[313] *See, e.g.*, Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 529, 532, 541 (1996) (discussing the politicization of the Violent Crime Control and Law Enforcement Act of 1994).

important component in advancing social movements, placing a premium on reformers to craft and disseminate their messages effectively in order to have their ideas successfully converted to action.[314] While proponents of change must be cognizant of the political landscape confronting them, proponents of reliable justice are well positioned to navigate these challenges precisely because their essential mission is not and should not be considered controversial. The twin aims of holding the guilty responsible and safeguarding the innocent can be universally embraced. With this core premise representing their compelling call to action, adherents of reliable justice have good reason to be able to secure broad-based support in advancing their goals.

V. CONCLUSION

Guarding against the wrongful conviction of innocents, a vitally important goal in itself, becomes all the more urgent when coupled with the companion objective of fairly and accurately identifying the perpetrators of crime and bringing them to justice. These twin aims sometimes involve trade-offs.[315] Reducing the likelihood of one type of error, be it the arrest and conviction of innocent persons, or the failure to apprehend and convict the guilty, will sometimes come at the expense of enhancing the risk of committing the other type of error.[316] Nevertheless, these occasional trade-offs should not cause policymakers with different outlooks on the administration of justice to lose sight of the many interests they share within the common ground of reliable justice principles.

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[314] *See, e.g.*, NORRIS, *supra* note 15, at 125 ("Th[e] matter of framing or issue construction is [an] area of social movement scholarship, covering the ways in which mutual understandings or meanings are created that make collective action worthwhile or legitimate."); Marvin Zalman & Nancy E. Marion, *The Public Policy Process and Innocence Reform*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 24, 26 (Marvin Zalman & Julia Carrano eds., 2014); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 611–12 (2000); Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 J. COMM. 99, 102 (2007); Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCIENTIST 508, 511 (2000).

[315] *See* Clark, *Blackstone*, *supra* note 22, at 1105–06, 1107.

[316] *Compare* Larry Laudan, *Different Strokes for Different Folks: Fixing the Error Pattern in Criminal Prosecutions by "Empiricizing" the Rules of Criminal Law and Taking False Acquittals and Serial Offenders Seriously*, 48 SETON HALL L. REV. 1243, 1245 (2018) (suggesting lowering the burden of proof in criminal trials for serial offenders), *with* Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1312 (2018) (suggesting there can be a "win-win" solution to the trade-off problem).

As discussed herein, police investigative efforts, eyewitness identification procedures, and the interrogation of suspects offer many opportunities to achieve reliable justice that diminish neither the safeguarding of innocents nor the successful prosecution of lawbreakers.[317] And, there is no reason to confine the reliable justice paradigm to the early stages of the criminal justice process. By making use of the metaphorical veil of ignorance and engaging in reasoned discourse, decision-makers committed to reliable justice would similarly be able to reach agreement about other policies and procedures that are best suited to advance the objectives of fairly and accurately determining both guilt and innocence. Once a commitment is made to the goals and decisional framework of reliable justice, policymakers will have a clear roadmap and will need only the will to act to achieve meaningful criminal justice reforms.

[317] *See* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 64, at 5, 6; IDENTIFYING THE CULPRIT, *supra* note 102, at 25, 106, 107, 108, 109; Kassin et al. (2010), *supra* note 207, at 25, 26.