Introduction


ix  **But they were still in the church:** Benton, *Self and Society in Medieval France*, 213–14.

ix  **Clement and Evrard, who were peasants:** Benton, *Self and Society in Medieval France*, 212.

ix  **The charge was heresy:** Benton, *Self and Society in Medieval France*, 212.

ix  **That is why:** Benton, *Self and Society in Medieval France*, 212.

ix  **But the brothers:** Benton, *Self and Society in Medieval France*, 212.

ix  **No, they were emissaries:** Benton, *Self and Society in Medieval France*, 212.

ix  **Into idle ears:** Benton, *Self and Society in Medieval France*, 212.

ix  **And in the shadows:** Benton, *Self and Society in Medieval France*, 212.

ix  **As Abbot Guibert recorded:** Benton, *Self and Society in Medieval France*, 212–13.

ix  **Indeed, rumor had it:** Benton, *Self and Society in Medieval France*, 212–13.
Such were the men: Benton, *Self and Society in Medieval France*, 213.

The brothers had been betrayed: Benton, *Self and Society in Medieval France*, 213–14.

But these accusers: Benton, *Self and Society in Medieval France*, 214.

And when questioned by the lord bishop: Benton, *Self and Society in Medieval France*, 213.

Following the celebration of Mass: Benton, *Self and Society in Medieval France*, 214.

As they appeared before the water: Benton, *Self and Society in Medieval France*, 214.


It was at this moment: Benton, *Self and Society in Medieval France*, 214.

This was the trial: Benton, *Self and Society in Medieval France*, 213.


Baptismal water was pure: Howland, *Ordeals, Compurgation, Excommunication*, 11.


He “floated like a stick”: Benton, Self and Society in Medieval France, 214. As Abbot Guibert recorded later, “At this sight, the whole church was filled with unbounded joy. [The brothers’] notoriety had brought together such an assembly of both sexes that no one present could remember seeing one like it before.” Benton, Self and Society in Medieval France, 214.


With the trial complete, the brothers were brought directly to the prison, where they were joined by two other “established heretics from the village of Dormans” who had been foolish enough to come to watch the proceedings and were seized in short order. Benton, Self and Society in Medieval France, 214.


However, with the guilt of the men determined, the townspeople had no interest in further deliberations and rushed upon the prison, seizing all four men. A great fire had been built outside the city and Clement and Evrard were “burned . . . to ashes.” Benton, Self and Society in Medieval France, 214. In the closing line on the incident, Abbot Guibert offered his support for
the actions of the mob toward the brothers: “To prevent the spreading of the cancer, God’s people showed a righteous zeal against them.” Benton, *Self and Society in Medieval France*, 214.


*And here was a neutral process:* Colman, “Reason and Unreason in Early Medieval Law,” 585–86.

*Witnesses could lie and judges could bow:* Colman, “Reason and Unreason in Early Medieval Law,” 586.


*With no dominant governmental authority:* Pilarczyk, “Between a Rock and a Hot Place,” 107-08.
But godly action: The pervasiveness of these beliefs may explain the numerous examples of individuals voluntarily undergoing trial by ordeal, in lieu of other means of proof. Colman, “Reason and Unreason in Early Medieval Law,” 585.

Moreover, with an ordeal like Clement’s: Brown, “Society and the Supernatural,” 138.


The legitimacy of the ordeal was bolstered by the fact that it appeared to work so well. Some people floated and some did not—and those who floated were rarely in a position to offer counter evidence after the fact to prove that they were actually innocent. Leeson, “Ordeals,” 705. Neither of the two types of cases that leant themselves to the ordeal posed much of a risk of subsequent developments contradicting or otherwise undermining the judgment. The first category involved crimes such as adultery, surreptitious murder, witchcraft, arson, housebreaking, and heresy, where there might not be explicit evidence or even a direct witness. Pilarczyk, “Between a Rock and a Hot Place,” 93; Colman, “Reason and Unreason in Early Medieval Law,” 583; Bartlett, *Trial by Fire and Water*, 30. Towns like Soissons faced invisible yet dangerous threats, and the normal judicial tools were simply not up to the task. Bartlett, *Trial by Fire and Water*, 22–23. By the twelfth century, particularly in areas of northern France and the Rhineland, heresy cases like Clement and Evrard’s were regularly adjudicated through trial by ordeal. Bartlett, *Trial by Fire and Water*, 22–23, 52. The second set of cases were those in which the accused was disqualified from the normal procedures of swearing an oath or could not assemble others to attest to his innocence. Colman, “Reason and Unreason in Early Medieval
Law,” 584. In other words, the people most likely to undergo the ordeal were those least likely to have the relevant connections or power to contest the validity of the proceedings or the final judgment: slaves or other unfree persons, outsiders (foreigners), and those who were of general ill-repute who could not get others to swear on their behalf. Colman, “Reason and Unreason in Early Medieval Law,” 584; Palmer, “Trial by Ordeal,” 1550; Kerr, Forsyth, and Plyley, “Cold Water and Hot Iron,” 574–75.

xii  There was no apparent alternative: Although European legal systems subjected men and women to physical tests of guilt for more than a thousand years, the heyday of the ordeal was between the ninth and thirteenth centuries. Leeson, “Justice, Medieval Style”; Bartlett, Trial by Fire and Water, 13.

xii  Innocent men and women: Pilarczyk, “Between a Rock and a Hot Place,” 106.

xii  Women and heavyset men: Leeson, “Ordeals,” 707. Although a few modern scholars have attempted to show that under certain circumstances, ordeals could have led to accurate outcomes, there is little evidence that they were able to accurately distinguish guilt and innocence—and much reason to surmise that they did not. Pilarczyk, “Between a Rock and a Hot Place,” 110.

xii  Even if the process had been valid: Pilarczyk, “Between a Rock and a Hot Place,” 110.

xii  What interest does society have: Benton, Self and Society in Medieval France, 212.


In one study, researchers asked: Although I have focused on two sets of participants, there were seven groups in total who were each given an assessment of the mental patient with slightly different wording. Paul Slovic, John Monahan, and Donald G. MacGregor, “Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats,” Law and Human Behavior 24 (2000): 285–87.

Both groups were provided with: Slovic, Monahan, and MacGregor, “Violence Risk Assessment,” 287.

The only difference was: Slovic, Monahan, and MacGregor, “Violence Risk Assessment,” 287.

Those who considered the risk: Forty-one percent of those who considered the risk of violence as a frequency determined that Mr. Jones should not be released versus 21 percent of those who considered the risk of violence as a probability. Slovic, Monahan, and MacGregor, “Violence Risk Assessment,” 288.

When the researchers probed more deeply: Paul Slovic and Ellen Peters, “Risk Perception and Affect,” Current Directions in Psychological Science 15 (2006): 324. Put differently, when considering the risk as a probability, people imagined a single individual who might or might not act violently in the future. By contrast, when considering the risk as a frequency, people imagined a set of offenders who would certainly commit horrible acts, which was more


**xv A one-in-five-million chance:** Cass Sunstein has termed this dynamic “probability neglect”: we can be so focused on certain negative consequences that we largely ignore the likelihood that those events will transpire. Cass R. Sunstein, “Terrorism and Probability Neglect,” *The Journal of Risk and Uncertainty* 26 (2003): 122.


**xv Mother Teresa was right:** Paul Slovic, “‘If I Look At the Mass I Will Never Act’: Psychic Numbing and Genocide,” *Judgment and Decision Making* 2 (2007): 80.

**xv Research suggests that:** Slovic, “‘If I Look At the Mass I Will Never Act,’” 88.


irreversible, human-generated, and impacting children, among others. Kuran and Sunstein, “Availability Cascades and Risk Regulation,” 701, 708–10. One of the intriguing things about our threat perceptions is how difficult they are to control: we may “know” that a risk is very unlikely to happen, but still see it as a major threat. Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011), 323. For many of us, a great example of this phenomenon comes when we fly in an airplane: we know that our chances of death are significantly less than if we completed the same journey by car; yet our automatic emotional response leaves us on edge for the flight. Likewise, we may be aware that we are far more likely to die of heart disease than Ebola, but be much more motivated to respond to the risk of Ebola.

xvi  **So we invest heavily:** Today, you can search a free online database of registered sex offenders in every state. Lancaster, “Sex Offenders: The Last Pariahs.” And the amount of oversight and punishment of sex offenders shows no sign of dissipating. Forty-four states, for example, have either enacted or are currently considering laws that require certain sexual predators to wear electronic monitoring devices for the rest of their lives. Lancaster, “Sex Offenders: The Last Pariahs”; National Conference of State Legislatures, *State Statutes Related to Jessica’s Law*, accessed November 3, 2014, http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf. At the federal level, in less than 20 years, the average sentence for possessing or distributing child pornography has more than quintupled to just under a decade in prison. U.S. Sentencing Commission, *Sentence Length in Each Primary Offense Category* (2011), Table 13, http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table13.pdf; Rachel Aviv, “The Science of Sex Abuse.”
Unfortunately, research suggests that these types of laws are extremely costly and often ineffective. “Sex Laws Unjust and Ineffective,” The Economist, August 6, 2009, http://www.economist.com/node/14164614. Indeed, a study of Megan’s Law in New Jersey, funded by the federal government, showed no meaningful effect on recidivism rates. Kristen Zgoba, Megan’s Law: Assessing the Practical and Monetary Efficacy (New Jersey Department of Corrections, 2008), 2; Lancaster, “Sex Offenders: The Last Pariahs.” And these statutes can actually make matters worse. Once they are listed on a public registry, people are at serious risk of losing their jobs and struggle to find employment. Jill S. Levenson and Leo P. Cotter, “The Effect of Megan’s Law on Sex Offender Reintegration,” Journal of Contemporary Criminal Justice 21 no. 1 (2005): 49, doi: 10.1177/1043986204271676; “Sex Laws Unjust and Ineffective.” Laws that bar offenders from living within a certain number of feet of parks or schools further marginalize these individuals, particularly in urban areas where most of the landscape ends up being off-limits “Sex Laws Unjust and Ineffective.” Research shows that those without a stable place to live or a job are more likely to reoffend. Center for Sex Offender Management, What You Need to Know About Sex Offenders (Center for Effective Public Policy, 2008), 4-5, http://www.csom.org/pubs/needtoknow_fs.pdf; “Sex Laws Unjust and Ineffective.”

Our registries also make those previously convicted of sex offenses targets for harassment and attacks. “Sex Laws Unjust and Ineffective”; Richard Tewksbury and Matthew Lees, “Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences,” Sociological Spectrum 26 (2006): 329. That is, we facilitate serious crimes against people who have served their time and, in many cases, are simply trying to piece their lives back together.
Similarly, passing a bill allowing for the indefinite civil detention of sex offenders even after they have completed their sentences may seem like a sensible response to a particularly egregious crime against a child—a way to use the tragedy to enact change that will keep kids in the community safer. And, in fact, the Adam Walsh Act and more than twenty state sexually violent predator laws provide for the subsequent civil commitment of those prisoners assessed to have serious impulse control issues related to sexually assaulting children. Rachel Aviv, “The Science of Sex Abuse.” But it seems extremely unjust to determine that a person has sufficient control over his actions to be found criminally blameworthy, have that person serve his time in prison, and then, just as he is about to regain his freedom, decide to lock him up in a mental-health facility on the grounds that he is dangerous because he does not have the ability to control his actions. A dirty trick like that would seem more at home in a Kafkaesque nightmare than present-day America.

xvi  The news media further distorts: Kahneman, Thinking, Fast and Slow, 137–45.

xvi  And how easily we can recall: Kahneman, Thinking, Fast and Slow, 142; Kuran and Sunstein, “Availability Cascades and Risk Regulation,” 685–86.

xvi  It makes a difference: It’s easy to see how media coverage can engender a vicious cycle—what some scholars call an “availability cascade.” Kuran and Sunstein, “Availability Cascades and Risk Regulation,” 685; Daniel Kahneman, Thinking, Fast and Slow, 142. Horrible crimes are given prominence by the media, which causes private citizens and lawmakers to assess these crimes as more likely to occur than they actually are and to believe that addressing them is particularly important. This, in turn, means that the media focuses even more time on covering rapes, murders, and brutal assaults, which encourages the public to see them as even more important and dangerous.


Stefania had pled guilty: Feresin, “Italian Court Reduces Murder Sentence.”

Critics of the reduced sentence: Hamzelou, “Brain Scans.”

Moreover, they noted, Stefania’s brain: Feresin, “Italian Court Reduces Murder Sentence.”

It seems obvious that: Hamzelou, “Brain Scans.”


There are corridors of injustice: We could continue the tour, entering an entire wing with cases of people who actually committed their crimes, but who never received the honest, unbiased process or the fair treatment they were promised. And beyond that we could pass through a nursery with all of the botched juvenile cases that ended up sealed and near misses where someone was incorrectly identified and pursued as a prime suspect up through trial only
for the truth to be revealed by a bit of final luck. Innocence Project, “DNA Exonerations Nationwide”; Saul M. Kassin et al., “Police-Induced Confessions: Risk Factors and Recommendations,” *Law and Human Behavior*, 34 (2010): 3. And if we stopped we would hear the beams of the attic creak with the pressure of a mountain of plea bargains where no judge or jury ever weighed the evidence that would certainly have raised a reasonable doubt. Gross et al., “Rate of False Conviction,” 1.

1. The Labels We Live By ~ The Victim


3 **He was trying to move himself:** Willoughby, *Summary of Special Report*, 18.

3 **Jerry placed one of his slippered feet:** Willoughby, *Summary of Special Report*, 18.

3 **Less than ten minutes:** Willoughby, *Summary of Special Report*, 21.

3 **Almost as soon as they started:** Willoughby, *Summary of Special Report*, 21.

4 **Claude thought that:** Wilber and Wilgoren, “Medical Condition Suspected.”

4 **This wasn’t a stroke:** Willoughby, *Summary of Special Report*, 27.

4 **The engine driver found:** Willoughby, *Summary of Special Report*, 25.

4 **They decided not to perform:** Willoughby, *Summary of Special Report*, 4.

4 **When one of the responding:** Willoughby, *Summary of Special Report*, 35.

4 **As a result, the cops:** The police admitted that, as a result, they “did not get a close look at the man.” Willoughby, *Summary of Special Report*, 35.

4 **According to protocol, they should:** Willoughby, *Summary of Special Report*, 5.

4 **The ambulance carrying emergency medical technicians:** Willoughby, *Summary of Special Report*, 46.


4 **She wasn’t pleased:** Willoughby, *Summary of Special Report*, 39.

4 **The firefighters had noticed:** Willoughby, *Summary of Special Report*, 4.

4 **And neither of the EMTs asked:** Willoughby, *Summary of Special Report*, 6.

4 **Consequently, they loaded him:** Willoughby, *Summary of Special Report*, 25.

4 **Given her advanced training:** D.C. Fire and Medical Services Department v. D.C. Office of Employee Appeals, 986 A.2d 419, 421 (D.C. 2010).

The Glasgow Coma Scale was developed to assess the consciousness of brain-trauma victims by assigning numerical values to the degree of eye opening (1–4), verbal response (1–5), and motor response (1–6). By adding up the three scores, clinicians arrive at a number that is used to classify the seriousness of the brain injury. In general, a total score of 3 to 8 is considered severe, 9 to 12 is considered moderate, and 13 to 15 is considered mild.

4 The assistant, though, classified him: *D.C. Fire and Medical*, 986 A.2d at 421.


5 Although Fire and Emergency Medical: *D.C. Fire and Medical*, 986 A.2d at 423 n. 1.

5 It was twice as far: Willoughby, *Summary of Special Report*, 8; *D.C. Fire and Medical*, 986 A.2d at 422.

5 The patient could sleep: *D.C. Fire and Medical*, 986 A.2d at 422.


5 He was pushed into the hallway: Duggan, “Report Scolds D.C. Agencies.”


5 As the triage nurse later explained: Willoughby, *Summary of Special Report*, 53.

5 No one at the hospital performed: Willoughby, *Summary of Special Report*, 7.


5 “I saw he was not in distress”: Willoughby, *Summary of Special Report*, 53.

5 When she passed the man off: Willoughby, *Summary of Special Report*, 54.


5 He was not having respiratory problems: Willoughby, *Summary of Special Report*, 56.


6 At around 11:30 p.m., another nurse: Willoughby, *Summary of Special Report*, 56.

6 As they were moving the gurney: Willoughby, *Summary of Special Report*, 56–57.

6 That was sometimes a bad sign: Willoughby, *Summary of Special Report*, 56.

6 They repeated the rub: Willoughby, *Summary of Special Report*, 56.

6 The nurses couldn’t believe it: Willoughby, *Summary of Special Report*, 57.


6 They intubated the man: Willoughby, *Summary of Special Report*, 60.

6 His pupils were unequal: Willoughby, *Summary of Special Report*, 60.


6 It would be for naught: Complaint for Damages at 7, *Rosenbaum*.


6 He had a wife: Purdum, “David Rosenbaum.”

6 He lived right around the block: “3824 Harrison Street NW in Washington-Friendship Heights Sold for $1,000,000,” Blockshopper.com, December 18, 2006, http://dc.blockshopper.com/sales/cities/washington-friendship_heights/property/18510064/3824_harrison_street_nw/1351355. Details about the house and neighborhood were collected using Google Maps.

7 The major breaks: Willoughby, Summary of Special Report, 37.

7 The lead officer: Willoughby, Summary of Special Report, 35.

7 When he visited the home: Willoughby, Summary of Special Report, 35.

7 However, it wasn’t until: Willoughby, Summary of Special Report, 35–36.

7 This was a possible robbery: Willoughby, Summary of Special Report, 35–36.


8 It was a good score: Brief for Appellee, Jordan, 2010 WL 7359345, at *6–7.

8 Leaving the area: Brief for Appellee, Jordan, 2010 WL 7359345, at *7.

8 They were back: Brief for Appellee, Jordan, 2010 WL 7359345, at *42.


8 It seemed to be: Gamboa and Ross, “Prosecutor in FL.”

8 But the special prosecutor: Corey was specifically responding to the claim that it was only the unexpected public furor that led to a charge of second-degree murder against Zimmerman. Susan Green, “George Zimmerman Makes First Court Appearance at Bond Hearing,” Examiner.com, April 12, 2012, http://www.examiner.com/article/george-zimmerman-makes-first-court-appearance-at-bond-hearing.

9 When his nametag read: King, “The Death of David Rosenbaum.”

9 The police, for their part: Duggan, “Report Scolds D.C. Agencies”; Willoughby, Summary of Special Report, 8.


9 When the lead officer was asked: Willoughby, Summary of Special Report, 5, 34.

9 Once “the drunk” was identified: King, “The Death of David Rosenbaum.”
9 When the media and the police: Janofsky, “Official Washington Pays Tribute.” David served as the chief Congressional correspondent and chief domestic policy correspondent, earning a George Polk Award for national reporting. Purdum, “David Rosenbaum.”


9 Hamlin was sentenced: Accuracy Project, “David Rosenbaum.”

9 The problem is not: David Mamet, Faustus (New York: Dramatists Play Service, Inc. 2007), 18.

10 Recent research in psychology: Duggan, “Report Scolds D.C. Agencies.”

10 In the words of the D.C. inspector: Duggan, “Report Scolds D.C. Agencies.”


10 In fact, we are not: Daniel Kahneman, Thinking, Fast and Slow (New York: Farrar, Straus and Giroux, 2011), 86.


10 Ambiguity and doubt are: Kahneman, Thinking, Fast and Slow, 80, 87–88.

10 In certain circumstances: Kahneman, Thinking, Fast and Slow, 80, 85–86.

10 The less we know: Kahneman, Thinking, Fast and Slow, 87.

12 When the exact same student: In the actual experiment, participants were also given a brief written background about the girl, which described her parents’ levels of educational and occupations (in the negative-expectancy condition, they had high school educations and blue-collar jobs; in the positive-expectancy condition, they were college-educated professionals). John M. Darley and Paget H. Gross, “A Hypothesis-Confirming Bias in Labeling Effects,” *Journal of Personality and Social Psychology* 44, no. 1 (1983): 20, 23–25.


12 The patrol service area: Wilber and Wilgoren, “Medical Condition Suspected.”

12 Although there were more: Wilber and Wilgoren, “Medical Condition Suspected.”

12 When interviewed after the fact: Willoughby, *Summary of Special Report*.

12 And it seems to have had: Disgust—the repulsion we feel toward certain substances, entities, and behaviors—is one of the automatic gut responses that provide information about how we should understand and evaluate what we are seeing. Schnall et al., “Disgust Embodied as Moral Judgment,” 1096–97; Yoel Inbar and David Pizarro, “Grime and Punishment: How Disgust Influences Moral, Social, and Legal Judgments,” *Jury Expert* 21, no. 2 (March 2009), 13; Erik D’Amato, “Mystery of Disgust,” *Psychology Today*, January 1, 1998, http://www.psychologytoday.com/articles/200909/mystery-disgust.

13 **While different people experience disgust:** Inbar and Pizarro, “Grime and Punishment,” 13, 15.


13 **In experiments, a two-year-old:** Paul Rozin et al., “The Child’s Conception of Food: Differentiation of Categories of Rejected Substances in the 16 Months to 5 Year Age Range,” *Appetite* 7 (1986), 146; McNerney, “A Nauseating Corner of Psychology.”

13 **We cringe at the thought:** Dan Vergano, “Jamestown Cannibalism Confirmed by Skull from ‘Jane,’” *USA Today*, May 1, 2013, http://www.usatoday.com/story/news/nation/2013/05/01/jamestown-cannibalism/2126421/.

13 **Many scientists believe that disgust:** Schnall et al., “Disgust Embodied as Moral Judgment,” 1097.

13 **But it also proved useful:** Schnall et al., “Disgust Embodied as Moral Judgment,” 1097.

13 **As a result, today we see:** Jones, “The Depths of Disgust,” 769.

13 **Both help us stay:** Jones, “The Depths of Disgust,” 770. When something is disgusting, we seek to avoid it lest we be contaminated. This is true even when the item in question cannot actually taint us. Andrea C. Morales and Gavan J. Fitzsimons, “Product Contagion: Changing
Consumer Evaluations Through Physical Contact with ‘Disgusting’ Products,” *Journal of Marketing Research* 44, no. 2, (May 2007): 275–78; Michael D. Lemonick, “Why We Get Disgusted,” *Time*, May 24, 2007, http://content.time.com/time/magazine/article/0,9171,1625167,00.html. In one study, researchers looked at how people reacted to food that happened to be placed in a basket with things that are considered disgusting, like tampons and kitty litter. Morales and Fitzsimons, “Product Contagion,” 275–78; Lemonick, “Why We Get Disgusted.” What they found was that even when a package of cookies was unopened and did not actually touch the kitty litter, people would not eat them.

And moral disgust appears to operate in the same way: in a compelling demonstration, people were asked to consider wearing the sweater of someone they viewed to personify evil (e.g., Adolf Hitler). Carol Nemeroff and Paul Rozin, “The Contagion Concept in Adult Thinking in the United States: Transmission of Germs and Interpersonal Influence,” *Ethos* 22, no. 2 (1994): 164, 166; Jones, “The Depths of Disgust,” 769. Although it was specified that the garment had just been laundered and no one would observe the wearing, the vast majority of people were nonetheless repulsed by the idea. Nemeroff and Rozin, “The Contagion Concept,” 169–70; Jones, “The Depths of Disgust,” 769. For a broader discussion of these contagion dynamics, see Carol Nemeroff and Paul Rozin, “The Makings of the Magical Mind: The Nature and Function of Sympathetic Magical Thinking,” in Karl S. Rosengren, Carl N. Johnson, and Paul L. Harris, *Imagining the Impossible: Magical, Scientific and Religious Thinking in Children* (Cambridge, UK: Cambridge University Press, 2000), 1–34; Paul Rozin and Carol Nemeroff, “The Laws of Sympathetic Magic: A Psychological Analysis of Similarity and Contagion,” in *Cultural Psychology: Essays on Comparative Human Development*, edited by James W. Stigler,


14 The desk you are asked: Schnall et al., “Disgust Embodied as Moral Judgment,” 1101.


15 It matters every step: Data gleaned from police and court records suggests that different victims receive different justice (and, in some cases, injustice), depending on key identifiers like age, gender, and race. Marc Riedel, “Homicide Arrest Clearances: A Review of the Literature,” *Sociology Compass* 2, no. 4 (2008): 1150–59; Steven Briggs and Tara Opsal, “The Influence of


15 Privileging the young: Goodwin and Landy, “Valuing Different Human Lives,” 780.

15 But clearly there is a limit: Goodwin and Landy, “Valuing Different Human Lives,” 778, 789.

15 When an older man: Goodwin and Landy, “Valuing Different Human Lives,” 783, 785. A number of studies show that when an older person is killed, we do not feel the same sense of injustice as when a young person is killed. Mitchell J. Callan, Rael J. Dawtry, and James M. Olson, “Justice Motive Effects in Ageism: The Effects of a Victim’s Age on Observer Perceptions of Injustice and Punishment Judgments,” *Journal of Experimental Social Psychology* 48 (2012): 1343–44. For instance, when researchers looked into how members of the public felt about an accident in which a drunk driver ran a red light and hit an innocent victim, they found that people perceived less injustice when a seventy-four-year-old was the victim than when an eighteen-year-old was the victim. And they recommended lower sentences for the guilty driver who hit the older person. This enhanced indifference may affect our response, even when we
face no tragic tradeoff, when there is just one victim on the ground and plenty of opportunity to help save his life and catch his attacker. Callan, Dawtry, and Olson, “Justice Motive Effects in Ageism,” 1343.


16 This is often the case: Inbar and Pizarro, “Grime and Punishment,” 16–17; McNerney, “A Nauseating Corner of Psychology.”


16 In one demonstration: Harris and Fiske, “Dehumanizing the Lowest of the Low,” 848–49, 852.

16 More interesting, though, was: Harris and Fiske, “Dehumanizing the Lowest of the Low,” 848–52.
16 It lit up when: Harris and Fiske, “Dehumanizing the Lowest of the Low,” 848–52.


16 Passing a homeless drunk: Jones, “The Depths of Disgust,” 769–70.

17 The dehumanization is all the easier: David’s outgroup label was ultimately removed, but for many victims there is no opportunity to become “one of us.” Most are who they appear to be: a transgender prostitute stabbed by a pimp; an untouchable woman robbed and beaten. There is no veil to pull back that will make them worthy of our justice.


17 Take a moment to ponder: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 417–18.


17 When confronted with: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19.

17 And we eliminate that discomfort: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19.

17 We trick ourselves: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19.

17 She must have done something: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19. The easier it is for us to see the implicated harm as resulting from the victim’s free choice, the easier it is for us to blame her for what happened and maintain our belief in a just world. Looking into why certain tragedies, like the tsunami of 2004, spark significant charitable
giving, while others, like the crisis in Darfur, do not, a group of scientists had participants read about a fake famine and then asked them if they would like to make a donation to the victims. Hanna Zagefka et al., “Donating to Disaster Victims: Responses to Natural and Humanly Caused Events,” *European Journal of Social Psychology* 41 (2011): 358, doi: 10.1002/ejsp.781; Situationist Staff, “The Situation of Donations,” *Situationist*, May 29, 2011, http://thesituationist.wordpress.com/2011/05/29/the-situation-of-donations/. Some participants were told that the famine had arisen from “drought,” while others were told that it had been sparked by “armed conflict.” Could that small background fact make a difference? The answer was a clear yes: those who were starving because of a drought received significantly more donations, which the authors suggested arose because these people were seen as less implicated in causing their own suffering. Zagefka et al., “Donating to Disaster Victims,” 358–59; Situationist Staff, “The Situation of Donations.” Again, we want to believe that the world is a just place where individuals get their righteous deserts. Zagefka et al., “Donating to Disaster Victims,” 361; Situationist Staff, “The Situation of Donations”; Callan, Dawtry, and Olson, “Justice Motive Effects in Ageism,” 1343–44. Participants could maintain such a belief by assuming that those suffering as a result of an “armed conflict” must have been partially to blame—something they couldn’t do when a natural disaster was behind the famine. Zagefka et al., “Donating to Disaster Victims,” 361; Situationist Staff, “The Situation of Donations.”


18 **Penn State students rioted:** Eric Randall, “Bullies Force an Alleged Sandusky Victim to Leave His High School,” *Wire*, November 21, 2011,

We may see child abuse: Participants in the study on rape and respectability sentenced the defendant to a longer term of imprisonment for raping a married woman than raping a divorcee. And the experimenters reasoned that this was because the social harm was seen as worse in the case of the rape of a married woman (e.g., her husband was harmed as well). Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19.

To do that, we may: Jones and Aronson, “Attribution of Fault to a Rape Victim,” 418–19. This blame dynamic may help explain the seemingly unexplainable: the severe punishment of those who have been raped, including children and other innocents, in certain cultures around the world. In Somalia in 2008, for example, a thirteen-year-old girl was stoned to death in front of a thousand spectators after her father reported that she had been gang raped. Chris McGreal, “Somalian Rape Victim, 13, Stoned to Death,” Guardian, November 2, 2008, http://www.theguardian.com/world/2008/nov/03/somalia-rape-amnesty. In Sudan in 2013, an eighteen-year-old pregnant woman who was raped by seven men was then charged with adultery, prostitution, and committing indecent acts, which carried the death penalty. “Sudan: Gang Rape

18 **Why, then, do most:** Being able to rewrite our existing labels would certainly be beneficial, given that amending, reassessing, and sometimes rejecting our initial hypotheses in light of emerging facts is critical to reaching accurate conclusions. Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* (Cambridge, MA: Harvard University Press, 2012), 22.

18 **Research suggests that once we have:** Simon, *In Doubt*, 23.

19 **But really our minds are bending:** Simon, *In Doubt*, 37–38.


19 **Without any conscious effort:** Cohen, “Person Categories and Social Perception,” 447.


19 **In an experiment along these lines:** Nick D. Lange et al., “Contextual Biases,” 182–83.

19 What is incredible is that: Eberhardt, Dasgupta, and Banaszynski, “Believing Is Seeing,” 367–68.

19 Medical research suggests: Simon, In Doubt, 23.


20 In fact, DNA testing: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 47.

In one recent study, researchers gave: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 47.

They needed to confirm: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 47.

As expected, the experts found: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 47.

Only one of the seventeen: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 47.

Once David was labeled a drunk: This is what psychologists commonly refer to as a “positive test strategy” by which people search for evidence that confirms what is already believed to be true, rather than looking for evidence that contradicts it. Kahneman, Thinking, Fast and Slow, 81. When that supporting information is inevitably found, the existing hypothesis appears to be established.

Interestingly, the first people: Wilber and Wilgoren, “Medical Condition Suspected.”

Well, perhaps because they weren’t looking: Wilber and Wilgoren, “Medical Condition Suspected.”

As one of the firefighters recounted: Willoughby, Summary of Special Report, 26.


After dinner on a Friday night: Brief for Appellant, Jordan, 18 A.3d 703 (No. 07-CF-340), 2010 WL 7359337, at *2.
22 But the problem wasn’t just that: Simon, *In Doubt*, 38.

22 For example, one of the firefighters: Willoughby, *Summary of Special Report*, 23.


22 According to Commander Robert Contee: Wilber and Wilgoren, “Medical Condition Suspected.”


22 As it was, the first person: Willoughby, *Summary of Special Report*, 56.

23 There was actually plenty: Willoughby, *Summary of Special Report*, 8, 28, 47.

23 The failure to appreciate counterevidence: Kahneman, *Thinking, Fast and Slow*, 84.


23 This is why when, say, six people: Kahneman, *Thinking, Fast and Slow*, 84.


24 We could start by: Our disgust reactions to certain groups can be amplified by those with an interest in doing so, as genocides throughout history make clear. Harris and Fiske, “Dehumanizing the Lowest of the Low,” 852. One of the reasons that the Nazis were able to perpetrate the Final Solution was because of a powerful propaganda campaign aimed at depicting Jews as disgusting: diseased and akin to vermin. Sandra Kiume, “Disgust and Social Tolerance,” *Psych Central*, accessed February 15, 2014, http://psychcentral.com/blog/archives/2007/01/04/disgust-and-social-tolerance/. Thankfully, education can also serve to reduce the disgust we may feel toward outgroups.

24 Perhaps most important: Kassin, Dror, and Kukucka, “The Forensic Confirmation Bias,” 49.


25 In that panicked moment: Schaffer, “The Moral Dilemmas of Doctors.”


25 They carried an almost infinite array: Schaffer, “The Moral Dilemmas of Doctors.”
2. Dangerous Confessions ~ The Detective


26  **Someone had washed:** Brief for Defendant at 2, Rivera (No. 2-09-1060).

26  **And if you walked right:** Brief for Defendant at 2–3, Rivera (No. 2-09-1060).


26  **Holly Staker was supposed to be:** Possley, “DNA Tests.”

26  **A neighbor had noticed him:** Possley, “DNA Tests.”

26  **No one picked up:** Possley, “DNA Tests”; Brief for Defendant at 3, Rivera (No. 2-09-1060).

Details about the house and neighborhood were collected using Google Maps and Zillow.


27  **A single white tennis shoe:** “Juan Rivera Exhibit 2,” *Northwestern Law*, 39, accessed May 5, 2014,
A chair in the dining room: Le, “Testimony”; “Juan Rivera Exhibit 2,” 39.

Taylor, the two-year-old: Le, “Testimony.”

It was not until the police arrived: Le, “Testimony.”


She had been stabbed: Brief for Defendant at 3, Rivera (No. 2-09-1060).


Guilty: Rivera, 962 N.E. 2d at 55.

And so it went at the second trial: Rivera, 962 N.E. 2d at 55–56.


A vaginal swab had been collected: Rivera, 962 N.E. 2d at 60.

But after being labeled: Rivera, 962 N.E. 2d at 56.

The semen in the sample: Rivera, 962 N.E. 2d at 59.

With the lab test: *Rivera*, 962 N.E. 2d at 62.

The prosecution didn’t back away: Martin, “Court Reverses Conviction.”

The problem for the prosecution: *Rivera*, 962 N.E. 2d at 63.

Semen tends to drain into underwear: *Rivera*, 962 N.E. 2d at 59.

That meant that the prosecution: *Rivera*, 962 N.E. 2d at 63.

The account seemed implausible: *Rivera*, 962 N.E. 2d at 63.


Juan, on the threshold: Black and Fuller, “3rd life sentence.”

It was a verdict that: Black and Fuller, “3rd Life Sentence.”

It wasn’t just that none: *Rivera*, 962 N.E. 2d at 59–60, 62; Brief for Defendant at 38, *Rivera* (No. 2-09-1060).

There were also phone records: Brief for Defendant at 22, 26, *Rivera* (No. 2-09-1060); Martin, “Prosecution’s Case.”

Yet, despite Juan’s alibi: *Rivera*, 962 N.E. 2d at 57, 61-62; Brief for Defendant at 17, *Rivera* (No. 2-09-1060).

As Holly’s sister later: Martin, “Prosecution’s Case.”

29 The potency of this assumption: Experimental evidence shows that people place great weight on confessions. Saul M. Kassin and Gisli H. Gudjonsson, “The Psychology of Confessions: A Review of the Literature and Issues,” *Psychological Science in the Public Interest* 5 (2004): 56–59; Saul M. Kassin, Christian A. Meissner, and Rebecca J. Norwick, “‘I’d Know a False Confession If I Saw One’: A Comparative Study of College Students and Police Investigators,” *Law and Human Behavior* 34 (2005): 211–227; Kassin et al., “Police-Induced Confessions: Risk Factors and Recommendations,” *Law and Human Behavior* 34 (2010): 24–25. For an overview of some of that research, see Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* (Cambridge, MA: Harvard University Press, 2012), 160–62. The power of the confession is not lost on members of the judiciary. According to Supreme Court Justice Byron White, “the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant’s own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting).
29 **We expect people to be consistent:** Sam Sommers, *Situations Matter* (New York: Riverhead Books, 2011), 30.

29 **In a famous study documenting:** Edward Jones and Victor Harris, “The Attribution of Attitudes,” *Journal of Experimental Social Psychology* 3 (1967): 1, 4.

29 **Despite being told that:** Jones and Harris, “Attribution of Attitudes,” 1, 4–6.

30 **As Supreme Court Justice Hugo Black:** Chambers v. Florida, 309 U.S. 227, 237–38 (1940).


30 **But that has been abandoned:** Simon, *In Doubt*, 134–35. Of course, it is worth noting that, well prior to the 1930s, the Supreme Court made clear that an admissible confession had to be “free and voluntary” and “must not be extracted by any sort of threats or violence.” Bram v. United States, 168 U.S. 532, 542–43 (1897). It just took a few more decades for police practice to match the judicial rhetoric.

30 **Juan Rivera, though, did falsely confess:** Confessions, as a general matter, are fairly common, despite what we might imagine. It appears that there is a full confession or, at least, an incriminating statement made in about half of all interrogations. Simon, *In Doubt*, 120; Saul M. Kassin et al., “Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs,” *Law and Human Behavior*, 31 (2007): 395.
One of the first American episodes of false confession came during the Salem witch trials in 1692, when dozens of women admitted to practicing witchcraft. Kassin et al., “Police-Induced Confessions,” 4; Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England* (New York: W.W. Norton & Company, 1998). However, false confessions are not an American phenomenon and have been documented in Germany, Canada, Ireland, China, Japan, and numerous other countries. Kassin et al., “Police-Induced Confessions,” 5.


30 **More broadly, they appear to have:** “DNA Exonerations Nationwide.”


30 **Indeed, in one of the most famous:** The boys were subjected to lengthy interrogations and immediately retracted their statements after being arrested. However, they were all convicted and sent to prison, until the true rapist confessed and agreed to a DNA test. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, MA: Harvard University Press, 2011), 31; “Central Park Jogger (1989),” *New York Times*, October 3, 2012, http://topics.nytimes.com/top/reference/timestopics/subjects/c/central_park_jogger_case_1989/index.html; Kassin et al., “Police-Induced Confessions,” 4.

30 **While some who falsely confess:** Simon, *In Doubt*, 121. For a discussion of the different types of confessions, see Lawrence S. Wrightsman and Saul M. Kassin, *Confessions in the*
Courtroom (Newbury Park, CA: Sage, 2003), 84–93. The focus in this chapter is on coerced confessions. There is an entirely separate category of truly voluntary false confessions, which may emerge particularly following highly publicized crimes. Two hundred people, for example, are known to have confessed to the kidnapping of Charles Lindbergh’s infant son. Kassin et al., “Police-Induced Confessions,” 14.

30 The generally accepted gold standard: Fred E. Inbau et al., Criminal Interrogation and Confessions, 5th ed. (Burlington, MA: Jones & Barlett Learning, 2013); Simon, In Doubt, 121–22; Garrett, Convicting the Innocent, 22. Hundreds of thousands of investigators in North America, Europe, and Asia have been trained in the Reid technique. Inbau et al., Criminal Interrogation, viii.

30 Using the Reid approach: Inbau et al., Criminal Interrogation, 3–7, 187. Investigators following the Reid technique may ask “behavior-provoking questions” (e.g., “Jim, under any circumstances do you think the person who started that fire should be given a second chance?”) meant to induce revealing behavior, like fidgeting with one’s hands, averting one’s gaze, and freezing up. Inbau et al., Criminal Interrogation, 155, 161; Kassin et al., “Police-Induced Confessions,” 6.

31 And far from correcting: Inbau et al., Criminal Interrogation, 101–37; Simon, In Doubt, 127–28.

31 Indeed, it is innocent people: Simon, In Doubt, 140.

31 They tend to assume: There is some evidence that being innocent may actually increase one’s risk of falsely confessing. Kassin et al., “Police-Induced Confessions,” 22–23.; Simon, In Doubt, 140.

31 Since they didn’t commit the crime: Simon, In Doubt, 140.
31 But, in reality, once the interrogation: Inbau et al., *Criminal Interrogation*, 185–327; Simon, *In Doubt*, 133.

31 To this end, the Reid manual: Kassin et al., “Police-Induced Confessions,” 12. The Reid manual, for instance, suggests bringing in a false evidence file into the interview room along with “other visual props, such as a DVD disc, CD-ROM, audio tape, a fingerprint card, an evidence bag containing hair or other fibers, spent shell casings, vials of colored liquid, and others.” Inbau et al., *Criminal Interrogation*, 192.

31 As a result, the environment: Kassin et al., “Police-Induced Confessions,” 7; Simon, *In Doubt*, 134.


31 And experimental evidence suggests: It has been hypothesized that because resisting accusations during an interrogation appears to result in stress-related bodily changes, it may be that participants falsely confess simply to relieve heavy physiologic stress. Max Guyll et al., “Innocence and Resisting Confession During Interrogation: Effects on Physiologic Activity,” *Law and Human Behavior* 37 (2013): 8, doi: 10.1037/lhb0000044.

31 When we have an opportunity: *Rivera*, 962 N.E. 2d at 65–66.

32 According to the nine steps: Kassin et al., “Police-Induced Confessions,” 7.

32 The officer might suggest that: Inbau et al., *Criminal Interrogation*, 217–18; Kassin et al., “Police-Induced Confessions,” 12.

32 Empirical evidence suggests that both of these: While the minimization technique appears to lead people to believe that they are being promised lenient treatment, maximization tends to be interpreted as a threat. Kassin and Gudjonsson, “The Psychology of Confessions,” 53-55; Saul

32 **And the effects are not small:** Russano et al., “Investigating True and False Confessions,” 483–84. The minimization prompt provided in the main text is just one example of those used in the experiment.

32 **When the interrogator added:** Russano et al., “Investigating True and False Confessions,” 484. It should be noted that the fifth edition of the Reid manual contains numerous asides offering cautions and caveats, some of which nod to the concerns raised in this chapter. The problem is that, looking at the manual as a whole from a typical reader’s perspective, it is hard to view them as anything but exceptions (e.g., gaze aversion is a good way to tell someone is lying, but there are a couple of exceptions). Inbau et al., *Criminal Interrogation*, 161. Indeed, the Reid manual may pose *more* of a threat now: while the problematic core has been preserved, the current edition contains sufficient hedges and scientific asides to convince judges that it is unlikely to encourage false confessions.

32 **Despite these serious concerns:** It is not as if the Supreme Court has failed to grasp the importance of a confession. In the case of *Colorado v. Connelly*, the Court explained that “the introduction of a confession makes the other aspects of a trial in a court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” *Colorado v. Connelly*, 479 U.S. 157, 182 (1986). So, the failure of the Court to make changes to eliminate false
confessions likely reflects mistaken beliefs about the prevalence of such incidents and a fear of constraining police officers and prosecutors.

32 While the Supreme Court has formally: Bram v. United States, 168 U.S. 532, 542–43 (1897); Simon, In Doubt, 134–36. For instance, a review of cases revealed numerous instances where judges allowed confessions gained after interrogators offered what amounted to a prohibited “deal” (i.e., if you confess, we will make sure you get a lesser sentence). Welsh S. White, Miranda’s Waning Protections: Police Interrogation Practices after Dickerson (Ann Arbor, MI: University of Michigan Press, 2006). Indeed, while the language that the Supreme Court used in Bram v. United States would suggest a firm ban on minimization techniques, the case has been a weak and often nonexistent constraint on such practices. Kassin et al., “Police-Induced Confessions,” 12.

32 Further, the justices have explicitly sanctioned: Simon, In Doubt, 135; Garrett, Convicting the Innocent, 23; Kassin and Gudjonsson, “The Psychology of Confessions,” 54. The Supreme Court has made it clear that deception by the police is not enough by itself to make a confession involuntary. Frazier v. Cupp, 394 U.S. 731 (1969); Kassin et al., “Police-Induced Confessions,” 13. That said, some state courts have barred the actual construction of false evidence (e.g., fake crime lab reports), while continuing to allow the police to lie to the suspect about the existence of incriminating evidence. Kassin et al., “Police-Induced Confessions,” 13.


33 Investigators suspected that Martin: Shipler, “Innocent People Confess.”
33 **After the fake conversation:** Shipler, “Innocent People Confess.” The interrogator also lied and said that strands of Martin’s hair were found in his mother’s hand and that a “humidity test” had revealed that he had showered to remove the blood on his body. Kassin et al., “Police-Induced Confessions,” 17.

33 **The father, in fact, never came to:** Shipler, “Innocent People Confess.”


33 **A disproportionate number of verified:** Those who are young, low in intelligence, or mentally disabled have demonstrated particular susceptibility to coercion and a strong desire to defer to or please interrogators. Garrett, *Convicting the Innocent*, 38; Simon, *In Doubt*, 140.


33 **Among other mental illnesses:** Brief for Defendant at 26, *Rivera* (No. 2-09-1060).

33 **Despite these warning signs:** “Juan Rivera, Center on Wrongful Convictions.” His mental health conditions were disclosed to the police on a Mental Data Sheet before the first polygraph. Brief for Defendant at 5, *Rivera* (No. 2-09-1060).

33 **It took four days:** “Juan Rivera, Center on Wrongful Convictions.”

33 **But the police, as they often do:** “Juan Rivera, Center on Wrongful Convictions.”

34 **Although the polygraphs administered:** Brief for Defendant at 77, *Rivera* (No. 2-09-1060).

It is worth noting that, in experiments, falsely telling participants that a polygraph shows that
they committed a violation increases the number of people who admit to that violation. Kassin et al., “Police-Induced Confessions,” 17.

34 Rivera immediately became upset: Brief for Defendant at 7–8, Rivera (No. 2-09-1060).

34 At around midnight: Brief for Defendant at 9, Rivera (No. 2-09-1060).

34 He wasn’t able to get the words out: Brief for Defendant at 9, Rivera (No. 2-09-1060).

34 Over the next few hours: Brief for Defendant at 9–10, Rivera (No. 2-09-1060).

34 By 3 a.m., the officers had: Brief for Defendant at 11, Rivera (No. 2-09-1060).

34 Rivera, left on his own: Brief for Defendant at 11, 27, Rivera (No. 2-09-1060).

34 Moved to a padded cell: Brief for Defendant at 11, 27, Rivera (No. 2-09-1060).

34 The nurse on duty described him: Brief for Defendant at 11–12, Rivera (No. 2-09-1060).

34 When she checked back: Brief for Defendant at 12, Rivera (No. 2-09-1060).

34 Returning in the early morning: Brief for Defendant at 12, Rivera (No. 2-09-1060).

34 The document, though, was so inconsistent: Brief for Defendant at 13, Rivera (No. 2-09-1060).

34 The two detectives: Brief for Defendant at 13, Rivera (No. 2-09-1060).

35 These interrogators focused on: Brief for Defendant at 15, Rivera (No. 2-09-1060).

35 After a few more hours: Brief for Defendant at 15, Rivera (No. 2-09-1060).

35 Questions like: Brief for Defendant at 15, Rivera (No. 2-09-1060); Simon, In Doubt, 136.

35 Information that only the real perpetrator: Simon, In Doubt, 136.

35 Juan Rivera discussed the crime: Rivera, 962 N.E. 2d at 67; Brief for Defendant at 5, Rivera (No. 2-09-1060); Brief for Respondent at 7, Rivera (No. 2-09-1060), http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/documents/Rivera_States2011Brief.pdf.
Moreover, at least fifteen: *Rivera*, 962 N.E. 2d at 65–66. It is notable that a significant number of false confessions cases have involved taking the suspect to the crime scene. Garrett, *Convicting the Innocent*, 33.

Lamentably, these are just the types: Simon, *In Doubt*, 136.

While a more rigorous interrogation protocol: A less error-prone interrogation approach would have involved eliminating suggestive questioning, contaminating information, and coercive pressures, among other things. Although the Reid manual explicitly bars contaminating confessions by providing relevant details to a suspect, it still occurs. Garrett, *Convicting the Innocent*, 23.

This can be problematic when it comes to: *In Doubt*, 126; Carol Toris and Bella M. DePaulo, “Effects of Actual Deception and Suspiciousness of Deception on Interpersonal Perceptions,” *Journal of Personality and Social Psychology* 47 (1984): 1063–73.

Beginning the process with a theory: Simon, *In Doubt*, 126.

This, in turn, can lead them: Simon, *In Doubt*, 137.

One study found that mock interrogators: Simon, *In Doubt*, 137.

The results were stark: Simon, *In Doubt*, 137.

As is common in false confessions: Brief for Defendant at 9, 10, 42, *Rivera* (No. 2-09-1060). It is very common for suspects to provide facts that contradict what is known about the crime, appearing in at least 75 percent of known false confession exoneration cases. Garrett, *Convicting the Innocent*, 33.

36 **In turn, your defense attorney:** Kassin et al., “Police-Induced Confessions,” 23. While prosecutors tend to maximize the charges they bring against confessing defendants and seek higher bails, defense attorneys tend to push plea bargains thinking they’ll lose at trial. Drizin and Leo, “The Problem of False Confessions,” 922.

36 **Perhaps most important, a confession:** Once they get a confession, the police wrap things up, which means that new evidence of innocence tends to be disregarded and leads focused on other suspects tend to be ignored. Kassin et al., “Police-Induced Confessions,” 23; Drizin and Leo, “The Problem of False Confessions,” 921–23; Garrett, *Convicting the Innocent*, 35.

36 **In one particularly egregious case:** Garrett, *Convicting the Innocent*, 35.

36 **He was turned down, however:** Garrett, *Convicting the Innocent*, 35.

37 **In eight of the first 250:** Garrett, *Convicting the Innocent*, 35.

37 **The only reason these men:** Garrett, *Convicting the Innocent*, 35.

37 **As remarkable as it is:** Garrett, *Convicting the Innocent*, 35.

37 **Hard-nosed interrogations are particularly:** Simon, *In Doubt*, 132; Garrett, *Convicting the Innocent*, 21.

37 **Failing to gain a confession:** Simon, *In Doubt*, 132.

37 **By the time Juan was brought in:** Martin, “Prosecution’s Case.”

37 **In December 2011:** Martin, “Illinois: Inmate Cleared.”

37 **Juan Rivera spent half his life:** Martin, “Prosecution’s Case”; Martin, “Illinois: Inmate Cleared.” Juan suffered, as the court put it, “the nightmare of wrongful incarceration.” *Rivera*, 962 N.E. at 67–68.

37 **It took Juan keeping faith:** Black and Fuller, “3rd Life Sentence.”

38 During the closing argument: Martin, “Prosecution’s Case.”

39 Members of the media and others: Martin, “Prosecution’s Case.”


39 He took the plea and spent: “James Ochoa.” Thankfully, the stabbing was not fatal. Moxley, “CSI Games.”

40 In one recent study extending: Dervan and Edkins, “The Innocent Defendant’s Dilemma,” 1, 3.

40 Over half of innocent participants: Dervan and Edkins, “The Innocent Defendant’s Dilemma,” 1, 3.


3. The Criminal Mind ~ The Suspect

41 Mug shot photographs: Frank Masters, photograph, 1890 (New Zealand Police Museum, Porirua); John Powell, photograph, 1889 (New Zealand Police Museum, Porirua); Alick Evan McGregor, photograph, 1887 (New Zealand Police Museum, Porirua); William Johnston, photograph, 1887 (New Zealand Police Museum, Porirua).


42 And as I began writing: Frank Masters; John Powell; Alick Evan McGregor; William Johnston.


42 The rapist was the man: “Frank Masters.”

42 The others in the lineup: “John Powell”; “Alick Evan McGregor”; “William Johnston.”

42 Masters was a serial sex offender: “This Day: An Extraordinary Scene,” Evening Post, December 4, 1889, http://paperspast.natlib.govt.nz/cgi-
Though all of those affected: “Frank Masters”

Even if we could trade: “This Day.”

During his fourth trial: “Criminal Sittings,” Evening Post, October 5, 1888,

And at the suggestion of his lawyer: “Criminal Sittings.”

Nonetheless, Dr. Johnston: “Criminal Sittings.”

So, despite Masters’ pleas: “Criminal Sittings.”

At his sentencing for that crime: “This Day.”

“He couldn’t help himself”: “This Day.”

In addition to “suggesting that he should”: “This Day.”

He wanted to do good: “This Day.”

The reporter who recounted: “This Day.”

But the judge was less sure: “This Day.”

We all have intuitions: Sharrona Pearl, About Faces: Physiognomy in Nineteenth-Century Britain (Cambridge, MA: Harvard University Press, 2010), 1, 38.

The idea that a person’s facial traits: Pearl, About Faces, 1, 11.

The message in the wind: Pearl, About Faces, 186.


45 They were particularly interested: Cole, Suspect Identities, 23.

45 One of Lombroso’s epiphanies: Gina Lombroso-Ferrero, Criminal Man According to the Classification of Cesare Lombroso (New York: The Knickerbocker Press, 1911), xv.

45 Those among us who seemed: Lombroso, Criminal Man, xv.

45 They were “born criminals”: Jonathan Finn, Capturing the Criminal Image: From Mug Shot to Surveillance Society (Minneapolis: University of Minnesota Press, 2009), 14; Lombroso, Criminal Man, xv.

45 In order to identify those “degenerates”: Cole, Suspect Identities, 23; Finn, Capturing the Criminal Image, 15; Encyclopedia Britannica, “Cesare Lombroso.”

45 He and his followers set about: Cole, Suspect Identities, 23.

45 These were all on: Cole, Suspect Identities, 24.


46 Lombroso’s project was greatly: Finn, Capturing the Criminal Image, 15–16.

46 There were devices to record: Finn, Capturing the Criminal Image, 15–16.


In the quest to record: Cole, *Suspect Identities*, 22.

Although mug shots were initially used: The first use of photography in fighting crime was a simple means of making manifest a person’s otherwise hidden criminal past. Cole, *Suspect Identities*, 20–22. And, in that sense, it paralleled earlier practices of altering the body of the criminal to signal his evil nature. Cole, *Suspect Identities*, 7. In preceding centuries, ne’er-do-wells had been literally marked. Cole, *Suspect Identities*, 7.

The British and French recorded images of prisoners as early as the 1840s. Cole, *Suspect Identities*, 20. And, in the subsequent decades in the United States, police departments began to assemble “rogues’ galleries” that could be displayed for members of the police—and sometimes the public—to view hundreds of photographs of known criminals in order to be able to note them later. Cole, *Suspect Identities*, 20-21. By comparing and cataloguing these photos, physiognomists hoped to capture the signs of criminal nature in the body with great accuracy. Cole, *Suspect Identities*, 24.


**46 What does a hotel thief:** Cole, *Suspect Identities*, 24.

**46 Galton would take the pictures:** Cole, *Suspect Identities*, 24.

**47 Conceivably, a person could then:** Cole, *Suspect Identities*, 26.

**47 The work of Galton:** People had devoted their professional lives to devising complex classification systems, writing books, creating journals, circulating pamphlets, and holding society conferences, and it was mostly all bogus. Pearl, *About Faces*, 189.

**47 And far worse, their crackpot:** Finn, *Capturing the Criminal Image*, 16–17, 20.


**47 We teach the forcible sterilizations:** John Kitzhaber, “Proclamation of Human Rights Day, and Apology for Oregon’s Forced Sterilization of Institutionalized Patients” (speech, Salem, OR, December 2, 2002); Elizabeth Cohen, “North Carolina Lawmakers OK Payments for Victims of


48 We tend not to pay much attention: Ross and Shestowsky, “Contemporary Psychology’s Challenges to Legal Theory and Practice,” 1092–93; Fiske et al., “The Cultural Matrix of Social


48 Sometimes that turns out to be right: One fifteen-state study by the U.S. Bureau of Justice Statistics showed that only 1.2 percent of those released after being convicted of murder were rearrested for homicide within three years. Patrick A. Langan and David J. Levin, U.S. Department of Justice, Recidivism of Prisoners Released in 1994 (Washington, DC: Bureau of Justice Statistics, June 2, 2002), 1, http://www.bjs.gov/content/pub/pdf/rpr94.pdf. More broadly, approximately half of all of those convicted of homicide have no arrests for any crimes in the five years after being released. Matthew R. Durose, Alexia D. Cooper, and Howard N. Snyder, U.S. Department of Justice, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (Washington, DC: Bureau of Justice Statistics, April 2014), 8, http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf. Counterintuitively, violent offenders appear significantly less likely to reoffend than those convicted of property or drug offenses. Approximately three out of four state prisoners are rearrested within five years of being released. Durose, Cooper, and Snyder, Recidivism of Prisoners, 7.


Gage’s fame all came down: Wheeler, “UCLA Researchers Map Damaged Connections in Phineas Gage’s Brain.”

His actions (perhaps not unexpectedly): Wheeler, “UCLA Researchers Map Damaged Connections in Phineas Gage’s Brain.”
In an amazing bit of luck: Mobbs et al., “Law, Responsibility, and the Brain,” 693.

But as his friends quickly noticed: Mobbs et al., “Law, Responsibility, and the Brain,” 693.


Even though he understood that: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 437.

Oft was kicked out: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 437; Greely, “Law and the Revolution in Neuroscience,” 700.
It was so bad that he: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 437; Greely, “Law and the Revolution in Neuroscience,” 700.

But no sooner had his: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 438. He also urinated on himself, had trouble walking, and struggled on certain neurological tests, including being unable to draw a clock and write legibly. Morse, “Neuroimaging Evidence in Law,” 353.


The surgery to remove it provided: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 438; Greely, “Law and the Revolution in Neuroscience,” 700–01.

Seven months later: Burns and Swerdlow, “Right Orbitofrontal Tumor,” 438.


But it is important to understand: Morse, “Neuroimaging Evidence in Law,” 352; Greely, “Law and the Revolution in Neuroscience,” 699–701. For instance, we do not know for certain
how much Gage and Oft could actually control their antisocial behavior. Morse, “Neuroimaging Evidence in Law,” 353.


51 Our prisons, for example, contain: Mobbs et al., “Law, Responsibility, and the Brain,” 695; “Mental Illness Not Linked to Crime, Research Finds,” American Psychological Association, last modified April 21, 2014, http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx. Moreover, illnesses tend to cluster together. As one example, it is estimated that between 75 percent and 93 percent of pedophiles also have other mental disorders, like depression or anxiety. Christine Wiebking et al., “Pedophilia,” in *Neuroimaging in Forensic Psychiatry*, ed. Joseph Simpson (Oxford: John Wiley & Sons, 2012), 102. And 60 percent have been shown to have personality disorders. Wiebking et al., “Pedophilia,” 102.

However, it is important to note that although those with mental illness are incarcerated at much higher rates than those without mental illness, criminal behavior may not be directly
related to the *symptoms* of mental illness. That is, the crimes committed by those with schizophrenia, for example, appear to only rarely result directly from hallucinations and delusions. Jillian K. Peterson et al., “How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?” *Law and Human Behavior* 38, no. 5 (2014): 439–49, doi: 10.1037/lhb0000075.

Although both are correlated with criminality, psychopathy and antisocial personality disorder are overlapping but distinct conditions. Jeremy Coid et al., “Psychopathy Among Prisoners in England and Wales,” *International Journal of Law and Psychology* 32, no. 3 (2009): 134–41, doi: 10.1016/j.ijlp.2009.02.008. The DSM-5 only recognizes antisocial personality disorder and classifies it as “a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.” Unfortunately, the DSM-5 introduces some confusion into the area by suggesting that “this pattern has also been referred to as psychopathy, sociopathy, or dissocial personality disorder.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Arlington, VA: American Psychiatric Publishing, Incorporated, 2013), 659.

criteria (scored at 0, 1, or 2) to determine whether someone meets the diagnosis (a total score of 30 or higher). Some of the criteria relate to antisocial behavior, while others relate to emotional and interpersonal traits. Kiehl and Buckholtz, “Inside the Mind of a Psychopath,” 28.


51 This neuroimaging technology has allowed: Morse, “Neuroimaging Evidence in Law,” 344. It is important to grasp how difficult it is to connect the brain to the mind to behavior. Morse, “Neuroimaging Evidence in Law,” 343. The brain is our most complex organ. Boffey, “The Next Frontier Is Inside Your Brain.” Each of our brains contains some 100 billion neurons, each of which is connected to thousands of other neurons. Eagleman, “What Our Brains Can Teach Us.” With a single neuron potentially firing multiple times each second and perhaps 1,000 trillion neural connections in each of our brains, neuroscientists face an immense challenge. Eagleman, “What Our Brains Can Teach Us”; Boffey, “The Next Frontier is Inside Your Brain.”


52 There are also links: Mobbs et al., “Law, Responsibility, and the Brain,” 693–94.

52 This aligns with other research: Mobbs et al., “Law, Responsibility, and the Brain,” 694; Batts, “Brain Lesions,” 268.

52 One of the strangest aspects: Mobbs et al., “Law, Responsibility, and the Brain,” 697.


Neuroscientists have identified this: Mobbs et al., “Law, Responsibility, and the Brain,” 694–95.

When it is not functioning properly: Mobbs et al., “Law, Responsibility, and the Brain,” 694.

We have known for a long time: Mobbs et al., “Law, Responsibility, and the Brain,” 693–94.

Although we’ve been considering: Batts, “Brain Lesions,” 269–70.

Pedophilia, for example, seems to: Wiebking et al., “Pedophilia,” 108.

But the location of the abnormality: Mobbs et al., “Law, Responsibility, and the Brain,” 695.

Those who have deficiencies in: Mobbs et al., “Law, Responsibility, and the Brain,” 695.

By contrast, those with demonstrated abnormal: Mobbs et al., “Law, Responsibility, and the Brain,” 695.


53 And the case against our simplistic: Adult experiential and other factors can obviously also play a role.


54 All things being equal: Greely, “Law and the Revolution in Neuroscience,” 691.


54 Scientists have suggested that: It is important to note that we are still learning about the effects of this genetic condition and the research remains controversial. S.Z. Sabol, Stella Hu, and D. Hamer, “A Functional Polymorphism in the Monoamine Oxidase A Gene Promoter,”


55 And many of these risk factors: Shader, “Risk Factors for Delinquency,” 3.

55 We know that people in: Mobbs et al., “Law, Responsibility, and the Brain,” 698.


56 As you’d expect from looking: Mobbs et al., “Law, Responsibility, and the Brain,” 698.


57 They were raised in South Boston: Chinlund, Lehr, and Cullen, “Senate President."

57 The elder James had lost: Chinlund, Lehr, and Cullen, “Senate President."

57 Whitey and Bill shared a room: Chinlund, Lehr, and Cullen, “Senate President."

57 Though the project has since: Chinlund, Lehr, and Cullen, “Senate President."

58 The Bulgers did not have much: Chinlund, Lehr, and Cullen, “Senate President."

58 Whitey stayed local and fell: Chinlund, Lehr, and Cullen, “Senate President."

58 The boys he hung out with: Chinlund, Lehr, and Cullen, “Senate President.”

58 **In short order he would:** “Whitey Bulger Biography.”

58 **Age fourteen was similarly pivotal:** Chinlund, Lehr, and Cullen, “Senate President.”

58 **While Whitey was brawling:** Chinlund, Lehr, and Cullen, “Senate President.”

58 **Later, while Bill was immersing:** Chinlund, Lehr, and Cullen, “Senate President.”

58 **Bill went off to law school:** Chinlund, Lehr, and Cullen, “Senate President.”


58 **He was later appointed:** “UMass Presidents: William M. Bulger.” Over the years, Bill also served on numerous boards, from the Boston Public Library Board of Trustees to the Massachusetts General Hospital Board of Trustees to the Museum of Fine Arts Board of Trustees. “UMass Presidents: William M. Bulger.”


58 **When Osama bin Laden was killed:** Dick Lehr and Girard O’Neill, “Whitey Bulger: Secrets behind the Capture of the FBI’s Most Wanted Man,” *Salon*, February 24, 2013, http://www.salon.com/2013/02/24/whitey_bulger_secrets_behind_the_capture_of_the_fbis_most


59 **All that said, we shouldn’t:** Asma Khalid, “Whitey and Billy: A Tale of Two Boston Brothers,” *WBUR*, June 2, 2013, http://www.wbur.org/2013/06/02/whitey-billy-bulger-brothers.


60 **In one experiment, a group:** Miller, *The Social Psychology of Good and Evil*, 30. Some of the games were benign in nature and some required physical confrontation in order to win. Miller, *The Social Psychology of Good and Evil*, 30.

60 **In the “anonymous” second set:** Miller, *The Social Psychology of Good and Evil*, 30.

60 **It seemed to be the costumes:** Miller, *The Social Psychology of Good and Evil*, 30–31.

60 **As a follow-up, the researchers decided:** Vedantam, “Behind a Halloween Mask.”

60 **In the experiment, young trick-or-treaters:** Vedantam, “Behind a Halloween Mask.”
The person who greeted the children: Vedantam, “Behind a Halloween Mask.”

So what did the kids do: Vedantam, “Behind a Halloween Mask.”

Well, lots of them stole: Vedantam, “Behind a Halloween Mask.”

Some groups took the entire: Vedantam, “Behind a Halloween Mask.”

But there was an interesting twist: Vedantam, “Behind a Halloween Mask.”


In one set of studies: Witt and Brockmole, “Action Alters Object Identification,” 1159.

Participants were told that: Witt and Brockmole, “Action Alters Object Identification,” 1160.


The best explanation is that: Witt and Brockmole, “Action Alters Object Identification,” 1159–60; 1166.

And that suggests that having: Witt and Brockmole, “Action Alters Object Identification,” 1166.
61 **Even the surrounding landscape:** Anyone who has ever taken the time to look at a map of crimes in his or her community will have noted one of the key features of crime: it is extremely spatially concentrated. Ken Pease, “Crime Reduction,” in *The Oxford Handbook of Criminology*, eds. Mike Maguire, Rod Morgan, and Robert Reiner, 3rd ed. (Oxford: Oxford University Press, 2002), 960. Part of the explanation for this phenomenon has to do with other factors that are spatially concentrated, like poverty. But there is also evidence that elements in the physical landscape may themselves engender crime. Benforado, “The Geography of Criminal Law,” 842–43.


62 **In one set of experiments:** Keizer, Lindenberg, and Steg, “The Spreading of Disorder,” 1681–85.

62 **When there was more graffiti:** Keizer, Lindenberg, and Steg, “The Spreading of Disorder,” 1684.

62 **When the experimenters illegally locked:** Keizer, Lindenberg, and Steg, “The Spreading of Disorder,” 1683–84.


Although logic suggested that: The 63 percent figure is from the participants in Milgram’s first experiment, which is similar to the level observed in follow-up work. Zimbardo and Leippe, *The Psychology of Attitude Change and Social Influence*, 68.

What was even more interesting: Milgram, *Obedience to Authority*, 35, 60–61, 94–95, 119.

If so, obedience plunged: Milgram, *Obedience to Authority*, 116–21.
63 **With a scientist:** Milgram, *Obedience to Authority*, 16, 95, 99–105.

63 **In the Bridgeport lab:** Milgram, *Obedience to Authority*, 60–70.

63 **We want to believe that:** Miller, *The Social Psychology of Good and Evil*, 8, 26.

63 **But that is simply:** As the psychologist Phil Zimbardo has written, “While a few bad apples might spoil the barrel (filled with good fruit/people), a barrel filled with vinegar will always transform sweet cucumbers into sour pickles—regardless of the best intentions, resilience, and genetic nature of those cucumbers.” Miller, *The Social Psychology of Good and Evil*, 47.

63 **There is psychological truth behind:** Miller, *The Social Psychology of Good and Evil*, 3.


4. **Breaking the Rules ~ The Lawyer**

67 **Gerry Deegan was dying:** Connick v. Thompson, 131 S. Ct. 1350, 1374–75 (2011) (Ginsburg, J., dissenting); Dahlia Lithwick, “Cruel but Not Unusual: Clarence Thomas Writes


67 Now his number had come up: Connick, 131 S. Ct. at 1374–75 (Ginsburg, J., dissenting).

67 Riehlmann was a former prosecutor: Connick, 131 S. Ct. at 1374–75 (Ginsburg, J., dissenting).

67 It all started with: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

67 The only witness to the shooting: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

67 But that didn’t narrow things: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

67 The money lured Richard Perkins: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

67 According to Perkins: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).


68 Thompson’s two sons were there: Thompson, “The Prosecution Rests.”

68 They watched as the police: Thompson, “The Prosecution Rests.”

68 He was twenty-two: Thompson, “The Prosecution Rests.”

68 Freeman matched the description: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

68 But it was Thompson: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).
His photo in the paper: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

Now, looking at the Afro: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

And when they went down: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

What’s more, Freeman had turned: Connick, 131 S. Ct. at 1371–72 (Ginsburg, J., dissenting).

All they had to do: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

The opening move was to try: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

If he chose to testify: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

And without Thompson’s testimony: Connick, 131 S. Ct. at 1374 (Ginsburg, J., dissenting).


Deegan was enlisted to assist: Connick, 131 S. Ct. at 1372 (Ginsburg, J., dissenting).

Thompson was going: Connick, 131 S. Ct. at 1356.


He was sitting there now: Connick, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).
During the carjacking, the eldest: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

A crime-scene investigator had: Connick, 131 S. Ct. at 1371 (Ginsburg, J., dissenting).

But Thompson’s lawyer never knew: Connick, 131 S. Ct. at 1373 (Ginsburg, J., dissenting).

He had kept all of this: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).


Failing to do so: Connick, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

Richlmann suggested that Deegan reveal: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

But when Deegan elected: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

For five more years: Connick, 131 S. Ct. at 1374 (Ginsburg, J., dissenting).

Each time it was delayed: Thompson, “The Prosecution Rests.”

His seventh and final date: Thompson, “The Prosecution Rests.”

In a last-ditch effort: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

It was less than a month: Bandes, “The Lone Miscreant,” 715.

And then there it was: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

B, it said: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

Thompson had type O blood: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

He was innocent: Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

Thompson was finally able: Bandes, “The Lone Miscreant,” 722–23.
At the new trial: *Connick*, 131 S. Ct. at 1357 n. 2.

*It took the jurors only:* *Connick*, 131 S. Ct. at 1376 (Ginsburg, J., dissenting).

*After more than eighteen years:* *Connick*, 131 S. Ct. at 1376 (Ginsburg, J., dissenting).

During his time in prison, Thompson spent fourteen years on death row. *Connick*, 131 S. Ct. 1350 at 1370 (Ginsburg, J., dissenting).

*Prosecutors are mostly upstanding:* *Connick*, 131 S. Ct. at 1366.

*Prosecutors know their:* *Connick*, 131 S. Ct. at 1362–63, 1365–66.

*And in the Court’s view:* *Connick*, 131 S. Ct. at 1362–63, 1366.


*But when the case made it:* Thompson, “The Prosecution Rests.”

*In the majority’s opinion:* *Connick*, 131 S. Ct. at 1362–63, 1366.

*Similarly, Justice Scalia, in a concurrence:* *Connick*, 131 S. Ct. at 1368–69 (Scalia, J., concurring).

*Deegan, in this framing:* *Connick*, 131 S. Ct. at 1368 (Scalia, J., concurring).


*Yes, we should expect:* The Nazis at Nuremberg had lawyers. “Nuremberg Trials,” History.com, accessed April 21, 2014, http://www.history.com/topics/world-war-ii/nuremberg-

A slight variation on this common conception of the lawyer is that it is not so much that he is immoral than that he is amoral. And this amorality leads lawyers to willingly act dishonestly when it is in their interests to do so (i.e., when the benefits outweigh the costs). Lawyers look at (1) what is to be gained and (2) the likelihood of being caught and do a simple calculation.

These notions of the character of the attorney are ever-present in our culture. If you look at depictions of lawyers in films, television series, and popular fiction, you will generally find two stock characters. The first is the good lawyer: the selfless hero, true to his principles, defending the disenfranchised and the downtrodden and fighting for justice. Carrie Menkel-Meadow, “Can They Do That? Legal Ethics in Popular Culture,” 48 UCLA Law Review 1305, 1315 (2001). Atticus Finch, Clarence Darrow, and Perry Mason are all in this mold. Menkel-Meadow, “Can They Do That?” 1315. The second is the bad lawyer: the greedy and unethical predator, manipulative, back-stabbing, and vicious. Michael Asimow, “Embodiment of Evil:
Law Firms in the Movies,” 48 UCLA Law Review 1339, 1341 (2001). Here, we have law firm associate Fletcher Reed, Jim Carrey’s character in Liar Liar, who revels in his mendacity, until his son casts a spell that compels him to speak only the truth, seriously endangering his job at the firm where lying is a way of life. Asimow, “Embodiment of Evil,” 1356–57. Or we have managing partner John Milton, played by Al Pacino in The Devil’s Advocate who is actually (spoiler alert) Satan. Asimow, “Embodiment of Evil,” 1357–58. John Grisham’s books and the resultant slew of movie adaptations are filled with these despicable characters ready to break the rules whenever they have a chance. Asimow, “Embodiment of Evil,” 1352–54. Dishonesty seems to infect even the more sympathetic of Grisham’s lawyers, including Rudy—the fresh-faced attorney (played by a young, fresh-faced Matt Damon) going up against an evil insurance company—in The Rainmaker who explains, “each time you try a case, you step over the line. You do it enough times and you forget where the line is.” Asimow, “Embodiment of Evil,” 1354.

Grisham’s oeuvre embodies what some researchers believe has been a shift toward more negative depictions of lawyers, particularly in the last three or four decades, which may be tied to a loss of faith in lawyers generally during this time period. Asimow, “Embodiment of Evil,” 1371. The dishonest lawyer is now all lawyers: a stock character in late-night stand-up routines, New Yorker cartoons, and, if my life has been any guidance, the jokes of older family friends upon hearing that you are in law school or have been admitted to the bar.


“How many lawyers does it take to screw in a lightbulb? Three. One to climb the ladder. One to shake it. And one to sue the ladder company.” “Lawyer Joke Collection.”
Today, when I tell people I’m a lawyer, I expect about half the time, I’ll get a groan and good-natured cut down. And unsurprisingly, in polls measuring confidence in public institutions, law firms rank at the bottom. Harris Interactive, “Confidence in Congress Stays at Lowest Point In Almost Fifty Years,” May 21, 2012, http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/1068/Default.aspx. In 2012, only 12 percent of the public expressed that they had a great deal of confidence in the leadership of law firms. Harris Interactive, “Confidence in Congress.”

72 When Deegan failed to turn: Lithwick, “Cruel but Not Unusual.”


73 Cheating by students is rampant: “A Cheating Crisis in America’s Schools,” ABC News, April 29, 2012, http://abcnews.go.com/Primetime/story?id=132376&page=1; Richard Pérez-

73 Graduate students cheat, too: Researchers conducted a survey of 5,331 students at thirty-two graduate schools. Donald L. McCabe, Kenneth D. Butterfield, and Linda Klebe Treviño, “Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action,” Academy of Management Learning and Education 5 (2006): 299; Lucia Graves, “Which Types of Students Cheat Most?,” U.S. News and World Report, October 3, 2008, http://www.usnews.com/education/articles/2008/10/03/which-types-of-students-cheat-most?s_cid=related-links:TOP. It is possible that the lower percentage for law students may partially reflect the fact that law school exams are often essay exams that may be more difficult to cheat on. That said, there is no evidence to suggest that law students are somehow more ethically challenged than their peers in other disciplines.

73 What’s more, top students appear: Pérez-Peña, “Studies Find More Students Cheating.”

73 In recent years, significant cheating: Pérez-Peña, “Studies Find More Students Cheating.”


73 Making it less likely that: Ariely, The (Honest) Truth About Dishonesty, 20–21.

73 Indeed, when the researchers increased: Ariely, The (Honest) Truth About Dishonesty, 19–20.


And sure enough, a very large: Mazar and Ariely, “Dishonesty in Everyday Life,” 7.


We want to believe that: Shu, Gino, Bazerman, “Dishonest Deeds, Clear Conscience,” 331.


Although all participants were aware: Bryan, Adams, and Monin, “When Cheating Would Make You a Cheater,” 3–4.

74 When the verb “cheat” was used: Bryan, Adams, and Monin, “When Cheating Would Make You a Cheater,” 4.

75 To feel good about ourselves: Ariely, The (Honest) Truth About Dishonesty, 26–27.


When the IRS Oversight Board conducted a survey in 2011, 84 percent of participants reported that it was “not at all acceptable to cheat on one’s income taxes.” Jarvis, “What Cheaters Cost Us.” Tax cheating is so widespread that even those who are most likely to get caught and have the most to lose seem unable to resist. Right after President Obama first took office in 2009, for example, he immediately had to deal with the controversy related to three of his high-profile nominees acknowledging that they failed to pay certain income taxes. Jeff Zeleny, “Daschle Ends Bid for Post, Obama Concedes Mistake,” New York Times, February 3, 2009, http://www.nytimes.com/2009/02/04/us/politics/04obama.html?adxnnl=1&amp;adxnnlx=1358357494-69yNRPiCWFllvL3DdUjLxA.

75 **If we want to understand why:** Ariely, The (Honest) Truth About Dishonesty, 39.

75 **When justifying our actions:** Ariely, The (Honest) Truth About Dishonesty, 53.

75 **And therein lies the key:** Some experts have theorized that deceiving ourselves is beneficial because it means that we are less likely to manifest to others that we are dishonest. Ariely, The (Honest) Truth About Dishonesty, 142.

75 **One of the most promising strategies:** Ariely, The (Honest) Truth About Dishonesty, 184.

75 **And the greater the distance:** Ariely, The (Honest) Truth About Dishonesty, 59.

76 **For example, scientists have found:** Ariely, The (Honest) Truth About Dishonesty, 33–34. The experiment parallels the experience of the worker who steals office supplies but not cash, or
the shopper who receives an unexpected “discount”: it’s easy to justify not returning to a
department store to remedy a $20 undercharge on our credit card but very difficult to rationalize
taking a $20 bill out of the cash register—despite the fact that the ultimate harm to the store is
the same. In another study of this dynamic, when researchers asked golfers about how
comfortable the average golfer would be cheating in different ways, participants reported that
moving the ball with the club would be most comfortable, followed by kicking it with a shoe,
The more distance between the golfer (or customer, student, or employee) and the clearly
impermissible act or undeniable harm, the easier to act dishonestly and maintain a positive self-

77 **Since Thompson was on death row:** Connick, 131 S. Ct. at 1374 (Ginsburg, J., dissenting);
Lithwick, “Cruel but Not Unusual.”

77 **Indeed, it was possible that:** This aligns with one of Williams’s claims that the lab report
did not qualify as *Brady* material ”because [he] didn’t know what the blood type of Mr.
Thompson was.” Connick, 131 S. Ct. at 1379 (Ginsburg, J., dissenting). The District Court,
however, instructed the jury that the report did qualify as *Brady* material. Connick, 131 S. Ct. at
1379 (Ginsburg, J., dissenting).

77 **Although we can’t know for sure:** Lithwick, “Cruel but Not Unusual.”

78 **Other common types of prosecutorial misconduct:** Possley and Armstrong, “The Flip Side
of a Fair Trial.”

78 **It can also feel like:** Shu, Gino, and Bazerman, “Dishonest Deed, Clear Conscience,” 331.

In a recent study, psychologists had: Gino, Ayal, and Ariely, “Contagion and Differentiation,” 395.

One of the “test-takers,” who was: Gino, Ayal, and Ariely, “Contagion and Differentiation,” 395.

The question was whether: Ariely, *The (Honest) Truth About Dishonesty*, 197, 199; Gino, Ayal, and Ariely, “Contagion and Differentiation,” 395–96.

It did, but only when: Ariely, *The (Honest) Truth About Dishonesty*, 204–06; Gino, Ayal, and Ariely, “Contagion and Differentiation,” 396.

When he was wearing a rival: Ariely, *The (Honest) Truth About Dishonesty*, 204–06; Gino, Ayal, and Ariely, “Contagion and Differentiation,” 396.

Responding to Justice Scalia’s characterization: *Connick*, 131 S. Ct. at 1366 (Scalia, J., concurring); Liptak, “$14 Million Jury Award to Ex-Inmate Is Dismissed.”

As she described: *Connick*, 131 S. Ct. at 1370 (Ginsberg, J, dissenting).

Bruce Whittaker, the prosecutor who had: *Connick*, 131 S. Ct. at 1372 (Ginsberg, J, dissenting); *Connick*, 131 S. Ct. at 1356.

But neither man turned it over: *Connick*, 131 S. Ct. at 1356; *Connick*, 131 S. Ct. at 1372 (Ginsberg, J, dissenting).

Then Deegan, who was working: *Connick*, 131 S. Ct. at 1356.

Neither Williams nor Deegan mentioned: *Connick*, 131 S. Ct. at 1356.

There were other critical materials: *Connick*, 131 S. Ct. at 1372 (Ginsberg, J, dissenting).
80 Thompson’s attorneys might have seriously: *Connick*, 131 S. Ct. at 1374 (Ginsberg, J, dissenting).

80 Likewise, the defense team might have: *Connick*, 131 S. Ct. at 1374 (Ginsberg, J, dissenting).

80 And, critically, Thompson’s attorneys: *Connick*, 131 S. Ct. at 1374 (Ginsberg, J, dissenting).


80 As Justice Ginsburg put it: *Connick*, 131 S. Ct. at 1370 (Ginsberg, J, dissenting).

80 District Attorney Connick himself: *Connick*, 131 S. Ct. at 1378 (Ginsberg, J, dissenting);


81 But we also take cues: Ariely, *The (Honest) Truth About Dishonesty*, 122.

81 This explains, in part, how: Ariely, *The (Honest) Truth About Dishonesty*, 137.


81 It is not just that small infractions: Ariely, *The (Honest) Truth About Dishonesty*, 123–30.

81 In one of my favorite experiments: Ariely, *The (Honest) Truth About Dishonesty*, 123–24.

81 You might expect that the fake: Ariely, *The (Honest) Truth About Dishonesty*, 125.

81 According to the researchers: Ariely, *The (Honest) Truth About Dishonesty*, 126.


82 It is easy to see how: Ariely, *The (Honest) Truth About Dishonesty*, 136.

82 Initially, a colleague or superior: Ariely, *The (Honest) Truth About Dishonesty*, 136.
82 Awareness of that transgression may: Ariely, *The (Honest) Truth About Dishonesty*, 136.

82 After the initial breach of ethics: Ariely, *The (Honest) Truth About Dishonesty*, 136.

82 Making matters worse, the research predicts: Ariely, *The (Honest) Truth About Dishonesty*, 132–34.

82 As improbable as it sounds: Shu, Gino, and Bazerman, “Dishonest Deed, Clear Conscience,” 331.

82 Indeed, research suggests that a major: Ariely, *The (Honest) Truth About Dishonesty*, 177–78.

82 In one experiment, scientists looked: Ariely, *The (Honest) Truth About Dishonesty*, 177–78.

82 Customers on the receiving end: Ariely, *The (Honest) Truth About Dishonesty*, 177–78.

83 We might also imagine a new attorney: Ariely, *The (Honest) Truth About Dishonesty*, 136–37.

83 Deegan was the least experienced: Connick, 131 S. Ct. at 1372 n. 3 (Ginsberg, J, dissenting).

83 Along similar lines, one way: Shu, Gino, and Bazerman, “Dishonest Deed, Clear Conscience,” 331.


84 In a startling finding: Ariely, *The (Honest) Truth About Dishonesty*, 232.

84 If we are acting solely: Ariely, *The (Honest) Truth About Dishonesty*, 232.


84 Ironically, then, it is caring deeply: Ariely, *The (Honest) Truth About Dishonesty*, 232.


85 Their hypothesis was that people: Ariely, *The (Honest) Truth About Dishonesty*, 172.


85 Moreover, the researchers found that: Ariely, *The (Honest) Truth About Dishonesty*, 184–85; Gino and Ariely, “The Dark Side of Creativity,” 450–51.


85 And with frequently vague: Ariely, *The (Honest) Truth About Dishonesty*, 172.


86 It made a difference that Deegan: *Connick*, 131 S. Ct. at 1356.

86 It also mattered that the blood: *Connick*, 131 S. Ct. at 1356.

86 We should worry, then: Possley and Armstrong, “The Flip Side of a Fair Trial.”
In addition, research suggests that: Gino et al., “Unable to Resist Temptation,” 192.


But he may face other stresses: Zimmerman, “Stress and the Trial Lawyer,” 37.

Figuring out how to please: Worse still, researchers have documented that the very act of refraining from engaging in unethical behavior may itself deplete self-regulatory resources—making even the most ethical of us more likely to subsequently engage in dishonest action. Ariely, The (Honest) Truth About Dishonesty, 101.


Concealing evidence, one of the most: Garrett, *Convicting the Innocent*, 168.


In one set of experiments: Chance, “Temporal View,” 15657.


Research suggests that the more: Novotney, “Beat the Cheat,” 54.

In one notorious example: Possley and Armstrong, “The Flip Side of a Fair Trial.”

Growing experimental evidence suggests: Ariely, *The (Honest) Truth About Dishonesty*, 224, 227. The social aspects of dishonesty are so potent that only certain monitoring approaches appear to be effective. Ariely, *The (Honest) Truth About Dishonesty*, 231. In particular, the most promising approach is likely to be continual external reviews of district attorneys’ offices. For the best results, these monitors should be outsiders (experiments suggest that monitors with whom we are friendly are significantly less effective). Ariely, *The (Honest) Truth About Dishonesty*, 231–34. But they may not actually need to do much intervention, as long as prosecutors believe their work is being monitored. Ariely, *The (Honest) Truth About Dishonesty*, 231–34.

We know such a cultural shift: Innocence Project, “Conviction Integrity Unit Reviews Possible Wrongful Convictions,” *Innocence Blog*, March 26, 2013, http://www.innocenceproject.org/Content/Conviction_Integrity_Unit_Reviews_Possible_Wrongf


More astonishing, the benefits: Ariely, The (Honest) Truth About Dishonesty, 42–43.

MIT, for instance, doesn’t: Ariely, The (Honest) Truth About Dishonesty, 42.

This research suggests that we ought: Ariely, The (Honest) Truth About Dishonesty, 253, 52.

One idea might be: Ariely, The (Honest) Truth About Dishonesty, 250.

Likewise, to encourage attorneys to turn: Ariely, The (Honest) Truth About Dishonesty, 44.


5. In the Eye of the Beholder ~ The Jury


A Cadillac came up: Scott, 550 U.S. at 374.

He wasn’t even going to: Brief for Respondent at 4, Scott (No. 05-1631).

But the Cadillac didn’t slow: Scott, 550 U.S. at 374–75; Brief for Respondent at 4, Scott (No. 05-1631).

Reynolds radioed in the license plate: Scott, 550 U.S. at 375.

He didn’t request assistance: Scott, 550 U.S. at 375.

He thought he’d boxed the driver: Scott, 550 U.S. at 375; Brief for Respondent at 9, Scott (No. 05-1631).

Rejoining the chase: Scott, 550 U.S. at 375; Brief for Respondent at 7, Scott (No. 05-1631).

The six-minute pursuit had covered: Scott, 550 U.S. at 375.

He radioed in for permission: Scott, 550 U.S. at 375.

A Precision Intervention Technique: Scott, 550 U.S. at 375.

And though it’s known to be: Scott, 550 U.S. at 375.

The cars had reached a narrow stretch: Brief for Respondent at 9, Scott (No. 05-1631).


The result was dramatic: YouTube, “Police Chase—Scott v. Harris.”

Scott yelled into his radio: YouTube, “Why I ran.”

White smoke poured: YouTube, “Police Chase—Scott v. Harris.”

The officers ran down: YouTube, “Police Chase—Scott v. Harris.”

Scott looked through the window: YouTube, “Why I ran.”

One of the officers said what: YouTube, “Police Chase—Scott v. Harris.”

Victor Harris, nineteen: YouTube, “Why I ran.”

But the cost of the accident: YouTube, “Why I ran.” Note that Victor does not appear to have complete paralysis in his arms.

Taking stock of the events: Scott, 550 U.S. at 375–76.

Victor’s argument was that: Scott, 550 U.S. at 382–83.
93 Perhaps chief among them: *Scott*, 550 U.S. at 381, 383.


93 To determine whether Victor created: *Scott*, 550 U.S. at 386.

94 As Justice Scalia explained: Oral Argument Transcript at 24, *Scott* (No. 05-1631).

94 The Supreme Court majority found: *Scott*, 550 U.S. at 378–81.

94 According to the Court, after watching: *Scott*, 550 U.S. at 395.

94 As Justice Scalia wrote: *Scott*, 550 U.S. at 380–81.

94 The Court was so sure of itself: *Scott*, 550 U.S. at 378.


95 When we watch a video: Ross and Ward, “Naïve Realism.”

95 When we come across those: Ross and Ward, “Naïve Realism.”

95 One option would be to reassess: Ross and Ward, “Naïve Realism.”

95 Rather, we look to dismiss: Ross and Ward, “Naïve Realism.”

95 Those with conflicting viewpoints: Ross and Ward, “Naïve Realism.”


96 In a powerful demonstration of this: Scott, 550 U.S. at 380–81, 395; Kahan, Hoffman, and Braman, “Whose Eyes?,” 841.

96 Did “the videotape . . . speak for itself”: Kahan, Hoffman, and Braman, “Whose Eyes?,” 841.

96 The researchers asked a diverse group: Kahan, Hoffman, and Braman, “Whose Eyes?,” 841.

96 What they found were clear rifts: Kahan, Hoffman, and Braman, “Whose Eyes?,” 872–79.

96 A less affluent, liberal, highly educated: Kahan, Hoffman, and Braman, “Whose Eyes?,” 879. The researchers found that characteristics such as race, gender, wealth, political orientation, and place of residence were each linked to people’s perceptions of the tape. Kahan, Hoffman, and Braman, “Whose Eyes?,” 870. But they also found that combinations of these characteristics mattered. Kahan, Hoffman, and Braman, “Whose Eyes?,” 870–79.

97 And the fact that the true source: Kahan, Hoffman, and Braman, “Whose Eyes?,” 838.

97 As the research team pointed out: Kahan, Hoffman, and Braman, “Whose Eyes?,” 838, 887.


97 As jurors, we are often oblivious: Kahan, Hoffman, and Braman, “Whose Eyes?,” 885–90.


97 “Most of ’em,” he explains: Rose, 12 Angry Men.
And, yet, after saying many: Rose, *12 Angry Men*.

In *12 Angry Men*, Juror #8: Rose, *12 Angry Men*.


As Justice Scalia explained: *Scott*, 550 U.S. at 381.


But all of our seemingly neutral: Benforado, “Frames of Injustice,” 1347–51.

When we view events as if standing: Lassiter et al., “Videotaped Confessions: Is Guilt in the Eye of the Camera?,” 197. The source of the difference in attributions between actors and observers appears to be the different elements that draw our attention when we view events from these two perspectives. Emily Pronin and Lee Ross, “Temporal Differences in Trait Self-Ascription: When the Self Is Seen as an Other,” *Journal of Personality and Social Psychology* 90 (2006): 197. We tend to give unwarranted weight to the factors that are more salient to us. Lassiter, “Illusory Causation,” 204.
Imagine that you are impaneled: Ratcliff et al., “Camera Perspective Bias,” 197; Lassiter, “Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion,” 268.

As luck would have it: Lassiter, “Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion,” 268.


By simply shifting the point: Lassiter, “Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion,” 268.

Watching the interrogator through the eyes: Lassiter, “Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion,” 268.

Those who watched the videotape: Lassiter, “Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion,” 268. Reading a traditional transcript of the interrogation, without seeing any video footage, led to voluntariness judgments that were closest to assessments made by those who viewed the interrogation from the perspective of the suspect. Lassiter et al., “Videotaped Interrogations and Confessions,” 868.

Camera perspective bias can also influence: Lassiter, “Illusory Causation,” 206; Ratcliff et al., "Camera Perspective Bias,” 197.

In one experiment, moving from: Lassiter, “Illusory Causation,” 206.

What’s more, the bias seems to occur: Lassiter, “Illusory Causation,” 206.

And it’s surprisingly sticky: See, e.g., Lassiter et al., “Evaluating Videotaped Confessions,” 224–25; Lassiter and Geers, “Bias and Accuracy,” 207; G. Daniel Lassiter et al.,

101 **Justice Scalia thought**: *Scott*, 550 U.S. at 378.


101 **Watching the tape, we sit where he sat**: YouTube, “Why I ran”; Kahan, Hoffman, and Braman, “Whose Eyes?,” 855.

101 **Having adopted the officer’s**: Benforado, “Frames of Injustice,” 1353.

101 **What if the Supreme Court had**: Benforado, “Frames of Injustice,” 1353.

101 **What if there had been**: Benforado, “Frames of Injustice,” 1353.

101 **Each of these tapes would be**: *Scott*, 550 U.S. at 372, 373; Benforado, “Frames of Injustice,” 1353–55.

102 **Viewers might have considered**: Benforado, “Frames of Injustice,” 1354; *Scott*, 550 U.S. at 372, 384, 389, 396.

102 **It might have triggered feelings**: Benforado, “Frames of Injustice,” 1354.

102 **At the time of the accident**: YouTube, “Why I ran.”

102 **He had left home**: YouTube, “Why I ran.”

102 **By 11 p.m. he was completely**: YouTube, “Why I ran.”

102 **When he suddenly saw**: YouTube, “Why I ran.”

102 **His license had been suspended**: YouTube, “Why I ran.”

102 **Running from the police**: For an interesting and revealing (if controversial) sociological perspective on the threat of capture and confinement that characterizes the lives of many young

102 **There is no expectation:** Goffman, *On the Run*, 23–53, 195–201. Survey data shows that only 44.2 percent of black people between the ages of eighteen and twenty-nine trust the police, as compared to 71.5 percent of whites. “Young People of Color Mistrust Police, Legal System, Report Finds,” *ScienceDaily*, August 16, 2014, www.sciencedaily.com/releases/2014/08/140816204417.htm. And 54.5 percent of black youths have been harassed by the police—almost twice the rate of non-blacks. “Young People of Color Mistrust Police.”


102 **In a fateful instant:** YouTube, “Why I ran.”

102 **As he explained later:** YouTube, “Why I ran.”

103 **We see, in the words:** Matt. 7:3.


104 **Over the next year:** Lovett, “In California.”

104 **Knowing that they were:** Lovett, “In California.” Subsequently, the police department expanded the program to cover every uniformed officer. Other jurisdictions, including New York

Lovett, “In California.”


104 Since camera angles that offer: Ratcliff et al., “Camera Perspective Bias,” 203.

104 Since it’s often not possible: Benforado, “Frames of Injustice,” 1359.

104 We should be particularly careful: Benforado, “Frames of Injustice,” 1359. One danger is that police leadership may not be aware of the problem of perspective bias. The commissioner of the NYPD, Bill Bratton, for instance, has sung the praises of having cameras on his officers: “So much of what goes on in the field is ‘he-said-she-said,’ and the camera offers an objective perspective.” Lovett, “In California.” If only that were true.

104 Alternatively, we might allow it: Benforado, “Frames of Injustice,” 1359.


The basic idea behind: “About the IAT,” Project Implicit.

When an image or word appears: “About the IAT,” Project Implicit.

Then the categories are changed: “About the IAT,” Project Implicit.


In these cases, many people: Phelan et al., “Implicit and Explicit Weight Bias,” 1201–08.

To date, the researchers who have developed: “Ethical Considerations,” Project Implicit, accessed May 13, 2014, https://implicit.harvard.edu/implicit/ethics.html.


6. The Corruption of Memory ~ The Eyewitness


108 “Yes, sir”: Harvard University Press, “Understanding Eyewitness Misidentifications.”


108 This was a pivotal moment: Garrett, “Introduction,” 672.


108 “If you would, please, ma’am”: Harvard University Press, “Understanding Eyewitness Misidentifications.”
“That’s him”: Harvard University Press, “Understanding Eyewitness Misidentifications.”

John Jerome White was convicted: Garrett, “Introduction,” 672.

At trial, White had been adamant: Innocence Project, “John Jerome White.”

He was not the one: Innocence Project, “John Jerome White.”


The prosecution didn’t have much: Transcript of Record at 102, 122, State v. White, No. 314 (Ga. Super. Ct. May 29, 1980).

But under cross-examination: Transcript at 112.


But John Jerome White was not: Innocence Project, “John Jerome White.”


Without her error, White wouldn’t: White initially served ten years in prison for the crime he did not commit. While on parole, he was convicted of drug and robbery charges and served an additional 12.5 years—a sentence enhanced by his previous (wrongful) conviction. Innocence Project, “John Jerome White.”
The authorities never looked: Rankin, “Innocent Man’s Conviction.”


White appears in the middle: Wells, “The Mistaken Identification.”

He is rail thin: Wells, “The Mistaken Identification.”

He looks directly at: Wells, “The Mistaken Identification.”

Lineup photograph: I thank Brandon Garrett for providing this copy of the original lineup.


As she explained, she was: Garrett, Convicting the Innocent, 66.


At the police station, she had looked: Garrett, “Introduction,” 672.

Parham’s inclusion in the lineup: Garrett, “Introduction,” 672–73.


The police had no idea: Wells, “The Mistaken Identification.”

And it would be almost thirty years: The perpetrator’s DNA was eventually matched to the pubic hair found at the original crime scene. Rankin, “Innocent Man’s Conviction.”

Even among the limited number: Garrett, Convicting the Innocent, 57–58, 67.

She was determined to help: Thompson, “I Was Certain, but I Was Wrong.”

Thompson was “completely confident”: Thompson, “I Was Certain, but I Was Wrong.”

But then another man: Thompson, “I Was Certain, but I Was Wrong.”

At Cotton’s retrial, Poole was brought: Thompson, “I Was Certain, but I Was Wrong.”

Without hesitation she responded: Thompson, “I Was Certain, but I Was Wrong.”

Cotton was sentenced again: Thompson, “I Was Certain, but I Was Wrong.”

But, just like White: Thompson, “I Was Certain, but I Was Wrong.”

As Thompson wrote later: Thompson, “I Was Certain, but I Was Wrong.”


Some witness memories, like the face: Simon, In Doubt, 51.

Others are important for determining: Simon, In Doubt, 90.


Our dependence on witness memory: Simon, In Doubt, 53.


This is great news if: Simon, In Doubt, 54.

But even more disturbing: Simon, In Doubt, 54; Clark, “Regularities in Eyewitness Identification,” 198–218.

Moreover, people who successfully pick: Simon, In Doubt, 54.


As we’ve seen before, one of the reasons that erroneous witness identifications or testimony can be so damaging is that they influence other evidence. Simon, In Doubt, 55. When the police get a positive identification of someone like White, they are likely to then work harder to find corroborating evidence to confirm his guilt and interpret such evidence in a biased way. That may mean placing more weight on the testimony of a jailhouse informant, who would otherwise be viewed skeptically, or interpreting genuinely ambiguous forensic evidence (like the hair sample found in the victim’s apartment) in a manner that confirms guilt.

Victims tend to be strongly motivated: Victims may, however, be fearful of helping the police or reluctant to confront the perpetrator at trial, despite wanting the offender to be caught and punished.


There is nothing in: Garrett, “Introduction,” 673.


Sure, sometimes we forget: Simons, “What People Believe.”


As a result, we have great faith: Simons, In Doubt, 150–57.

114 **How is it possible that:** Charles Darwin, *On the Origin of Species* (London: John Murray, 1859).

114 **The answer is that our memories:** Overall, there is a large gap between widely held beliefs about memory and the scientific consensus. Simons and Chabris, “What People Believe.” Indeed, in a recent study, only 1.5 percent of participants demonstrated an accurate understanding of memory across the six basic questions that were asked. Simons and Chabris, “What People Believe.”

114 **To begin with, our real memories:** Simons and Chabris, “What People Believe.”


115 **We don’t generally take notice:** University of California, Los Angeles, “Did you See That?”

115 **In one study, researchers found that:** Alan Castel et al., “Fire Drill: Inattentional Blindness and Amnesia for the Location of Fire Extinguishers,” *Attention, Perception, and Psychophysics* 74 (2012): 1391–92; University of California, Los Angeles, “Did you See That?”

115 **The fire extinguishers were not germane:** Castel, “Fire Drill,” 1391, 1395. This is the potent influence of inattentional blindness and amnesia—our failure to attend to elements in a scene when our focus is directed elsewhere, with a corresponding inability to recall those elements later despite having seen them. Castel, “Fire Drill,” 1391. Perhaps the most famous demonstration of inattentional blindness comes in the so-called “invisible gorilla” experiments,
in which people shown a video of two teams of basketball players and asked to count the number
of passes made by one team fail to notice a man in a gorilla suit walking into the picture. Castel,
“Fire Drill,” 1391; Daniel J. Simons and Christopher F. Chabris, “Gorillas in our Midst:

115 **On the bright side:** Castel, “Fire Drill,” 1394–95.

115 **When the experimenters returned:** Castel, “Fire Drill,” 1394–95; University of
California, Los Angeles, “Did you See That?”

116 **Ten Dollar Bill image:** “File: US10dollarbill-Series 2004A.jpg,” *Wikimedia Commons*, last

116 **They lack the permanence:** Simon, *In Doubt*, 98.

116 **We tend to be best at remembering:** Dan Simon, “The Limited Diagnosticity of Criminal

116 **The specifics are also the fastest:** Simon, *In Doubt*, 97, 109.

116 **Events that elicit strong emotion:** Simon, *In Doubt*, 107; John C. Yuille et al.,
“Eyewitness Memory of Police Trainees for Realistic Role Plays,” *Journal of Applied
of Emotional and Weapon Presence on Police Officers’ Memories for a Simulated Crime,” *Legal

117 **The trouble with relying on:** Simons, “What People Believe.”

117 **As a result, two people will not:** Simons, “What People Believe.”

117 **And once formed:** Simons, “What People Believe.”

117 **Memory is a constructive process:** Simon, *In Doubt*, 96.

117 **When we go to retrieve a memory:** Simons, “What People Believe.”


We can even remember things: Simon, *In Doubt*, 99.

One study found that: Steven Frenda, Rebecca Nichols, and Elizabeth Loftus, “Current Issues and Advances in Misinformation Research,” *Current Directions in Psychological Science* 20 (2011): 22.

Tiananmen Square photographs: The original photo used in the experiment is by Stuart Franklin, “The Tank Man” (Magnum Photos, 1989).


In most cases, our false memories: Simon, *In Doubt*, 100–105.


She was seventy-four years old: Downey, “Sharper Eyewitnessing”; Rankin, “Innocent Man’s Conviction.”

The only light came from: Innocence Project, “John Jerome White.”

And before leaving, the perpetrator: Rankin, “Innocent Man’s Conviction.”

For instance, one study showed that: Simon, *In Doubt*, 60.


In White’s case, for example: Harvard University Press, “Understanding Eyewitness Misidentifications.”


In one study, for example, participants: Valentine, “Eyewitness Identification Under Stress,” 154.


One implication is that when: Hope et al., “Witnesses in Action,” 386.

It’s likely that they just: Hope et al., “Witnesses in Action,” 388–89.

Yet these officials have significant: Simon, *In Doubt*, 57.

And the processes and practices we use: Of course, the two types of factors often interact with each other: someone who sees a suspect in low light for a short period of time is likely to be more susceptible to the misleading influence of a police officer. Simon, *In Doubt*, 57–58.

A large majority of officers: Simon, *In Doubt*, 76 n. 130.

The real-life rape case: Innocence Project, “John Jerome White.”


But the very process of working: Simon, *In Doubt*, 65; Wells, Charman, and Olson, “Building Face Composites,” 147–56.

In White’s case, any distortion: We do not have a copy of the original photographic array because it was not preserved but it almost certainly showed White along with a number of other men. Harvard University Press, “Understanding Eyewitness Misidentifications.”


Cops like show-ups because: Simon, *In Doubt*, 70.


The good news is that: Brewer and Wells, “Eyewitness Identification,” 24; Simon, *In Doubt*, 73.

Furthermore, showing multiple photographs: Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification* (New York:
There is an easy solution here: Simon, *In Doubt*, 71. The potential drawback of sequential lineups is that, although they have been consistently shown to reduce false identifications, in certain studies they also reduced some correct identifications. Simon, *In Doubt*, 71.

Perhaps the biggest problem: Rankin, “Innocent Man’s Conviction.”


Indeed, the most precipitous drop: Simon, *In Doubt*, 66.

In one study, witnesses who identified a perpetrator: Simon, *In Doubt*, 66; Tim Valentine, Alan Pickering, and Stephen Darling, “Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups,” *Applied Cognitive Psychology* 17 (2003): 983–84, 988. However, in the period between a month and six months, the proportion of correct identifications seems to level out.

Although it’s less common than some: Simon, *In Doubt*, 69.

One of the basic principles of creating: Brewer and Wells, “Eyewitness Identification,” 25.

So a lineup may really: Simon, *In Doubt*, 72. Think about it this way: if someone who had not witnessed the crime could read the description of the perpetrator and easily pick the suspect out of the lineup (or quickly eliminate two of the fillers), the witness’s identification is fairly worthless. That seems pretty common sense and, yet, there are numerous cases in which the
suspect was the only person who met the witness’s description of having facial hair or pock-marked skin or crossed eyes. Garrett, *Convicting the Innocent*, 58–59.

123 In White’s case, the victim initially: Garrett, “Introduction,” 672; Garrett, *Convicting the Innocent*, 66.

123 She said he had short hair: Harvard University Press, “Understanding Eyewitness Misidentifications.”

123 Flip back to the photograph: Harvard University Press, “Understanding Eyewitness Misidentifications.”

123 Moreover, his hair is fairly long: Harvard University Press, “Understanding Eyewitness Misidentifications.”

123 Indeed, the only man who seems: Harvard University Press, “Understanding Eyewitness Misidentifications.”

123 There is substantial evidence that: Simon, *In Doubt*, 96.


123 This unconscious transference can arise: Brewer and Wells, “Eyewitness Identification,” 25.

123 In fact, there is some evidence: Garrett, “Introduction,” 682.


124 In White’s case, the second procedure: Harvard University Press, “Understanding Eyewitness Misidentifications”; Rankin, “Innocent Man’s Conviction.”
What they did not realize is that: Innocence Project, “John Jerome White.”

The victim may have felt: Rankin, “Innocent Man’s Conviction.”


After a witness observes a crime: Simon, In Doubt, 101–02.

Some of this information may come: Simon, In Doubt, 101–02.

There is, of course, the potential: Simon, In Doubt, 101–03.


When participants were asked: Frenda, Nichols, and Loftus, “Current Issues and Advances in Misinformation Research,” 21.


When the word smashed was used: Loftus and Palmer, “Reconstruction of Automobile Destruction,” 585.


Perhaps most shocking is that: Frenda, Nichols, and Loftus, “Current Issues and Advances in Misinformation Research,” 22.

A number of studies have shown: Frenda, Nichols, and Loftus, “Current Issues and Advances in Misinformation Research,” 22.

One group of researchers found that: Sacchi, Agnoli, and Loftus, “Changing History,” 1006–07.

Both verbal and nonverbal cues: Simon, In Doubt, 74.

It seems like good advice and harmless: Simon, In Doubt, 74.


Since most officers have very little: Fisher, Milne, and Bull, “Interviewing Cooperative Witnesses,” 16; Simon, In Doubt, 112.

When they reach a dead end: Simon, *In Doubt*, 94.

This may be effective on occasion: Simon, *In Doubt*, 94, 114.

And the more that detectives repeat: Simon, *In Doubt*, 113.

However, research suggests that most judges: Simon, *In Doubt*, 55.

And they are often oblivious: Simon, *In Doubt*, 151–52.

Compounding the problem is that: Simon, *In Doubt*, 152.


When a woman like the victim: Garrett, *Convicting the Innocent*, 66.


Yet these identifications might: Simon, *In Doubt*, 155.

They believe that standard legal tools: Garrett, “Introduction,” 682.


The men shouted at each other: Münsterberg, *On the Witness Stand*, 52.


Given that a criminal investigation was: Münsterberg, *On the Witness Stand*, 52.

Unbeknownst to them, the entire: Münsterberg, *On the Witness Stand*, 52.

The results were disheartening: Münsterberg, *On the Witness Stand*, 52–53.


In the direct aftermath: Downey, “Sharper Eyewitnessing”; Rankin, “Innocent Man’s Conviction.”


In the vast majority of jurisdictions: Garrett, “Introduction,” 675, 680–82.


In the last thirty years: Liptak, “34 Years Later, Supreme Court Will Revisit Eyewitness IDs.”


In almost half of those cases: Innocence Project, *Reevaluating Lineups*.

As a spokesman for the Georgia Bureau: Rankin, “Innocent Man’s Conviction.”


Reformers hope that New Jersey: Goode and Schwartz, “Police Lineups Start to Face Fact.”


Studies have documented that: Fisher, Milne, and Bull, “Interviewing Cooperative Witnesses,” 17.

In revolutionizing our eyewitness system, we should also support the development of new investigative methods. There are many promising avenues on the horizon, from improving recall of memory details by employing eye-closure or using timelines to improving identification


131 **One of the reasons that:** Fisher, Milne, and Bull, “Interviewing Cooperative Witnesses,” 16; Frenda, Nichols, and Loftus, “Current Issues and Advances in Misinformation Research,” 22.

131 **The benefits of that approach suggest:** Others have made similar suggestions. Liptak, “34 Years Later, Supreme Court Will Revisit Eyewitness IDs”; Simon, *In Doubt*, 81.

132 **As Hugo Münsterberg argued:** Münsterberg, *On the Witness Stand*, 44–45.

132 **Münsterberg thought that the path:** Münsterberg, *On the Witness Stand*, 44–45, 194.

According to Münsterberg, we need to admit what we don’t know and seek help: “No juryman would be expected to follow his general impressions in the question as to whether the blood on the murderer’s shirt is human or animal. But he is expected to make up his mind as to whether the memory ideas of a witness are objective reproductions of earlier experience or are mixed up with associations and suggestions.” Münsterberg, *On the Witness Stand*, 45.

**7. How to Tell a Lie ~ The Expert**

Though it was almost one: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

In the first seconds: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

He’s got Taser darts: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

Over the next minute and a half: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

He falls and they kick him: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

He rolls on the ground: *The “Rodney King” Case;* Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

They drag him: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

He suffered a concussion: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

And though it was speeding: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.” Drunk and on parole for a robbery conviction, King had sped by a cop at around 100 miles per hour and then led LAPD officers on an eight-mile chase. Koon v. United States, 518 U.S. 81, 86 (1996). When he had finally pulled over, he hadn’t complied with the police orders; unlike the two other passengers in the car who lay down on their stomachs with their arms behind their backs, he had resisted. Koon, 518 U.S. at 86.


The details that emerged: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”


And after nearly killing King: Linder, “The Rodney King Beating.”


According to Tom Bradley: Mydans, Stevenson, and Egan, “Seven Minutes in Los Angeles.”

The evidence was so clear: Rosenthal, “Bush Calls Police Beating ‘Sickening.’”


And Darryl F. Gates, the police chief: Mydans, “Los Angeles Policemen Acquitted.”


Stores were looted: Mydans, “The Police Verdict.”


The acquittals that set off: Linder, “The Rodney King Beating Trials”; The “Rodney King” Case.

135 **The real reason that Koon:** Goldstein, “The Other Beating.”

136 **They watched Koon on the stand:** *The Rodney King Incident: Race and Justice in America*, directed by Michael Pack (Princeton, NJ: Films for the Humanities and Sciences, 1998), videocassette (VHS), 56 min.

136 **They looked at his relaxed body:** *The Rodney King Incident*.

136 **They listened to his measured voice:** *The Rodney King Incident*.

136 **They watched how he’d look:** *The Rodney King Incident*.

136 **They met his gaze:** *The Rodney King Incident*; Christine Pelisek, “L.A. Riots Anniversary: Stacey Koon’s Disturbing Testimony,” *Daily Beast*, April 28, 2012, http://www.thedailybeast.com/articles/2012/04/28/l-a-riots-anniversary-stacey-koon-s-disturbing-testimony.html. Here, the defense attorney Darryl Mounger had asked Koon why King had been beaten so violently. Koon was quite forthright that it was a violent and brutal beating, but emphasized that it was necessary to “control an aggressive combative suspect.” Pelisek, “L.A. Riots Anniversary.”

136 **They took it all in:** *The Rodney King Incident*.

136 **Likewise, the jury ate up:** Bill Nichols, *Blurred Boundaries: Questions of Meaning in Contemporary Culture* (Bloomington: Indiana University Press, 1994), 30.
Duke, a former LAPD self-defense instructor: *The Rodney King Incident*.

Barrel-chested with a brown mustache: *The Rodney King Incident*. Unsurprisingly, jurors are less likely to accept what an expert says when there is a salient reason to think he might be biased. Owen D. Jones et al., “Neuroscientists in Court,” *Nature Review Neuroscience* 14 (2013): 732. The prosecution’s expert on use of force, Commander Michael Bostic, was effectively discredited when the defense team raised the suggestion that Bostic was simply acting as a mouthpiece for the L.A. police chief—his boss—who wanted the officers convicted so he could wipe away the problem. Linda Deutsch, “Witness Denies Being Influenced by Gates,” *Los Angeles Times*, April 14, 1992, http://articles.latimes.com/1992-04-14/local/me-1_1_excessive-force. By focusing our attention on salient biases like this, we may overlook more powerful skew that lies below the surface.


No: “Excerpts from the LAPD Officers’ Trial.”

The officers were following: *The Rodney King Incident*; “Excerpts from the LAPD Officers’ Trial.”

Just as important: Nichols, *Blurred Boundaries*, 30.


137 **His approach focused the attention:** Feldman, “On Cultural Anesthesia,” 412.

138 **We assume that the result:** There is an evolutionary narrative here, too: with capacities honed over 250,000 generations—five million years since we diverged with our chimpanzee siblings—it stands to reason that we are no amateurs when it comes to spotting liars and miscreants. Paul H. Robinson, Robert Kurzban, and Owen Jones, “The Origins of Shared Intuitions of Justice,” *Vanderbilt Law Review* 60 (2007): 1643 n. 35. To gain the significant benefits of group living, we had to minimize the costs. Robinson, Kurzban, and Jones, “The Origins,” 1647–49. Those less able to discern deception, deceit, and dishonesty in the people around them would have been at a comparative disadvantage in the competition to survive and pass on their genes. Robinson, Kurzban, and Jones, “The Origins,” 1647–49. Evolutionary pressures, then, left us natural-born experts in lie detection—or so we assume.


138 **Before trial, Third Circuit judges:** MODEL CRIMINAL JURY INSTRUCTIONS §3.04.

139 **Detecting lies isn’t rocket science:** MODEL CRIMINAL JURY INSTRUCTIONS §3.04.

Our system of justice celebrates: Model Criminal Jury Instructions: Role of the Jury § 1.02 (3d Cir. 2012).

Those officially designated as experts: Fed. R. Evid. 702.

In the Third Circuit, for example: Model Criminal Jury Instructions: Opinion Evidence (Expert Witnesses) § 2.09 (3d Cir. 2012).

In fact, a juror “may disregard”: Model Criminal Jury Instructions § 2.09.

In experiments and surveys: Dan Simon, “The Limited Diagnosticity of Criminal Trials,” Vanderbilt Law Review 64 (2011): 175–76. And it is not just Americans or Westerners who put a lot of stock in the link between truth and maintaining eye contact, either—when researchers surveyed respondents from over fifty countries, some two-thirds of people suggested that averting one’s gaze was linked to lying. Simon, “Limited Diagnosticity,” 176.


And to do that: Fred E. Inbau et al., Criminal Interrogation and Confessions (Burlington, MA: Jones & Bartlett Learning, 2011), 121. According to the Reid technique, by asking
challenging questions, a police officer can elicit different posture, eye contact, facial expressions, and movements of the hands and feet based on whether the suspect is being honest or deceitful. “The Reid Technique,” John E. Reid & Associates, Inc. At the opening of the chapter “Behavior Symptom Analysis,” the Reid technique manual quotes from *Hamlet*: “There is a kind of confession in your looks, which your modesties have not craft enough to color.” Inbau et al., *Criminal Interrogation*, 101.

140 **So, for example, “a suspect”:** Inbau et al., *Criminal Interrogation*, 135. While embracing gaze aversion as a relevant cue to lying, the Reid manual does caution that averted gaze can occasionally arise from eye disability, psychological disorders, or cultural differences. Inbau et al., *Criminal Interrogation*, 135.

140 **Knowing the signs of deceit:** Inbau et al., *Criminal Interrogation*, 121–134; “Beyond Good Cop/Bad Cop.” Since this training manual, and others like it, cast the notion that these “tells” reveal lying as a general truism, it’s no surprise that police officers rely on these cues in a variety of circumstances outside of interviewing suspects, from talking to witnesses at a crime scene to routine traffic stops.

140 **Similarly, in evaluating the believability:** Simon, “Limited Diagnosticity,” 174.

140 **In the Third Circuit, for example:** *Model Criminal Jury Instructions* §3.04.

140 **Indeed, we have such faith:** Max Minzner, “Detecting Lies Using Demeanor, Bias, and Context,” *Cardozo Law Review* 29 (2008): 2559; Simon, “Limited Diagnosticity,” 174. A strong belief in the power of demeanor evidence underlies some of the core structures of our criminal justice system. Simon, “Limited Diagnosticity,” 174. As the Supreme Court explained, the great benefit of the Confrontation Clause requirement that witnesses testify in person is that it provides the accused with “an opportunity . . . of compelling [the witness] to stand face to face with the
jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” Mattox v. United States, 156 U.S. 237, 242–43 (1895); Donelly v. California, 228 U.S. 243 (1913) (quoted in Minzner, “Detecting Lies,” 2559). Likewise, one of the reasons that appellate courts defer to the factual determinations of the trial court is that appellate judges are not able to observe the testimony offered in a case. Minzner, “Detecting Lies,” 2559. In the Supreme Court’s view, only those who are there during the actual trial are in a position to “be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) (quoted in Simon, “Limited Diagnosticity,” 174). Vital information is missed when a judge only reads a transcript of what was said.

140 If a jury watches a defendant: Model Criminal Jury Instructions § 3.04; Minzner, “Detecting Lies,” 2559. Even in less dire circumstances, judgments of witness credibility often turn the direction of trials; and these judgments can also have an effect in the weeks and months before a jury is chosen, as police officers conduct investigations to gather the evidence used by prosecutors. Simon, “Limited Diagnosticity,” 174.


141 Numerous studies have shown, for example: Lucy Akehurst et al., “Lay Persons’ and Police Officers’ Beliefs Regarding Deceptive Behavior,” Applied Cognitive Psychology 10 (1996): 467–68; Simon, “Limited Diagnosticity,” 176 n. 140; Siegfried L. Sporer and Barbara


141 **According to the researchers:** Kleisner et al., “Trustworthy-Looking Face,” 1, 6; Public Library of Science, “Brown-eyed People.” Another theory is that rounder faces are perceived to be more baby-faced, and those with baby faces are viewed as more honest. Kleisner et al., “Trustworthy-Looking Face,” 1, 3–4.
In a recent analysis of more than: In the sample, people accurately classified about 60 percent of truths and 48 percent of lies. Bond, Jr., and DePaulo, “Accuracy of Deception Judgments,” 223, 230–31.

And the elements that we: Bond, Jr., and DePaulo, “Accuracy of Deception Judgments,” 231.

Moreover, the people one might: Bond, Jr., and DePaulo, “Accuracy of Deception Judgments,” 229. This is not to suggest that there is nothing to be done to improve our ability to detect lying. The most promising avenue, though, may have more to do with changing how we interact with the person we are assessing than in somehow bolstering our own detection skills. In the police investigation context, there is initial evidence, for example, that individuals can improve their deceit judgments by initially collecting more information from a person and then confronting that person with inconsistencies in what they’ve said, or by making the individual cognitively work harder to respond to questioning (e.g., making a suspect tell his story starting with the last event first). Simon, In Doubt, 126–27; Maria Hartwig et al., “Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works,” Law and Human Behavior 30 (2006): 614–17; Aldert Vrij et al., “Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order,” Law and Human Behavior 32 (2008): 253, 262–63.


Although it would be nice: Simon, “Limited Diagnosticity,” 179.

First of all, while study participants: Simon, “Limited Diagnosticity,” 178.

And being unable to attend: United States v. Watson, 483 F.3d 828, 834–35, (D.C. Cir. 2007). At least one court, however, has invalidated a per se rule excluding blind jurors (although it noted that in some cases exclusion may be appropriate). Galloway v. Superior Court, 816 F.Supp. 12, 18 (D.D.C. 1993).

Ironically, contrary to the assumptions: For the same reason, appellate judges may have an advantage over trial observers. That is counterintuitive: we generally assume that appellate judges are in a worse position to judge veracity than the fact finders in the trial court because they generally have access only to a trial transcript and, thus, must focus on what was said rather than how it was said. Simon, “Limited Diagnosticity,” 178. Looking across dozens of studies, however, researchers found that participants who judged deceit purely based on body language performed significantly worse than those who were given only audio or only a written transcript. Bond, Jr., and DePaulo, “Accuracy of Deception Judgments,” 225.


Finally, it is hard to see: Simon, “Limited Diagnosticity,” 179.

How is she supposed to: Simon, “Limited Diagnosticity,” 179. In addition, although it might seem likely that jurors could overcome these challenges by consulting with one another during deliberations, the benefits of group assessments only seem to come in making individuals feel more confident in their observations, with only insignificant improvements in judging

**143 Besides, everyone knows that:** The fact that experts tend to be compensated for preparing and providing their testimony by a particular side is one of the reasons that jurors feel confident in relying on their own intuitions instead: the lack of a monetary incentive, one way or the other, seems to ensure objectivity. Studies show that when experts are unaware of which side of a case has hired them, people view them as more credible and their testimony is more persuasive. Christopher T. Robertson and David V. Yokum, “The Effect of Blinded Experts on Juror Verdicts,” *Journal of Empirical Legal Studies* 9, no. 4 (2012): 777–78.

Empirical research also suggests that our skepticism about experts is not unfounded. For instance, when scientists had 108 experienced forensic mental health experts evaluate violent sex offenders, they rated the individuals as at a significantly greater risk of reoffending when they believed that they were being paid as an expert for the prosecution than when they believed they were being paid as an expert for the defense. Daniel C. Murrie et al., “Are Forensic Experts Biased by the Side That Retained Them?” *Psychological Science* 24, no. 10 (2013): 1889, 1893–96; Association for Psychological Science, “Forensic Experts May Be Biased by the Side That Retains Them,” *ScienceDaily*, August 28, 2013, http://www.sciencedaily.com/releases/2013/08/130828092302.htm?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+sciencedaily%2Fscience_society%2Fjustice+%28ScienceDaily%3A+Science+%26+Society+News+--++Justice%29.

**143 The fact that we expect lying:** As Charles Dickens recorded more than 150 years ago, “Nature never writes a bad hand. Her writing, as it may be read in the human countenance, is
invariably legible, if we come at all trained to the reading of it.” Charles Dickens, *The Works of Charles Dickens*, vol. 36, *The Demeanour of Murderers* (New York: Charles Scribner’s Sons, 1908), 111. Just as we continue to expect that we can spot guilt or evil in a person’s face—despite the demise of physiognomy—we also maintain a belief that, in the words of the Blue Fairy in Pinocchio, “Lies can be easily recognized.” Don Grubin and Lars Madsen, “Lie Detection and the Polygraph: A Historical Review,” *Journal of Forensic Psychiatry and Psychology* 16, no. 2 (June 2005): 357. Yes, in real life, noses don’t grow when people fib, but perhaps they twitch, turn cold, or flare at the nostrils.


144 **Some two hundred years later:** Grubin and Madsen, “Lie Detection,” 359–60.

144 **Like Defoe, Marston pursued:** Grubin and Madsen, “Lie Detection,” 359.

144 **Yet there was nothing fictive:** Grubin and Madsen, “Lie Detection,” 360.

144 **The court ultimately refused:** Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); Grubin and Madsen, “Lie Detection,” 360.

144 **But his efforts laid critical groundwork:** Grubin and Madsen, “Lie Detection,” 360.

the *Frye* test was prompted by Congressional adoption of Federal Rule of Evidence 702, which provided that a “qualified” expert witness could testify if her specialized knowledge would “assist the trier of fact.” *Fed. R. Evid.* 702. In the case of *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court interpreted the rule to require judges to make their own determination of whether the expert testimony was relevant and scientifically reliable, rather than focusing solely on whether the implicated scientific community had accepted the research, as with the *Frye* test. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589–94; *Fed. R. Evid.* 702; Cutler and Kovera, “Expert Psychological Testimony,” 54. That said, although the federal rules of evidence are widely influential, each state has adopted its own rules for deciding which expert testimony is admissible. Cutler and Kovera, “Expert Psychological Testimony,” 54. It is important to note that both of these tests are only focused on determining whether scientific testimony is relevant to the issues in the case. To be admissible in court, the testimony must also not be unduly prejudicial, in the sense of having a disproportionate effect on the jury. Jones et al., “Neuroscientists in Court,” 733.


**144 Part of the problem is that:** Grubin and Madsen, “Lie Detection,” 366–67.

**144 People regularly lie without sweating:** Grubin and Madsen, “Lie Detection,” 367.

It’s appealing to think: Wiseman et al., “Eyes Don’t Have It,” 5. I do not mean to suggest that eye-related assessments are necessarily a dead end when it comes to lie detection, only that much of what is currently parading as settled science is untested hearsay. Two more promising avenues may be new research on periorbital thermography, which is focused on temperature changes in the area near the eyes brought about by increased blood flow from rapid eye movements associated with lying, and microfacial expression analysis championed by the psychologist Paul Ekman. Mark Hansen, “True Lies,” *ABA Journal*, October 1, 2009, http://www.abajournal.com/magazine/article/true_lies/; Greely and Illes, “Neuroscience-Based Lie Detection,” 389–90. At this time, though, neither has provided sufficient evidence of accuracy to be considered a reliable tool for assessing deception. Greely and Illes, “Neuroscience-Based Lie Detection,” 389–90. The lack of empirical support has done little to slow the growth in YouTube videos, training courses, and thousands of webpages all promising to reveal the science of eye movements. Wiseman et al., “Eyes Don’t Have It,” 1.

Office reviewed it, they found that there was no proof of its effectiveness and suggested eliminating funding. “TSA Should Limit Future Funding,” 47–48.


145 We now have the potential: In essence, fMRI holds the potential to move beyond capturing a person’s responses to lying to capturing the underlying lie based on the idea that different areas of the brain are activated when a person lies versus when a person tells the truth. Greely and Illes, “Neuroscience-Based Lie Detection,” 395–400.

Another fMRI approach to identifying deceit may yield even greater benefits over the traditional polygraph: detecting the presence of memories that a person has explicitly denied (e.g., you said that you were never at the crime scene, but when you were shown a photograph of the bathroom where the murder took place, your brain reacted in a certain way). Thomas Nadelhoffer and Walter Sinnott-Armstrong, “Neurolaw and Neuroprediction: Potential Promises and Perils,” *Philosophy Compass* 7, no. 9 (September 2012): 632, doi: 10.1111/j.1747-9991.2012.00494.x. With a polygraph, we need the person to participate actively by answering questions in order to gain any information. If the person refuses to respond, the polygraph cannot function. That’s not true with fMRI: we are looking at brain activity, which may be prompted simply by showing someone a photograph of a gun used in the crime or reading a letter from the victim. Jay Stanley, “High-Tech ‘Mind Readers’ Are Latest Effort to Detect Lies,” *Free Future* (blog), American Civil Liberties Union, August 29, 2012, https://www.aclu.org/blog/technology-and-liberty/high-tech-mind-readers-are-latest-effort-detect-lies.

145 And there has been a mad dash: Schauer, “Can Bad Science Be Good,” 1198–99.


When the police had arrived: Laris, “Debate on Brain Scans.”

He was the one who had: Laris, “Debate on Brain Scans.”
Sure enough, when the officers: Laris, “Debate on Brain Scans.”

But, curiously, there was no gun: Laris, “Debate on Brain Scans.”

Gary had proceeded to try: Laris, “Debate on Brain Scans.”

He’d come home and found: Laris, “Debate on Brain Scans.”

No, the gun was there: Laris, “Debate on Brain Scans.”

No, wait, Gary had been: Laris, “Debate on Brain Scans.”

He had panicked because: Laris, “Debate on Brain Scans.”

He had thrown it: Laris, “Debate on Brain Scans.”


Technicians asked Gary a series: Laris, “Debate on Brain Scans.”

He was told to lie: Laris, “Debate on Brain Scans.”

“Did you shoot Mike”: Laris, “Debate on Brain Scans.”

Gary responded that: Laris, “Debate on Brain Scans.”

Professor Haist then reviewed: Laris, “Debate on Brain Scans.”


In Haist’s opinion, the images taken: Laris, “Debate on Brain Scans.”

The clear implication, then: Laris, “Debate on Brain Scans.”

First of all, we do not yet: Schauer, “Can Bad Science Be Good,” 1200.


Neither are most scientists: Greely and Illes, “Neuroscience-Based Lie Detection,” 387–88.


Although there are more than two dozen studies that consider fMRI lie detection, there is little agreement on which particular areas of the brain matter when it comes to lying. Greely, “To Tell the Truth”; Hansen, “True Lies.” The fMRI images also vary quite a lot among people with normally functioning brains, making it a challenge to determine when a level of activity in a particular part of the brain is actually significantly raised. Carey, “Decoding the Brain’s
Cacophony,” 4. In addition, using fMRI is both expensive and resource intensive, so most experiments don’t have more than a handful of participants, and those participants tend to be disproportionately healthy, young, white, right-handed men. Greely and Illes, “Neuroscience-Based Lie Detection,” 402–03.


148 **Is a person trying to cover up:** Hansen, “True Lies.”


148 **We’ve known for a long time that:** Greely and Illes, “Neuroscience-Based Lie Detection,” 404–05; Hansen, “True Lies.”

148 **You can render the data unusable:** Greely and Illes, “Neuroscience-Based Lie Detection,” 404–05; Canli et al., “Neuroethics and National Security,” 6; Hansen, “True Lies.”

148 **Changing what you are thinking about:** Canli et al., “Neuroethics and National Security,” 6; The Royal Society, *Brain Waves Module 4*, 8–9. With respect to memory-based approaches to detecting deceit, cognitive neuroscientists have documented that people can alter their neural responses when presented with familiar and unfamiliar faces by thinking about something familiar when looking at an unfamiliar face and focusing on a part of a known face that is novel. In the laboratory, when participants employed these countermeasures, researchers were unable to use the brain scans to determine whether each person was looking at a familiar or unfamiliar face. Cognitive Neuroscience Society, “Memory, the Adolescent Brain and Lying: The Limits of

148 **But if you make your brain busier:** Greely and Illes, “Neuroscience-Based Lie Detection,” 404–05.

148 **Conversely, if you carefully memorize:** Greely and Illes, “Neuroscience-Based Lie Detection,” 404–05. It is interesting to consider how the race to gain access to revealing brain activity is likely to encourage efforts to develop means to disguise or eliminate that brain activity. Based on initial experiments with animals, it seems probable that it will one day be possible to erase certain memories in humans with the aid of newly developed drugs or technology. Erica J. Young et al., “Selective, Retrieval-Independent Disruption of Methamphetamine-Associated Memory by Actin Depolymerization,” *Biological Psychiatry Journal* 75 (2014): 100–03; Scripps Research Institute, “Possibility of Selectively Erasing Unwanted Memories,” *ScienceDaily*, September 10, 2013, http://www.sciencedaily.com/releases/2013/09/130910140941.htm?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+sciencedaily%2Fmind_brain%2Fpsychology+%28ScienceDaily%2A+Mind+%26+Brain+News+--+Psychology%29. In one study, researchers were able to eliminate memories associated with methamphetamine use, including objects seen or felt and odors detected, by inhibiting certain molecular activity in the brains of mice and rats that occurs during the maintenance phase of memory formation. Young et al., “Selective, Retrieval-Independent Disruption,” 100–03. Interestingly, the intervention did not appear to disrupt other memories. Young et al., “Selective, Retrieval-Independent Disruption,” 102.

149 **In the 1990s, attorneys:** Wendy Brickell, “Is It the CSI Effect or Do We Just Distrust Juries?” *Criminal Justice* 23 (2008): 16. Looking at just expert psychological testimony, we have
solid evidence that it sways jurors. Cutler and Kovera, “Expert Psychological Testimony,” 55. In one representative experiment, mock jurors presented with a case involving a woman who had killed her abusive husband were more supportive of self-defense claims and more lenient in their ultimate decisions when presented with expert testimony by a psychologist than when no expert opinion was offered. Regina A. Schuller and Patricia A. Hastings, “Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence,” *Law and Human Behavior* 20, no. 2 (1996): 167, 181–85. The influence of the expert was significant, regardless of whether she described matters in terms of “battered woman syndrome” or focused on the husband’s coercion and the wife’s agency. Schuller and Hastings, “Trials of Battered Women Who Kill,” 167, 181–85.

149 **A decade later, the fears morphed:** Deborah R. Baskin and Ira B. Sommers, “Crime-Show-Viewing Habits and Public Attitudes Toward Forensic Evidence: The ‘CSI Effect’ Revisited,” *Justice System Journal* 31, no. 1 (2010): 97; Brickell, “Is It the CSI Effect,” 11. The experimental evidence documenting “white coat syndrome” and the “CSI effect” has been decidedly mixed, and some critics have argued that these fears are more a reflection of distrust of the jury system and a need to explain unexpected verdicts than anything else. Brickell, “Is It the CSI Effect,” 13, 17; Schauer, “Can Bad Science Be Good,” 1210.

Research has shown, for example, that describing MRI images as indicating brain lesions increased the likelihood of finding a defendant not guilty by reason of insanity. Jessica R. Gurley and David K. Marcus, “The Effects of Neuroimaging and Brain Injury on Insanity Defenses,” Behavioral Sciences and the Law 26 (2008): 85, 93–95.

That said, a complete picture of how and when neuroscientific evidence can be prejudicial is still emerging and a few of the early studies have drawn criticism for, among other things, design flaws that prevented a fair comparison of neuroscientific evidence with other equivalent evidence. Schauer, “Can Bad Science Be Good,” 1210 n. 103, 1211 n. 104, 1211 n. 108.


149 **In one experiment, significantly more:** McCabe, Castel, and Rhodes, “The Influence of fMRI,” 566, 570, 572. In a control condition, no evidence that the defendant was lying was presented. McCabe, Castel, and Rhodes, “The Influence of fMRI,” 570.

149 **Diagnostic imaging, we assume:** At this point, however, it is unclear whether the brain images—the pictures—have an independent influence on people. Building on the general research on the undue influence of images (see, e.g., David A. Bright and Jane Goodman-Delahunty, “Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making,” Law and Human Behavior 30, no. 2 (2006): 183, 197-200; Aura Hanna and Roger Remington, “The


149 **According to testimony from:** Aspinwall, Brown, and Tabery, “The Double-Edged Sword,” 846.


150 **The other half of the judges:** Aspinwall, Brown, and Tabery, “The Double-Edged Sword,” 846.


150 The question, of course, is whether: Carey, “Study of Judges.”


151 It should not make any difference: Aspinwall, Brown, and Tabery, “The Double-Edged Sword,” 847; Carey, “Study of Judges.” More specifically, it seems problematic that the defendant who is described as having “an impaired emotional-processing system” is given a
greater sentence than the defendant who is described as having “an impaired emotional-processing system” as a result of carrying a particular gene. Aspinwall, Brown, and Tabery, “Supplementary Materials,” 9–12; Aspinwall, Brown, and Tabery, “The Double-Edged Sword,” 846–47.

151 **During three days of pretrial testimony:** Laris, “Debate on Brain Scans.”

151 **Now he had to decide:** Laris, “Debate on Brain Scans.”

151 **It was never going to be:** Laris, “Debate on Brain Scans.”

151 **All he asked was that:** Laris, “Debate on Brain Scans.”

151 **No, said Judge Johnson:** Laris, “Debate on Brain Scans.”


151 **Aditi Sharma and Udit Bharati met:** Pulice, “Right to Silence at Risk,” 865.
They dated as students: Pulice, “Right to Silence at Risk,” 865.


As she sat with thirty-two electrodes: Giridharadas, “India’s Use of Brain Scans,” 2.

“I met Udit at McDonald’s”: Giridharadas, “India’s Use of Brain Scans,” 2.

According to investigators administering: Giridharadas, “India’s Use of Brain Scans,” 2; Saini, “The Brain Police.” BEOS was developed by Champadi Raman Mukundan, the former head of the clinical psychology department at the National Institute of Mental Health and Neuro Sciences in Bangalore. Giridharadas, “India’s Use of Brain Scans,” 1.

When she heard the details: Giridharadas, “India’s Use of Brain Scans,” 1–2; Saini, “The Brain Police.”

Aditi had not just heard: Giridharadas, “India’s Use of Brain Scans,” 2.
And what is particularly astonishing: Saini, “The Brain Police.”

The BEOS results provided key evidence: Giridharadas, “India’s Use of Brain Scans,” 2; Pulice, “Right to Silence at Risk,” 866; Maharashtra, Sessions Case No. 508/07, 58–67.


In the United States, courts have resisted: Carey, “Decoding the Brain’s Cacophony,” 4.

Over the last decade: The Royal Society, Brain Waves Module 4, 13; Jones et al., “Neuroscientists in Court,” 730.


Two jurors who came out: Jones et al., “Neuroscientists in Court,” 734; Miller, “Brain Exam May Have Swayed Jury.”

“It turned my decision”: Jones et al., “Neuroscientists in Court,” 734; Miller, “Brain Exam May Have Swayed Jury.”

“The technology really swayed me”: Jones et al., “Neuroscientists in Court,” 734; Miller, “Brain Exam May Have Swayed Jury.”

If either of those jurors: Jones et al., “Neuroscientists in Court,” 734; Miller, “Brain Exam May Have Swayed Jury.”
Although the polygraph has: Grubin and Madsen, “Lie Detection,” 366.

Polygraphs are regularly used: Grubin and Madsen, “Lie Detection,” 366.


The test administrator, however: Eldeib, “3 Disputed Polygraph Exams”; Fourth Amended Complaint at 12–13, Fox, 2006 WL 1157466.

procedures—like recording all tests and having results reviewed by a second person. Eldeib, “Polygraphs and False Confessions.”

153 **Polygraphs are a routine part:** Grubin and Madsen, “Lie Detection,” 364–65.


154 **Failing the test can mean:** Megerian, “Parole Board Says Polygraph Tests Effective”; Tubman-Carbone, “An Exploratory Study,” 2.

154 **In certain states, they may:** Texas Department of Criminal Justice Parole Division, “Sex Offender Treatment and Polygraph Guidelines.” January 28, 2014, 10, https://www.tdcj.state.tx.us/documents/parole/03.06.09_parole_policy.pdf.

154 **These technologies are starting:** The message of this chapter is not that novel technology and science that attempts to capture people’s hidden thoughts, memories, and intentions must be permanently kept out of our judicial system. Some of this initial research is greatly promising and should continue. For instance, inspired by the Aditi Sharma case, cognitive neuroscientists decided to conduct some initial experiments looking at whether brain images can be used to distinguish between whether someone is looking at a novel image or something they have previously encountered. Cognitive Neuroscience Society, “Memory, the Adolescent Brain and
Lying.” To test this, they had people wear a digital camera around their necks for a few weeks, which took 45,000 photos per person. Study participants were then placed inside an MRI and shown some of those photos along with scenes that they had never seen. By looking at the participant’s brain activity, researchers found they could distinguish the familiar and unfamiliar images with a mean accuracy of 91 percent. Cognitive Neuroscience Society, “Memory, the Adolescent Brain and Lying.” This is precisely the type of valuable endeavor that we should support.

As suggested in the introduction, we must also remember that our current approaches to determining people’s inner motives and impressions may rest on completely untested assumptions, so in some cases techniques based on encouraging but limited findings or imperfect science may actually be an improvement over the status quo.


154 Moreover, in an experiment involving: Margaret Bull Kovera and Bradley D. McAuliff, “The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological


Although, there is no general regulation of lie detectors requiring that they prove their effectiveness, at least one scholar has suggested adopting an FDA-type review of neuroscience
lie detection technology to address unreliability and maximize the benefits of the new scientific approaches. Greely and Illes, “Neuroscience-Based Lie Detection,” 405–20.

155 For centuries, we’ve espoused: Stanley, “High-Tech ‘Mind Readers.’”


155 In the United States, the Fourth: Stanley, “High-Tech ‘Mind Readers.’”


156 The truth is that many Americans: Stanley, “High-Tech ‘Mind Readers.’” The ACLU takes the position that even if lie detection was sufficiently reliable, it ought to be rejected as an “unacceptable violation of civil liberties.” Stanley, “High-Tech ‘Mind Readers.’”


156 There’s no reason that prosecutors and defendants: Certain scholars have made strong arguments in favor of having different standards of admission of scientific evidence for the prosecution and defense. Christopher Slobogin, Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness (New York: Oxford University Press, 2007), 131–44.

8. Umpires or Activists? ~ The Judge
John Roberts was sitting on: Biographies of Current Justices of the Supreme Court, Supreme Court of the United States, http://www.supremecourt.gov/about/biographies.aspx.


There were now two vacancies: Stevenson, “President Names Roberts.”


Like Roberts, Bork had: Totenberg, “Robert Bork’s Supreme Court Nomination.”

And despite the efforts: Totenberg, “Robert Bork’s Supreme Court Nomination.”

But a series of missteps: Totenberg, “Robert Bork’s Supreme Court Nomination.”

In the end, fifty-eight senators: Totenberg, “Robert Bork’s Supreme Court Nomination.”


Where Bork had weighed in: Confirmation Hearing on the Nomination of Robert H. Bork to be Associate Justice of the United States, Before the Comm. on the Judiciary, 100th Cong. (1987); Totenberg, “Robert Bork’s Supreme Court Nomination”; Jost, “Roberts’ Confirmation Hearings Conclude.”


They don’t pitch: Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Before the Comm. on the Judiciary, 109th Cong. (2005).

Bad judges, by contrast: Schwartz, “Like They See ’Em.”

They are unelected activists: Schwartz, “Like They See ’Em.”

In setting out the two: Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Before the Comm. on the Judiciary, 109th Cong. (2005); Jost, “Roberts’ Confirmation Hearings Conclude.”

More important, he engendered a world: Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Before the Comm. on the Judiciary, 109th Cong. 14 (2006); Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States, Before the Comm. on the Judiciary, 109th Cong. 57–59 (2009); Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Before the Comm. on the Judiciary, 111th Cong. (2010).


In Sotomayor’s estimation: Sotomayor, “A Latina Judge’s Voice,” 92. This perspective aligned with President Barack Obama’s statement, during the search to replace retiring justice David Souter on the bench, that “empathy” was a key trait that he looked for in a Supreme Court nominee. “Failure of Empathy and Justice,” New York Times, March 31, 2011, http://www.nytimes.com/2011/04/01/opinion/01fri2.html. And it is no surprise that the president also came under fire, as a result: the empathetic justice is, in many ways, the opposite of the cold, steel-eyed umpire justice.


There was a war over: Benforado, “Color Commentators of the Bench,” 466.

Establishing the umpire as an ideal: Benforado, “Color Commentators of the Bench,” 466.

There was no need: Benforado, “Color Commentators of the Bench,” 466.
And it would limit others: Benforado, “Color Commentators of the Bench,” 466.


In one of the most famous demonstrations: Vallone, Ross, and Lepper, “The Hostile Media Phenomenon,” 580.


What is surprising is that: Vallone, Ross, and Lepper, “The Hostile Media Phenomenon,” 581. In sports, the same dynamic may give rise to the strange—but not unusual—situation where opposing fans at the end of a game agree on nothing, except that the refs were terrible.

In line with Roberts’s model: Take the general directive that a “judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.” “Code of Conduct for United States Judges,” United States Courts, last revised March 20, 2014,
This implies that a judge is fully aware of when, say, his identity as a Republican, Harvard-educated, white male or a member of the Catholic church influences his decision-making and can simply decide not to allow it to have any effect. Being impartial, in this view, is a choice.

161 That’s why we have rules: “Code of Conduct for United States Judges”; “Judicial Conference Regulations—Gifts,” United States Courts, http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/JudicialConferenceRegulationsGifts.aspx. We assume that by focusing on “bribes” and close personal ties to litigants and controversies, our rules to guard against bias are on the right track, but may just not go far enough. According to the Code of Conduct for United States Judges, a judge should not hold office in a political organization or solicit funds for a candidate. “Code of Conduct for United States Judges.” Likewise, a judge should not receive gifts from those coming before the court. And a judge should not secretly meet with one side in a case and exclude the other. “Judicial Conference Regulations—Gifts.” These prohibitions all make intuitive sense. Seemingly, the only problem is that they don’t apply to all judges—in particular, Supreme Court Justices and state and local judges—and leave too much discretion to individual judges.

The evidence that members of the judiciary regularly and consciously exploit the lacunas in our rules at the expense of impartiality is all too clear to many of us. On the right side of the bench, the wife of Justice Clarence Thomas founded a conservative legal organization dedicated to opposing President Obama’s policy agenda and Thomas attended a private political retreat set up by Charles Koch, the billionaire conservative who has made no secret of his goal to undermine the Obama administration, yet Thomas has failed to recuse himself in key cases in which the president’s policies have been challenged. Eric Lichtblau, “Thomas Cites Failure to

161 As we will see, all judges: In essence, we are guarding our benches with a faulty alarm system. The sirens—whether part of our formal judicial code or sounded in public opinion—certainly discourage certain problematic behavior. But the system is plagued by false alarms and is frequently triggered by disagreements over substance, not by actual bias. When he penned the majority opinion upholding Obamacare, Chief Justice Roberts went from objective umpire to backboneless politician in the eyes of many, not because he suddenly decided to stop being fair and balanced, but because his substantive decision in a particular case was objectionable to a


161 Democratic appointees disproportionately: Sunstein, “Judicial Partisanship Awards.” In the rare instances where the method of classifying decisions as “liberal” and “conservative” did not withstand scrutiny (for instance, where the public interest group bringing the challenge was a conservative group), the researchers adjusted the coding. Sunstein and Miles, “Depoliticizing
Administrative Law,” 2200. Justice Thomas was the most partisan member of the Supreme Court and was 46 percent more likely to support invalidating a liberal agency decision than a conservative agency decision. Sunstein and Miles, “Depoliticizing Administrative Law,” 2205–06.

162 What’s more, although the charge is: Sunstein, “Judicial Partisanship Awards.” Ironically, Justice Scalia was the most “activist” Supreme Court justice. Sunstein and Miles, “Depoliticizing Administrative Law,” 2206–07.

And the closer it is to an election, the more it seems to matter whether you are appearing before an elected or an appointed judge. Carlos Berdejo and Noam M. Yuchtman, “Crime, Punishment and Politics: An Analysis of Political Cycles in Criminal Sentencing,” *Review of Economics and Statistics* 95, no. 3 (2013): 741–56. In a study of Superior Court judges in Washington, while appointees exhibited general consistency, elected judges used their discretion to deviate upwards from sentencing guidelines 50 percent more often and handed down criminal sentences for serious offenses that were about 10 percent longer at the end of an election cycle, as compared with the beginning. Berdejo and Yuchtman, “Crime, Punishment and Politics,” 741. Even elected judges who were running unopposed were significantly affected by the political climate in the last three months before an election. Berdejo and Yuchtman, “Crime, Punishment and Politics.”

Nonpartisan elections do not appear to be a salve: when it comes to contentious issues, like the death penalty, state supreme court justices show a bias towards majority public opinion when there are targeted campaigns waged to influence judicial positions. Brandice Canes-Wrone, Tom S. Clark, and Jason P. Kelly, “Judicial Selection and Death Penalty Decisions,” *American Political Science Review* 108, no. 1 (2014): 23–39. A judge may believe that he is being consistent and delivering sentences based purely on the facts before him, when he is really being subtly drawn away from uniformity and objectivity by his own attitudes and worldviews, amplified by salient and personally meaningful external events.


162 Although she was forced to: Sotomayor, “A Latina Judge’s Voice,” 92.


162 But the fact is that no judge: Obviously, one response to all of this is to constrain how personal differences between judges influence outcomes. You should not get a sentence that is twice as long because you happen to come before Judge X instead of Judge Y. That is not justice; that is luck. In this regard, a promising solution, taken up in the final chapter of this book, may be to reduce judicial discretion. That was the original impetus for the Federal Sentencing Guidelines, although they have been less than successful, in part because they are only advisory. United States v. Booker, 543 U.S. 220 (2005); Adam Liptak, “Harsher Sentencing Guidelines Can’t Be Used for Old Offenses, Justices Say,” New York Times, June 10, 2013, http://www.nytimes.com/2013/06/11/us/politics/supreme-court-divides-over-sentencing-guidelines.html.

162 Researchers recently found that: Adam N. Glynn and Maya Sen, “Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women’s Issues,” American Journal of Political Science (2014): 14, doi: 10.1111/ajps.12118. It is important to note that the study did not find the daughter effect with respect to criminal cases. Glynn and Sen, “Identifying Judicial Empathy,” 11. However, the researchers’ focus on rape cases very likely distorted the data. Other work shows that gender-based commitments may take a backseat to more dominant
cultural predispositions (in particular, the degree to which someone is supportive of existing hierarchies in society) when it comes to views on rape cases. Kahan, “Culture, Cognition, and Consent.” More research is needed to sort out whether having daughters has an influence on how judges decide criminal cases with a gender angle.


163 White men, for instance: Torres-Spelliscy et al., “Improving Judicial Diversity.” Indeed, even today, a number of state supreme courts are all white. Torres-Spelliscy et al., “Improving Judicial Diversity.” The fact that this is, nonetheless, the most varied judiciary we have ever enjoyed has deep implications and brings an added urgency to the diversification project. On this front, we might consider adopting proven diversity-enhancement measures from business and academia—like nominating commissions focused specifically on identifying minority judicial candidates—so that when you appear before a particular supreme court, at the state or federal level, you are at least getting a cross-section of viewpoints and commitments. Ciara Torres-Spelliscy et al., “Improving Judicial Diversity,” Brennan Center for Justice, 2010, http://www.brennancenter.org/publication/improving-judicial-diversity. Each justice may be biased, but if they are biased in different ways, that may encourage a more neutral outcome or, at least, make the influence of personal characteristics on judicial decision-making more obvious, which might, in turn, prompt other reforms aimed at providing more impartial justice.


The Supreme Court was pumping out: Smelcer, *Supreme Court Justices*, 6–8.

So, even if you happen to: Torres-Spelliscy et al., “Improving Judicial Diversity.” Were it not for their bias-enhancing effects, judicial elections might seem like a ready solution, but states in which citizens vote for judges do not yield more diverse judiciaries, likely, in part, because of redistricting efforts that reduce the influence of minority voters. Torres-Spelliscy et al., “Improving Judicial Diversity.”


You might suppose that a judge: Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 5.


Shockingly, even rolling a set of dice: Englich, Mussweiler, and Strack, “Playing Dice With Criminal Sentences,” 194.

One of the things that was: Englich, Mussweiler, and Strack, “Playing Dice With Criminal Sentences,” 197.


The source of the problem is no secret: Englich, Mussweiler, and Strack, “Playing Dice With Criminal Sentences,” 189.

It doesn’t help that the evidence: Englich, Mussweiler, and Strack, “Playing Dice With Criminal Sentences,” 189.

Judges are required, for example: Vidmar, “The Psychology of Trial Judging,” 59.


The study’s authors hypothesize: Danziger, Levav, and Avnaim-Pesso, “Extraneous Factors in Judicial Decisions,” 6889. The status quo enjoys an unfair advantage across many
situations, especially when we face a difficult or complex decision. When we have doubt, we are inclined to stay the course, which can lead to erroneous decision-making and poor choices, whether that means sticking with your employer’s default retirement package or failing to overturn the death sentence of a defendant. Stephen Fleming, Charlotte Thomas, and Raymond Dolan, “Overcoming Status Quo Bias in the Human Brain,” *Proceedings of the National Academy of Sciences* (2009): 6005, 6007, http://www.pnas.org/content/107/13/6005.

166 Repeatedly making decisions taxes our: Danziger, Levav, and Avnaim-Pesso, “Extraneous Factors in Judicial Decisions,” 6889. Although the researchers didn’t look specifically at whether it was the influence of eating or simply taking a break that explained the pattern, it seems that the judges’ two daily food breaks had a restorative effect on their abilities to deviate from the norm. Danziger, Levav, and Avnaim-Pesso, “Extraneous Factors in Judicial Decisions,” 6889–92.

167 The two parole boards involved: Danziger, Levav, and Avnaim-Pesso, “Extraneous Factors in Judicial Decisions,” 6889. After concerns were raised that the pattern of results might be the result of prisoners without representation being seen at the end of sessions, the authors of the study reanalyzed their data and replicated their original results, with case order and the timing of the break continuing to be robust predictors of the judges’ decisions. Keren Weinshall-Margel and John Shapard, “Overlooked Factors in the Analysis of Parole Decisions,” *Proceedings of the National Academy of Sciences* 108, no. 2 (2011), http://www.pnas.org/content/108/42/E833. The results also held up when the authors reran their analysis separating out rejections of parole from deferrals (both of which result in the prisoner staying locked up), which they had originally treated together. Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, “Reply to Weinshall-Margel and Shapard: Extraneous Factors in


167 **And one of the most disheartening:** Uri Simonsohn and Francesca Gino, “Daily Horizons: Evidence of Narrow Bracketing in Judgment From 10 Years of M.B.A. Admissions Interviews,” *Psychological Science* 24 (2013): 219-241.


167 **Researchers have dubbed this:** Simonsohn and Gino, “Daily Horizons,” 219.

167 **According to this research:** Simonsohn and Gino, “Daily Horizons,” 223.

168 **As the legal theorist and appellate:** Jerome Frank, *Law and the Modern Mind* (New York: Brentano’s, 1930), 104. At the same time, we must remember the complexity of the task at hand. It is not that judges are slaves to their backgrounds and at the total mercy of unappreciated elements in their situations. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 29. Judges do engage in careful deliberation and, in certain circumstances, do appear able to counteract certain erroneous intuitions. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 29. For instance, there is some evidence that judges are capable of overcoming hindsight bias when they are encouraged to engage in a deliberative process. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 28. In one research study, judges asked to determine the constitutionality of a particular car search *after* being informed that the police had found
damning criminal evidence in the trunk (the hindsight condition), were no more likely to find probable cause than judges who were presented with a comparable request for a telephonic warrant to search the same car not knowing what would be found inside (the foresight condition). Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 27. The authors of the study hypothesized that, in this special context, the Byzantine rule structures of the Fourth Amendment might have forced judges to deviate from their gut intuitions. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 27.

More research is needed into how various psychological dynamics play out across situations and how they interact when more than one is implicated in a real life case. The circumstances in which bias can creep in are numerous and diverse because of the nature of judicial decision-making: it is not just about ultimate outcomes and punishments. Vidmar, “The Psychology of Trial Judging,” 58. Judicial bias can appear at any stage in a criminal case, from admitting evidence and signing off on plea bargains, to ruling on objections during cross-examination and approving jury instructions, to allocating time for oral argument during appeal and granting habeas motions seeking the release of a prisoner. Vidmar, “The Psychology of Trial Judging,” 58.

168 While some social scientists have: As with judges, we’ve always assumed that the danger with referees is conscious bias: people altering their judgments in exchange for a bribe, out of spite, or after being threatened. The poster boy for the biased ref is Tim Donaghy, who bet on NBA games that he worked, as well as passing on critical information about referees and players to professional gamblers. Howard Beck and Michael S. Schmidt, “N.B.A. Referee Pleads Guilty to Gambling Charges,” New York Times, August 16, 2007, http://www.nytimes.com/2007/08/16/sports/basketball/16nba.html?ref=timdonaghy. And leagues
have always been eager to portray bias by officials as rare and deliberate. Just as there are good, objective judges and bad, partisan judges, there are also good, objective referees who choose to adhere to the rules and bad, biased refs who choose to ruin the game for their own personal gain. According to this narrative, a handful of Donaghys in the system present the only threat: as former NBA Commissioner David Stern put it, “rogue, isolated criminal[s].” “Stern: Bet Probe ‘Worst Situation That I Have Ever Experienced,’” ESPN.com, July 25, 2007, http://sports.espn.go.com/nba/news/story?id=2947237. But this account does not hold up against the empirical evidence.


168 Tennis officials, for instance: David Whitney et al., “Perceptual Mislocalization of Bouncing Balls by Professional Tennis Referees,” Current Biology 18 (2008): R947–49. More broadly, umpires, like judges, believe they are seeing the game exactly as it happens through unfiltered lenses and they are rarely in a position to understand that their particular perspective and situation may influence their judgments.

168 The spot where an umpire perceives: Whitney et al., “Perceptual Mislocation of Bouncing Balls.” A similar issue arises in soccer. Trained referees are taught to observe the game following a diagonal path across the field, and a referee using a left-diagonal system will observe players moving into the offensive side of the field from a right-to-left orientation, while his linesmen, traveling along the sidelines, will observe players moving left to right. Kranjec et al., “A Sinister Bias,” 1–3. Why might this matter? Scientists have discovered that experimental participants call more fouls when considering pictures of left-moving soccer tackles as when
looking at pictures of right-moving tackles. The likely reason has to do with familiarity: in the West, we read from left to right, and so things that occur right to left tend to be seen as atypical and disfluent. The end result is that, as with judges, a different perspective on the same events can lead to a different outcome.


Given that referees frequently have to make calls without all of the necessary information or in situations where the evidence that they have isn’t conclusive, it is no surprise that they take cognitive short cuts just like judges. Robert L. Askins, “The Official Reacting to Pressure,” *Referee* 3 (1978): 17, 18. Clearly, the fact that someone is a superstar doesn’t tell you whether he just threw a ball or a strike; but when we don’t know whether the pitch was inside or outside the strike zone, we may turn to the player’s stardom to give us an answer: it was a strike. Tobias J. Moskowitz and L. Jon Wertheim, *Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won* (New York: Crown Archetype, 2011), 19–20. The result is that, on the mound, aces are given bigger strike zones than nonstars, and champion sluggers are less likely to get a third strike called on them than low-percentage hitters. Moskowitz and Wertheim, *Scorecasting*, 19–20. The same is true in basketball, where stars are less likely to receive additional fouls when they have gotten into early trouble than nonstars. Moskowitz and Wertheim, *Scorecasting*, 21.
Stranger and more troubling is the fact that white basketball referees appear to call relatively more fouls on black players than white players, and strike zones in baseball are partially defined by the race of the batter. Price and Wolfers, “Biased Referees?” 328. In one recent experiment, researchers found that although participants viewed black and white football players who “celebrated” after scoring as equally arrogant, black players were penalized for their actions at a greater rate. Erika Hall and Robert Livingston, “The Hubris Penalty,” *Journal of Experimental Social Psychology* 48 (2012): 899–904. According to the study’s authors, the likely explanation is that pride and arrogance are tolerated for those group members who possess high status (white players), but not for those with low status (black players). Black players face a “hubris penalty” that does not apply to their white counterparts. Much like with judges and police officers, racial cues seem to result in disparate treatment in sports, beyond the conscious awareness of the officials involved.

168 In addition, as with judges who expect: Moskowitz and Wertheim, *Scorecasting*, 22–24; Kyle J. Anderson and David A. Pierce, “Officiating Bias: The Effect of Foul Differential on Foul Calls in NCAA Basketball,” *Journal of Sports Sciences* 27 (2009): 692–93. Again, the irony is that the great effort a person puts into trying to be neutral and objective can itself create bias. In basketball, the erroneous assumption that the number of fouls called on each team should be approximately equal in a fairly refereed game subtly influences the actions of those who are strongly motivated to appear fair. The larger the difference in fouls between two opposing basketball teams, the more likely the next whistle will be blown against the team with fewer fouls. Anderson and Pierce, “Officiating Bias,” 692–93. Whether it’s three fouls on the same team or three parole grants in a row, deviation from a preconceived vision of the pattern of objectivity sets off internal alarm bells, even though unequal distributions are statistically
predicted. When an umpire or referee makes a clear mistake, the motivation to even things out becomes even stronger. So, investigators have found that when umpires erroneously call a strike a ball, they are more likely to call the next pitch a strike. Moskowitz and Wertheim, *Scorecasting*, 22–23. Make-up calls are real, although, for many officials, they do not feel that way at all.

A related source of distortion involves the tendency to avoid blowing the whistle in critical situations. Moskowitz and Wertheim, *Scorecasting*, 24–30. Refs don’t want to risk being seen as introducing bias and so, across a range of sports—hockey, football, and basketball, included—they show a significant tendency to omit calling fouls where it is not absolutely clear in the final moments of a game. Moskowitz and Wertheim, *Scorecasting*, 24–30. Instead, they go ahead and let the players “play” and “determine their own destinies.” But, of course, that is neither fair nor an accurate description of what is happening: erroneously not calling an offensive foul that wins the game for one team is distorting the righteous outcome just as much as erroneously calling an offensive foul that loses the game for the same team.

168 Finally, like judges, referees are not: Anderson and Pierce, “Officiating Bias,” 692–93; Moskowitz and Wertheim, *Scorecasting*, 138. We are a profoundly social species and none of us can just turn off the influence that other humans have on our decision-making. As with those who preside over our courts, sports officials will swear that they are not influenced by public perceptions, but the evidence suggests otherwise. Moskowitz and Wertheim, *Scorecasting* 156–65. In soccer, referees award fewer cards and more penalties to home teams and increase the amount of extra time at the end of a match when the home team is trailing and reduce it when they are ahead. Peter Dawson, et al., “Are Football Referees Really Biased and Inconsistent?: Evidence of the Incidence of Disciplinary Sanction in the English Premier League,” *Journal of*

Moreover, the bigger the crowd and the closer they are to the field, the larger the home-team bias. Moskowitz and Wertheim, Scorecasting, 160. The same trends are evident in basketball, football, and baseball: at away games, basketball players have an increased probability of being called for fouls and traveling, football players face a heightened likelihood of being penalized, and baseball players are at a disadvantage in calls related to stealing bases and turning double plays. Moskowitz and Wertheim, Scorecasting, 160.

169 Most would vigorously deny that: Justice Scalia is a case in point of how judges almost never see themselves as acting in a biased fashion. He counts his statement refusing to recuse himself from a case involving Vice President Cheney, with whom he’d gone duck hunting, as “maybe the only heroic opinion [he] ever issued.” As he explained, “I did the right thing and it let me in for a lot of criticism and it was the right thing to do and I was proud of that. So that’s the only heroic thing I’ve done.” Jennifer Senior, “In Conversation: Antonin Scalia,” New York, October 6, 2013, http://nymag.com/news/features/antonin-scalia-2013-10/.

169 Indeed, most would feel quite confident: Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 43.


With seemingly no room for personal: Textual originalism, according to Justice Scalia and his coauthor, Bryan Garner, is the only “objective standard of interpretation even competing for acceptance.” Posner, “The Incoherence of Antonin Scalia.”

The Fourth Amendment begins: U.S. Const. amend. IV.


In situations like this, a judge is free: Posner, “The Incoherence of Antonin Scalia.”


But members of the Court actually: Larsen, “Confronting Supreme Court Fact Finding”; Rothman, “Supreme Court Justices.”
Rather than simply relying on: Larsen, “Confronting Supreme Court Fact Finding”; Rothman, “Supreme Court Justices.”

Indeed, in surveying the 120 most: Larsen, “Confronting Supreme Court Fact Finding,” 1262.

If a case comes down to: United States v. Sykes, 131 S. Ct. 2267, 2270 (2011).

In United States v. Sykes, both: Larsen, “Confronting Supreme Court Fact Finding,” 1266. As Justice Kennedy wrote in the majority opinion, “Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana’s vehicular flight crime is a violent felony.” Sykes, 131 S. Ct. at 2274. So where did these important statistics come from? They did not appear in the briefs or in the record from the court below—rather, they were found by the justices and their clerks. Larson, “Confronting Supreme Court Fact Finding,” 1266–67.

Isn’t this precisely what we want: The Supreme Court is faced with a caseload that gets more diverse and specialized each year. If a justice does not feel he or she possesses enough knowledge to make an important decision, shouldn’t he or she seek out additional information? The Federal Rules of Evidence take just such a solicitous view of this type of “in house” fact finding, placing no restrictions on the practice. Larsen, “Confronting Supreme Court Fact Finding,” 1267–68.

In many cases, the “facts”: Larsen, “Confronting Supreme Court Fact Finding,” 1277–86. This is particularly noteworthy because citations and sources are uniquely important to the law. In the United States, the law’s authority relies, in part, on the perceived legitimacy of the individuals and institutions charged to uphold and enforce it, but also, to a great extent, on the reasoning that those individuals and institutions employ. The facts carry a great amount of power. They may be used to persuade readers or to make a shaky proposition seem more solid.
They may be employed to win over sympathetic colleagues or undermine the positions or reasoning of adversaries. Sometimes the particular fact that a judge “uncovers” is essential to the outcome of the case—indeed, it may resolve the key question at issue. Larsen, “Confronting Supreme Court Fact Finding,” 1277–86.

172 Judges, just like the rest of us, tend: Ezra Klein, “Unpoular Mandate,” The New Yorker, June 25, 2012, http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein#ixzz1yF1uS1MZ. In conducting a “common sense” parsing of a statute or case, a judge may be steered quickly and surely to what he believes and expects to be true, as he ignores, rejects, and overlooks contradictory evidence. Posner, “The Incoherence of Antonin Scalia.”

172 When judges do research: Larsen, “Confronting Supreme Court Fact Finding,” 1300.


173 A similar effect was found: Klein, “Unpopular Mandate.”

173 With more information on hand: Klein, “Unpopular Mandate.”


But when participants were asked to: Kahan et al., “Motivated Numeracy,” 21–24; O’Brien, “Do the Math?”

When the data pointed to a conclusion: Kahan et al., “Motivated Numeracy,” 25–26.


The reverse was true for liberals: Kahan et al., “Motivated Numeracy,” 21–24; O’Brien, “Do the Math?”


Indeed, when Justice Elena Kagan: Larsen, “Confronting Supreme Court Fact Finding,” 1275; Sykes, 131 S. Ct. at 2290 n. 3 (Kagan, J., dissenting).

Look at recent opinions and you’ll see: Larsen, “Confronting Supreme Court Fact Finding,” 1300. Sure, there is the New England Journal of Medicine, the New York Times, and the website of the FDA, but so also Musicweek, the Arkansas Gazette, Sporting News, and the


174 Justice Scalia reads two newspapers: Senior, “In Conversation.”

174 As he told a journalist: Senior, “In Conversation.”

174 He was tipped over the edge: Senior, “In Conversation.”

174 He “usually” listens to talk radio: He particularly likes Bill Bennet. Senior, “In Conversation.”

174 In the past, he went to dinner parties: Senior, “In Conversation.”

175 And you may surround yourself: While judges like to trot out examples of clerks they hired who had different worldviews (likely to bolster their self-affirming views as neutral and unbiased), such actions are exceptional. As Justice Scalia has explained, “I’ve said often in the past that other things being equal, which they usually are not, I like to have one of the four clerks whose predispositions are quite the opposite of mine—who are social liberals rather than social conservatives. . . . The trouble is, I have found it hard to get liberals . . . who pay attention to text and are not playing in a policy sandbox all the time.” “In Conversation With Antonin Scalia,” New York, http://nymag.com/news/features/antonin-scalia-2013-10/index6.html. In fact, empirical research shows that the hiring of clerks has taken on an increasingly partisan character over time. So, for example, 92.7 percent of Justice Scalia’s and 100 percent of Justice Thomas’s

**175 But search engines are themselves:** Larsen, “Confronting Supreme Court Fact Finding.”


**175 In essence, without your awareness:** Larsen, “Confronting Supreme Court Fact Finding,” 36. Moreover, judges are not usually in a position to assess how much weight to place in a particular source. In many cases, they simply do not have the expertise to assess the methodology of research or place the findings in context. Though he is a not-infrequent offender when it comes to in-house fact-finding, Justice Scalia has offered the most pointed criticism of the Court on this score: “an adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies’ findings on faith, without examining their methodology at all.” Larsen, “Confronting Supreme Court Fact Finding,” 34–35.

The problem is compounded by the simply overwhelming amount of data available on any question that might be asked. There was a point in the recent past when information was held primarily in books and other print resources, which limited the number and quality of information providers, as well as the ability of a judge to access the information. He or she had to go to a library or research facility, wait for a book or journal to be retrieved, and, then, flip page-by-page to search for the relevant information. Today, in real time, a judge can read a rare book on early-English judicial procedure held by Cambridge University, sift through the entire canon
of law review articles in search of a particular term, and gain access to nearly every social
science study published in a major scholarly periodical over the last decade. It is easy to get
buried under the ever-increasing weight of information. Larsen, “Confronting Supreme Court
Fact Finding,” 38. Typing “danger from police chases” into Google, for example, yields
26,900,000 results. Which of those pages holds the truth?

The adversary system was designed so that the different sides of a case or controversy
could resolve that question by scrutinizing and challenging the evidence provided by the other
side or sides. Larsen, “Confronting Supreme Court Fact Finding,” 34–35. But when judges go
looking for their own facts, there is no such oversight. Larsen, “Confronting Supreme Court Fact
Finding,” 34–35. The traditional gatekeeping function of the trial court is lost; indeed, the gates
are flung open. Justices are free to disregard the information sources available—the briefs and
lower court record—when those sources do not contain what they want to hear and go in search
of conforming evidence to support their preconceived notions. Allison Orr Larson, “The Trouble

A related problem comes from amicus curiae briefs that were once fashioned as impartial
“friend of the court” supplements to aid justices in understanding the unique facts of a case, but
that have developed into an inexpensive way for outside parties to advocate for particular
positions. Larson, “The Trouble with Amicus Facts,” 1765–68. As a result, in important cases,
the Supreme Court may be swamped by a sludge of unvetted and dubious facts, which the
justices then paw through in hopes of finding a few nuggets to add a sparkle of legitimacy to
whatever position they already hold. Larson, “The Trouble with Amicus Facts,” 1763–64. To
make matters worse, instead of carefully scrutinizing the original sources, the justices often
appear to uncritically accept the second-hand account on offer and cite in opinions directly to the briefs as authorities. Larson, “The Trouble with Amicus Facts,” 1779.

The ultimate result is deep unfairness, both to the parties who are supposed to have a right to participate in the development and interrogation of the key facts of the case, as well as to all of those who are affected by the Court’s decisions and who are entitled to legitimate process. Larsen, “Confronting Supreme Court Fact Finding,” 43.


175 Although they often purport to: Larsen, “The Trouble with Amicus Facts,” 1757, 1763.


176 Every day it caused numerous people to: Tur, “MTA Blocks Staircase.”

176 But no one did anything: “MTA Fixing Trippy Brooklyn Subway Stairs.”

176 The guy who nearly: “MTA Fixing Trippy Brooklyn Subway Stairs.”

176 The woman who fell: “MTA Fixing Trippy Brooklyn Subway Stairs.”
They caught their balance: Tur, “MTA Blocks Staircase.”

Few, if any, blamed the step: “MTA Fixing Trippy Brooklyn Subway Stairs.”


And within a day of the evidence: Tur, “MTA Blocks Staircase.”

But if no one is keeping: There is an interesting analogy to the revolution in baseball entailed by the rise of Sabermetrics. Phil Birnbaum, “A Guide to Sabermetric Research,” Society for American Baseball Research, accessed November 7, 2014, http://sabr.org/sabermetrics. As the godfather of Sabermetrics, Bill James has revealed the sophisticated statistical analysis of baseball that begun in the 1980s would never have been possible without the great data that had accumulated over many decades as a result of the decision by people back in the nineteenth century to keep really detailed records of games. Bill James, “Keynote Speech at the Conference on Empirical Studies,” Penn Law School, Philadelphia, PA, 25 October 2013, Keynote Address.


In 2010, 82 percent of defendants: Bombardieri, Saltzman, and Farragher, “For Drunk Drivers.”
In interviews, the judges themselves: Bombardieri, Saltzman, and Farragher, “For Drunk Drivers”; Jonathan Saltzman, Marcella Bombardieri, and Thomas Farragher, “A Judicial Haven for Accused Drunk Drivers,” Boston Globe, November 6, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/11/06/a_judicial_haven_for_accused_drunk_drivers/. It is unclear why judges were so much more inclined to support drunk driving defendants than jurors were, but one theory is that because the evidence in such cases is highly repetitive (e.g., most police reports include a nearly identical description of bloodshot eyes, slurred speech, and the odor of alcohol on the breath), judges who hear the same thing over and over may become more skeptical that the routine description of events is genuine in a given case and apply a stricter reasonable doubt standard than do jurors for whom the evidence is novel. R. J. Cinquegrana and Diana K. Lloyd, Report to the Supreme Judicial Court (Boston: Choate, Hall & Stewart LLP, 2012), 32–34.

The journalists’ work prompted: Brian Fraga, “Nearly Two Dozen State Judges Acquit 95 Percent of OUI Defendants in Bench Trials, Report States,” Herald News (Fall River, MA), November 1, 2012, http://www.heraldnews.com/news/x303002561/Report-details-high-rate-of-OUI-acquittal-by-nearly-two-dozen-state-judges?zc_p=1. With respect to “judge shopping,” for instance, the report suggested rotating judges and making jury waiver rule changes to require the consent of the prosecutor (in order to switch to a bench trial) and the exercise of the waiver prior to the assignment of the trial date. Cinquegrana and Lloyd, Report to the Supreme Judicial Court, 46–48. Although acknowledging that some of the changes required action by the legislature, the Massachusetts Supreme Court Justices did embrace certain suggested reforms, including instituting better training of judges in the handling of scientific evidence. Statement of

177 These ongoing reform efforts: Saltzman, Bombardieri, and Farragher, “A Judicial Haven.”

177 If the Massachusetts Trial Court had: Bombardieri, Saltzman, and Farragher, “For Drunk Drivers.”


177 But seeing the data could be: Educated about bias and equipped with personalized statistics, a judge could say to herself, I know that in 90 percent of the Fourth Amendment cases that have come before me, I have sided with the police, while my colleagues rule in favor of the police at a 60 percent rate. I’ve also learned that people often engage in a biased search for evidence that confirms what they already believe to be correct, but that consciously shifting your frame of analysis can act as a counterweight. Guthrie, Rachlinski, and Wistrich, “Inside the Judicial Mind,” 822. So, since my initial instinct was that the police were justified in their actions, I am going to now go back through the record with a different perspective: I am going to imagine that I hold the opposite instinct and see how much evidence I can find to support this conclusion. “The Mechanisms of Choice,” Observer 25, no. 1 (2012), http://www.psychologicalscience.org/index.php/publications/observer/2012/january-12/the-mechanics-of-choice.html.
A judge is always going to: Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 32–33.

But since they can also: Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 32–33. That may mean, in some cases, encouraging judges to take more time making critical decisions that are routinely decided on the fly, like the admissibility of evidence during trial. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 36. And, as we will discuss in the last chapter, it may imply a greater reliance on established protocols that guide the decision-making process on key issues and force a broadly focused deliberative process. Guthrie, Rachlinski, and Wistrich, “Blinking on the Bench,” 35, 40–41.


Everything is stacked against it: “After Sending a Man to Prison, Judge Admits He Was Biased,” NPR, June 14, 2014, http://www.npr.org/2014/06/14/321952967/after-sending-a-man-to-prison-judge-admits-he-was-biased.

In October 1999, the defendant: Casarez, “Did Racial Bias.”

Kagan claimed that he had acted: Casarez, “Did Racial Bias.”

But Judge Barbaro convicted him: Casarez, “Did Racial Bias.”

Although it had been more than: Casarez, “Did Racial Bias.”

He realized that his own background: “After Sending a Man to Prison.”

That frame had caused him: Casarez, “Did Racial Bias.”

Revisiting the facts, Wint now appeared: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

It seemed Kagan had shown: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

Wint’s friends had dragged: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

When Kagan pulled his gun: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

In the scuffle, the gun: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

In December 2013, fourteen years after: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”

It is almost unheard of: McKinley, “Ex-Brooklyn Judge Seeks Reversal.”


But it seemed to Barbaro that: “After Sending a Man to Prison.” When asked by an interviewer whether there was room in the legal system for the doubt he was feeling, Barbaro remarked, “I think too many times there is pressure to finish the cases, get the cases done and off the calendar. This pressure dooms people to be convicted unjustly. Now I'm not saying every case, but one is too much.” “After Sending a Man to Prison.”
9. An Eye for an Eye ~ The Public


183 They assembled around the town: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 Earlier, the accused had been: Bondeson, *The Feejee Mermaid and Other Essays*, 143.


183 Indeed, the guilty party had not: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 The crowd watched with eager eyes: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 She had been dressed in: McNamara, “Curiosities of the Law,” 32.

183 It was 1386: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 But still, the condemned: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 As the last preparations were made: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

183 It was, the Vicomte must: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

184 When, some three decades later: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

184 Though the fresco has not: Bondeson, *The Feejee Mermaid and Other Essays*, 143.

184 She was a pig: Bondeson, *The Feejee Mermaid and Other Essays*, 143.


Mastiffs were guillotined: Bondeson, *The Feejee Mermaid and Other Essays*, 151.

Murderous bulls were seized: Evans, *The Criminal Prosecution*.

Horses were burned by court: Evans, *The Criminal Prosecution*, 162.


Likewise, by the mandate: Exodus 21:28 (King James). Interestingly, death by stoning was a special type of sentence reserved for the most egregious type of crimes and expressing the particular moral outrage of the offense. Goodwin and Benforado, “Judging the Goring Ox,” 4; J. J. Finkelstein, “The Ox That Gored,” *Transactions of the American Philosophical Society* 71, no. 2 (1981).

Many of the recorded examples: Goodwin and Benforado, “Judging the Goring Ox, 4.”
And should the tribe fail: Sir James George Frazer, “The Ox That Gored,” in Folk-Lore in the Old Testament, vol. 3 (London: Macmillan, 1919), 415–16; John Macrae, “Account of the Kookies of Lunctas,” Asiatic Researches 7 (1803): 189. I’ve added italics to emphasize a particularly interesting facet of the quotation: if the actual perpetrator is not caught, a stand-in perpetrator must be found and killed.


An ox lacks many: Goodwin and Benforado, “Judging the Goring Ox, 3, 5, 22-23.”

To suppose otherwise is: Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916). The court provided the ox cart example in the context of a discussion of “deodand,” which historically was any personal property “whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king, for sale and a distribution of the proceeds in alms to the poor by his high almoner, ‘for the appeasing of God’s wrath’ . . . .” Parker-Harris Co., 188 S.W. at 55.

At the same time that: “Kentucky Dog Murder Trials Held Repealed,” Washington Post, January 25, 1929.

In 1918, Kentucky had passed: “Kentucky Dog Murder Trials Held Repealed.”

But the courts were slow: “Kentucky Jury Convicts Dog: Death Sentence Carried Out,” New York Times, January 11, 1926.


Which helps explain why: “Condemned Dog Faces Kentucky Court Today.”
Thanks—perhaps—to his royal: “Condemned Dog Faces Kentucky Court Today.”


Interestingly, it was not: “Condemned Dog Faces Kentucky Court Today.”

It was, she explained: “Condemned Dog Faces Kentucky Court Today.”


And when I press you: Aharoni and Fridlund, “Punishment Without Reason,” 5.


Study participants were quick to: Haid, Björklund, and Murphy, “Moral Dumbfounding,” 3, 9; Haidt, “The Emotional Dog and Its Rational Tail,” 814; Carlsmith and Darley, “Psychological Aspects of Retributive Justice,” 212.

Even when they ran out: Aharoni and Fridlund, “Punishment Without Reason,” 5–6; Carlsmith and Darley, “Psychological Aspects of Retributive Justice,” 212.

In these moments: Carlsmith and Darley, “Psychological Aspects of Retributive Justice,” 212; Haidt, “The Emotional Dog and Its Rational Tail.”


There are several potential: Aharoni and Fridlund, “Punishment Without Reason,” 2. For an overview of various theories of punishment, see Joshua Dressler, Understanding Criminal Law, 6th ed. (LexisNexis, 2012), 14–23.

When asked, people tend to: Carlsmith and Darley, “Psychological Aspects of Retributive Justice,” 211.

But these self-reports don’t: Carlsmith and Darley, “Psychological Aspects of Retributive Justice,” 213.

Regrettably, that question is hard: Goodwin and Benforado, “Judging the Goring Ox,” 2–3, 5-7.

But people should also feel: Goodwin and Benforado, “Judging the Goring Ox,” 2–3, 5-7.

So varying the gravity: Goodwin and Benforado, “Judging the Goring Ox,” 2–3, 5-7.

That was exactly the dilemma: Goodwin and Benforado, “Judging the Goring Ox, 2–3, 5-7.”

When we hunt down: Goodwin and Benforado, “Judging the Goring Ox, 3, 8.”

So we can effectively: Goodwin and Benforado, “Judging the Goring Ox,” 3.

Eliminating the possibility that: Goodwin and Benforado, “Judging the Goring Ox,” 15, 20.

In one, a shark attacks: Goodwin and Benforado, “Judging the Goring Ox,” 17.
The shark has been hunted: Goodwin and Benforado, “Judging the Goring Ox,” 15.

How much of a numbing agent: Goodwin and Benforado, “Judging the Goring Ox,” 15.

If your motivation is ensuring: Goodwin and Benforado, “Judging the Goring Ox,” 15, 20.

But your answer should change: Goodwin and Benforado, “Judging the Goring Ox,” 18–19.

Sure enough, that’s what Geoff and I: Goodwin and Benforado, “Judging the Goring Ox,” 18–19.

We can alter the types: Goodwin and Benforado, “Judging the Goring Ox,” 19–23.

People are driven by retribution: Goodwin and Benforado, “Judging the Goring Ox,” 19–24.

On a purely rational level: Goodwin and Benforado, “Judging the Goring Ox,” 20.


**191 In their view, this is only:** Carlsmithe and Darley, “Psychological Aspects of Retributive Justice,” 215, 233. Other psychologists are skeptical of this model of moral judgment. See, e.g., Malle, Guglielmo, and Monroe, “A Theory of Blame.”
191 We’ve worked, for instance: For instance, the Model Penal Code—an influential template developed to help modernize and standardize penal law across the United States—treats many attempted crimes the same as accomplished crimes. Dressler, *Understanding Criminal Law*, 412.


As Benjamin Lindsey, a pioneering: Aviv, “No Remorse,” 57.


Perceived blameworthiness does track: Adam Benforado and Geoff Goodwin, Unpublished Experiment.

But these judgments are sensitive: Benforado and Goodwin, Unpublished Experiment.

People believe that a boy: Benforado and Goodwin, Unpublished Experiment.

If through pure chance: Benforado and Goodwin, Unpublished Experiment.

What’s more, on average: Benforado and Goodwin, Unpublished Experiment.

Indeed, people punish the unlucky: Although no harm came to the passengers of the car in the “harmless” condition, it is worth noting that we tried to ensure that the action of the boy was identical, so in both cases the bottle that he threw smashed the windshield of the vehicle. Benforado and Goodwin, Unpublished Experiment. For more on the psychology of “moral luck,” see Fiery Cushman, “Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment,” *Cognition* 108 (2008): 353–80.

In this context, it is hardly: Aviv, “No Remorse,” 57.

Our hidden drives help explain: Erik Eckholm, “Juveniles Facing Lifelong Terms.” In other cases, legislators have responded by enacting strong new mandatory minimums—twenty-five or more years before parole becomes an option—for juveniles who commit murder. Eckholm, “Juveniles Facing Lifelong Terms.”

We profess not to blame: Dressler, Understanding Criminal Law, 350.


But we often seem to be: Clark et al., “Free to Punish,” 502. So, why are we driven to punish in the first place? Evolutionary psychologists suggest that the shared desire to blame and punish those who have committed wrongs provided a fitness benefit in a complex social world in which the danger of others taking harmful action was ever present. Clark et al., “Free to Punish,” 502–03; Paul H. Robinson, Robert Kurzban, and Owen D. Jones, “The Origins of Shared Intuitions of Justice,” Vanderbilt Law Review 60 (2007): 1633.


That is strange indeed: Clark et al., “Free to Punish,” 508.


195 And the connection may run: Clark et al., “Free to Punish,” 508.

195 Wanting to punish the judge: Interestingly, not only do people report stronger beliefs in free will after considering immoral behavior than after assessing neutral behavior, but real world data also shows that countries with higher crime and murder rates also have higher beliefs in free will. Clark et al., “Free to Punish,” 501, 508.

195 When it comes to our moral intuitions: Experiments show that judgments of causation, for example, are contingent both on whether the consequences of an action are harmful or helpful (with harmful consequences giving rise to a greater sense of causality) and whether the purpose of the action giving rise to a harm was good or bad. Clark et al., “Free to Punish,” 502. In one study, people viewed a driver as possessing more causal control in an accident when he crashed racing home to hide drugs from his parents than when he was racing home to hide an anniversary present he had bought them. Mark D. Alicke, “Culpable Causation,” *Journal of Personality and Social Psychology* 63, no. 3 (1992): 368–78.

195 That is remarkable, given that: Alexander Volokh, “n Guilty Men,” *University of Pennsylvania Law Review* 146 (1997): 174. Remember, even back in the early Middle Ages, before mental state and capacity requirements were introduced, there still needed to be proof that the defendant in question caused a harm. Dressler, *Understanding Criminal Law*, 85, 117.

The famous English jurist: Volokh, “*n Guilty Men*,” 174.

Even the Bible says that: Volokh, “*n Guilty Men*,” 173, 177.

In one set of experiments: Benforado and Goodwin, Unpublished Experiment.

In the first scenario: Benforado and Goodwin, Unpublished Experiment.

In the third scenario: Benforado and Goodwin, Unpublished Experiment.

Not surprisingly, participants showed: Benforado and Goodwin, Unpublished Experiment.

But they didn’t see: Benforado and Goodwin, Unpublished Experiment.

The shark from the same species: Benforado and Goodwin, Unpublished Experiment.


What they found was that nearly: Cushman, Durwin, and Lively, “Revenge without Responsibility?” 1108

When it was their team: Cushman, Durwin, and Lively, “Revenge without Responsibility?” 1109.

The implications of the research: Benforado and Goodwin, Unpublished Experiment.


Numerous studies have shown: Eberhardt et al., “Looking Deathworthy,” 383.


If we keep everything else: Eberhardt et al., “Looking Deathworthy,” 383.


197 **Juvenile probation officers, for instance:** Graham and Lowery, “Priming Unconscious Racial Stereotypes,” 489–90, 496.

197 **It appears to be largely:** That said, both implicit and explicit racism may have an effect. Rattan et al., “Race and the Fragility,” 2.

198 **Scientists think that the ultimate:** Graham and Lowery, “Priming Unconscious Racial Stereotypes,” 485, 487.

198 **These stereotypes provide a ready:** Graham and Lowery, “Priming Unconscious Racial Stereotypes,” 485.

198 **And when the focus is on:** Graham and Lowery, “Priming Unconscious Racial Stereotypes,” 487, 499.

198 **In one recent experiment, researchers had:** Rattan et al., “Race and the Fragility,” 2.

198 **Participants were then asked:** Rattan et al., “Race and the Fragility,” 2.

198 **The texts given to the groups:** Rattan et al., “Race and the Fragility,” 2.

198 **Participants who had read about:** Rattan et al., “Race and the Fragility,” 1–2. This is particularly noteworthy because, as we touched on earlier, the evidence from neuroscience and psychology on the reduced cognitive development, moral reasoning abilities, and neurological capacities of young people as compared to adults had a large impact on the Supreme Court’s decision to strike down sentences of life without parole in the context of an extremely similar case. Rattan et al., “Race and the Fragility of the Legal Distinction between Juveniles and Adults,” 4. The broader progress entailed in this 2010 case may be seriously undermined by the
influence of race and may, in part, explain the rise in transferring juveniles to adult courts. Rattan et al., “Race and the Fragility,” 1.


198 In a real trial, race may: Rattan et al., “Race and the Fragility,” 4.


198 And there is some evidence to suggest: Stevenson and Bottoms, “Race Shapes Perceptions,” 1663.


199 The same dynamic is at work: Eberhardt et al., “Looking Deathworthy,” 383.

199 One study found that felons with: Eberhardt et al., “Looking Deathworthy,” 383.


199 **In essence, when you have a pretty face:** Robinson, Jackowitz, and Bartels, “Extralegal Punishment Factors,” 770.


We’ve been focusing on Pete’s: Jamie Arndt et al., “Terror Management in the Courtroom,” *Psychology, Public Policy, and Law* 11, no. 3 (2005): 432.


200  **It is terrifying to think:** Arndt et al., “Terror Management in the Courtroom,” 408.

200  **Luckily, we have developed:** Arndt et al., “Terror Management in the Courtroom,” 409.

201  **Religions, for example, commonly:** Arndt et al., “Terror Management in the Courtroom,” 409.

201  **Our legal institutions offer:** Arndt et al., “Terror Management in the Courtroom,” 409.

201  **The more terror we feel:** Arndt et al., “Terror Management in the Courtroom,” 432–33.

201  **A number of experiments have:** Arndt et al., “Terror Management in the Courtroom,” 432–33.

Before considering the facts: Rosenblatt et al., “Evidence for Terror Management Theory I,” 682; Cave, “Imagining the Downside of Immortality.”

The judges who had been subconsciously: Rosenblatt et al., “Evidence for Terror Management Theory I,” 682.


Had this been a real case: Kirchmeier, “Our Existential Death Penalty,” 68–70.


And some people simply do not: Kirchmeier, “Our Existential Death Penalty,” 68–70.


Likewise, a witness may describe: Kirchmeier, “Our Existential Death Penalty,” 72–73.

Not only are thoughts of death: Kirchmeier, “Our Existential Death Penalty,” 80–81.

In addition, only those who: More research is needed to confirm that this is, indeed, the case. Kirchmeier, “Our Existential Death Penalty,” 75–78.


It is far more unsettling to think: Ellard et al., “Just World Processes in Demonizing,” 351.

In trying to understand: Webster and Saucier, “Angels and Demons,” 1455–70, 1455–56; Burris and Rempel, “Just Look at Him,” 70.

In one study, the potency: Campbell and Vollhardt, “Fighting the Good Fight,” 18, 20–21.

Though much of the public: At the basic level, research has shown that simply labeling an offender as evil correlates with people hating the offender more and supporting more harsh punishment for him. Campbell and Vollhardt, “Fighting the Good Fight,” 17.

Even seemingly insignificant things: People who are highly skeptical of the existence of evil appear less likely to be influenced by symbolic “evil” cues. Burris and Rempel, “Just Look at Him,” 78; Ellard et al., “Just World Processes in Demonizing,” 355. That said, the list of relevant “evilness” cues is ever-growing. In one study involving a violent murder, the more the offender experienced pleasure from the killing, the more people supported giving him a capital sentence, which was mediated by perceptions of the evilness of the offender. Dena M. Gromet, Geoff P. Goodwin, and John M. Darley, “Taking Pleasure in Doing Harm: The Influence of Hedonic States on Judgments of Immorality and Evil” (unpublished manuscript). In another experiment, if a criminal broke into a house “just for the thrill of it” and ended up shooting the owner, people were inclined to view him as more evil and hand out a longer sentence than if he broke in for money and fired the same shots. Ellard et al., “Just World Processes in
Demonizing,” 356. It also mattered whether he later expressed a desire to apologize: lack of remorse may itself activate the evilness schema, which may partially help explain why those who express regret fair better at sentencing. Ellard et al., “Just World Processes in Demonizing,” 356.

203 Damien Echols, the accused: Burris and Rempel, “Just Look at Him,” 78.

204 People with an ardent belief: In fact, they may have an outsized role in certain circumstances. For instance, those who end up on juries in which the defendant committed a capital crime are likely to be those with more intense beliefs in pure evil (given that such fervor is correlated with support for the death penalty, which is, again, a prerequisite for sitting on a jury in which a capital sentence is possible). Burris and Rempel, “Just Look at Him,” 78; Kirchmeier, “Our Existential Death Penalty,” 75–78.

204 It matters when a governor: Campbell and Vollhardt, “Fighting the Good Fight,” 16.


204 Such individuals are at a: Ellard et al., “Just World Processes in Demonizing,” 350–51.

204 And this creates a tragic paradox: Ellard et al., “Just World Processes in Demonizing,” 351.


10. Throwing Away the Key ~ The Prisoner


Each year it’s meant to be: Eastern State Penitentiary, “FAQ, Terror Behind the Walls.”

In 2013, the prison began: Eastern State Penitentiary, “FAQ, Terror Behind the Walls.”


The “special Terror Behind”: Eastern State Penitentiary, “VIP Experiences, Terror Behind the Walls.”


Before setting off for: Kahan, *Eastern State Penitentiary*, 12. Quaker practices were officially against the law as a result of the Uniformity Act of 1662 and Conventicle Act of 1664.


207 As a result, the early: Johnston, *Crucible of Good Intentions*, 21.

207 While the lash had been: As a 1787 grand jury concluded, “the gaol had become a desirable place for the more wicked and polluted of both sexes.” Johnston, *Crucible of Good Intentions*, 26. Men and women were thrown in together with no sense of decorum, escapes were common, and drunkenness was rampant. Johnston, *Crucible of Good Intentions*, 26.


207 The key innovation was: While there were certainly experiments elsewhere with solitary confinement over the centuries, it was in Philadelphia that the practice received its purist embodiment. Johnston, *Crucible of Good Intentions*, 24.

207 The first inmate at the prison: Eastern State Penitentiary, “Timeline”; Johnston, Crucible of Good Intentions, 49.

207 He had light black skin: Eastern State Penitentiary, “Timeline.”

207 He was a farmer by trade: Eastern State Penitentiary, “Timeline.”

207 And he had been convicted: Eastern State Penitentiary, “Timeline.”

207 He was received by the first: Eastern State Penitentiary, “Timeline”; Johnston, Crucible of Good Intentions, 49.

208 Whenever Charles was led from: “Eastern State Penitentiary,” USHistory.org; Johnston, Crucible of Good Intentions, 49.

208 And when it was removed: “Timeline”; Johnston, Crucible of Good Intentions, 49.

208 He occasionally interacted with: Johnston, Crucible of Good Intentions, 49.

208 Charles was no longer Charles: Johnston, Crucible of Good Intentions, 49.

208 To contemporary reformers: Kahan, Eastern State Penitentiary, 28.


208 At a time when the president: “History.”

209 It is interesting to think: Johnston, Crucible of Good Intentions, 21.


209 It’s more likely than not: Gopnik, “The Caging of America.”

209 Although there are many factors: To understand the ultimate origins of our high incarceration rates, one must grapple with an array of forces: “zero tolerance” policing, the war on drugs, the legacy of slavery, gun culture, a political system that encourages judges and legislatures to appear “tough on crime,” media fear-mongering, a failure to erect a more robust social safety net, and the emergence of for-profit companies that contract to provide incarceration services and benefit from increased prison rolls and longer sentences, among others. Gopnik, “The Caging of America”; Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”


209 While no more than 10 percent: Subramanian and Shames, *Sentencing and Prison Practices*, 9–10. In Germany, for example, burglary, aggravated assault, and extortion are minor crimes—not major ones, as in the United States—and offenders are regularly diverted away from formal prosecution and end up with fines or community service. Subramanian and Shames, *Sentencing and Prison Practices*, 6, 8–9.
We also hand out: Subramanian and Shames, *Sentencing and Prison Practices*, 10; Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”

Burglarize a house in Vancouver: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”

But drive an hour south: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”


In California, the law said: *Lockyer*, 538 U.S. 63; Chemerinsky, “Cruel and Unusual,” 1; Kohn, “Three Strikes: Penal Overkill in California?”
When the U.S. Supreme Court reviewed: *Lockyer*, 538 U.S. 63; Chemerinsky, “Cruel and Unusual,” 1.


211 **Other efforts at the state:** “Smarter Sentencing”; Goode, “U.S. Prison Populations Decline.”


211 **These are all important steps:** Goode, “U.S. Prison Populations Decline.”

211 **There are still five times:** Goode, “U.S. Prison Populations Decline.”

211 **Three-strikes laws are still:** Cal. Penal Code § 1170.12 (West 2014).


212 **To decrease crime, the thinking:** Robinson and Darley, “The Role of Deterrence,” 950–51.

212 **Wake up in the morning:** Conditions of solitary confinement vary across the country, but under extreme conditions such as those found in “supermax” prisons, individuals have no control over the electric light in their cells. John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons* (New York: Vera Institute of Justice, 2006), 57, http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf;


212 There are no windows: “The Abuse of Solitary Confinement”; Gawande, “Hellhole.”

213 There is a toilet: Gawande, “Hellhole.”

213 This is where you sit: Gawande, “Hellhole.”


213 In Maine, no radios or televisions: Tapley, “The Worst of the Worst.”
At California’s Pelican Bay: Devereaux, “Prisoners Challenge Legality of Solitary Confinement Lasting More Than a Decade.”

It is a bit softer in: Gawande, “Hellhole.”

Human contact is virtually: Keim, “Solitary Confinement.”

The doors are often solid: Resnick and Curtis-Resnick, “Abolish the Death Penalty and the Supermax, Too.”

For many, the opening of: Ridgeway, Casella, and Rodriguez, “Senators Finally Ponder the Question: Is Solitary Confinement Wrong?”

If you want to feel: Devereaux, “Prisoners Challenge Legality of Solitary Confinement Lasting More Than a Decade”; Tapley, “The Worst of the Worst.”


Your clothes may be cut off: “Supermax Prison Cell Extraction.”

You may then be strapped: Tapley, “The Worst of the Worst.”

More than 185 years after: Johnston, Crucible of Good Intentions, 102.

Philadelphia’s penitentiary had a: Johnston, Crucible of Good Intentions, 61. The “tranquilizing chair” used at the penitentiary in the 1830s shows a striking resemblance to the restraint chair they use in Maine today. Johnston, Crucible of Good Intentions, 61. The instrument of straps, chains, and locks was invented by Dr. Benjamin Rush of the Society for Alleviating the Miseries of Public Prisons, who saw himself as a true humanitarian reformer and friend of the less fortunate—an apt reminder that those with the most benevolent intentions can engender the cruelest of punishment regimes. Johnston, Crucible of Good Intentions, 61.

Our brains are wired for connection: Matthew D. Lieberman, *Social: Why Our Brains Are Wired to Connect* (New York: Random House, 2013), 22, 33–35. Although friendship is rare in the animal kingdom, it is rarely absent among humans: we are a naturally and strongly social species. Lieberman, *Social*, 24; Holt-Lunstad, Smith, and Layton, “Social Relationships and Mortality Risk.” And one theory is that the main reason the modern human neocortex is so large is that it facilitated living in larger, more social groups. Lieberman, *Social*, 32.


Infants die without food: Holt-Lunstad, Smith, and Layton, “Social Relationships and Mortality Risk,” 14–15. Prior to the fall of communism, in countries such as Romania, foster care was rarely used and infants and children were often placed in large institutions where they experienced profound neglect. UNICEF, *Children at Risk in Central and Eastern Europe: Perils and Promises* (Florence, Italy: United Nationals Children’s Fund, International Child Development Centre, 1997), 12–14. In many cases, existing family ties were completely severed.
but not replaced by other significant human contact. UNICEF, *Children at Risk in Central and Eastern Europe*, 12–14.

214 **More recently, researchers have found:** Holt-Lunstad, Smith, and Layton, “Social Relationships and Mortality Risk,” 14.


214 **When the U.S. military studied:** Gawande, “Hellhole.”

214 **As a POW, John McCain spent:** Gawande, “Hellhole.”

214 **When he returned, he did not:** Gawande, “Hellhole.”


214 **A healthy person who has:** Keim, “Solitary Confinement”; Gawande, “Hellhole.”

214 **And many inmates in solitary:** Tapley, “The Worst of the Worst”; Gawande, “Hellhole.”

214 **A number of these psychological problems:** Tapley, “The Worst of the Worst.”

214 Nineteenth-century Philadelphians were no doubt: Johnston, *Crucible of Good Intentions*, 61.


215 Few of us stop to consider: Our incarceration system may cause more anguish than any the world has ever known, but it’s hard to recognize that reality. Indeed, I am always interested to witness how vigorously some of my friends and colleagues will argue against the brutality of the death penalty and their ardor in fighting for its elimination while showing little concern with the current alternative of long prison sentences and solitary confinement.

215 Yet there have been prominent: Indeed, solitary confinement has been used for centuries as torture—that is, for the precise purpose of causing extreme suffering. Keim, “Solitary Confinement.”

215 On March 8, 1842, during his tour: Johnston, *Crucible of Good Intentions*, 57.

215 He subsequently “passed the whole day”: Johnston, *Crucible of Good Intentions*, 58.

The prison staff, in fact: Johnston, *Crucible of Good Intentions*, 58.


Dickens was correct: Dickens, *American Notes*, 239; Gopnik, “The Caging of America.” We are also skeptical of harms that do not produce physical evidence because there is always the possibility that they might be feigned. Supporters of solitary confinement attacked Dickens’s account of Eastern State on just such grounds, petitioning the British consul-general to re-interview several of the inmates with whom Dickens spoke for signs of deception. Johnston, *Crucible of Good Intentions*, 58. The consul-general did not disappoint, noting, in particular, a German prisoner who Dickens described as a “dejected, heart-broken, wretched creature” and “a picture of forlorn affliction and distress of mind,” who turned out to be “an ingenious and clever fellow but a great hypocrite, and evidently saw Mr. D’s weak side.” Johnston, *Crucible of Good Intentions*, 58.

It is “a secret punishment”: Gopnik, “The Caging of America.”
216 When researchers studied prisoners: Gawande, “Hellhole.”


216 It is much more difficult to administer: In his experimental variations, Stanley Milgram found that when the person administering the shock could not hear or see the victim who was in another room, 65 percent of participants provided the maximum shock. However, when the victim was in the same room, that number dropped to 40 percent. And in the condition where the participant had to hold the victim’s hand on the shock plate, full compliance dropped to 30 percent. The average maximum voltage that participants were willing to inflict upon the victim followed the same trend. Stanley Milgram, Obedience to Authority: An Experimental View (New York: Harper and Row, 1974), 32–36.

216 Similarly, we are more hesitant when: Milgram, Obedience to Authority, 121–22.

217 We know that it’s easier to: In Milgram’s studies, the shock generator had thirty lever switches with voltage designations ranging from 15 to 450 volts. Milgram, Obedience to Authority, 20.


217 The result is that few of us: No doubt, it also matters that those suffering are members of a despised outgroup—criminals. We will rarely feel motivated to protect those who we are already attuned to devalue.


There is something unquestionably perverse: There are some promising signs that views may be changing, but only time will tell. In 2012, the Department of Justice issued a final rule setting national standards to address prison rape, pursuant to the Prison Rape Elimination Act of 2003, and explicitly noted that it was wrong to dismiss rape “as an inevitable—or even deserved—consequence of criminality.” National Standards to Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. pt. 115 (2012). According to the DOJ, sexual abuse is not “punishment
for a crime. Rather, it is a crime, and it is no more tolerable when its victims have committed crimes of their own.” 28 C.F.R. pt. 115. The success of these national standards is likely to turn on changing how guards, prison administrators, members of the public, and even prisoners view rape. Unfortunately, there has already been some heavy resistance to the new law: in March 2014, Governor Rick Perry of Texas sent a letter to the DOJ stating his plans to ignore the law—which mandates monitoring and adherence to a zero-tolerance policy under threat of decreased federal prison funding—because it was unneeded. Editorial, “Grandstanding on Prisons in Texas,” New York Times, April 4, 2014, http://www.nytimes.com/2014/04/05/opinion/grandstanding-on-prisons-in-texas.html.

219 Nor is it only the “worst”: There is little or no acknowledgment, let alone responsive action, to the fact that some people are much more psychologically resilient than others. For one prisoner, solitary might be excruciating, while for another it might not seem significantly different from imprisonment in the general population. The result of failing to assess individual differences in experience is that neither inmate receives what he truly deserves in proportion to the gravity of his crime.

219 In some prisons, it is enough to: Tapley, “The Worst of the Worst.”

219 It is particularly unsettling to: Tapley, “The Worst of the Worst.”

women are particularly overrepresented: more than 70 percent of female prisoners have mental-health problems. James and Glaze, “Mental Health Problems of Prison and Jail Inmates,” 4.


Psychologists have documented that: Tapley, “The Worst of the Worst.”


And only about a third: James and Glaze, “Mental Health Problems of Prison and Jail Inmates,” 9.

When it comes to being model prisoners: Tapley, “The Worst of the Worst.”

State inmates with mental illness: James and Glaze, “Mental Health Problems of Prison and Jail Inmates,” 1, 10. In one survey, while 14 percent of those without mental illness had been charged with an assault on either prison guards or other inmates, 24 percent of those with mental illness had faced such charges. James and Glaze, “Mental Health Problems of Prison and Jail Inmates,” 10.

When that happens, they can be: Tapley, “The Worst of the Worst.” Guards often mistake those with mental problems as deliberately noncompliant. Katherine Harmon, “Brain Injury Rate


221 On a very general level: Robinson and Darley, “The Role of Deterrence,” 951.

221 The rise of mass imprisonment: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”


221 A savvy visitor to the Big Apple: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”

221 It seems clear that the get-tough-on-crime: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”

221 First, there are many other: Miguel Llanos, “Crime in Decline”; Gopnik, “The Caging of America.” One particularly important innovation in reducing crime seems to be the practice of increasing the numbers of cops in particular crime hot spots in order to prevent incidents before they happen. Gopnik, “The Caging of America.”


But that is not the case either: Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.” With respect to the United States, it is worth noting that all the states that cut their imprisonment rates in recent years also experienced a decline in their levels of crime just like states that increased their imprisonment rates. PEW Center on the States, State of Recidivism, 5.


Second, these statistics often omit: Glazek, “Raise the Crime Rate.”

Indeed, some scholars and journalists: Glazek, “Raise the Crime Rate.”

Prisons are rife with drug dealing: Glazek, “Raise the Crime Rate.”


A number of empirical studies since then: National Research Council, Deterrence and the Death Penalty, 1.

But when the National Research Council: National Research Council, Deterrence and the Death Penalty, 3.
For proof of deterrence, you really need: As the Council explained, “there is no way to determine what would have occurred if a given state had a different sanction regime”: “the outcomes of counterfactual sanction policies are unobservable.” National Research Council, *Deterrence and the Death Penalty*, 7.

Instead of trying to find the answer by: Chemerinsky, “Cruel and Unusual,” 1–2.

The idea was that a repeat offender: The legislation was also justified on incapacitation grounds. Ewing v. California, 538 U.S. 11, 24–28 (2003).

Understanding the law is the starting point: Robinson and Darley, “The Role of Deterrence,” 989.

Here, Leandro needed to know: Chemerinsky, “Cruel and Unusual,” 2.

And although two counts of such: Chemerinsky, “Cruel and Unusual,” 2–3.

In essence, Leandro needed to know: Chemerinsky, “Cruel and Unusual,” 2–3.

To conduct a true cost-benefit analysis: Robinson and Darley, “The Role of Deterrence,” 977.


So, a legislature may aim to: Weaver, Garcia, and Schwarz, “The Presenter’s Paradox,” 456. Interestingly, when individuals take on the role of a legislator selecting penalties in order to deter crime, they adopt the logical position that adding consequences is likely to decrease the likelihood of people to break the law. Weaver, Garcia, and Schwarz, “The Presenter’s Paradox,” 450–51. To best decrease littering, for instance, they select a $750 fine and two hours of

225  It doesn’t help that none of us: Robinson and Darley, “The Role of Deterrence,” 978.
225  And even if we could foresee: Robinson and Darley, “The Role of Deterrence,” 954–55.
225  Indeed, the experience of imprisonment: Robinson and Darley, “The Role of Deterrence,” 954–55.
225  This means that ten years: Robinson and Darley, “The Role of Deterrence,” 954–55.

That’s a real problem, given that: “Five Things About Deterrence.”


Some cases take three: Glaberson, “Evidence Fades as a Suspect Sits in Jail.”

Even when punishment is certain: Robinson and Darley, “The Role of Deterrence,” 994.

If we really wanted to deter crime: Nagin, “Deterrence in the 21st Century,” 3.

We are almost always better served: Nagin, “Deterrence in the 21st Century,” 3; “Five Things About Deterrence.”

A punishment needs to be distasteful: “Five Things About Deterrence.”

That’s true both for deterring: Nagin, “Deterrence in the 21st Century,” 3; “Five Things About Deterrence.”

The few judicial systems that have: Hawken and Kleiman, Managing Drug Involved Probationers, 9.

For many years, probation violations were: Hawken and Kleiman, Managing Drug Involved Probationers, 6.

But in 2004 the state launched: Hawken and Kleiman, Managing Drug Involved Probationers, 6.


Every morning they have to call: “Program Profile: Hawaii Opportunity Probation with Enforcement (HOPE).”

If they test positive: “Program Profile: Hawaii Opportunity Probation with Enforcement (HOPE).” If substance-abusing probationers fail to appear for a drug test, a bench warrant is
immediately written up for their immediate arrest. “Program Profile: Hawaii Opportunity Probation with Enforcement (HOPE).”

227 The results have been impressive: Hawken and Kleiman, Managing Drug Involved Probationers, 64.

227 Seventeen states have now adopted: “A New Probation Program in Hawaii Beats the Statistics: Transcript.”

227 You'd imagine that taking a bunch: Gawande, “Hellhole.”


227 The influx of inmates: Gawande, “Hellhole.”

228 Pack people in and give them: Gawande, “Hellhole.”


228 Although the average daily adolescent: United States Attorney, SDNY, CRIPA Investigation, 6, 9.

228 Harsh abuse by staff: United States Attorney, SDNY, CRIPA Investigation, 8.

228 And many of the resulting injuries: United States Attorney, SDNY, CRIPA Investigation, 3.

228 Conditions were so bad that: United States Attorney, SDNY, CRIPA Investigation, 8.


Inmates in long-term isolation: Gawande, “Hellhole.”

Many inmates acquire drug habits: Many previously unaffiliated individuals join gangs in order to gain protection from violence within the prison.

And the lone criminal may gain: There is evidence that inmates may learn how to be more effective criminals in prison. “Five Things About Deterrence.”

Those kept in solitary usually: Keim, “Solitary Confinement.”

It should come as no surprise: Gibbons and de B. Katzenbach, *Confronting Confinement*, 54; Gawande, “Hellhole”; “The Abuse of Solitary Confinement.” It is worth noting that one study of several hundred supermax inmates showed that solitary confinement did not appear to increase the likelihood of recidivism beyond the effect of spending time in general lockup. Jesenia M. Pizarro, Kristen M. Zgoba, and Sabrina Haugebrook, “Supermax and Recidivism: An Examination of the Recidivism Covariates Among a Sample of Supermax Ex-Inmates,” *Prison Journal* 94 (2014): 193–96. More research is needed, however, to assess whether this dynamic is present across jurisdictions and to understand it. If the findings hold up, one explanation may be that although solitary confinement promotes psychological problems linked to recidivism, it also hinders the ability of offenders to maintain and develop ties to criminal networks while locked up, such that those in the general prison population are socially better positioned to reoffend upon release.
This is one of the reasons that: Gibbons and de B. Katzenbach, *Confronting Confinement*, 54; Gawande, “Hellhole.”

Losing the stimulation of: This is particularly true because we also regularly deprive a person in solitary of any preparation for reintegration.


But the extreme harshness: Darley et al., “Psychological Jurisprudence,” 51–52.


Research has shown that citizens: Darley et al., “Psychological Jurisprudence,” 51–52.


Those who had read about: Nadler, “Flouting the Law,” 1410–16.


The total bill for our: Gibbons and de B. Katzenbach, *Confronting Confinement*, 11.

A year in a New Jersey prison: Brian Resnick, “Chart: One Year at Prison Costs More Than One Year at Princeton,” *Atlantic*, November 1, 2011,


As the Commission on Safety: Gibbons and de B. Katzenbach, Confronting Confinement, 11.

Halden is one of Norway’s: Gentleman, “Inside Halden.”

It houses murderers: Gentleman, “Inside Halden.”
But there are no bars: Gentleman, “Inside Halden.”

You cannot see the huge wall: Gentleman, “Inside Halden.”

It was built to rehabilitate: Gentleman, “Inside Halden.”

The facility has a sleek: Gentleman, “Inside Halden.”

Each prisoner is given a room: Gentleman, “Inside Halden.”

Linked to every ten or twelve rooms: Gentleman, “Inside Halden.”

Prisoners are locked in their cells: Gentleman, “Inside Halden.”

The prison has several workshops: Gentleman, “Inside Halden.”

The inmates often save up: Gentleman, “Inside Halden.”

There are tablecloths: Gentleman, “Inside Halden.”

The prison staff aren’t cast as unyielding: Gentleman, “Inside Halden.”

And effort goes into fostering family ties: Gentleman, “Inside Halden.”

It makes sense, according to Halden’s governor: Gentleman, “Inside Halden.”

Halden will never be repurposed: More than fifty paranormal investigation teams search for ghosts at Eastern State each year and the penitentiary has been the focus of SyFy’s Ghost Hunters, Fox’s World’s Scariest Places, MTV’s FEAR, and TLC’s America’s Ghost Hunters. “FAQ, Terror Behind the Walls.”


And the grim fortress: Subramanian and Shames, Sentencing and Prison Practices, 3.

At the German and Dutch prisons: Subramanian and Shames, *Sentencing and Prison Practices*, 12–13. Inmates are also commonly allowed other privacy rights denied American prisoners, with guards knocking before entering a cell and walled toilets. In addition, the physical space of the prison in Germany and the Netherlands is not meant to be unpleasant like in the United States: there are plenty of windows and light. Subramanian and Shames, *Sentencing and Prison Practices*, 12.


And prisoners were provided with: Subramanian and Shames, *Sentencing and Prison Practices*, 13.


To encourage proper conduct: Subramanian and Shames, *Sentencing and Prison Practices*, 12. In keeping with the research on optimal deterrence, when inmates violate a prison rule, discipline is quickly meted out and it is tailored specifically to the violation. Subramanian and Shames, *Sentencing and Prison Practices*, 13, 18.

And when offenders were released: Subramanian and Shames, *Sentencing and Prison Practices*, 13.


Different countries use different ways to measure reoffending, which makes direct comparisons between countries difficult. Subramanian and Shames, *Sentencing and Prison Practices*, 6. That said, it is clear that the rate is far lower than in the United States. Adams, “Norway Builds the World’s Most Humane Prison.” In addition, it is worth noting that because Halden only opened in 2010, there is not sufficient data yet to draw any conclusions about reoffending at the specific prison. Jan R. Strømnes, deputy governor of Halden prison, e-mail message to author, February 11, 2014.


And it’s true that the success: Gopnik, “The Caging of America”; Liptak, “Inmate Count in U.S. Dwarfs Other Nations’.”

Britain, which managed to turn away: Gawande, “Hellhole.”
234 But British leaders found the courage: Gawande, “Hellhole.”


234 For a country that trumpets its: Some scholars have suggested expanding the text of the Eighth Amendment to ban prolonged solitary confinement, as well as the death penalty. Resnick and Curtis-Resnick, “Abolish the Death Penalty and the Supermax, Too.”

11. What We Must Overcome ~ The Challenge


239 “Would you be more likely”: Juror Information Questionnaire.

239 “Would you have any problem”: Juror Information Questionnaire.

239 “Is there any other reason”: Juror Information Questionnaire.
240 **And this puts us in a worse**: To see why that is the case, consider a medical system that instead of testing people, simply asked them “Do you have HIV?” and then advised those who said “yes” to cure themselves by choosing to “turn off” the virus. Though intended to reduce the transmission of the disease, the system would have the exact opposite effect: initial infection with HIV cannot be identified through introspection nor cured through positive thinking, and this approach would lead asymptomatic people infected with the virus to conclude that they were healthy and those who were sick to believe that they were cured, increasing the likelihood that they would engage in behaviors likely to spread the affliction.


241 **“Do not allow sympathy”**: Model Criminal Jury Instructions § 1.02.

241 **Likewise, whenever the judge sustains an objection**: Model Criminal Jury Instructions § 1.08.

241 **And if the judge orders evidence**: Model Criminal Jury Instructions § 1.08.

242 **Out of thin air, the Third Circuit**: During the second-degree murder trial of George Zimmerman, the prosecution’s claim was that Zimmerman had racially profiled seventeen-year-old Trayvon Martin before killing him and that he was the aggressor, stalking Martin as he walked back to his father’s fiancée’s townhouse. Cara Buckley, “State’s Witnesses in Zimmerman Trial Put the Prosecution on the Defensive,” *New York Times*, July 2, 2013, http://www.nytimes.com/2013/07/03/us/prosecutors-in-zimmerman-trial-ask-jury-to-disregard-comments.html?_r=0; Yamiche Alcindor, “Officer Testimony No Slam Dunk for Zimmerman Prosecutors,” *USA Today*, July 2, 2013,
http://www.usatoday.com/story/news/nation/2013/07/02/zimmerman-trayvon-martin-murder-trial/2482325/. However, in a critical moment at trial, Officer Chris Serino of the Sanford Police stated that, in interviewing the defendant following the incident, Zimmerman appeared to be truthful in recounting that he had shot seventeen-year-old Trayvon Martin in self-defense. Buckley, “State’s Witnesses Put Prosecution on Defense.” Having your own witness confirm the central account of the other side can lose a case, but the prosecution did not object immediately. Buckley, “State’s Witnesses Put Prosecution on Defense.” By the next day, though, having considered its options, the prosecution decided to argue that Serino’s testimony on Zimmerman’s credibility ought to be excluded. Alcindor, “Officer Testimony No Slam Dunk.” The judge agreed and the jurors were simply told to ignore what they had heard and considered in the intervening hours. Alcindor, “Officer Testimony No Slam Dunk.” While we cannot know exactly why the prosecution went on to lose the case, as discussed earlier, experimental evidence casts serious doubt on the effectiveness of the judge’s admonition. Matthew Hutson, “Unnatural Selection,” *Psychology Today* 40 (2007): 95. Our judicial procedures have conjured up a magical delete button in jurors’ brains that simply does not exist. Hutson, “Unnatural Selection,” 95.

243 **When significant injustice has come:** University of Virginia School of Law, “Promoting Policing at Its Best,” *Virginia Journal* 15 (2012): 39.

243 **In the 1960s, for instance:** University of Virginia School, “Promoting Policing at Its Best,” 39.

243 **Faced with the specter of coerced confessions:** Miranda v. Arizona, 384 U.S. 436, 479 (1966).


If the police begin to interrogate: *Salinas*, 133 S.Ct. at 2180; *Miranda*, 384 U.S. at 479.

Likewise, the Supreme Court has stated: *Salinas*, 133 S.Ct. at 2180.

If the police ask you to come: *Salinas*, 133 S.Ct. at 2180.

Far from ensuring our goal: Is it true that the Fourth, Fifth, and Sixth Amendments are the major influences governing police officer and prosecutor interactions with members of the public—and that they have shielded the innocent, while exposing the guilty to the sword of the law? Is it true that the Eighth Amendment is the primary factor impacting the treatment of prisoners? I would suggest that the answer to these questions is a strong no. Procedural protections are important, but the best evidence from social science is that they are not the major movers of our legal actors and that they are insufficient, in and of themselves, to secure the justice that we seek. University of Virginia School, “Promoting Policing at Its Best,” 41.


Facing significant criticism, the Supreme Court finally: Equal Justice Initiative, “Illegal Racial Discrimination in Jury Selection: A Continuing Legacy” (2010): 12,
Sommers and Norton, “Race-Based Judgments,” 263–64. When Robert Swain, a black man, unsuccessfully challenged his death penalty conviction based on the fact that there were no black people on his jury (all six African Americans on the panel were struck by the prosecutor), the Supreme Court dissent noted that, despite African Americans making up 26 percent of the jury-eligible population, no African American “within the memory of persons [then] living [had] ever served on any petit jury in any civil or criminal case tried in Talladega Country, Alabama.” Swain v. Alabama, 380 U.S. 202, 231–32 (1965) (Goldberg, J., dissenting).

244–45 Unfortunately, it has not been much: Lieberman, “The Utility of Scientific Jury Selection,” 48.


245 Experimental research involving practicing attorneys: Sommers and Norton, “Race-Based Judgments,” 261.

245 As a result, in many areas: Lieberman, “The Utility of Scientific Jury Selection,” 48; Sommers and Norton, “Race-Based Judgments,” 261-64.


Despite all of the effort: University of Virginia School, “Promoting Policing at Its Best,” 41–42.


We would address the fact that roughly: Rogers, “Getting It Wrong About Miranda Rights,” 729.

And we would care that the vast majority: Simon, In Doubt, 140; Rogers, “Getting It Wrong About Miranda Rights,” 730–31.

Most critically, we would pay attention: Simon, In Doubt, 139.


Officers are encouraged to bring up: Shipler, “Why Do Innocent People Confess?”

When the Miranda doctrine was first introduced: Simon, In Doubt, 138.


If we heeded the evidence: Rogers, “Getting It Wrong About Miranda Rights,” 729.

And it is revealing that most: Rogers, “Getting It Wrong About Miranda Rights,” 729.

When a single journal subscription: Owens, “Academic Publishing Industry,” 1. To make it through, you have to be a member of a university or big business—and even universities are now struggling with the financial burden. This is particularly galling because, each year, billions in taxpayer revenue goes to funding scientific research that ends up being published in journals that deny access to the people who made the research possible in the first place. Owens, “Academic Publishing Industry,” 4.


249 **In major litigation, trial consultants:** Lieberman, “The Utility of Scientific Jury Selection,” 48.

249 **Interestingly, these consultants are not:** Joel D. Lieberman and Bruce D. Sales, *Scientific Jury Selection* (Washington, DC: American Psychological Association, 2007), 9.

250 **Rather, they are social scientists:** Lieberman and Sales, *Scientific Jury Selection*, 9.

250 **As one litigation consultant explained:** Matthew Hutson, “Unnatural Selection,” 95.


250 **A group of scientists led by:** Kressel and Kressel, *Stack and Sway*, 62–63.

250 **In addition, the team collected:** The scientists identified other factors, as well, that correlated with a pro-prosecution disposition. Kressel and Kressel, *Stack and Sway*, 62–63;

250 **Although the trial dragged on:** Kressel and Kressel, *Stack and Sway*, 62–63.

250 **Some critics now question:** Kressel and Kressel, *Stack and Sway*, 82–83.

251 **It is still standard practice:** Lieberman, “The Utility of Scientific Jury Selection,” 49.


251 **Trial consultants may put together:** Lieberman and Sales, *Scientific Jury Selection*, 11, 39; Hutson, “Unnatural Selection,” 93.

251 **Historically, the big concern has been:** There has always been a danger of bogus expertise and advice from those offering to reveal the secret tricks for winning trials. Amy J. Posey and Lawrence S. Wrightsman, *Trial Consulting* (New York: Oxford University Press, 2005): 22. Although the notion, back in the 1950s, that a New York prosecutor should go for Yankee fans
and strike Brooklyn Dodger fans is a close second, my favorite bit of historical flimflam is that it is best to get rid of all jurors who work in professions that start with the letter p, including “pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phonies, parachutists, pipe-smokers, or part-time anything.” Lieberman and Sales, *Scientific Jury Selection*, 58 (quoting William Jennings Bryan, *The Chosen Ones: The Psychology of Jury Selection* [New York: Vantage Press, 1971], 28). Such advice seems clearly absurd, but the desperation of those facing criminal punishment can make them easy marks, even today.

A related issue is that efforts to predict jury behavior, in general, based on personality traits or demographic factors such as race, gender, age, and income have produced decidedly mixed results. Lieberman and Sales, *Scientific Jury Selection*, 79–80. Certain personal characteristics and preferences have shown promise, including an individual’s preference for clear rules, order, and authoritarian leadership, which appears to be linked to having a pro-prosecution bent (that is, being more inclined to find a defendant guilty and support a harsher sentence). Lieberman and Sales, *Scientific Jury Selection*, 80–81. Yet, for many factors, there appears to be a lot of within-group variation and the correlations are often highly dependent on the particular facts of a case. Lieberman, “The Utility of Scientific Jury Selection,” 49. For instance, consultants are aware that the influence of juror race appears to turn on whether the juror and the defendant are the same race: we favor our fellow ingroup members, in part, because we are motivated to see those who are “like us” in positive lights. Lieberman, “The Utility of Scientific Jury Selection,” 49. But if the defendant is clearly guilty of a quite significant harm, and the other jurors happen to be of a different race, the effect may flip, with harsher resulting judgments of the defendant (scientists refer to this, rather aptly, as “the black sheep effect”).
Lieberman, “The Utility of Scientific Jury Selection,” 49; Crocker and Kovera, “Systematic Jury Selection,” 20. As a result, it can be tricky to figure out how known predictive factors will interact in a particular case.

That said, as additional research is conducted, and trial consultants continue to incorporate insights from psychology into their practice, it is likely that a lot of the current haziness may clear and trial consultants will become more adept at predicting general jury behavior.


251 **The result is that trial services:** Crocker and Kovera, “Systematic Jury Selection,” 27.


But those with fewer resources: Hartje, “A Jury of Your Peers?” 503. Judges have rarely sought to even the playing field. In the voir dire of Rajat Gupta’s insider trading trial, for example, although the prosecution objected to the use by the defense of jury consultants and lawyers outside of the courtroom who analyzed potential jurors as their names were called out, Judge Jed S. Rakoff allowed it on the grounds that finding out potential juror conflicts earlier in the trial would improve the efficiency of the proceedings. Lattman, “Jury Is Seated in Rajat Gupta Trial.”

Some scholars have made the claim that a poor defendant ought to be provided with a trial consultant if he cannot afford to hire one on his own as a basic due process right. Steven C. Serio, “A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert,” *American University Law Review* 53 (2004): 1186. And at least one court has provided a consultant for an indigent defendant when there was significant damaging pretrial publicity. Corenevsky v. Superior Court, 682 P.2d 360, 369 (Cal. 1984); Serio, “A Process Right Due?” 1186. As much as I agree that justice should not depend on one’s wealth, I am skeptical that recognizing an ineffective assistance of counsel claim brought by defendants whose public defender did not employ a trial consultant is the right approach. Kressel and Kressel, *Stack and Sway*, 75. In such a scenario, many low-income (but not destitute) individuals will still be denied access.


Seven antiwar activists: Oliver, “R.D. Herman.”

The government elected to stage: Lieberman and Sales, Scientific Jury Selection, 4.


It presents a golden: What is for sale is not truth or accuracy—it is the keys to manipulating the system and its central players. The product at The Advocates—the leading jury and trial consulting firm in the United States—is influence: “successfully persuading judges,


254 Lawyers are responsible for the: As the Maryland Court of Appeals explained, “Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses.” State v. Earp, 571 A.2d 1227, 1234–36 (Md. 1990).

254 In fact, a defendant can actually bring: See, e.g., Gilliam v. State, 629 A.2d 685, 694 (Md. 1993).


254–55 As the North Carolina Supreme Court explained: State v. McCormick, 259 S.E.2d 880, 882–83 (N.C. 1979). A large majority of judges and attorneys see nothing wrong with a lawyer or consultant refreshing the memory of a witness during trial preparation. As the
Appellate Court of Illinois articulated, “An attorney is bound by the testimony of his witnesses and there is nothing improper in refreshing their memories before they take the stand. Reviewing their testimony before trial makes for better direct examination, facilitates the trial and lessens the possibility of irrelevant and perhaps prejudicial interpolations.” People v. McGuirk, 245 N.E.2d 917, 922 (Ill.App. 1969).

255 Members of the United States Supreme Court: United States v. MacDonald, 456 U.S. 1, 23 (1982).


255 All of this means that: Interestingly, although a lawyer is responsible for the trial consultants that he or she hires, trial consultants are not regulated—you can call yourself a trial consultant and go to work without any particular qualifications at all. LeGrande and Mierau, “Witness Preparation and the Trial Consulting Industry,” 951, 957. The American Society of Trial Consultants does have a professional code, with standards enforceable by the society, as well as purely advisory guidelines. American Society of Trial Consultants, The Professional Code of the American Society of Trial Consultants (2013), http://www.astcweb.org/userfiles/image/ASTCFullCodeFINAL20131.pdf. But the standards are extremely general and easily met, even when an attorney engages in conduct that is very likely to distort witness memory and testimony: for example, “Trial consultants shall advocate that a witness tell the truth.” American Society of Trial Consultants, The Professional Code, 31. The guidelines also leave an incredible amount of latitude to the trial consultant: they suggest not
scripting “specific answers” or censoring “appropriate and relevant answers based solely on the expected harmful effect on case outcome.” American Society of Trial Consultants, The Professional Code, 32. Moreover, the guidelines approve of methods of witness preparation that have been shown to lead to distortion including “[w]orking to increase witness comfort and confidence in testimony” and “conduct[ing] and review[ing] a sufficient number of mock examinations to encourage the greatest improvement.” American Society of Trial Consultants, The Professional Code, 33.


255 In the experiment, every mock juror: Moore et al., “Wolves in Sheep’s Clothing,” 175.

255 Even when it was made explicit: Moore et al., “Wolves in Sheep’s Clothing,” 176.

256 According to the researchers: Moore et al., “Wolves in Sheep’s Clothing,” 175.


256 In some ways, research like this: As another example, one of the fascinating ways that scientific jury analysis is employed is for identifying potentially helpful jurors who the other side might try to remove for an impermissible reason, like the fact that they are African American.
Paterson and Silverstein, “Jury Research—How to Use It.” However, it can also have a dark side: coming up with alternative reasons for preemptively challenging someone that you want to remove based on race or gender. Indeed, an article in the United States Attorneys’ Bulletin more than a decade ago suggested that U.S. prosecutors already had the capacity to employ questionnaire data and statistical analysis to do exactly that. As the two government attorney authors explained, “for each juror the government was likely to strike, the computer identified and included in the report those areas of the questionnaire that could be used to defend against a potential Batson challenge made by the defense.” Paterson and Silverstein, “Jury Research—How to Use It.”

12. What We Can Do ~ The Future


257 After taking his oath: Chesterton, “G. K. Chesterton Empanels a Jury.”

257 From that intimate vantage point: Chesterton, “G. K. Chesterton Empanels a Jury.”

257 As he explained, the problem: Chesterton, “G. K. Chesterton Empanels a Jury.”

257 For Chesterton, the solution was: Chesterton, “G. K. Chesterton Empanels a Jury.”

There’s now evidence, for example: People show racial bias both in how quickly they make decisions to shoot or hold their fire and in how accurate those decisions turn out to be (that is, whether they fire at those pointing guns and don’t fire at those holding wallets or cell phones). So, when presented with an unarmed black man, experimental participants are more likely to shoot him than if he is white, and they are also more hesitant in responding to armed and dangerous white men. For an overview of the research, see Adam Benforado, “Quick on the Draw: Implicit Bias and the Second Amendment,” *Oregon Law Review* 89: 42–44. For a sample of some of the research studies investigating the role of race in shooter decision-making, see Joshua Correll et al., “Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot,” *Journal of Personality and Social Psychology* 92, no. 6 (2007): 1006; Joshua Correll et al., “Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control,” *Journal of Experimental Social Psychology* 42 (2006): 120; E. Ashby Plant and B. Michelle Peruche, “The Consequences of Race for Police Officers’ Responses to Criminal Suspects,” *Psychological Science* 16 (2005): 180; Anthony G. Greenwald et al., “Targets of Discrimination: Effects of Race on Responses to Weapons Holders,” *Journal of Experimental Social Psychology* 39 (2003): 399; Joshua Correll et al., “The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals,” *Journal of Personality and Social Psychology* 83 (2002): 1314. For discussion of the positive effects of

258 **The training doesn’t remove:** Benforado, “Quick on the Draw,” 48; Correll et al., “Across the Thin Blue Line,” 1020.


258 **Another involves presenting a vivid story:** Lai et al., “Reducing Implicit Racial Preferences,” 7, 15–16; Neyfakh, “The Bias Fighters.”

258 **Now that we know some:** Lai et al., “Reducing Implicit Racial Preferences,” 17–18; Neyfakh, “The Bias Fighters.”


260 **The lacquer on the exterior:** “Martin Guitar Factory Tour.”

260 **With its pressure-sensitive wheel:** “Martin Guitar Factory Tour.”

We need to be similarly flexible: Whether the focus has been on building instruments, diagnosing illnesses, or racing cars, naysayers have inevitably emerged to suggest that human intuitions, decision-making, and execution are just fine (even optimal), and that the latest research that suggests that they are not is just a fad or a conspiracy or worse. When sabermetrics—the statistical study of baseball—was first introduced, there were numerous skeptics who believed that the best way to tell a good player was by watching him swing a bat and throw a ball, and, even today, there are many who remain wary of replacing or supplementing the intuitions of scouts with mathematical calculations of dynamics that you can’t pick up from just watching games. Phil Birnbaum, “A Guide to Sabermetric Research,” Society for American Baseball Research, accessed May 20, 2014, http://sabr.org/sabermetrics. It is unpleasant to imagine that a computer might be better at selecting a team than a human being. And it is equally disquieting to think that a machine might do a better job polishing a fine Martin guitar—objects made with human hands, we imagine, are necessarily superior. Yet, in each case, the backlash has been largely overcome by the results.

Little would be lost: If eliminating the right to remove jurors without cause proved politically untenable, we might consider replacing it with a more vigorous disqualification for cause. In any case, people should not lose their ability to participate in a vital part of our civic process because of the clothes they are wearing, the color of their fingernail polish, or their posture, let alone the color of their skin or their gender.
Although, as we’ve seen, videos are not: Of course, as discussed previously, we must be cautious about how we employ video footage, conscious that it can create its own biases.

The closer we come to a world: One long-term project may be to develop technology that can create rough images or models of people’s faces from DNA left at a crime scene. That possibility has been raised by recent research focused on using interpersonal differences in certain genes believed to be implicated in facial development to produce predictive 3D models of what a person looks like. Sara Reardon, “Mugshots Built from DNA Data,” Nature, March 20, 2014, http://www.nature.com/news/mugshots-built-from-dna-data-1.14899. The challenge is that there is no one gene that determines the shape of your nose and environmental influences can have a big impact on your ultimate visage. But researchers are not daunted and other projects are underway focused on using DNA to predict height and eye color, among other personal features.


262 **Coming across an individual on the street:** Ruderman, “New Tool for Police Officers.”

263 **This apartment, according to the details:** Ruderman, “New Tool for Police Officers.”

263 **Such technology does raise civil liberties concerns:** We will have to engage in a similar balancing calculation when it comes to new tracking technology, like the StarChase system, which allows officers to shoot a small sticky GPS device from the front of their squad car at a fleeing vehicle. Mike Riggs, “The End of Car Chases,” *The Atlantic*, October 31, 2013, http://www.theatlanticcities.com/technology/2013/10/end-car-chases/7425/; StarChase, “How it Works—Overview,” 2013, accessed May 21, 2014, http://www.starchase.com/howitworks.html. Already being used in Florida and Iowa, the hope is that the system will eliminate the need for dangerous police chases that lead to loss of life and significant property damage, as we saw in Victor Harris’s case. Riggs, “The End of Car Chases.” Critics, though, worry that such warrantless tracking presents a significant threat to citizens’ privacy rights. Riggs, “The End of Car Chases.”

263 **All that said, the best way to:** Indeed, the best solution to a problem is not always the obvious one and we should be creative. One of my favorite demonstrations of this principle
relates to an unexpected way that researchers discovered to cut down on illiteracy in the developing world. Amy Yee, “In India, a Small Pill with Positive Side Effects,” New York Times, April 4, 2012, http://opinionator.blogs.nytimes.com/2012/04/04/in-india-a-small-pill-with-positive-side-effects/?hp. It wasn’t hiring better teachers or instituting monetary rewards for learning milestones; it was deworming pills. Yee, “In India, a Small Pill.” It turns out that 600 million children suffer from worms and it is a leading reason why they miss school. Yee, “In India, a Small Pill.” For less than the cost of a coffee per student, however, the parasites can be wiped out, resulting in a big boost in attendance and a significantly increased chance that a child will learn to read and write. Yee, “In India, a Small Pill.”


The federal government had begun requiring: Looking at the state of Missouri, the authors surmised that taking about $55.9 million of cash out of circulation each month produced a 9.8 percent reduction in crime. Wright et al., “Less Cash,” 25.


Responding to the scene of: Similarly, during an interrogation, a detective could depart from protocol established to diminish the likelihood of false confessions and lie to the suspect about evidence found at the scene of the crime, but that officer would do so knowing that he would later have to articulate his reasons and knowing that if such reasons were deemed insufficient, it would seriously undermine the validity of any confession that was obtained.


We need to disrupt automatic behavior: The good news is that this is unlikely to require much of a shift in practice. Police officers already follow numerous rules of conduct. And while there may be some resistance based on the notion that protocols are for “low level” functionaries and that judges and lawyers cannot possibly be expected to follow them, these legal actors already operate based on established scripts, from the rules of procedure in the courtroom to the
way they write their briefs or opinions constrained by statutory law and precedent. The
difference is simply that the new protocols will be based in empirical research, not untested
intuitions. As the science becomes more and more settled, some of the defaults could be changed
into absolute prohibitions.

266 If jurors and judges can be swayed: In the future, a juror might put on a pair of “trial”
glasses that linked up to a virtual environment. In this environment, every person could be
represented by a neutral avatar with the same facial features, blended skin tone, ambiguous
gender, and other physical characteristics. When judges, attorneys, witnesses, and jurors needed
to speak, their voices could be modulated to create uniformity.

267 Introducing virtual trials would also be: Courtroom violence, especially against
courtroom staff, judges, and lawyers, has been on the rise. Caroline Counnoyer, “Courtroom
Violence on the Rise,” Governing the States and Localities, January 19, 2012,

268 All virtual trials could be recorded: In addition, another significant benefit of establishing
carefully controlled uniformity would be that it would allow for much more effective scientific
research in the future. Psychologists and neuroscientists always struggle to simulate a real trial
environment, but with the use of virtual courtrooms, that problem might be largely eliminated.
Every experiment on juror perceptions or witness testimony or attorney behavior could employ
the same virtual environment used in real cases. Indeed, by recording virtual trials, study
participants could be presented with the exact same experience as actual judges and jurors in real
cases.

268 Today, they usually get only: The law varies by state as to whether courts permit video-
recording devices in the courtroom. Digital Media Law Project, “Recording Public Meetings and

269 That way, if a lawyer’s objection: This wouldn’t prevent the judge from being influenced, of course, but it would be a clear step in the right direction.


Videoconferencing is also increasingly common in more routine interactions, from chatting with friends and family using Skype or Apple FaceTime to conducting meetings with Microsoft NetMeeting to teaching online classes. In one recent survey, roughly half of MBA student job applicants and two out of three employers had experience using video conferencing technology. Greg J. Sears et al., “A Comparative Assessment of Videoconferencing and Face-to-Fact Employment Interviews,” *Management Decision* 51 (2013): 1738. It is also worth noting that it is already common at trials for jurors to be presented with animations or virtual-reality reenactments of key events. Brian Bornstein and Edie Greene, “Jury Decision Making: Implications For and From Psychology,” *Current Directions in Psychological Science* 20 (2011): 66.

270 **So, we must ask ourselves:** The legal obstacles—like the Sixth Amendment’s guarantee that the accused “shall enjoy the right . . . to be confronted with the witnesses against him”—are more significant, but they are not insurmountable. U.S. Const. amend. VI. Courts have already carved out exceptions to the right to face-to-face confrontation, including allowing closed circuit video testimony by children in cases involving abuse. Werse, “The Confrontation Clause in Video Conferencing,” 4. And the meaning of the Amendment may very well continue to evolve to permit a virtual courtroom as virtual interactions become more common in all fields.

270 **The traditional justifications:** Werse, “The Confrontation Clause in Video Conferencing,” 12.

270 **If our current legal rules prevent us:** One important consideration in deciding whether increased virtual interactions make sense in the criminal justice system is whether they might introduce new biases or bring other unforeseen costs. There is some evidence, for example, that interviews using video conferencing result in lower ratings for job candidates and more negative
assessments of interviewers. Sears et al., “A Comparative Assessment of Videoconferencing and Face-to-Fact Employment Interviews,” 1733. That said, it seems likely that such effects will significantly dissipate or vanish completely with improved technology and increased virtual interactions, as lagging Internet connections, poorly placed cameras, and stress brought on by unfamiliarity with the format are not likely to be future problems. Sears et al., “A Comparative Assessment of Videoconferencing and Face-to-Fact Employment Interviews.”

270 **Plus, with virtual technology:** As with the virtual courtroom, virtual interrogations and interviews could all be recorded, which would allow researchers to identify more readily the best techniques for eliciting complete and uncorrupted testimonial evidence.


270 **Lineups created, chosen, and administered:** Simon, *In Doubt*, 86; Maclin, Meissner, and Zimmerman, “PC_Eyewitness”; MacLin, Zimmerman, and Malpass, “PC_Eyewitness and the Sequential Superiority Effect.”


272 **One recent example comes from:** Buntin, “What Does It Take to Stop Crips and Bloods from Killing Each Other.”

273 **Hoping to reverse the tide:** Buntin, “What Does It Take to Stop Crips and Bloods from Killing Each Other.”

273 **The two groups began coming together:** Buntin, “What Does It Take to Stop Crips and Bloods from Killing Each Other.”

273 **The new level of understanding:** Buntin, “What Does It Take to Stop Crips and Bloods from Killing Each Other.”


273 **There are many factors at work:** Buntin, “What Does It Take to Stop Crips and Bloods from Killing Each Other.”
And we ought to rethink certain: The New York Police Department, for example, prohibits personnel from residing in the same precinct to which they are assigned. Brian Lehrer, “Following Up: Should Cops Live in the Same Neighborhoods they Police?,” WNYC, April 18, 2013, http://www.wnyc.org/story/287583-following-beat-cops-and-community-policing/.

The resulting interrogations tend to: It is noteworthy that the first of the Reid technique’s “nine steps of interrogation” is “confrontation of the suspect with a statement that he is considered to be the person who committed the offense.” Fred E. Inbau et al., Criminal Interrogation and Confessions (Burlington, MA: Jones & Bartlett Learning, 2011), 188.


That’s why detectives are permitted: Inbau et al., Criminal Interrogation and Confessions, 205. The Reid technique manual states that “the purpose of an interrogation is to learn the truth.” Inbau et al., Criminal Interrogation and Confessions, 5. But that’s contradicted by the focus on minimization approaches that direct investigators to, for example, “Suggest a Less Revolting and More Morally Acceptable Motivation or Reason for the Offense Than That Which Is Known or Presumed.” Inbau et al., Criminal Interrogation and Confessions, 214. Someone who is believed to have sexually assaulted a child is to be given the opportunity “to ‘save face’ by blaming alcohol for his conduct.” Inbau, et al., Criminal Interrogation and Confessions, 214. Likewise, an investigator should suggest to a suspect in a fatal robbery “that the suspect had not intended, or had not planned, the killing, and that the only motive was to get some needed money; nevertheless, the shooting was necessary when the victim resisted the robbery attempt.” Inbau et al., Criminal Interrogation and Confessions, 215. In other words, the goal is getting an admission of guilt, facts be damned. And this is extraordinarily problematic,
not only because in suggesting these “themes” investigators are liable to interfere with levels of criminal intent relevant during the guilt phase of trial but also because these false justifications may sway the punishment phase of trial. The Reid manual’s suggestion that such problems can be dealt with by investigators going back later in the interrogation process to solicit additional corroborative details to prove the required element of criminal intent or by police testifying at trial about the nature of the confession seem weak countermeasures indeed. Inbau et al., *Criminal Interrogation and Confessions*, 217–18.

274 During the initial stages of: We need detectives to approach an interview with the mindset that the suspect may or may not be guilty and that information gained under coercion is not useful. Simon, *In Doubt*, 141; Kassin et al., “Police-Induced Confessions,” 27–28.


It was developed to ensure fairness: Langbein, “Torture and Plea Bargaining,” 11.


We just don’t have the resources: Langbein, “Torture and Plea Bargaining,” 8.


Only one in ten is provided: Langbein, “Torture and Plea Bargaining,” 21.


And this is particularly consequential: Langbein, “Torture and Plea Bargaining,” 18.

Blacks taking pleas end up with: Devers, “Plea and Charge Bargaining Research Summary,” 3.

People committing: One district attorney may decide to crack down on an offense, while another offers leniency. Devers, “Plea and Charge Bargaining Research Summary,” 3.

And, as we’ve seen: This is exacerbated when prosecutors use threats to gain a conviction despite having insubstantial evidence to actually prevail before a jury. Devers, “Plea and Charge Bargaining Research Summary,” 1–2.

When that happens, not only: A related problem is that, with plea bargaining, we also end up falsely labeling the crimes that people did actually commit. Someone may commit murder, for instance, but then plea to the lesser offense of manslaughter. When that happens, the important distinctions between the crimes is lost, as is the truth-telling function of the legal system.
The plea bargain, then, is best likened: Langbein, “Torture and Plea Bargaining,” 17.


As part of this process, it may: Dubber, “American Plea Bargains,” 579. In practice, prosecutors may still exhibit some bias toward gaining a conviction, like their counterparts in England and the United States, but the evenhanded conception of the office is likely to have an impact, as we discussed in the context of prosecutorial misconduct. Dubber, “American Plea Bargains,” 579.


Rather than minimize direct contact: James, “The Norwegian Prison Where Inmates Are Treated Like People”; Subramanian and Shames, *Sentencing and Prison Practices*.


Day-pass employment of prisoners: Such privileges can also be great tools for positive reinforcement, offering inmates more of the freedoms that those on the outside enjoy as they demonstrate that they are prepared to handle the responsibilities of upright citizens. Although there are risks to this approach, the evidence from countries like the Netherlands, Norway, and Germany is that the benefits outweigh the costs and can be successfully managed. Subramanian and Shames, *Sentencing and Prison Practices*.

Roughly nine out of ten employers: Kimani Paul-Emile, “Beyond Title VII: Rethinking Race, Ex-Offender Status and Employment Discrimination in the Information Age,” *Virginia Law Review* 100 (2014): 895. The criminal background check industry is thriving with thousands of companies and revenues of more than a billion dollars a year. Paul-Emile, “Beyond Title VII,” 903. And researchers have documented that while both whites and blacks are less likely to receive a call-back interview when they have a criminal record, blacks are significantly more hurt by the record than whites. Indeed, in the study, a white with a criminal record was more likely to receive a call back than a black without a record. Devah Pager, “The Mark of a Criminal
The scope of the problem is enormous: over 65 million individuals—just under a third of the total adult U.S. population—have some sort of criminal record. Paul-Emile, “Beyond Title VII,” 895; Michelle Natividad Rodriguez and Maurice Emsellem, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment (New York: The National Employment Law Project, 2011), 3; U.S. Census Bureau, Profile of General Population and Housing Characteristics: 2010, 1. The added injustice for people of color is that they are arrested at vastly higher rates than whites. For instance, when it comes to minor offenses, blacks are some fifteen times more likely than whites to be arrested or receive a citation—both of which may show up in a criminal background check. Paul-Emile, “Beyond Title VII,” 896; Council on Crime and Justice, Low Level Offenses in Minneapolis: An Analysis of Arrests and their Outcomes (2004), 4.

278 And criminal records are also used to: Jeremy Travis, Amy L. Solomon, and Michelle Waul, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry (Washington, DC: Urban Institute, 2001), 40.


278 Across a range of offenses, experts have tracked: “Written Testimony for Amy Solomon Senior Advisor to the Assistant Attorney General Office of Justice Programs, U.S. Department of Justice,” U.S. Equal Employment Opportunity Commission, July 26, 2011,


279 But that just doesn’t mesh with: Free will, as we have always thought of it, is a fantasy. Martha Farah, “Neuroethics: The Practical and the Philosophical,” Trends in Cognitive Sciences 9 (2005): 37–38. The scientific evidence suggests that there is no independent causal agent that directs our actions: the neural activity that drives all behavior, including criminal actions, is ultimately determined entirely from genetic and environmental interactions over which we have no conscious control. Thomas Nadelhoffer and Walter Sinnott-Armstrong, “Neurolaw and Neuroprediction: Potential Promises and Perils,” Philosophy Compass 7 (2012): 634–35. It is worth noting that there are a number of different conceptions of free will and I am focused on what is referred to as an “incompatibilist” view that assumes that the ultimate source or origin of a person’s action is her own freely made choices and that determinism is false. Randolph Clarke and Justin Capes, “Incompatibilist (Nondeterministic) Theories of Free Will,” Stanford Encyclopedia of Philosophy, August 17, 2000, http://plato.stanford.edu/entries/incompatibilism-
It is not a coincidence that roughly: Roughly 15 percent of prisoners experience delusions, hallucinations, and other psychotic symptoms. Fried, “Beyond Blame.”

We can start by acknowledging that: Fried, “Beyond Blame.”


The moral responsibility of the child: *In re* Devon T., 584 A.2d at 1291.

Unfortunately, in the intervening decades: *In re* Devon T., 584 A.2d at 1292.

In response to the failure of our: David DeMatteo et al., “Community-Based Alternatives for Justice-Involved Individuals with Severe Mental Illness: Diversion, Problem-Solving Courts, and Reentry,” *Journal of Criminal Justice* 41 (2013): 64.

One of the most notable developments: DeMatteo et al., “Community-Based Alternatives,” 66; David DeMatteo et al., “Treatment Models for Clients Diverted or Mandated into Drug Treatment,” in *Addictions: A Comprehensive Guidebook*, eds. Barbara S. McCrady and Elizabeth E. Epstein, ed. 2 (New York: Oxford University Press, 2013), 553. It is important to note that there are a number of community-based alternatives that may divert the offender from the normal criminal justice process at various points along the way, from the moment that he encounters law enforcement to just before trial to the time he is about to be released. DeMatteo et al., “Community-Based Alternatives,” 65. For example, a police officer encountering an individual who has committed a low-level offense could divert that person toward mental-health treatment instead of arresting him. DeMatteo et al., “Community-Based Alternatives,” 65. As with problem-solving courts, research suggests that officers specifically trained in handling those with mental illness and in making use of community behavioral health services enjoy better outcomes. DeMatteo et al., “Community-Based Alternatives,” 66; H. Steadman and M. Naples, “Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders,” *Behavioral Sciences and the Law* 23 (2005): 163–70.
The underlying theory is that you cannot: There has been a realization, for example, that drugs play a special role in shaping crime and any corrections approach that ignores that role is doomed to failure. Four out of five of those locked up at the state and federal level are there for a substance-abuse–related offense—using or selling, committing a crime to get money in order to buy, under the influence while acting—or have a clear history of alcohol or drug problems. DeMatteo et al., “Treatment Models,” 551. Drugs are implicated in roughly half of all violent crimes and domestic abuse crimes. DeMatteo et al., “Treatment Models,” 551. And those who have previously abused drugs are not only more likely to use drugs in the future but also more likely to be rearrested: at the state level, 95 percent of inmates with drug histories return to using within three years and 68 percent are rearrested. DeMatteo et al., “Treatment Models,” 552; Steven S. Martin et al., “Three-Year Outcomes of Therapeutic Community Treatment for Drug Involved Offenders in Delaware,” Prison Journal 79 (1999): 194–320; Patrick A. Langan and David J. Levin, U.S. Department of Justice, Recidivism of Prisoners Released in 1994 (Washington, DC: Bureau of Justice Statistics, 2002), http://www.bjs.gov/content/pub/pdf/rpr94.pdf; DeMatteo et al., “Community-Based Alternatives,” 65.

Problem-solving courts don’t ignore these realities; they accept and address them. Indeed, one of the underlying motivations for problem-solving courts is the notion that social science should be employed to understand how legal rules and processes actually impact the well-being of those who come under its command. DeMatteo et al., “Treatment Models,” 555; Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder,” Psychology, Public Policy, and Law 1 (1995): 193–219.

281 Drugs courts, for example: DeMatteo et al., “Treatment Models,” 555.


281 Research shows that the more humane: DeMatteo et al., “Community-Based Alternatives,” 69. That said, some critics have raised concerns that specialty courts lack the procedural rigors to deliver fair and equal justice, while others have suggested that judges and attorneys lack training and expertise in dealing with cases of mental illness, drug abuse, and other specialized problems. Leon Neyfakh, “The Custom Justice of ‘Problem-Solving Courts,’” *Boston Globe*, March 23, 2014, http://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQhiefT6MM/story.html.

282 Those who come before: DeMatteo et al., “Community-Based Alternatives,” 68. They also appear more likely to believe that they were treated with dignity. Neyfakh, “The Custom Justice of ‘Problem-Solving Courts.’”


282 Yet they still handle only: Although drug courts were first to arrive on the scene, today, they manage only about 5 percent of those who would be eligible to participate in them. DeMatteo “Treatment Models,” 560.

282 And the major question is: One problem with problem-solving courts is that while they do a far better job at understanding and then treating the specific issues underlying an offender’s criminal behavior than the standard incarceration approach, they still rely on overly general classifications and channeling. For instance, a significant number of those who end up before mental-health courts also have serious substance abuse problems that may not be actively treated. DeMatteo et al., “Community-Based Alternatives,” 68. And those who find themselves before drug courts can have very different dependencies, yet they tend to all face the same general protocols. Most importantly, the categories of covered individuals naturally leaves many offenders stuck with the ineffective and cruel status quo.

It makes little sense that: Cassell, “Standing for Victims.”

They should be permitted an active role: Cassell, “Standing for Victims.”


284 **In only 5 to 10 percent of all:** Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* (New York: Benjamin N. Cardozo School of Law, Yeshiva University), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.


285 **Why should law be different:** Imagine if we possessed the knowledge to light houses with electricity, make walls that didn’t crack in earthquakes, and produce hot running water whenever we liked, but were told that such innovations were ill-advised because our dark and cold, wood slat houses had worked well enough (surprisingly, well, even) for the previous two hundred and fifty years. Would we accept that? Would we sit idly by, shivering in candlelight awaiting “the big one”? No—we would push ahead. It is true: not every building design innovation has been
successful (indeed, some have resulted in injuries or even deaths) and many core construction
principles have lasted for decades if not centuries, but we have not resisted or feared progress.


(August 2012): 709-11; Robert Bartlett, Trial by Fire and Water: The Medieval Judicial Order,
(New York: Oxford University Press, 1986), 80. In the early years of the thirteenth century, Pope
Innocent III launched a wide-reaching effort to eradicate ordeals—with the Fourth Lateran
Council banning priests from continuing to participate in them—largely on the grounds that they
were uncanonical and violated the Christian dictate not to tempt the Lord. Leeson, “Ordeals,”
709-11; Bartlett, Trial by Fire and Water, 80. With the religious backbone removed, the practice
within secular judicial systems collapsed—in some places, like Denmark and England, following
formal prohibitions and in other places, like France, as a matter of informal acceptance. Leeson,
“Ordeals,” 709–11. By 1300, in most of Europe, the pools had dried up and the irons had cooled.

286 And what replaced the ordeal: Langbein, “Torture and Plea Bargaining,” 3-4; Palmer,
“Trial by Ordeal,” 1547, 1554. The trial by cold water, for instance, involved no significant
physical harm, while even the person deemed innocent through judicial torture suffered
immensely. Just as critically, there is reason to think that ordeals might very well have been more
effective than torture at sorting the innocent from the guilty. One scholar has suggested that in a
population that believed fervently in God’s power to intervene in man’s affairs, those who were
guilty and those who were innocent would both have expected to be revealed as such during the
ordeal. Leeson, “Ordeals,” 691. So, the guilty were inclined to admit to their crimes to avoid suffering the ordeal as well as the punishment and, knowing that those who elected to undergo the ordeal would tend to be innocent, priests could manipulate the outcome toward exoneration by allowing a burning iron to cool or determining that a person had sunk to a sufficient distance in water. Leeson, “Ordeals,” 691. By contrast, with judicial torture, both the innocent and guilty parties faced the same calculation and optimal strategy: refuse to confess and hope that you were freed before the pain simply became too unbearable or, if the prospect of torture was worse than death, confess before proceedings began. As a result, the sorting effect of judicial torture was not between the upright citizen and the criminal, but between the extremely pain-tolerant and the extremely pain-sensitive. Langbein, “Torture and Plea Bargaining,” 7. And the seemingly robust checks built into the system to ensure that only parties who were very likely guilty were tortured and that confessions were true and voluntary turned out to be hopelessly ineffective. Langbein, “Torture and Plea Bargaining,” 7. Although a party had the ability to recant a confession as part of the required hearing after an admission of guilt under torture, if that happened, the person would be sent back to be examined under torture again. Langbein, “Torture and Plea Bargaining,” 7, 14. Furthermore, suspects undergoing interrogation often learned of facts about the crime inadvertently from those conducting the interrogation, jailers, and others—a problem that continues to plague our system today. Langbein, “Torture and Plea Bargaining,” 7.


286 Like us, they constructed: Langbein, “Torture and Plea Bargaining,” 5. A threshold akin to “probable cause” had to exist before torture could be ordered and, as detailed in contemporary
treatises meant to guide judges, clerks, and other court actors, specific protocols had to be followed, such as ensuring that the questioning dealt with topics of which only the accused would know and barring suggestive questioning by the examining magistrate. Langbein, “Torture and Plea Bargaining,” 5, 7. Likewise, any confession under torture had to be affirmed subsequently without torture and investigators were charged with confirming factual details elicited through torture (e.g., officials were meant to verify the disclosed location of the murder weapon to ensure that the accused’s statements were true). Langbein, “Torture and Plea Bargaining,” 5, 7. This was not brutality for brutality’s sake: this seemed to be the just and ordered system, based in reason, that had evaded those who had relied on godly intervention to reveal innocence through supernatural miracles.

286 And what sets us apart: There is, indeed, an odd parallel between our modern mechanism of plea bargaining and the tortured confessions of many centuries ago. Langbein “Torture and Plea Bargaining,” 12. Both seemingly short-circuit core legal principles that purportedly guide our criminal justice system, including transparency, shared adjudicatory responsibility and participation, freedom from coercion, and proof of guilt as a prerequisite to punishment. Langbein “Torture and Plea Bargaining,” 18. The modern prosecutor deciding to offer a plea agreement enjoys an incredible amount of discretion and scope of power, in some ways more akin to the medieval magistrate—as accuser, investigator, and sanctioner, all in one—than to the modern trial judge, limited largely in his presiding role and constrained by precedent and statutory guidelines. Langbein, “Torture and Plea Bargaining,” 18. And the contemporary prosecutor oversees a process that is unequivocally coercive: “admit your guilt or we will break your bones” is not so fundamentally different from “admit your guilt or we will seek the death penalty or nail you with life in prison without the possibility of parole.” Langbein, “Torture and
Plea Bargaining,” 12. Perhaps most critically, it is hard to see clear progress toward a world in which only people who have been proven guilty with objective evidence are subjected to punishment, when, in 90 to 95 percent of cases in the United States today, there is no trial at all and the sole trigger for punishment is—just as it was with judicial torture—an admission of guilt by the accused. Langbein, “Torture and Plea Bargaining,” 12–13.