Advances in Psychology and Law 4

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Advances in Psychology and Law

Volume 4

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Advances in Psychology and Law

Volume 4

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ISSN 2366-6099 ISSN 2366-6102 (electronic)
Advances in Psychology and Law
ISBN 978-3-030-11041-3 ISBN 978-3-030-11042-0 (eBook)
https://doi.org/10.1007/978-3-030-11042-0

Library of Congress Control Number: 2018966437

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In loving memory of Alan Bornstein.

—Brian H. Bornstein

For my parents and grandparents who laid the foundation for my path.

—Monica K. Miller

Preface

We are very pleased to offer the fourth volume in the *Advances in Psychology and Law* book series. The initial vision for the series was to contribute to the law-psychology field by providing a book series that publishes thorough reviews of existing research alongside the empirical work's legal and policy implications. The three previous volumes have done that, and the series is now well established as a reliable source of comprehensive and up-to-date information on a broad array of psycholegal topics.

This volume contains nine chapters, each focusing on a different topic within psychology and law. Each chapter provides a thorough but focused review of the legal issue, including a discussion of relevant statutes, case law, and legal procedures, as well as a synthesized review of the psychological research and its application to the relevant legal issues. Authors for each chapter conclude by identifying possible reforms and gaps in the literature that are ripe for further investigation.

The volume's first three chapters address topics related to criminal suspects. First, Kaplan and colleagues, in "Evaluating Coercion in Suspect Interviews and Interrogations", focus on the earliest stage of suspect-legal system interaction: the interrogation. They are especially interested in the role of coercion in suspect interrogations and how to evaluate it. The chapter considers individual differences in suspect vulnerability to the coercive pressures of interrogation, particularly with respect to youth and intellectual disability. The authors propose a new psychometric framework for measuring and quantifying coercion in investigative interviews and interrogations and review their own nascent research on the proposed instrument.

A frequent topic during interrogations is whether the suspect has an alibi. The chapter, "The Psychology of Alibis", by Charman and colleagues, reviews the current state of the literature on the psychology of alibis. They discuss the processes and problems associated with both alibi generation, by suspects themselves, and alibi evaluation, by law enforcement, jurors, and others. The chapter advances the theoretical understanding of the alibi generation and evaluation processes, and encourages researchers to adopt a system variables approach to maximize the impact of alibi research.

The last chapter on suspects, by Henderson and Levett on "Plea Bargaining: The Influence of Counsel", zeroes in on a later stage in the process—namely, plea bargaining. Their emphasis shifts somewhat, focusing primarily on defense counsel's role in the plea-bargaining process. The chapter provides a theoretical background to understand how the attorney's advice and role likely influence a suspect/defendant's decision to accept a guilty plea offer. It then examines the research examining legal and extra-legal factors that influence the type of advice an attorney gives a client contemplating a guilty plea offer, considering the implications of this research for the current standards used to define effective representation.

The chapter, "Post-identification Feedback to Eyewitnesses: Implications for System Variable Reform", by Douglass and Smalarz, addresses post-identification feedback, an increasingly important topic in the realm of eyewitness identification. The post-identification feedback effect has been featured in court cases around the country and has served as justification for reform recommendations intended to enhance the reliability of eyewitness identification evidence. The chapter reviews the extant literature on the post-identification feedback effect, discusses the role of post-identification feedback research in court decisions and legislated eyewitness identification procedures, and examines the relationship between post-identification feedback and system variable reform recommendations.

The next two chapters address issues related to gender, sexual orientation, and the legal system. The chapter, "Psychological Explanations of How Gender Relates to Perceptions and Outcomes at Trial", by Livingston and colleagues, explores the many and varied ways that gender relates to perceptions and outcomes at trial. The authors consider the gender of many participants involved in trials: litigants (especially criminal defendants); victims; attorneys; expert witnesses; and fact finders (i.e., judges and jurors). The chapter provides overarching theoretical psychological explanations for the observed effects of gender using the symbolic interactionist framework, gender roles, and the influence of expectations and stereotypes. This analysis includes a discussion of factors that might moderate or mediate gender effects at trial.

Plumm and Leighton, in their chapter "Sexual Orientation and Gender Bias Motivated Violent Crime", look at gender from a different perspective—that of the victim, in the context of hate crimes based on gender. The chapter also covers hate crimes based on sexual orientation. In identifying the current state of the literature on sexual orientation and gender bias motivated violent crimes, the authors consider whether hate crimes committed against members of the LGBTQ community differ from hate crimes involving other victim characteristics (e.g., race), and they discuss the policy implications for this expanding category of criminal statutes.

The final three chapters address issues related to minors who, as perpetrators or victims of violence and aggression, find themselves involved in the legal system or school disciplinary proceedings. In their chapter "The Law and Psychology of Bullying", Jenkins and colleagues review the law and psychology of bullying, a topic that is receiving attention from media, educators, parents, researchers, and legislators. The chapter describes current laws related to bullying and cyberbullying, examines existing research about the social and emotional characteristics of

bullies and victims, and presents a discussion of the interaction between law and the psychology of bullying. The chapter also covers intervention programs that can prevent bullying and/or reduce its severity.

Bullying occurs both inside and outside of schools; in schools, many kinds of misbehavior besides bullying can also lead to disciplinary action. In the next chapter, Girvan, in "The Law and Social Psychology of Racial Disparities in School Discipline", provides an overview of racial disparities in school discipline, and how such disproportionality contributes to the school-to-prison pipeline. The chapter introduces a conceptual framework connecting the types of discrimination prohibited by federal law to the primary social psychological factors that have been proposed as causes of racial disparities in school discipline.

Finally, Mauer and Reppucci, in "Legal and Psychological Approaches to Understanding and Addressing Teen Dating Violence", examine the intersection of legal and psychological research relevant to juvenile dating relationships, with a focus on victimization and perpetration of sexual assault and intimate partner violence (IPV). They distinguish IPV from teen dating violence (TDV) and describe legal responses to TDV and theoretical frameworks psychologists use to conceptualize TDV. The chapter also discusses means of TDV prevention and ways to approach prevention with teens' peers, parents, and other significant adults.

As this preview of the chapters included in Volume 4 illustrates, the field of psychology and law encompasses a wide variety of diverse and ever-expanding topics. We invite scholars to visit our website (http://www.springer.com/series/11918) and submit chapter ideas for future volumes (mkmiller@unr.edu or bbornstein2@unl.edu). It is our hope that the series will continue to be useful to psycholegal scholars, students, and professionals working in legal occupations. We are grateful to Springer, and especially to Sharon Panulla and Sylvana Ruggirello, for helping to make this book series a reality and for their efforts in producing this fourth volume.

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Evaluating Coercion in Suspect Interviews and Interrogations

Jeffrey Kaplan, Brian L. Cutler, Amy-May Leach, Joseph Eastwood and Stephanie Marion

Suspect interviews and interrogations are used on a day-to-day basis to solve crimes and gain valuable criminal intelligence (Inbau, Reid, Buckley, & Jayne, 2013; Kassin, Leo, Meissner, Richman, Colwell, & Leach et al., 2007; Meissner, Surmon-Böhr, Oleszkiewicz, & Alison, 2017). To ensure that criminal matters are adjudicated based on reliable and legally valid evidence, the process of eliciting confessions is often scrutinized by the criminal courts (Leo, 2017; Levesque, 2006). Although abuses of interrogation and false confessions are rare when considered against the backdrop of crimes successfully solved through interrogation, they are sufficiently common as to garner attention from innocence advocacy organizations (e.g., the Innocence Project) and others interested in criminal justice reform. Criminal justice officials and social scientists have therefore devoted considerable efforts toward identifying coercive interrogation practices that increase the risk of false confession or violate a suspect's legal rights (Kassin, Drizin, Grisso, Gudjonsson, Leo, & Redlich, 2010; Swanner, Meissner, Atkinson, & Dianiska, 2016).

It might therefore seem surprising that there is no empirical and psychometric method of objectively assessing coercion in an interrogation setting. The criminal courts generally approach issues of admissibility by interpreting past precedents and

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_1

constitutional documents to draw conclusions about the circumstances of an interrogation and the voluntariness of the suspect's statements (Leo, 2008; Schulhofer, 1981). If a confession is admitted into evidence, a jury may be informed by psychological expert testimony (Cutler & Kovera, 2011). Expert witnesses typically are not allowed to testify about the veracity of a confession (Marion, Kaplan, & Cutler, in press), though they may testify as to the coerciveness of an interrogation. Again, there is no objective measure of coercion used: expert witnesses review recorded interrogations (if available) and draw conclusions about the coerciveness of an interrogation based on their observations and related empirical research. The amount of psychological research focusing on police interrogations has increased greatly since the 1990s, but the measurement and quantification of coercion have remained elusive.

In this chapter, we address definitions of coercion, and previous and current attempts to operationalize coercion in interrogation settings. We begin by reviewing legal and psychological definitions of coercion, before offering our own definition. We then review how investigators are trained to interrogate suspects, some of the commonly used tactics and techniques that are believed to be coercive due to their nature or connection to false confessions, and how certain characteristics on the part of the suspect may serve to make them more vulnerable to coercive interrogation practices. We discuss differences in perceptions of coercion between criminal justice officials, social scientists, and laypeople who may serve on juries. We then review the empirical research on what occurs during interrogations, ending the chapter with a summary of our own ongoing research on this topic.

Importance of Coercion in Interrogation

Suspect interviews and interrogations are common police practice. One mass survey of investigators in the United States and Canada found the average investigator conducted approximately 46.3 interrogations per year (Kassin et al., 2007). Most interrogations are likely conducted without employing highly coercive methods, though on occasion external and internal pressures to solve crimes may lead to inadvertent or purposeful misuse of interrogation techniques (Leo, 2008). Such instances are usually not an intentional entrapment by police aimed at incriminating the innocent. Rather, the police believe in the suspect's guilt, and often have strong rational reasons for their belief. Police may also be placed under significant pressure to obtain a confession, particularly when a heinous crime has not been solved, when the public starts losing confidence in the police, or when the investigation strains police resources (Innes, 2003). These circumstances create an intense need to quickly identify, charge, and convict a suspect. Given the relative efficacy and economy of interrogation, it may be tempting for investigators to pressure a confession from a suspect through highly coercive means (Huff, 2002).

Within Canadian and American judicial systems, a highly coerced statement from a defendant might not meet admissibility standards, rendering the entire

interrogation process a wasted effort on the part of law enforcement. Worse, overly coercive methods have been associated with false confessions, and, should due process fail, wrongful convictions (Drizin & Leo, 2004; Kassin et al., 2010; Leo & Ofshe, 1998). Where there are wrongful convictions, there are also failures to apprehend the guilty, leaving them free to continue causing criminal harm to society. Whether viewing the issue from a crime control or due process perspective, there is a clear need to evaluate coercive pressures and the suspect's psychological duress during police questioning.

Actors in the criminal justice system are routinely required to evaluate inculpatory statements made by criminal defendants. Law enforcement officials must be conscious of this; both for the purposes of evaluating the validity of a suspect's statements, and to ensure those statements will be admissible as evidence. The level of coercion present in an interrogation, therefore, also has direct and immediate implications for the judge as the trier of law when determining a confession's admissibility. If a judge allows a confession into evidence, then evaluating the reliability of the confession becomes the responsibility of the jury as the trier of fact. Attorneys also require a firm understanding of the coerciveness of an interrogation. The prosecution may consider this information in determining whether or not to bring forward or drop charges. The defense may use it in deciding whether to challenge the admissibility or reliability of a defendant's statements, or enter into an appropriate plea arrangement.

Defining Coercion

Any attempt to operationalize and measure coercion in interrogations necessitates first defining the term coercion. Criminal courts and legal scholars have made determinations about what does (and does not) constitute a voluntary statement (e.g., *Miranda v. Arizona*, 1966; *R. v. Hebert*, 1990), though they have not put forward a principled theory of coercion. Social scientists have offered theoretical descriptions of coercion; however, as of yet, there is no one single accepted conceptualization of the term in psychology, let alone an operational definition. A proper definition and operationalization of the construct should balance comprehensiveness and parsimony, and ideally would satisfy both legal and psychological standards.

Legal Definitions. Before the first half of the twentieth century, interrogation was practiced with few, if any, restraints on the interrogators' conduct (Thomas & Leo, 2009). If a confession was obtained, the process of eliciting it was rarely questioned. Arguably, the basic principle that a confession coerced from a suspect against that suspect's will should be deemed unreliable was not firmly entrenched in North American law until the prevalence of coercive interrogations in the U.S. was

revealed by the federally commissioned *Wickersham Report* (1931),[1] followed by the precedent set by the U.S. Supreme Court in *Brown v. Mississippi* (1936). These determinations pertained mostly to barring the use of violence and torture to extract confessions, as such third-degree tactics were commonplace in American law enforcement at that time (Lavine, 1930; Maclin, 2015). Since the 1930s, criminal courts in the United States and Canada have become increasingly sensitive to the interrogation process as a source of coercion. Excessively long interrogation (e.g., *Ashcraft v. Tennessee*, 1944), denying the suspect access to basic necessities (e.g., *Malinski v. New York*, 1945; *R v. Hoilett*, 1999), and explicitly threatening criminal suspects or making promises of leniency contingent upon a confession (e.g., *Chambers v. Florida*, 1940; *R v. Hebert*, 1990) have subsequently been ruled as coercive and unlawful practices.

Our primary purpose in this chapter is to offer a psychological definition of and measurement approach to coercion. Nevertheless, we consider it instructive to examine legal definitions. The criminal courts often describe confession evidence in terms of voluntariness (Primus, 2015). To be admissible as evidence, a confession must be given voluntarily (*Dickerson v. United States*, 2000; *R v. Piche*, 1971). Yet replacing the word "coercion" with its antonym "voluntariness" does not advance an operational definition; it merely introduces a second term that lacks a firm definition.

Coercion, or rather involuntariness, has traditionally been viewed by the courts in terms of threats and promises, though not exclusively so: in *R. v. Hebert* (1990), the Canadian Supreme Court observed that "[t]he absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent" (p. 166). Canadian and American courts may consider the coerciveness of an interrogation and the voluntariness of statements based on a more general totality of circumstances (*Haynes v. Washington*, 1963; Schulhofer, 2001), and in respect to the suspect's age, mental maturity, and operating mind (e.g., *A.M. v. Butler*, 2004). When violence, threats, or promises are used to secure a confession, the courts readily identify that statement as involuntary (Primus, 2015; Stewart, 2009); in such cases, interpretations of constitutional rights found in past precedents are very firm. However, weighing the totality of circumstances and judging the suspect's operating mind are much more subjective processes (e.g., *R v. Oickle*, 2000). Psychological examinations of, and research on, coercion have delved more deeply into these more abstruse facets of coercion, as reviewed below.

Previous Psychological Definitions. There are any number of interrogation practices that may limit perceived autonomy and voluntary choice, and thereby contribute to coercion. The investigator may emphasize the harms of not acceding to his or her demands by confessing, or minimize the harms and inflate the benefits

[1]The issue of coercion in interrogation had been considered by criminal courts before the Wickersham Commission Report (1931). See *King v. Warickshall* (1783), *Hopt v. Utah* (1884), and *Bram v. United States* (1897).

of confessing (though without making any direct promises). The manipulation of the perceived harms and benefits of a given course of action is a persuasive strategy that has been termed *choice architecture* (Thaler & Sunstein, 2008). In an interrogation, these harms and benefits can range from the immediate to the long term, and they can be material, social, emotional, or psychological.

It is tempting to define coercion in interrogation as any persuasive tactic intended to manipulate choice architecture and elicit an inculpatory statement from a suspect; however, such a definition would be inadequate. Inbau et al. (2004) illustrate how a complication arises in using such a broad definition of coercion. In their example, an investigator interrogating a burglar confronts the suspect with evidence that he left fingerprints at the crime scene, was observed by several security cameras, and was found in possession of stolen goods. If he was to confess, some may say that the confession was involuntary; with a seemingly insurmountable amount of evidence indicating guilt, the burglar may have concluded that there was no way to convince the investigator that he is innocent. Assuming the evidence is genuine, however, few would argue that the interrogation was inappropriately coercive or that the confession was involuntarily coerced.

By contrast, a definition of coercion offered by Leo and Liu (2009) may help identify the threshold between persuasive pressure and coercion. They define coercion as “[that which] removes an individual’s perception of their freedom to make a meaningful choice during a police interrogation” (p. 385). Key here is the term “meaningful choice.” In Inbau et al.’s (2004) example, the burglary suspect under interrogation would probably not have believed that continued denial was a viable option. But would he have believed that he had the option of remaining silent, requesting a lawyer, or exercising any other legal rights? Did he believe that there was any feasible alternative but to confess? Coercion might not best be viewed by whether a suspect believed that he could choose to refute the investigator or necessarily pursue his preferred course of action, but rather by whether he was being led to believe that there was no other possible viable option except to make an inculpatory statement.

In the psychological literature on self-regulation, resistance to persuasion has been conceptualized as a finite cognitive resource. This resource may be depleted by stress, fatigue, or other factors (Knowles & Riner, 2007; Muraven & Baumeister, 2000), making one more likely to succumb to persuasion and acquiesce to the demands of others (Baumeister, Sparks, Stillman, & Vohs, 2008; Wheeler, Briñol, & Hermann, 2007). In the context of interrogation, repeated use of coercive tactics may erode a suspect’s ability to critically evaluate his choices and resist the investigator’s demands, a process referred to as *interrogation-related regulatory decline*, resulting in *acute situational suggestibility* (Davis & Leo, 2012). Tactics that cause emotional distress, remove denial as a viable option, maximize the harms of denial, minimize the harms of confessing, and insinuate some perceived benefits to confession may be repeatedly employed to wear down a suspect’s ability to self-regulate and cause “impairments of rational decision making and exertion of one’s will” (Davis & Leo, 2012, p. 675). Moreover, with a suspect in a more cognitively malleable state, an investigator has greater ability to further manipulate

the suspect's perception of the harms and benefits of confessing. As aggressive questioning proceeds, confessing simply to escape the interrogation and its associated psychological stress may become tempting to a suspect as well (Kassin et al., 2010).

Inbau et al. (2004) point out an additional complication in defining coercion: "Each suspect must be considered individually with respect given to such factors as previous experience with police, intelligence, mental stability, and age" (p. 343). In other words, it is difficult to determine the coerciveness of a given interrogation tactic in and of itself without considering the target of that tactic, and the context of its use. While a strict literal definition of coercion is simply the use of force or threats of force as a method of persuasion, we assert that a psychological operationalization of coercion must include not only behaviors on the part of the actor but also the second party's interpretation of, and reaction to, these behaviors, consistent with the *dynamic assessment approach* (Lidz, Mulvey, Hoge, Kirsch, Monahan, & Bennett et al., 1997). Of specific importance is whether the coercive action has the intended psychological effect, at least to some degree, on the target of that action. A suspect's perceptions, in turn, would likely be influenced by personal characteristics of the target, such as age, intelligence, and suggestibility, as well as the length and setting of the interrogation (Gudjonsson & Henry, 2003; Gudjonsson, Vagni, Maiorano, & Pajardi, 2016; Kassin et al., 2010). Dynamic assessment has been applied to the evaluation of coercion in psychiatric treatment (Lidz et al., 1997), abusive domestic relationships (Beck & Raghavan, 2010), and interrogation (Kelly, Miller, & Redlich, 2016; Pearse & Gudjonsson, 1999).

A Proposed Definition of Coercion. The operational definition that we propose closely draws on and amalgamates previous definitions: Coercion in police interrogation consists of the use of persuasive techniques that limit the suspect's autonomy by manipulating the perceived costs and benefits of possible courses of action and/or depleting the suspect's motivation or ability to resist acceding to the investigators' demands. Our aim is not to replace legal definitions, but to offer an independent psychological one. Consistent with many other psychological constructs, we believe that coercion should be viewed as a continuous variable (i.e., in degrees of coercion) rather than a dichotomous categorization.

In our definition, we have clearly made a distinction between what are objectively feasible options and what the suspect perceives as feasible. Under police questioning, a suspect may have many viable options, practically speaking, such as choosing to remain silent, requesting an attorney, or in the case of non-custodial interrogation, terminating questioning and leaving the interrogation. Yet, the suspect's perceptions of the situation may very well be the opposite; the nature of the interrogation may lead an individual suspect to conclude that his options are severely limited, and that the only practical choice is to confess. This is not to say that a suspect under coercive pressure necessarily feels psychological distress. Our definition not only captures interrogation situations that cause duress, but also interrogation techniques that downplay the seriousness of the crime, imply leniency, or offer incentives to confess. These latter types of tactics have been linked to false confessions (Leo & Ofshe, 1998), yet they do not necessarily evoke

feelings of anxiety or of being coerced on the part of the target (Russano, Meissner, Narchet, & Kassin, 2005). Such tactics directly manipulate the perceived costs and benefits of acceding to the investigator, and limit the suspect's autonomy; thus by our definition they would be considered coercive even if the suspect does not feel under coercive duress.

Finally, it is worth clarifying that a coerced confession and a false confession are not necessarily one and the same. For one, suspects have been known on occasion to make false confessions without being subjected to coercive pressures (Kassin & Wrightsman, 1985; Leo, 2008). Likewise, a confession involuntarily forced from a suspect is not necessarily false. Though veracity and voluntariness are distinct concepts, the latter may be indicative of the former. Laboratory research (e.g., Horgan, Russano, Meissner, & Evans, 2012; Kassin & Kiechel, 1996; Russano et al., 2005) and archival studies (Garrett, 2008; Leo & Ofshe, 1998) have repeatedly shown that the use of interrogation practices thought of as coercive, such as deception and implications of leniency, are predictive of false confessions. Throughout the chapter, we often cite a tactic's known connection to false confessions to be indicative of its possible coerciveness, but we do not equate false confessions to coerced confessions.

If coercion is to deplete the suspect's ability to resist persuasion and limit their perceived viable options to the point as to eliminate any meaningful choices, it leaves the question as to what actions accomplish or contribute to this effect. To begin to answer this, we turn to how investigators are trained to conduct interrogations, the tactics and strategies used in interrogations, and how they may contribute to coercion in interrogations.

Interrogation Training

In this section, we review theories and methods of suspect questioning, notably *The Reid Technique* (Inbau et al., 2013). We also describe the *PEACE* model (Milne & Bull, 1999), which was devised to reduce coerciveness and is gaining in popularity in contemporary North American policing.

Accusatory Methods. Various methods of questioning criminal suspects have been devised. In North America, investigators most frequently use *accusatory methods* (Meissner, Redlich, Bhatt, & Brandon, 2012). The most common accusatory method is *The Reid Technique* (Inbau et al., 2013), in which more than half of American officers have been trained (Cleary & Warner, 2016), if not the vast majority (Buckley, 2012; Snook, Eastwood, Stinson, Tedeschini, & House, 2010). The Reid Technique consists of both an interview and interrogation stage. The *Behavior Analysis Interview* (BAI) stage, unlike the interrogation component, is non-accusatory and intended to assess deception on the part of the interviewee (Inbau et al., 2013; Kassin, Goldstein, & Savitsky, 2003). Should the investigator judge the interviewee as deceitful, the interview is followed by an interrogation stage, and from this point forward the questioning is usually guilt presumptive

(Kassin & Gudjonsson, 2004; Meissner, Redlich, Michael, Evans, Camilletti, & Bhatt, 2014). The interrogation portion is informally referred to as *Reid's Nine Steps*, so called because it contains nine steps which may or may not be followed in order. Any given interrogation may or may not contain aspects of all nine steps.

The distinction between the terms interview and interrogation is somewhat ambiguous. Intuitively, one may conclude it is contingent on whether the individual is being questioned as a suspect or witness; however, a suspect can be interviewed and a witness can be interrogated (Loney & Cutler, 2015). Throughout the literature, fact-finding and non-confrontational methods of suspect questioning are often referred to as interviews (such as the BAI and PEACE model, described below), whereas guilt presumptive questioning aimed specifically at obtaining a confession is more commonly referred to as an interrogation. Although others may use these terms interchangeably, though for the purposes of this section, we maintain the convention of making the distinction between the two.

Accusatory methods, such as the Reid Technique's interrogation phase, are designed to wear down a suspect's resistance by making attempts at denial appear futile and increasing the anxiety associated with not making an admission and confession (Kassin et al., 2010). The suspect is then encouraged to take the one perceived route of escape by admitting to some perceived lesser form of guilt (Kassin, 2008). Many researchers have studied coercion within the framework of accusatory interrogation, and specifically *maximization* and *minimization techniques* (Kassin & McNall, 1991). Maximization techniques are those tactics that highlight the futility of denial, discourage noncooperation, and/or insinuate some undesirable outcome if the suspect does not confess (often that they will be treated more harshly by the criminal courts). The Reid Technique encourages investigators to begin an interrogation by confronting the suspect directly, expressing certainty of the suspect's guilt, and presenting or explaining the evidence that proves it. Though controversial, police investigators may also present the suspect with knowingly false evidence invented for the sake of the interrogation (Dixon, 2010; Leo, 2008). The intention behind presenting evidence, whether real or unsubstantiated, is to create the impression that the investigator already possesses proof of the suspect's crimes, and that attempting to maintain innocence is pointless. Any denials on the part of the suspect are interrupted until the suspect stops actively denying involvement (Inbau et al., 2013; Kassin & Gudjonsson, 2004; Kassin et al., 2010).

Minimization techniques, on the other hand, downplay the seriousness of the offence and may imply leniency, contingent on a confession. Often this effect is accomplished by developing *themes*. Themes are motivations, narratives, justifications, and excuses for committing the crime, some portraying the suspect as less morally and legally culpable than others (Inbau et al., 2013). Fully transitioning into minimization and theme building generally occurs after convincing the suspect that conviction is inevitable through maximization. At this point, the investigator may present the interrogation as an opportunity for the suspect to tell his or her side of the story (though some interrogations begin this way). The specifics of the themes developed differ from one case to another, and Inbau et al. (2013) offer a number of suggestions dependent on the crime and the type of suspect. For example, an

investigator may suggest that a crime was the result of desperation, necessity, or a brief emotional loss of control. Some themes are pragmatically based and may offer pseudo-legal justifications from which the suspect may infer leniency, whereas others play on suspects' moral guilt and encourage confession as a means of alleviating psychological pressure or saving face (Davis & Leo, 2012; Leo, 2008). Through a combination of maximization and minimization techniques, the admission and confession are thereby elicited by creating the impression that there is no way to avoid punishment, and the suspect's most logical choice is to avoid chasing sunk costs and admit to the lesser version of the crime to mitigate impending negative consequences.

Not every Reid-based interrogation is highly coercive. However, in many cases of known false confession arising from accusatory interrogation, maximization, and minimization techniques were taken to extreme levels that violated Reid training (Blair, 2005; Inbau et al., 2013). We assert that accusatory methods of interrogation, such as the Reid Technique, contain the strong potential for coercion. Referring to our definition of coercion offered in the previous section, the point of accusatory interrogation is clearly to manipulate the perceived costs and benefits of acceding to the investigator and confessing. Maximization techniques that cause emotional duress may also diminish the suspect's ability to resist the investigator's demands to confess (Davis & Leo, 2012). Some tactics are particularly controversial. The presentation of false evidence is a contentious tactic and has been strongly linked to false confessions in laboratory settings (Kassin & Kiechel, 1996; Nash & Wade, 2009), as have minimization techniques that imply leniency (Russano et al., 2005). Both types of tactics have been repeatedly present in wrongful convictions stemming from false confessions (Drizin & Leo, 2004; Leo & Ofshe, 1998), and social scientists are in strong agreement that deception and minimization are predictive of false confessions (Kassin, Redlich, Alceste, & Luke, 2018).

Information-Gathering Methods. Contrasting accusatory methods are *information gathering/investigative interviewing methods* such as *PEACE* (Milne & Bull, 1999). PEACE, an acronym for preparation and planning, engage and explain, account, closure, and evaluation, was developed based on best practices and other empirical evidence in an effort to reform criminal interrogation in the UK (Milne, Shaw, & Bull, 2007). North American law enforcement agencies have been somewhat reluctant to adopt the method, though it is becoming more common in Canadian policing (Snook, Eastwood, & Barron, 2014).

Unlike accusatory methods, information-gathering methods do not allow investigators to fabricate evidence nor use explicit deception (Kelly, Miller, Redlich, & Kleinman, 2013; Meissner et al., 2012). Another distinction is that the purpose of the interview is explained to the suspect before questioning begins (Dixon, 2010). Information-gathering methods also do not assume that the suspect is guilty at the outset, nor that evidence will need to be forced from the suspect under intense pressure (Milne & Bull, 1999); eliciting information is a highly cognitive rather than a highly emotional process. Investigators are trained to ask short, open-ended questions, rather than the leading closed-ended questions found in the theme building component of the Reid Technique (Clarke, Milne, & Bull,

2011; Meissner et al., 2012, 2014). However, if the suspect is being uncooperative or deceptive, the investigator may take much more direct control.

During the interview, the seriousness of the crime and the importance of honesty are expressed to the suspect, and the suspect is asked to recount their version of events without interruption. The investigator will first seek to get a full narrative from the suspect, and then explore specific topics in more detail. At the end of the process, the information generated by the suspect is assessed to determine if there are any inconsistencies either within the account or in comparison to the other case evidence. The investigator will then point out any logical contradictions and inconsistencies, and present any evidence that may discredit the suspect's account of events (Snook et al., 2010). Challenging a suspect's account is not intended to be adversarial; rather, challenges are posed as clarification-seeking inquiries. The investigator should not allow the suspect to try and evade these questions, however, and instead continue to press the suspect to explain any discrepancies. If the suspect's account does not match the available evidence, the investigator may continually point out the contradictions and impossibilities in the suspect's story, until the suspect is essentially caught in a web of his or her own lies.

At face value, then, information gathering would appear to be the less coercive of the two commonly recognized methods of suspect questioning. On the one hand, this proposition would seem to be supported by meta-analytical research demonstrating that information-gathering methods are significantly less likely to elicit false confessions than accusatory methods (Meissner et al., 2014). On the other hand, the implementation of PEACE training does not appear to be a perfect remedy for ridding interrogation of coercion. Some research into the application of PEACE has found that, in practice, there are few differences between those investigators who claim to be using the PEACE technique and those who do not (Clarke & Milne, 2001; Clarke et al., 2011). In their observational study of police interviews conducted in England and Wales, in which most of the investigators being observed were PEACE trained, Clarke, Milne, and Bull (2011) found that 10% of the interviews were not conducted in accordance with procedural laws governing evidence. The procedural departures included not giving the proper legal cautions, not adjusting for the suspect's mental illness or intellectual disability, and creating an environment that could be considered an atmosphere of oppression. Though the Reid Technique (Inbau et al., 2013) has been critiqued thoroughly (see Leo, 2008; Kassin et al., 2003), by comparison the possibility of coercion and false confession arising from PEACE-related tactics has gone relatively unexplored.

Personal Risk Factors

Individuals may vary in their vulnerability to coercive influence. Some of this variation may be due to temporary states, such as sleep deprivation, intoxication, and drug withdrawal, which have all been previously identified as risk factors for false confession (Blagrove, 1996; Frenda, Berkowitz, Loftus, & Fenn, 2016;

Kassin et al., 2010). Other risk factors are more permanent traits. For instance, ethnic minorities in some circumstances might be more vulnerable to coercion and false confession, in part due to stereotypes and stereotype threat (Villalobos & Davis, 2016). Specifically, it has been hypothesized that members of ethnic minorities commonly stereotyped as criminals may be highly concerned about being judged as such, creating a heightened level of emotional duress and decreasing self-regulatory abilities. In some contexts, certain immigrant groups may also experience a heightened fear of police officers (Menjívar & Bejarano, 2004) and experience language barriers in communicating with investigators (Chu, Song, & Dombrink, 2005; Villalobos & Davis, 2016). Villalobos and Davis (2016) further point out that a language barrier and lesser familiarity with Western legal systems may also render some immigrants less knowledgeable about their legal rights and how to exercise them.

Mental illness has also been cited as a risk factor for false confession (Redlich, 2004; 2007) and wrongful conviction (Drizin & Leo, 2004; Gross, Jacoby, Matheson, Montgomery, & Patel, 2005). The higher rates of false confession among the mentally ill can be partially explained by the fact that individuals with mental illnesses tend to have more contact with police than do their mentally healthier counterparts. The more times that a person is questioned, the more possible occasions there are to falsely confess (Coleman & Cotton, 2014; Theriot & Segal, 2005). Individuals with mental illnesses are also more prone to false confession absent any coercive pressures (i.e., *voluntary false confessions*; Kassin & Wrightsman, 1985). Voluntary false confessions can result from a break from reality and an inability to distinguish between truth and delusion, or pathological feelings of guilt and the belief that these feelings can be alleviated by judicial punishment (Gudjonsson, 1992, 2003; Kassin et al., 2010; Redlich, Summers, & Hoover, 2010). The extent to which mental illness serves as a personal risk factor is dependent on the individual and the nature of the illness. Suspects with more symptoms, and stronger symptoms, are more likely to falsely confess and falsely plead guilty as compared to suspects with fewer and less severe symptoms (Redlich et al., 2010). Mentally ill suspects can also be more likely to appear guilty to investigators; depending on the disorder and symptoms, individuals with mental illnesses may display signs of anxiety, a lack of focus, and disengagement from the conversation (Gudjonsson, 2010). Such behaviors often serve to deepen investigators' suspicions, resulting in increased scrutiny and persistence on the part of investigators during interrogations (Gudjonsson, Young, & Bramham, 2007; Kassin et al., 2010).

In addition to increasing the risk of a false confession, mental illness is also a risk factor that increases vulnerability to coercion itself. Often, suspects with mental illnesses do not understand their legal rights or how to exercise them (Rogers, Harrison, Hazelwood, & Sewell, 2007), do not understand the legal consequences of confessing (Gudjonsson, 2010), and can be highly passive and have a decreased ability to resist the demands of others (Follette, Davis, & Leo, 2007). The cognitive impairments associated with some mental illnesses could result in a diminished capacity to weigh the harms and benefits of confession, particularly long-term harms, and in some cases could make these suspects more vulnerable to deception

(Redlich, 2004; Redlich, Kulish, & Steadman, 2011). If poor source monitoring and memory deficits are accompanying symptoms of their disorder, mentally ill individuals may even internalize information given to them during interrogation, and become falsely convinced that they truly are guilty (Evans, Schreiber Compo, & Russano, 2009; Gudjonsson, 2003).

Two additional personal risk factors for coercion and false confession that are prominent throughout the literature are youth and intellectual disability. It is not our intention to directly equate these two traits to one another, but they share some interrelated characteristics that serve to increase vulnerability within the context of coercion in interrogation. Younger suspects and suspects with intellectual disabilities have a heightened susceptibility to social influences and show greater deference to authority (Perske, 2004; Redlich & Goodman, 2003; Richardson, Gudjonsson, & Kelly, 1995). For instance, youth are generally described as submissive and compliant by investigators experienced in the interrogation of juvenile suspects (Feld, 2013). The increased vulnerability of youth and those with intellectual disabilities is also seen in their disproportionate rates of wrongful convictions. In a sample of 31 cases of those wrongfully convicted based on a false confession and later exonerated by DNA evidence, 35% had a psychological disorder or intellectual disability and 39% were juveniles (Garrett, 2008). Subsequent research examining wrongful convictions has found similar over-representation of individuals with these personal risk factors (Cutler, Findley, & Moore, 2014; Drizin & Leo, 2004; Gross et al., 2005). Some observational studies have also found higher rates of admission and confession among juvenile suspects (Feld, 2013; Ruback & Vardaman, 1997) than observed among adult suspects (King & Snook, 2009; Leo, 1996).

Vulnerability to coercion is often discussed in reference to the dimension of *suggestibility*, "the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioral response is affected" (Gudjonsson & Clark, 1986, p. 1). Youth, particularly those under the age of 13, score much higher on measures of suggestibility than adults (Gudjonsson & Singh, 1984; Lee, 2004; Richardson et al., 1995). In an interrogation setting, intellectually disabled individuals have also been found to be more susceptible to acquiescence, suggestibility, and compliance than nondisabled individuals (Clare & Gudjonsson, 1995; Everington & Fulero, 1999). In turn, measures of suggestibility are predictive of false confessions (Gudjonsson, 1991; Redlich & Goodman, 2003). It may be because of this heightened suggestibility that youth are more vulnerable to deceptive maximization techniques; in a laboratory setting, Redlich and Goodman (2003) found that presenting false evidence was particularly likely to elicit false confessions from younger participants. Likewise, intellectually disabled individuals are highly vulnerable to deceptive interrogation practices (Greenspan & Driscoll, 2016). Accusatory tactics may exploit and exacerbate suggestibility (Goodman, Bottoms, Schwartz-Kenney, & Rudy, 1991), but among younger children, powerful maximization techniques do not appear necessary to elicit false confessions; they will often make self-incriminating statements in response to leading questions and positive reinforcement (Billings, Taylor, Burns, Corey, Garven, & Wood, 2007).

An impaired comprehension of the situation itself and the ability to properly weigh the potential harms and benefits of confessing increases vulnerability to coercion among youth and those with intellectual disabilities. Youth often lack the proper understanding of the situation and their rights to inform crucial legal decision-making (Grisso, Steinberg, Woolard, Cauffman, Scott, & Graham, 2003; McLachlan, Roesch, Viljoen, & Douglas, 2014; Roesch, McLachlan, & Viljoen, 2016). Thus, youth are even more likely than adults to waive their legal rights and agree to be questioned without counsel (Feld, 2006; Kassin et al., 2010). Those with mental illness and intellectual disabilities also tend to have poorer legal understanding and comprehension of Miranda warnings (Cooper & Zapf, 2008; O'Connell, Garmoe, & Goldstein, 2005). These risk factors may compound one another as well. Youth who also have a mental illness or intellectual disability tend to have an exceptionally poor understanding of their legal rights (McLachlan, Roesch, Viljoen, & Douglas, 2014; Redlich, 2007).

Beyond a decreased understanding of legal rights and the ability to exercise them, there appears to be a diminished capacity among these two populations to weigh what is in their best interests more generally (Richardson et al., 1995). When presented with hypothetical interrogation scenarios in the form of criminal justice vignettes, children and young teenagers were much more likely than adults and older teenagers to choose confession as the most viable option (Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003; Grisso et al., 2003). Similarly, Redlich and Shteynberg (2016) found that youth were also more likely to choose a guilty plea as the most viable option, even when the vignettes stated that they were innocent, and even when that plea involved incarceration. Individuals with intellectual disabilities are also less likely to understand the seriousness or consequences of confession; they are more likely to falsely confess under interrogation, often believing that factual innocence would ultimately exonerate them regardless of any statements they make (Clare & Gudjonsson, 1995).

Impulsivity is another prevalent trait among youth that likely contributes to an increased vulnerability to false confession, and possibly to coercion itself. Even if a young suspect fully comprehends the situation and information presented, their ability to reason using that information is often impaired relative to that of an adult due to decreased future orientation and impulse control. Youth exhibit a heightened concern for short-term goals and consequences, and do not consider the long-term as carefully or give it the same weight in decision-making (Steinberg, Graham, O'Brien, Woolard, Cauffma, & Banich, 2009). For this reason, youth may be more likely to make a false confession based on immediate concerns, such as simply to escape the situation and the investigator (de Koning, 2013). Investigators may be aware of this vulnerability, as some youth who have had encounters with police report having received implied promises of release in exchange for cooperation during questioning (Redlich, Silverman, Chen, & Steiner, 2004). An extreme example of this short-term orientation is the highly publicized case of two children in Chicago who falsely confessed to homicide in exchange for McDonald's Happy Meals (Possley, 1998).

Increased suggestibility, impulsiveness, and deference to authority, combined with decreased comprehension and cognitive resources, leaves youth and

intellectually disabled individuals highly vulnerable to coercive interrogation tactics. This collection of traits and deficits demonstrably lowers the capacity to weigh information, consider the viable options presented during an interrogation, and diminishes the ability to resist coercive persuasion. Thus, the same tactics and techniques typically used with developmentally normal adults may have a much greater coercive impact on members of these vulnerable populations. The criminal courts have made some acknowledgement of the heightened vulnerability of minors and the intellectually disabled, and as such a suspect's age, reasoning abilities, and emotional maturity are considered in determining the voluntariness of their statements (*A.M. v. Butler*, 2004; *Fare v. Michael C.*, 1979). Yet, investigators are often trained to use the same interrogative tactics and strategies when interrogating youth as they would with an adult suspect (Redlich et al., 2004), and they generally self-report doing so (Meyer & Reppucci, 2007; Reppucci, Meyer, & Kostelnik, 2010).

Lay and Professional Beliefs About Interrogation and False Confessions

Judging the reliability of a confession is often the paramount consideration for jury members in arriving at a verdict (Connors, 1996; Kassin et al., 2010; Leo, 2008). Given that importance, there have been a number of studies that have surveyed jury-eligible laypeople. Some studies have tested lay knowledge of the legality of various interrogation tactics and the likelihood that certain tactics would elicit a false confession (e.g., Chojnacki, Cicchini, & White, 2008; Henkel, Coffman, & Dailey, 2008). Others have asked laypeople how coercive they perceive common interrogation tactics to be (e.g., Blandon-Gitlin, Sperry, & Leo, 2011; Leo & Liu, 2009). There has been significantly less research surveying other interested parties regarding their perceptions of coercion in interrogation. A few have studied investigators' perceptions (e.g., Cleary & Warner, 2016; Kassin et al., 2007), one has studied the opinions of social scientists (Kassin et al., 2018), and our own recent research is the only one thus far to include prosecutors and defense attorneys (Kaplan, Cutler, Leach, Marion, & Eastwood, 2018). No studies, to our knowledge, have surveyed criminal court judges who regularly make admissibility decisions. In this section, we will review these studies and their findings, and explore how different groups of interested parties conceptualize coercion in interrogation.

Surveys of Laypeople. A criminal trial is intended to be a fair and impartial means of determining the truth of a criminal allegation and thereby serves as a safeguard against wrongful conviction. In practice, a confession is likely the strongest piece of evidence that a prosecutor can possess in seeking to convict a suspect (Leo, 2008; McCormick, 1972) and can even take priority over DNA evidence (Appleby & Kassin, 2016). Should a defendant wish to challenge the confession as the product of police coercion, there are two avenues by which to pursue that challenge. First, the legality of the interrogation process can be

challenged in an effort to have the confession barred on the grounds that the defendant's civil rights were violated (*Miranda v. Arizona*, 1966; *R. v. Hebert*, 1990). The presiding judge would then consider the evidence and arguments to determine the confession's admissibility. Such challenges can be an uphill battle for the defense, and without explicit threats or promises being made to the suspect in exchange for a confession, or some other particularly egregious circumstances, the likelihood of the success of such challenges is dubious (Smith, Stinson, & Patry, 2012).

Second, the defense has the option of disputing the veracity of the confession at trial by arguing that it was the product of police coercion (Perez, 2012). It is the duty of the trier of fact to consider this argument, and in cases of serious offences, the trier of fact is likely to be a jury of laypeople. A number of studies have, therefore, investigated laypeople's understanding of false confessions and coercion in interrogation (e.g., Chojnacki et al., 2008; Henkel et al., 2008) and the effect that expert testimony on interrogation and false confessions may have on their deliberations (e.g., Costanzo, Shaked-Schroer, & Vinson, 2010; Leo & Liu, 2009).

Two similar studies surveying jury-eligible laypeople were published in 2008, yielding somewhat dissimilar results. In Chojnacki et al. (2008), 94% of participants agreed that stress and psychological coercion could elicit a false confession from an innocent suspect. Yet, in Henkel et al. (2008), only 26% agreed with this proposition, and only a small minority thought that stress and confusion, or some implication or hope of leniency, were leading causes of false confession. Paradoxically, however, Henkel et al. (2008) also found that the majority of participants acknowledged that false confessions do regularly occur, and estimated that innocent suspects who are arrested and brought under interrogation falsely confess to crimes in nearly 25% of cases. Participants in both studies agreed that violence and torture were likely to elicit a false confession and recognized that these were not legally permissible. Nearly all participants in Chojnacki et al. (2008) understood that the police were not permitted to ignore an invocation of legal rights, deprive a suspect of food and water, or explicitly threaten them. Henkel et al. (2008) found, by contrast, that only a slight majority of their participants recognized that such conduct by investigators would be unlawful and render a suspect's statements inadmissible. The majority of Henkel et al.'s (2008) participants also believed that explicitly threatening suspects and making promises of leniency contingent on a confession were common practice, and nearly half believed that such highly coercive interrogation techniques were necessary to elicit true confessions from guilty suspects. As to suspect characteristics that serve as risk factors, neither group consistently recognized youth status as associated with increased vulnerability. Participants surveyed by Henkel et al. (2008) rated mental illness as a strong influence in falsely confessing to a crime, although among both groups of participants, there was less agreement and certainty that a suspect's age would significantly impact the likelihood of an interrogation eliciting a false confession.

It would appear from these two studies that laypeople believe that greatly emphasizing the harms of not confessing through threats and violence could force an innocent suspect to falsely confess, but that seemed to be the extent of consensus

among laypeople. There was disagreement among participants regarding interrogative practices that wear down resistance, and most did not recognize the risks of implying or promising leniency.

Whereas the above studies investigated beliefs about false confession and the legality of various occurrences, Leo and Liu (2009) and Blandon-Gitlin et al. (2011) attempted to uncover lay perceptions relating directly to the coerciveness of interrogation tactics, in addition to their potential for eliciting both true and false confessions. Assaulting a suspect and threatening physical violence were rated as the most coercive of the items and tactics presented, and the most likely to elicit a false confession. The presentation of false evidence was also rated as highly coercive by participants in Leo and Liu's (2009) study, and subsequent surveys of jury-eligible laypeople have also found that laypeople take a dim view of this tactic (Costanzo et al., 2010). Yet, while false evidence ploys were seen as coercive, they were not rated as highly likely to elicit a false confession by most participants (Leo & Liu, 2009). Other maximization techniques, such as repeatedly accusing the suspect of committing the crime, accusing the suspect of lying, and interrupting denials, were have not been seen as coercive or likely to elicit a false confession by most laypeople (Blandon-Gitlin et al., 2011; Leo & Liu, 2009). Minimization tactics, and even direct promises of leniency in charge or sentence, were likewise not seen as coercive by most of the jury-eligible laypeople surveyed (Blandon-Gitlin et al., 2011; Leo & Liu, 2009), nor did participants believe that such tactics had significant potential to elicit a false confession.

The results of the Leo and Liu (2009) and Blandon-Gitlin et al. (2011) studies demonstrated that most lay people only believed that deception and strong maximization techniques that threaten harm are coercive. By contrast, most jury-eligible lay participants did not believe that manipulating the benefits of confessing through minimization or even direct promises of leniency was coercive, legally problematic, or likely to lead to a false confession. Throughout the items presented in Leo and Liu (2009), coercion ratings were, with one exception, more strongly correlated with the estimated likelihood of their eliciting true rather than false confessions. This finding is compatible with Henkel et al.'s (2008) conclusion that laypeople believe highly coercive interrogation tactics are often needed to extract confessions from guilty suspects and are a "necessary evil" (p. 563).

As a final note on lay opinions, excessively long interrogation was seen as relatively normal and unexceptionable by laypeople who have been surveyed. In nearly all of the above surveys in which it was addressed, laypeople have given very high estimates of the amount of time an interrogation should be allowed to proceed, or needs to proceed, in order to elicit a confession. The mean estimate given by the laypeople in Leo and Liu (2009) as to how long interrogations need to proceed was 7.88 h, with 13.73 being the maximum amount of time that police should be allowed to question suspects; Blandon-Gitlin et al. (2011) found even higher means. Of those surveyed by Henkel et al. (2008), only 45% believed that questioning the suspect for more than 10 h should result in the suspect's statement being disallowed, and 70% believed that interrogations of this length are regularly used. These estimates are much longer than those self-reported by investigators

(Kassin et al., 2007) or found in observational studies of interrogations (Feld, 2013; King & Snook, 2009; Leo, 1996). Interrogations of these lengths would also be in violation of Reid training, which cautions against the use of interrogations lasting longer than four hours (Buckley, 2017; Inbau et al., 2013) and highly discourages the use of interrogations exceeding six hours (Blair, 2005).

Thus, it appears that laypeople may likely be substantially underestimating the coerciveness of commonly employed interrogation tactics. While the average jury-eligible layperson does recognize that false confessions are possible and do occur, they also view them as rare and improbable occurrences. Unless some threat is made or physical torture is used, the prospect of falsely confessing to a crime seems completely counterintuitive (Kassin, 2017), and most laypeople cannot envision themselves ever doing so (Costanzo et al., 2010; Henkel et al., 2008). More positively, it appears that expert testimony can help alleviate these misperceptions, and influence jury decision-making (Blandon-Gitlin et al., 2011).

Surveys of Criminal Justice Professionals. There has been surprisingly little investigation of how those who actually conduct interrogations perceive the coerciveness of interrogation tactics. The scant research surveying criminal justice officials has been more peripheral to the study of coercion in interrogation. Kassin et al. (2007) surveyed law enforcement officials regarding their experiences conducting interrogations. These investigators estimated that approximately two-thirds of suspects made some form of confession, and that nearly 5% of innocent suspects confessed under interrogation. As mentioned above, investigators also reported that the interrogations they had conducted in their careers were much shorter than laypeople generally believe them to be. Those surveyed by Kassin et al. (2007) estimated that the average length of interrogations in their experience to be 1.60 h (SD = 0.89), and that on average the longest interrogation that they had taken part in was 4.95 h (SD = 5.72).

There have also been a few survey-based studies examining how investigators perceive their interactions with young suspects (Cleary & Warner, 2016; Meyer & Reppucci, 2007; Reppucci et al., 2010). Police officers appear to have some awareness of youth as a risk factor: officers acknowledged that minors might be more suggestible, more easily intimidated by authority figures, and exercise poorer judgment (Meyer & Reppucci, 2007; Reppucci et al., 2010). Despite their apparent sensitivity to youth status as a risk factor, investigators report making few adjustments to their interrogative repertoire when questioning youth, and proceed in a manner similar to how they would with an adult suspect. For example, when asked about the frequency of use of specific interrogation tactics, such as the presentation of false evidence, deceit, interrupting denials, and presenting alternative questions, officers reported using these tactics in approximately one-quarter to one-half of their interrogations, and there were no differences in the frequencies with which they employed these tactics based on the suspect's age (Meyer & Reppucci, 2007). Cleary and Warner (2016) also found that the tactics used on suspects did not differ depending on whether an adult or youth suspect was being interrogated, though the number of times they would employ a given tactic did.

Surveys of Social Scientists. To date, there have been at least two studies that surveyed social scientists who specialize in evaluating interrogations and confessions. The first of these studies demonstrated a strong agreement among social science experts about tactics that are likely to elicit false confessions. Kassin et al. (2018) found that more than 90% of the 131 forensic psychologists they surveyed agreed that threats, promises, presenting false evidence, and minimization techniques have been reliably linked to false confession. Presumably, then, they would agree that these tactics are also coercive. There was also very little variation among social scientists that youth and individuals with intellectual disabilities are more vulnerable to false confession, as 94 and 95% agreed with these propositions, respectively. This study helped establish consensus among experts, an important consideration in determining the admissibility of expert testimony (*Daubert v. Merrell Dow Pharmaceuticals*, 1993; *R v. Mohan*, 1994).

In Kaplan et al. (2018), we directly compared perceptions of the coerciveness of interrogation tactics between jury-eligible laypeople who may be required to evaluate confession evidence, criminal justice officials with experience questioning criminal suspects or evaluating their statements (i.e., police and criminal lawyers), and social scientists with expertise and research interests in interrogation. We reasoned that criminal justice officials and social scientists might have varying perceptions of the coerciveness of different types of interrogation techniques. We found, to the contrary, that there were no statistically significant differences between criminal justice officials and social scientists in how they rated the coerciveness of maximization techniques, minimization techniques, or those tactics prohibited by law.

The group that consistently differed from the other two was that of the jury-eligible laypeople, who rated every set of items representing interrogation tactics as less coercive than did the experts. When asked about maximization techniques, criminal justice officials and social scientists both considered these interrogation tactics to be highly coercive, whereas laypeople's ratings of coerciveness were significantly and substantially lower. Particularly, strong differences were seen between groups with regard to presenting false evidence and leveraging polygraph results as evidence of guilt. We also observed significant differences in perceptions with respect to minimization tactics, such as offering justifications, highly understating the seriousness of a crime, and presenting the interrogation as an opportunity for suspects to improve their situation by telling their version of events. Again, laypeople viewed these tactics as being much less coercive than did both groups of experts. The largest differences between the laypeople and two expert groups were actually observed for tactics prohibited by law, such as directly promising leniency and offering inducements in exchange for confessing: the jury-eligible laypeople perceived these tactics as being relatively benign, and significantly less coercive, than the experts we surveyed.

Such a clear pattern of results did not emerge with regard to suspect risk factors. The social science experts and jury-eligible laypeople differed significantly, with the former giving higher ratings to how these factors increase vulnerability in interrogations. In analyzing the individual items comprising the scaled measures,

social scientists rated both youth status and intellectual disability as particularly more important considerations than did the laypeople. The criminal justice officials, however, did not differ significantly from either group.

The studies reviewed in this section have cast doubt on the ability of jurors to weigh the reliability of confession evidence, particularly when promises of leniency (explicit or implied) are offered. The jury-eligible laypeople in these studies have also been relatively insensitive to the coercive properties of powerful maximization techniques and the link between these tactics and false confessions. Social scientists specializing in interrogation were in agreement that such tactics were likely to force a false confession from an innocent suspect (Kassin et al., 2018). There is now some evidence that police officer and criminal lawyers also differ from laypeople and might be in closer agreement with social scientists in how they view interrogation practices (Kaplan et al., 2018). Yet, the admissibility of expert testimony in cases in which coercive tactics were used to secure a confession is still regularly disputed; such testimony is often disallowed into evidence on the grounds that it would not offer jurors any information that is not common knowledge (Chojnacki et al., 2008; Marion et al., in press; Perez, 2012).

Observational Studies: What Typically Occurs in the Interrogation Room?

The videotaping of police interrogations is now standard in most law enforcement agencies in North America and is legally mandated in a number of jurisdictions (Bang, Stanton, Hemmens, & Stohr, 2018; Sullivan, 2014). Though some agencies were initially skeptical of the practice, videotaping interrogations provides some advantages to police; it avoids argument through conflicting testimony between the suspect and police as to what occurred in the interrogation room, and it frees the investigator to focus completely on the suspect and questioning rather than being burdened with extensive note taking (Drizin & Reich, 2004). From the perspective of social scientists, law enforcement officials' collection of videotaped interrogations offers new avenues of research opportunities, such as examining what typically occurs during police interrogations, and what interrogation tactics (coercive or otherwise) may be employed by investigators.

Reid-Based Interrogations. Leo (1996) conducted the first known observational study to use videotaped police interrogations (though a number of interrogations viewed in-person were included in the sample as well). Given the prevalence of the Reid Technique (Inbau et al., 2013), particularly at the time of the study, he focused primarily on 25 different interrogation tactics that are taught as part of Reid training. It was the first known attempt to operationalize coercion in a set of what were termed *coercive tactics*: those which the courts have specifically deemed to be overtly coercive, and, if brought to light, would likely result in an admission and confession being excluded from evidence. King and Snook (2009)

later extended Leo's research by recording the frequency with which more specific components of the Reid Technique—17 *core Reid steps* (e.g., use of transition statements, theme development) and 11 *other Reid guidelines and suggestions* (e.g., plain room, investigator confidence in the suspect's guilt)—arose in a sample of videotaped interrogations. They also accounted for the suspect's behaviors during interrogations. Specifically, they coded for 10 behaviors indicative of duress such as making denials and objections, becoming withdrawn, and crying. This approach begins to capture the dynamic interactions between suspect and investigator that may create an atmosphere of psychological pressure and coercion.

In both studies, the majority of interrogations were conducted by one investigator, and the majority of investigators were Caucasian males. The crimes under investigation were relatively serious, the most common being robbery and sexual assault. Suspect demographics differed between the two studies: in Leo's (1996) study, nearly 70% of suspects were Black males, whereas 96% of the suspects in King and Snook (2009) were Caucasian. This difference was most likely due to location, as Leo's (1996) interrogations were conducted in California, and King and Snook's (2009) sample came from Atlantic Canada.

Despite being conducted decades apart, and in completely different regions of North America, there were a number of commonalities in the investigators' use of interrogation tactics. Coercive tactics occurred in only a minority of interrogations, and none of them rose to the level of physical coercion or violence. In a few instances, investigators threatened suspects with psychological harm, touched the suspect in an unfriendly manner, increasingly badgered the suspect, or made some promise of leniency. Of note, when coercive tactics did occur, they were predictive of the interrogation ending in a confession (Leo, 1996). King and Snook (2009) also observed that in a number of cases the proper legal warning was not read to the suspect during the videotaped portion of the interrogation. The authors pointed out, however, that this did not mean that the warnings were not read at some point off-camera.

Five or six Reid tactics were typically used per interrogation. Investigators in King and Snook's (2009) sample used slightly less of a variety of tactics than in Leo's (1996) sample, more typically four different tactics per interrogation. In both samples, the most commonly used interrogation tactics were presenting evidence of guilt and appealing to the suspects' self-interest. Undermining the suspects' denials and identifying contradictions in the suspects' accounts also occurred frequently, as did two tactics associated with minimization (offering moral justifications or psychological excuses and using praise or flattery). Of the Reid components and suggested themes, minimization techniques arose more often than did maximization techniques (King & Snook, 2009); the most consistently observed was changing themes if the suspect continued to reject the one being developed by the investigator. Leo (1996) found that presenting false evidence occurred in 30% of the interrogations. Other tactics, such as yelling at the suspect or exaggerating the seriousness of the crime, were rare across both studies.

Half of the suspects observed by King and Snook (2009) made either a full confession or partial admission; in Leo's (1996) sample, this was slightly higher

(65%). Leo (1996) also found that certain tactics were highly correlated with the interrogation successfully eliciting a confession. Appealing to the suspect's conscience was associated with a confession in 97% of the cases in which it was used. Pointing out contradictions, the use of praise or flattery, and offering moral justifications were also associated with confessions in more than 90% of the interrogations in which those tactics were employed. King and Snook (2009) did not find such strong associations between tactics and outcome, but did note that the number of Reid components and themes was predictive of confessions, albeit to a lesser extent.

With regard to the behaviors of those who were being questioned, King and Snook (2009) found the most frequent suspect behavior was denial of guilt. Eight-two percent of suspects made at least one denial (the average being more than 13 per interrogation). The majority of suspects also made at least one objection, meaning that they gave specific reasons as to why they would not or could not have committed the crime. The number of denials and objections raised by suspects appeared to negatively correlate with confession, though the relationship did not meet statistical significance. In only a minority of interrogations were other suspect behaviors observed, such as crying or mentally withdrawing.

Leo (1996) noted that the interrogations tended to break down into two types: those relying primarily on maximization and inflating the harms of not confessing, and those that minimized harms and created perceived incentives for confessing. In analyzing the results, he speculated that the amount of coercion exerted on a suspect was affected by the strength of the evidence, the suspect's race, the seriousness of the offence, and the suspect's known prior criminal history, as these variables correlated with the number of tactics used in the interrogations. Nonetheless, the most highly coercive interrogation tactics were relatively rare in both samples, except for the use of false evidence. Convincing suspects that denial was futile through the use of evidence and pointing out contradictions, followed by encouraging confession through minimization, appeared to be the preferred method of eliciting confessions rather than becoming threatening or abusive.

PEACE-Based Interrogations. Where Leo (1996) and King and Snook (2009) began with the Reid Technique as the cornerstone of their observational frameworks and observed Reid-trained officers, others have used the PEACE model as the framework for their observational research. PEACE places a strong emphasis on evaluating the effectiveness of interviews; evaluation is, after all, a core component of the acronym, and frameworks have been developed to measure interviewing skills and investigator fidelity to the model. Clarke et al. (2011) provided one of the more recent such observational studies. The interrogations they reviewed were conducted in England and Wales, and most of the investigators observed were PEACE trained. The majority of investigators were males, as were the majority of suspects. Age was not directly reported, but the authors indicated that 10% of the suspects were youth.

Clarke et al. (2011) did not report the frequencies with which specific tactics were used, but more generally evaluated investigator performance in keeping to the PEACE model. As mentioned in an above section, one of the most notable findings

was that 10% of the interviews were not conducted in accordance with procedural laws governing evidence. Rapport building during the "engage and explain" portion was also found to be generally lacking: only 7% of investigators properly conducted this part of the interview, and in 47% of interviews the rapport building aspect of PEACE was absent altogether. Another commonly observed problem was that the majority of the questions posed to suspects were closed-ended, contrary to PEACE training. More positively, investigators rarely used leading questions or asked multiple questions at once. Surprisingly, none of these measures significantly varied depending on whether the investigator had undergone PEACE training or not. The confession rate found in Clarke et al. (2011) was 65%, comparable to those observed in the Reid-based interrogations evaluated by Leo (1996) and King and Snook (2009). Unlike in those studies, none of the measures of the investigators' conduct during the interrogations correlated significantly with whether the suspect confessed.

Interrogations of Youth. There have been some interesting observational studies that focused specifically on police interactions with youth. Cleary and Vidal (2013) examined 83 videotaped interrogations of young suspects in the United States. The results reported in this study are mostly descriptive of the characteristics of the investigators and suspects, and context of the interrogation, rather than the interrogation tactics used. The youth were on average 15.4 (SD = 1.1) years of age, and in only a minority of interrogations was a parent present (21.1%). Approximately, 40% of suspects were Caucasian, 40% Black, and 20% another ethnicity or their ethnicity could not be identified. Similar to adult suspects (Leo, 1996; King & Snook, 2009), the majority of youth were interrogated by a single investigator, typically a Caucasian male. Feld (2013) conducted a more comprehensive examination of interrogations involving youth as suspects. Suspects in this study were slightly older (M = 16.5, SD = 0.50) than in Cleary and Vidal (2013). Approximately, half of the suspects were Caucasian, a third Black, and the remainder other ethnicities. More than half of the suspects were under investigation for relatively minor infractions such as theft and drug crimes, and fewer than a third were charged with more serious crimes against the person.

Feld (2006, 2013) observed a few different strategies used by investigators to obtain Miranda waivers from youth. Some investigators engaged the suspect in conversation unrelated to law enforcement to put them at ease, stated something to the effect of this was the suspect's chance to tell his or her side of the story before giving the legal warning, and/or presented the warning as a trivial bureaucratic formality. In the Feld (2013) study, 92.8% of the youth in this sample waived their legal rights and agreed to speak with investigators.

The interrogations of youth were relatively brief, and rarely exceeded half an hour (Cleary & Vidal, 2013; Feld, 2013). Feld (2013) observed that they tended to be mainly accusatory. Maximization tactics were used in approximately 70% of the interrogations, and they were more likely when the suspect was resistant and defiant than compliant. The most common maximization technique was to confront the suspect with evidence, seen in more than half of the interrogations. Though it is unknown how commonly false evidence was presented to suspects, as Feld (2013)

did not report whether the evidence was true or fabricated, a number of investigators did use a deceptive tactic known as the *bait question* (Luke, Crozier, & Strange, 2017). The bait question involves bluffing about evidence through hypothetical questions and suggestions, such as "what if I told you there is video surveillance footage" or "is there any reason why your fingerprints would be found at the scene?" In a third of the interrogations, the suspect was directly accused of lying. Challenging inconsistencies was less common than observed in the interrogations of adult suspects (King & Snook, 2009; Leo, 1996), as were minimization techniques, which only occurred in 17% of the interrogations analyzed by Feld (2013). In those interrogations in which it was used, the most common form of minimization was to shift blame onto a co-accused. Comparatively, about one-third of the interrogations in Leo's (1996) sample contained minimization techniques. Feld (2013) concluded that because the crimes under investigation were relatively minor, there was little utility in further minimizing the offence. Rather, it may have been more advantageous to the interrogation to inflate the perceived seriousness of these minor crimes through maximization.

Nearly, 80% of youth suspects were cooperative (Feld, 2013). A minority of suspects offered resistance through "non-cooperation, denial of knowledge and culpability, lying, evasion, silence, or blame shifting" (Feld, 2013, p. 18), and these suspects were much less likely to confess or make self-incriminating statements. Ultimately, 58.6% of the suspects made full confessions, and an additional 29.8% made incriminating statements (the majority of these were made only a few minutes into the interrogation). Cleary and Vidal (2013) found lower rates of confession: in their study, approximately 67% of youth made either incriminating statements or a full confession. The rates of confession found by Feld (2013) were higher than what is typically observed in interrogations of adult suspects, although Cleary and Vidal (2013) found comparable rates to studies involving adult suspects (Clarke et al., 2011; Leo, 1996).

Summary. The studies reviewed here suggest that presenting evidence and pointing out contradictions are the main staples of police interrogations. A large number of interrogations also included minimization and/or deception. It appears, however, that minimization may be less likely to be employed in the interrogations of youth, and that interrogations of youth are notably shorter than interrogations of adult suspects (Cleary & Vidal, 2013; Feld, 2013). What was particularly surprising were the number of interrogations in which false evidence was presented to the suspect, as observed by Leo (1996), and the use of bait questions with youth, as observed by Feld (2013). More positively, instances of threatening or otherwise abusing suspects were rare occurrences in all of these studies. This line of research suggests that highly coercive interrogations are rare, but when they do occur, they are less likely to involve a badgering detective shining a bright light in a suspect's eyes and bullying the suspect into confessing and more likely to involve the manipulation of the suspect in more subtle ways—through deception and minimization.

The Coercion Assessment Instrument (CAI)™

We begin this section by reviewing past frameworks for evaluating interrogations and discussing the basic premise of the CAI™. We will provide an overview of the survey research conducted to assist us in quantifying coercion, and explain how we chose to organize the CAI™. The section will conclude with a review of the CAI's™ scoring as it has been developed to this point, and future directions in our coercion assessment research.

Past Frameworks for Evaluating Interrogations. The observational studies discussed in the above section are some of the most significant that have been conducted, but they are mostly descriptive rather than evaluative. Although no observational studies to date have specifically endeavored to objectively and psychometrically capture coercion, some of the frameworks developed in past studies and meta-analyses provide a basis for organizing interrogation tactics and suspect behaviors for the purposes of coercion assessment.

The closest attempt to operationalize and quantify coercion in interrogations was an exploratory study by Pearse and Gudjonsson (1999). Their observational framework accounted for tactics used, the frequency with which they were used, and their intensity. A factor analysis grouped the interrogation tactics that they observed into the categories of *Intimidation*, *Robust Challenge*, *Manipulation*, *Question Style*, *Appeal*, and *Soft Challenge*. They found that high scores on the first three of these factors positively correlated with the confession being ruled inadmissible by a criminal court. This relationship only met marginal significance, potentially due to a small sample size and low statistical power. Whether confession evidence is ruled to be voluntary and admissible is perhaps not a measurement of coercion per se, though presumably there would be a substantial relationship between coercion and admissibility decisions. Indeed, in at least one of these cases, expert psychological witnesses testified that the interrogation was manipulative and oppressive. This study used a sample of only 18 interrogations, all of which were audiotaped rather than videotaped, and only investigated a relatively small number of tactics. Despite its limitations, no other observational study has examined the relationship between the frequency and intensity of the tactics used on a suspect, and an outcome variable like legal admissibility that so closely reflects coercion and a lack of voluntariness.

Bull and Soukara (2010) investigated how interrogation tactics, mostly related to the PEACE model, influence and interact with a suspect's behaviors. Bull and Soukara's (2010) fourth study in that article provided an additional insight into the dynamic relationship of interrogation by recording which interrogation tactics immediately preceded confessions. The strongest confession precursors were presenting evidence, open-ended questioning, and the use of repetitive questions. This is not to say that because the tactics were followed by a confession they had coerced that statement, but it does give some insight into which tactics are likely to have a meaningful impact on suspects. The methodology itself of comparing suspect

behaviors to the tactics that precede them is an innovation that has greatly influenced the development of our own framework.

Bull and Soukara (2010) provided insights into how one might measure the interaction between interrogation tactics that may be coercive, and suspect reactions indicative of being under coercive pressure. Pearse and Gudjonsson (1999) measured a relevant outcome variable: that the confession was not allowed into evidence. Pearse and Gudjonsson (1999) also provided a means of grouping items relevant to coercion. Perhaps the most coherent and comprehensive review of interrogation methods, strategies, and specific tactics was produced by Kelly et al. (2013). Noting a lack of consistent classification, particularly between macro-level strategies (e.g., accusatory vs. information gathering) and specific tactics (e.g., appealing to self-interest, presenting evidence), the researchers conducted a meta-analysis in an attempt to introduce a "mesolevel" and create a categorical taxonomy of interrogation tactics. Beginning with over 800 different variables from across 47 studies, the researchers removed duplicates, combined similar constructs, and discarded inapplicable items. They whittled down their pool of tactics to 71, divided into six domains: *Presentation of Evidence*, *Rapport and Relationship Building*, *Context Manipulation*, *Emotional Provocation*, *Confrontation and Competition*, and *Collaboration*. The authors asserted that these six mesolevel categories are all-encompassing of any interrogation tactics currently in use or that could potentially be devised, with the exception of outright torture, which they distinguish from interrogation.

Kelly et al.'s (2013) taxonomy was developed into an observational framework and employed in the assessment of recorded interrogations in Kelly et al. (2016). Kelly et al. (2016) recorded both the occurrence of tactics and the points in the interrogation at which they occurred, providing some insight into how tactics may change throughout an interrogation. They also examined how interrogation tactics interacted with the suspect's level of cooperation (coded on a 1–5 scale ranging from *strongly resistant* to *strongly cooperative*).

Rapport and relationship building tactics mainly occurred during the beginning stages of interrogations, and this was also when suspects were most cooperative. The prevalence of presenting evidence and emotional provocation tactics, conversely, increased as the interrogations progressed. Progression of the interrogation was also associated with a decrease in cooperativeness on the part of suspects, particularly mid-interrogation, as confrontational tactics increased. Further, it appeared that the negative relationship between confrontation and suspect cooperation may have been more strongly due to the suspect reacting to an aggressive interrogation, rather than an investigator reacting to an obdurate suspect; investigator confrontation in one phase predicted a lack of suspect cooperation at later stages. It is worth noting that a lack of cooperation at the beginning phase was also predictive of confrontation and presenting evidence in middle blocks. Thus, the relationship was likely bidirectional.

Those interrogations that employed emotional provocation or confrontational tactics tended to be consistent throughout, supporting Leo's (1996) earlier observation that interrogations generally follow strategies reliant upon either

minimization or maximization, rather than an equal balance or meshing of the two. Confessions, when they occurred, usually took place during the later phases of the interrogations. Rapport and relationship building did not correlate significantly with outcome, and confrontation and presenting evidence were negatively correlated with confessions or partial admissions. The length of the interrogation was correlated with obtaining a confession; however, the authors pointed out that this was largely because the suspect making a full detailed confession often took a considerable amount of time.

The methodology employed by Kelly et al. (2016) was useful in that it gave further insight into how suspects react to interrogation tactics, and how investigators react to different suspect behaviors. Those suspects who were exposed to fewer confrontational tactics were more cooperative and more likely to confess; if increasing confrontation was related to increasing rather than diminishing resistance, then what are we to make of its coercive potential? How much does the level of cooperation reflect coercion and the effect of interrogation techniques, and how much does it reflect the suspect's personal traits and characteristics? Those who confessed in this sample were also more cooperative at the outset of the interrogations, meaning that their cooperation was not necessarily the product of being coerced.

The research to date has provided an accounting of tactics and strategies that have been observed in interrogations and may be pertinent to the assessment of coercion, as well as organizing structures under which to assemble them. It has done little to identify which items are definitely coercive, or the coercive magnitude of interrogation tactics relative to one another. In comparing the coercive magnitude of tactics, those that have been ruled unlawful and/or that have been reliably linked to false confession may be of some use in quantifying their coerciveness (e.g., Drizin & Leo, 2004; Leo & Ofshe, 1998). Our review of past research led us to the point where we could ascertain what occurrences in the interrogation room likely need to be accounted for in assessing coercion, but it offers little more beyond that. In the following section, we summarize our own recent attempts to further our understanding of coercion assessment in interrogations.

Item Development. To remedy the lack of objective standardized measurements of coercion, we are developing a psychometric instrument to detect and quantify coercion in videotaped interrogations, the *Coercion Assessment Instrument*™. The CAI™ is designed to function as an observational framework for use while viewing videotaped interrogations. The rater reviews the video and uses specialized software to code for different occurrences (which we refer to in this section as *items*) throughout the interrogation. Once fully coded, the software tallies the items to produce a coercion score for the interrogation, and sub-scores across a few domains.

Construction of the CAI™ began with a thorough review of models of interrogation, what is known to occur in police interrogations from past observational studies, and how certain suspect characteristics may serve as risk factors for coercion and false confession. One of our primary sources of items that reflect interrogation tactics and suspect behaviors were interrogation manuals themselves,

such as Inbau et al. (2004, 2013) and surveys of police officers (e.g., Kassin et al., 2007; Meyer & Reppucci, 2007). We also reviewed observational studies (e.g., Feld, 2013; Kelly et al., 2016; King & Snook, 2009; Leo, 1996), case law (e.g., *Brown v. Mississippi*, 1936; *Malinski v. New York*, 1945), and meta-analyses (e.g., Kelly et al., 2013). We identified suspect risk factors by reviewing past literature on vulnerable groups, particularly Gudjonsson's works on suggestibility (e.g., Gudjonsson, 1997, 2003; Richardson et al., 1995). We also reviewed the research on personal risk factors in known cases of false confession (e.g., Drizin & Leo, 2004; Leo & Ofshe, 1998).

By consulting past research and literature on the topics of coercion and interrogation, we identified four types of items that may interact with one another to produce coercive pressure: (1) the investigator's behaviors (i.e., interrogation tactics), (2) the suspect's behaviors and reactions, (3) the suspect's traits and characteristics (e.g., youth), and (4) the environment and context of the interrogation. The latter two are not the types of items that would necessarily need to be accounted for contemporaneously while viewing an interrogation video. For instance, a suspect either has an intellectual disability or does not; this characteristic is not going to change as the interrogation proceeds and therefore does not need to be actively coded. Such items are marked on the CAI's™ scoring sheet in a Y/N dichotomous format. Other items, such as those reflecting behaviors on the part of the interrogator (e.g., presenting evidence) or on the part of the suspect (e.g., becoming flustered), need to be accounted for by the rater as such items occur.

Item Reduction and Quantification. The survey data gathered from social scientists and criminal justice officials in Kaplan et al. (2018) were not collected only for the sake of comparison to jury-eligible laypeople. The ratings of the various interrogation-related items from the social scientists and criminal justice officials were used to inform development of the CAI™.

From the literature reviewed, we identified 192 items. We assembled the collected items into a survey that we administered to social scientists and criminal justice officials in Kaplan et al. (2018). We recruited 54 social scientists from the *American Psychology—Law Society* who had expertise and research interests in police interrogations. We recruited our sample of 20 criminal justice officials though their organizations, the authors' professional contacts, and snowball sampling. The criminal justice officials were either senior investigators with experience conducting interrogations or criminal prosecutors and defense lawyers with experience evaluating confession evidence.

The sections of the survey were divided into items representing interrogation tactics, environmental factors, suspect behaviors, and suspect risk factors. Each participant rated the coercive potential of each interrogation tactic and environmental factor on 7-point Likert scales. In the case of suspect behaviors, participants rated how indicative each was of the suspect being under emotional duress on a 7-point scale. Participants rated the risk factors based on the extent that they believed each increased vulnerability to coercion, again on 7-point Likert scales. These scales allowed participants to indicate that an item was "vague or unclear." Criminal justice officials were also invited to an interview to discuss their thoughts

and concerns about empirically measuring coercion, and for their suggestions on how to better operationalize and capture the construct.

Survey data were used in a number of ways. Our first goal was item reduction. As mentioned, the CAI™ is intended to function as a coding framework whereby the evaluator actively records every item as it occurs. Attempting to account for 192 items simultaneously would not be practical and, even if it were, the amount of data produced would be unmanageable. Our first approach toward reducing the number of items was to drop those items that experts had indicated were innocuous and unnecessary for the assessment of coercion. These items were identified by running one-sample t-tests against a neutral score of zero (indicating the item neither enhances nor decreases coercion). We removed eight items using this criterion. We removed an additional ten items due to them being too vague for an evaluator to judge, as indicated by our respondents.

For the sake of further item reduction, we then set out to combine items that were conceptually similar and had been given similar coercion ratings by the two groups of social science and criminal justice experts. For instance, the item "Seriousness" is a combination of "the investigator overstated the seriousness of the crime" and "the investigator described/exaggerated the suspect's future sentencing." During the first pilot test in which we coded videotaped interrogations, a few remaining items were identified for removal or combination due to low inter-rater reliability and difficulty on the part of raters in consistently recognizing them. For example, the list of interrogation tactics used in the initial pilot testing contained a number of items meant to increase the suspect's feelings of guilt about the alleged crime(s). Because the differences between these items were relatively subtle, research assistants often confused them with one another. After reviewing the videos in which these items were coded, and after looking at their coercion ratings, these were all combined into the item "Increase Guilt."

Following this process, the list was reduced to 77 items: 39 interrogation tactics, 13 suspect behaviors and demeanors, 11 suspect risk factors, and 10 and environmental and contextual items. Assignment of coercion weights to each item was straightforward relative to the process of identifying, reducing, and combining items. Each item's coercion weight is the average coercion rating given by the experts surveyed (or in the case of combined items, the average of their averages). So, if a given tactic was used in an interrogation, it was coded as present and assigned the coercion weight based on the survey of experts. Each interrogation therefore produces a set of tactics used and weights assigned (the weights are associated with tactics and do not change from one interrogation to the other). The scores from an individual interrogation are them summed to form a coercion score for each category of tactic (e.g., suspect behaviors and demeanors, suspect risk factors, etc.) and a total score. Some items have much higher coercion weights and contribute much more to the final coercion score than others. For instance, pointing out how one of the suspect's statements contradicts a previous statement adds far less to the final CAI™ score than the use of deception or becoming threatening toward the suspect.

Structure of the CAI™. We divided our interrogation tactics across the domains, or mesolevel categories, identified by Kelly et al. (2013) for use as a general organizing structure of the items of the CAI™. The purpose of dividing items across domains was to allow the CAI™ to capture the genre or type of interrogation. To offer additional descriptive power, the CAI™ keeps count of how many maximization and minimization tactics were used during the interrogation, and if anything occurred that violates evidence law (what we termed *prohibited tactics*). Over many drafts, we removed items not pertinent to the assessment of coercion, combined items, organized items from external sources into their domains, and renamed some of the items and domains to better fit the purposes of coercion assessment.

Investigative and Evidence-Based. The first domain of the CAI™ we termed the Investigative and Evidence-Based domain. This domain contains items that leverage evidence (or supposed evidence) against the suspect. Some of the items of this domain are maximization techniques, specifically those intended to create the perception that the police have proof and are certain of the suspect's guilt, and therefore attempt to remove denial as a viable option. Presenting evidence (true or false), baiting the suspect with the possibility of evidence, and inflating the reliability of existent evidence are found under this domain. Pointing out contradictions in the suspect's account is also considered a part of the Investigative and Evidence-Based domain; contradictions in a suspect's statement can become pieces of evidence themselves.

Rapport Building. The Rapport Building domain is comprised of tactics aimed at establishing a social connection between the investigator and suspect. Though there were a number of tactics identified by Kelly et al. (2013) originally listed under Rapport Building, only four items were retained as necessary for the assessment of coercion. The items retained were sympathizing with the suspect, the investigator minimizing their role as a law enforcement officer, establishing rapport by engaging the suspect in conversation unrelated to the investigation, and using proper listening skills (e.g., not interrupting or talking over the suspect, not asking leading questions or ask multiple questions at once).

Emotional Provocation. The third domain of the CAI™ encompasses a variety of items which are employed with the intention of eliciting a strong emotional response. Causing emotional distress may highly contribute to interrogation-related regulatory decline, diminish the suspect's ability to weight harms and benefits, and reduce the suspect's ability to assert him or her self (Davis & Leo, 2012). The Emotional Provocation domain contains items such as expressing anger at or insulting the suspect. Some of the items contained here are also maximization techniques, such as presenting the suspect with graphic crime scene photos. Finally, Emotional Provocation can also take the form of flattering the suspect in an attempt to appeal to his or her ego or sense of grandiosity.

Confrontation. The Confrontation domain is the largest, and most of the items it contains are maximization techniques. This domain includes exaggerating the seriousness of the crime and sentence, staring at the suspect without speaking, directly accusing the suspect of the crime or of lying, and directly presenting a

forced choice between two inculpatory themes. This domain also encompasses a number of tactics prohibited in most jurisdictions, such as not allowing the suspect to exercise his or her rights, and directly threatening the suspect.

Cooperation. The items that comprise the Cooperation domain are all minimization techniques, as they all imply mitigated punishment in some way. This domain includes items such as directly offering justifications and understating the seriousness of the offence. The Cooperation domain also includes direct promises of leniency or secrecy, a tactic prohibited in most jurisdictions. Finally, the CAI™ also keeps track of whether the investigator offers the suspect any food, water, etc., either unsolicited or as an inducement made in exchange for information.

Suspect Behaviors. The CAI™ coding scheme contains a short list of eight suspect behaviors that reflect anxiety or duress. This includes physical signs of anxiety and making objections and denials. The CAI™ also records the suspect's more general demeanor during the interrogation, whether that be anxious, calm, fearful, withdrawn/defeater, or defiant. The methodology used in Bull and Soukara (2010) inspired the CAI's™ method of assessing how an investigator's behaviors may interact with the suspect's perceptions of the interrogation. Bull and Soukara were concerned with the interrogation tactics that preceded only one outcome measure: a confession. We have expanded on this methodology so that the CAI™ adjusts the coercion weights of interrogation tactics based upon the suspect's demeanor or if they co-occur or are immediately preceded by any of the eight suspect behaviors indicative of being under anxiety and coercive duress.[2] In the current draft of the CAI™, if an interrogation tactic item is met with a strong reaction on the part of the suspect, it amplifies (or in some cases reduces) the coercion score recorded for that instance.

Suspect Risk Factors. Certain traits held by the suspect that increase their susceptibility to coercion and risk of false confession are also accounted for by the CAI™ in the Suspect Risk Factor domain. Youth, mental illness, and intellectual disability have been reviewed in detail in this chapter; other items under Suspect Risk Factors include intoxication, sleep deprivation, or a language barrier. Like the environmental factors reviewed below, these items do not need to be actively coded while reviewing the videotaped interrogation. These risk factors affect coercion scores by modifying the weight of the suspect's reactions.

Environmental and Contextual Factors. Environmental and Contextual Factors are considerations related to the circumstances of the interrogation that may inflate coercive pressures. Environmental factors do not need to be actively coded while viewing the interrogation video, as they are either present or not present; therefore, the data may be recorded in a Yes/No format. Some of these environmental or contextual considerations may deplete self-regulatory cognitive resources and wear down resistance to coercive persuasion, such as an excessively long interrogation,

[2]The mathematical formulae augmenting the coercion weights of recorded interrogation based on suspect behaviors, suspect characteristics, and environmental factors influence tactics are still in development. These will be determined during future validation studies.

a very small interrogation room, and the interrogation taking place late at night or when the suspect would normally be sleeping. Other items, such as isolation or moving the suspect to a distant location for interrogation, may be intended to instill hopelessness, and thereby remove the perception of denial or silence as viable options.

Output. A sample section of the output produced by the CAI™ is shown in Table 1. The first part of this table displays the domains of the CAI™, a count of the number of interrogation tactics used per domain, and the coercion scores per domain. Directly underneath are the totals. In this example, a total of 105 instances of interrogation tactics arose during questioning of this suspect. The majority of the items fell into the Investigative and Evidence-Based or Confrontation domains. There were also 25 different Emotional Provocation items that emerged, and 10 Cooperation items. Below that, the output reflects how many of the 105 instances of items were minimization (most of which would have been from the Cooperation domain) and how many were maximization (most of which would have been Investigative and Evidence-Based or Confrontation). The CAI™ also makes note of anything that occurred that could be considered unlawful under the row for prohibited items. This would include denying access to necessities or making explicit threats or promises, which did not occur in this interrogation. Finally, the

Table 1 CAI™ sample output

Domain	Count	Score
Investigative and evidence-based	34	23.125
Rapport building	0	0
Emotional provocation	25	32.644
Confrontation	33	60.741
Cooperation	10	12.197
Concessions and inducements	0	0
Total	**105**	**128.707**
Special categories		
Minimization	12	14.579
Maximization	45	72 003
Prohibited	0	0
Notes		
Interview of for felony public exposure. May 2012		
Duration 1:22:22		
Suspect is present voluntarily, and has Miranda rights read		
Two officers present		
Clear good cop/bad cop		
Suspect left alone mid-interrogation		
Officers take a short break, place suspect in a cell during interim		
Suspect confesses in full		

rater's notes on the interrogation are displayed. If the suspect had any characteristics known to serve as risk factors, or if any of the environmental items were applicable, it should be noted here as well as recorded on the CAI™ scoring sheet. We also recommend taking note of the length of the interrogation, the outcome, and anything else of relevance that occurs, such as a break in the interrogation.

Future Development. We have a number of further studies planned to assist in further development of the CAI™. We will not review them all here, though they include validation, assessing user satisfaction, and investigating the possibility of rater bias and adversarial allegiance. We are currently developing a training curriculum for the CAI™ through which raters can be certified to conduct assessments of interrogations using the CAI™. We have written a comprehensive training manual that will be included in the training course. The manual covers the nature of coercion, basic strategies of police interrogation, the variables accounted for by the CAI™, the CAI's™ scoring, and the use of the software. We intend to work with a sample of 10 volunteers with backgrounds in forensic social science or criminal justice to undergo CAI™ training, which will take place over several sessions and include review of the manual and use of the CAI™. Trainees will then code several interrogations independently and meet with the instructor to review their coding and scoring. We will administer a user satisfaction and program evaluation survey to all trainees, the results of which will be used to refine and finalize the training program.

We will test the validity of the CAI™ in at least two studies. In the first of the validation studies, each of 20 criminal justice officials will review and evaluate one of the videotaped interrogations previously evaluated using the CAI™ and score the voluntariness of the suspects' statements on a simple Likert scale of 1–10, producing *legal voluntariness scores*. We hypothesize that CAI™ scores for given interrogations will correlate significantly with criminal justice officials' independent evaluations of voluntariness, demonstrating convergent and criterion validity. Low agreement between scores may highlight areas where we need to further refine the scoring matrix of the CAI. The second study of the validation phase will be similar to the first in concept, though rather than criminal justice officials our participants will be 20 forensic social scientists who will each evaluate two videotaped interrogations and provide ratings of psychological coercion. We will then compare CAI scores and *psychological coercion scores* to produce further evidence of construct, convergent, and criterion validity.

The development of a standardized sample would be particularly useful for interpreting CAI scores for any one interrogation. In Table 1, the count of interrogation tactics and the length of the interrogation are informative, though the CAI™ score is less easily interpreted in the absence of normative data. What does a coercion score of 128.707 mean? By developing a large standardized sample of coercion scores and plotting them on a normal curve, it will allow a given score to be compared to that curve, and then expressed in terms of percentiles of coerciveness. A statement could then be made that a given interrogation was "more coercive than 80% of police interrogations," or something to that effect. Although we do not necessarily believe that the use of percentiles will result in identification of some inflection point where an interrogation definitely becomes coercive,

they are expected to be much more easily comprehensible than an arbitrary raw value. Our hope is to determinate normative ratings with a representative sample of interrogations. The development of normative data is will involve developing a large and representative sample of interrogations. It might also be useful to develop normative data for (e.g., Canadian vs. American) or type of crimes under investigation (e.g., felony vs. misdemeanor, property vs. crimes against the person).

The end product will be a psychometrically derived instrument capable of detecting and quantifying coercion from videotaped interrogations and an associated handbook and training manual. The CAI™ will be of utility to law enforcement for training and evaluation, the criminal courts in determining the voluntariness and reliability of statements, and other psychological researchers interested in studying coercion or interrogations.

Summary and Conclusions

Investigators have at their disposal a number of maximization and minimization techniques that may be used to influence a suspect's perceptions of the harms and benefits of confessing. Tactics associated with the Reid Technique (Inbau et al., 2013), such as the presentation of false evidence and implications of leniency, have repeatedly stood out in the literature as among the most coercive and likely to elicit a false confession. Accusations, interrupting denials, and disputing objections may also be used to create the impression that denial or even remaining silent are not viable options. These potentially coercive tactics have consistently appeared in observational studies, though not in the majority of interrogations; the presentation of true evidence and pointing out contradictions appear to be the most common tactics employed in modern police interrogations (Bull & Soukara, 2010; King & Snook, 2009). Even those tactics that are relatively benign in and of themselves, if used repeatedly over a long period of time, can eventually wear down resistance and self-regulatory resources to the point that they may coerce a statement (Davis & Leo, 2012).

Interrogation tactics can have a greater coercive impact on some suspects than others. Owing largely to decreased comprehension and suggestibility, youth and intellectually disabled individuals are less able to effectively weigh their options during an interrogation. It is also plausible that they have fewer innate self-regulatory cognitive resources to draw upon, and may be more susceptible to interrogation-related regulatory decline. Yet, the interrogations of youth suspects do not differ markedly from those of adults, apart from perhaps being somewhat briefer and not as heavily focused on minimization (Feld, 2006, 2013).

Social scientists and criminal justice officials appear in agreement about coercive factors in interrogation (Kaplan et al., 2018; Kassin et al., 2018), though most of the above information does not appear to be within the ken of potential jury members. Jury-eligible laypeople underestimate the coerciveness of common interrogation techniques, relative to experts, and are uncertain about suspect risk factors

(Henkel et al., 2008; Leo & Liu, 2009). This would support the necessity of expert testimony in jury trials in which a confession is retracted and disputed.

The research and literature to date have provided a wealth of factors to consider in the assessment of coercion. With the pertinent variables identified, what remained was the task of compiling them in a systematic way so as to allow for the measurement of coercion. The first known attempt to measure and quantify coercion is currently underway, though the CAI™ requires further validation, and the development of a standardized sample in order to express coercion in comprehensible manner.

The CAI™ is not intended to be the end sum of coercion research, but rather another incremental step in the scientific understanding of coercion. As the study of interrogation and confession continues to evolve, so too will police methods of interrogation. In turn, as methods of interrogation evolve, so too will our means of assessing interrogations and confessions. This cycle of continuous improvement and collaboration between social sciences, law enforcement, and the legal profession has led to a better understanding of coercion and false confession and has allowed for advancements such as the PEACE model (Milne & Bull, 1999). We hope that, through this process, further means of eliciting true confessions that are non-coercive and remain within the proper legal parameters will be developed.

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The Psychology of Alibis

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The Psychology of Alibis

On the night of March 2, 2000, after a night of drinking with friends, Mary Beth Wolter was shot and seriously wounded in Palm Beach County by a man in a tan car who had pulled up beside her and her husband at a stop light. Almost a year later, on the basis of an apparent anonymous tip, pre-med student Vishnu Persad was placed in a lineup, identified by Wolter's husband Robert Dziadik, and subsequently charged with aggravated battery. To call the State's case against Persad weak would be a serious understatement. No physical evidence linked Persad to the crime, no weapon was recovered, and his vehicle did not match the description given by the witnesses. The identification was also highly suspect. The perpetrator was described as Hispanic; Persad is Indian. According to police, the witnesses (which included friends of Wolter's) were extremely drunk the night of the crime. The private investigator who showed Dziadik the lineup had been promised $10,000 for a conviction, and had told Dziadik beforehand that the shooter was in the lineup. The background of Persad's lineup picture was shaded differently than those of the fillers, many of whom appeared to be of a completely different nationality than Persad himself. Despite being 23, the lineup photo of Persad depicted him at age 17, possibly because more recent photographs of him (which depicted Persad with long hair) did not match the witnesses' description of a

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_2

short-haired perpetrator. Multiple witnesses failed to identify Persad from the lineup; at least one of them failed to identify Persad in court. And perhaps most importantly, three alibi witnesses provided unchallenged, unequivocal testimony in court that Persad had been with them some 30 miles away at the time of the crime—and they were sure of the date because they were studying for an upcoming scheduled exam in their organic chemistry class. One can only imagine Persad's shock, then, when he was found guilty by a jury.[1]

Persad's case is only one of the many in which a defendant provided seemingly decisive alibi witnesses who placed him somewhere other than the scene of the crime while the crime was happening, and yet ended up convicted nonetheless. In numerous real-world cases, detectives and juries have remained unconvinced by the defendant's alibi, in many cases (such as Persad's) choosing to believe questionable and error-prone evidence instead of multiple alibi witnesses' accounts of the defendant's whereabouts. In fact, in many instances, innocent people are unable to generate strong alibis to begin with, which is then used against them; analyses of the first 40 DNA exoneration cases of people who had been falsely convicted and later proven innocent showed that 28% of them had "weak alibi" or "no alibi" listed as a factor that contributed to the erroneous conviction (Wells et al., 1998). To the extent that such cases are not mere anomalies, but rather represent a systematic bias against innocent suspects in the way that alibi evidence is treated, it is incumbent upon psycholegal researchers to investigate the psychological basis of this bias.

The investigation into the psychology of alibis is still in its infancy, only being examined quasi-systematically for fewer than 15 years. Despite the varied and often scattered methodological approaches and findings, the alibi process has been generally conceptualized as being comprised of two domains: a generation domain, which examines how people generate alibis, and a believability domain, which examines how alibis are subsequently evaluated (Burke, Turtle, & Olson, 2007). Given the very different psychological processes involved in generating versus evaluating an alibi, this important distinction is maintained throughout this chapter, with separate sections devoted to each. Nevertheless, there is one prevailing theme that emanates from the convergence of these domains: A believable alibi is difficult to generate. This chapter is foremost an attempt to provide a synthesis of the extant psychological research on alibis, with a focus on the various problems that arise in both the generation and believability domains that make producing a believable alibi difficult (see also Crozier, Strange, & Loftus, 2017).

This chapter has two additional overarching goals. First, we wish to suggest a path for future research on alibis. In particular, we draw from Wells's (1978) classic paper in the eyewitness lineup literature that distinguishes between variables that affect eyewitness accuracy but are not controllable by the legal system (i.e., *estimator variables*), and variables that affect eyewitness accuracy and are controllable by the legal system (i.e., *system variables*). As Wells argued for eyewitness research, we argue for alibi research: It is undoubtedly important to understand the

[1]Persad's conviction was later vacated and the charges dismissed.

estimator variables that affect the alibi process, as greater knowledge of factors that predict alibi reliability aids in properly weighing alibi evidence. However, if we wish to maximize our real-world impact by improving the quality of alibi evidence obtained by the legal system, we need to begin taking more of a system variables approach. Although there has been (limited) headway on uncovering system variables, the nascent research on alibis has focused primarily on estimator variables (e.g., factors that affect the believability of an alibi, such as the relationship of an alibi corroborator to the alibi provider or the strength of corroborative evidence). Consequently, there are few concrete suggestions that researchers can currently make to detectives, or attorneys, or juries as to how to best handle alibi evidence. Developing such empirically based recommendations will require new paradigms, methodologies, and participant samples that capture the real-world ecology in which alibis are generated and evaluated; we make suggestions in the last section of this chapter on how this might be accomplished.

Although alibi research is driven largely by its applied consequences, it is critical also to develop a strong theoretical understanding of the memory and decision-making processes that underlie alibi generation and believability; such an understanding offers direction as to the best way to develop empirical recommendations to improve the collection and treatment of alibi evidence. Thus, the second overarching goal of this chapter is to integrate current findings into the beginnings of theoretical models of alibi generation and believability. Although speculative and relatively unrefined, these theoretical models are put forth as a means to generate fruitful future research to better understand the alibi process.

This chapter is thus organized in the following fashion. Within each of the two main sections of this chapter—one devoted to alibi generation and the other to alibi believability—we first provide a general overview of the research to date that is relevant to that domain. We end each of these two sections with theoretical refinements that should help to provide a framework to understand the extant research within that domain. Finally, we conclude the chapter with suggestions for future alibi research, with an emphasis on a system variable approach of testing new interventions that might aid the processes of alibi generation and evaluation.

Alibi Generation

The alibi process begins with a potential suspect providing an account of his or her whereabouts at the time in question and the subsequent investigation into that account, processes that occur within the alibi generation domain. Fundamental questions concerning alibi generation include how exactly people generate alibis to begin with, and, at least for innocent suspects, whether those alibis are accurate and verifiable. Because alibis generated by guilty and innocent suspects are generated based on different cognitive processes (e.g., Nahari & Vrij, 2014), they are discussed separately.

Guilty Suspects

For a guilty person attempting to cover up a crime, the answer to how a false alibi is generated is, on the surface, obvious: They lie. Of course, there are various strategies guilty people might use when providing a false alibi; they might, for instance, provide an unverifiable alibi (e.g., "I was home alone"), they might report an activity they had actually been engaged in at a different time, or they might fabricate an entire story from scratch to account for their whereabouts. Given that alibi researchers have focused mainly on how innocent people generate alibis, little is known about the exact strategies guilty people use to generate a false alibi. However, research using university students suggests that, at least under circumstances in which someone is willing to falsely corroborate their alibi, guilty people attempt to appear convincing by reporting details that are unverifiable (Nahari & Vrij, 2014). This comports with the more general deception detection literature, which has shown that liars tend to avoid mentioning verifiable details (Masip & Herrero, 2013).

Furthermore, the fabricated alibis that people report being able to come up with tend to involve corroboration that would be relatively easily manipulated. For instance, Culhane, Hosch, and Kehn (2008) reported that, when asked to provide a false alibi, the majority of their student-participants fabricated stories involving people who would be motivated to lie for them (i.e., family and friends). In contrast, only about a third of their participants believed they would be able to produce false physical evidence (which would presumably be somewhat more difficult to fabricate). To examine whether people could actually produce false evidence for an alibi (as opposed to simply believing they could), Culhane et al. (2013) had participants generate true or false alibis before being given 48 h to uncover and produce any supporting evidence. The majority of false alibi providers were able to bring a statement by a witness falsely attesting to their whereabouts; only about 16% were able to produce some form of fabricated physical evidence (the exact nature of which was unspecified).

These findings should be evaluated with some caution, however. On the one hand, falsely corroborating a student's whereabouts for a study carries no threat of penalty for the corroborator, whereas falsely providing an alibi for an actual criminal suspect carries potentially serious legal repercussions. This should tend to artificially inflate rates of false corroboration in lab-based studies. On the other hand, there was no penalty to students in this study if they were unable to produce a corroborator, whereas an actual suspect's failure to procure an alibi corroborator can have very serious consequences. This could tend to suppress rates of false corroboration in lab studies. Clearly, generalizing findings from low-stakes lab studies to high-stakes criminals is difficult.

This generalizability issue notwithstanding, other studies also suggest that people will, under certain conditions, provide corroboration for potentially guilty suspects. For instance, Marion and Burke (2013) developed a novel paradigm to test whether people would corroborate a stranger's false alibi, and whether the likelihood of false corroboration depended on (a) evidence of guilt, and (b) the

degree to which the participant liked the alibi provider. While participants were ostensibly hooked up to a heart rate monitor, a confederate who had been working on a series of tasks alongside the participant left the room for a few minutes and returned either with money or without money. The experimenter subsequently entered the room to declare that money had gone missing from an adjacent room, at which point the confederate immediately stated that the two of them had been in the testing room the whole time. The pair was separated and the participant questioned about the veracity of the confederate's claim.

The rate at which participants falsely corroborated the confederate's lie of having never left the room depended on whether the participant had seen the confederate with money upon returning to the lab: Seeing her return with money dropped the false corroboration rate from 36 to 10%. Follow-up questions revealed that the most common reason corroborators gave for why they lied for the alibi provider was because they believed she had not taken the money. In other words, corroborators might lie for alibi providers not just because they believe them to be guilty, but because they believe them to be innocent.

Contrary to Marion and Burke's (2013) predictions, a manipulation meant to increase liking between the participant and confederate failed to increase the likelihood of false corroboration. However, their liking manipulation was relatively weak, involving only an 8-min friendship-enhancing task, and certainly did not result in liking levels akin to that between long-term friends. To provide a stronger test of the proposition that liking will increase false corroboration rates, Marion and Burke (2017) used a similar paradigm comparing friend-pairs and stranger-pairs; results indicated that people are (unsurprisingly) more likely to lie to corroborate a friend's false alibi than a stranger's false alibi. This is consistent with other research demonstrating that people report being more willing to provide false corroboration for closer family members and friends than more distant ones (Hosch, Culhane, Jolly, Chavez, & Shaw, 2011).

Data from actual adolescent offenders has shown that people will not only lie for someone who provides a false alibi, but will under some conditions report being willing to falsely take responsibility for another's transgression, especially if the perpetrator is a friend (Malloy, Shulman, & Cauffman, 2014). To examine why this occurs, Willard, Guyll, Madon, and Allen (2017) had participants think of either a close friend or a casual friend, and then imagine that person having committed a crime (either driver negligence or shoplifting). Participants then indicated their feelings of reciprocity, empathic concern, and relationship distress toward their friend, and indicated their willingness to take the blame for their friend's crime. Willard et al. showed that people were more likely to take blame for a close, rather than casual, friend, and that this effect was mediated by both increased empathy for the offender as well as increased belief regarding the offender's likelihood of reciprocating blame-taking if the roles were reversed. This tendency for close others to be more likely to falsely corroborate a suspect's alibi is recognized by law enforcement, who tend to believe that it would be relatively easy for a criminal to generate a false alibi, and who therefore often discount corroborators who are family and friends of a suspect (Dysart & Strange, 2012), an issue we will return to later in the chapter.

Innocent Suspects

Although the generation of alibis by guilty people is certainly of forensic interest, the question that has received more attention by psychological researchers is how innocent people generate alibis. Because generating a truthful alibi is effectively an autobiographical memory task, the basic autobiographical memory literature is relevant in addressing this question; unfortunately, this research shows that autobiographical recall can be a difficult task. As such, errors of omission (leaving out important details) and commission (generating inaccurate details) often occur (e.g., Baddeley, 1992; Barclay, 1986; Hyman & Loftus, 1998; for a review see Rubin, 1996). This observed difficulty in remembering autobiographical information thus raises the natural question—can innocent alibi providers accurately report on their whereabouts for a specific time in the past?

Unfortunately, it is rather difficult methodologically to address this question, as measuring the accuracy of an alibi requires knowledge—or at least a reasonably strong belief—of what the alibi provider was actually doing during the critical time period. This difficulty has limited the conclusions that researchers have been able to draw from their research. For instance, in one of the first studies of alibi generation among innocent people, Culhane et al. (2008) simply asked their participants whether they could honestly provide evidence—either corroborators or physical evidence—of their whereabouts 2 days prior. Approximately 88% of their participants reported being able to provide an alibi witness, and 29% claimed to be able to produce physical evidence (such as a receipt). Although this type of self-report methodology is useful for determining the types of evidence that innocent people believe they can produce (which was the authors' purpose), it leaves unresolved the issue of whether the participants' reports were indeed accurate. In order to attempt to address the accuracy of innocent people's alibis, researchers have taken two approaches.

One approach is to collect alibis for some time in the past, and then have the alibi providers themselves investigate their own alibis and the evidence that supports them, before returning to inform the experimenters of the results of their investigation and of any required changes to their alibis (e.g., Culhane et al., 2013; Olson & Charman, 2012; Strange, Dysart, & Loftus, 2014). These studies tend to show that innocent people's alibis often require substantial narrative changes (i.e., changes to the alibi provider's entire story) or evidentiary changes (i.e., changes to the evidence that the alibi provider would be able to produce) after investigation.

Of course, this type of methodology has its shortcomings. Most notably, it is unclear how much effort participants expended in their investigations. If we assume that some participants did not thoroughly investigate their alibis, and if we further assume that some proportion of those participants would have uncovered discrepancies in their initial alibis had they investigated them, then the obtained estimates of alibi inaccuracy are likely a substantial underestimate of the true inaccuracy rate. In addition, a participant's investigation into his/her own alibi accuracy is likely to be substantially different from that of an actual investigator, who likely has access

to more types of evidence than the participants themselves. For example, a participant who reported having visited a convenience store lacks the ability to check the video surveillance tapes of that store, and might not even be aware that he or she was captured on video in the first place; detectives might have greater awareness of, and access to, these types of evidence. Consequently, this methodology of investigation of one's own alibi provides only a very rough estimate of alibi accuracy.

To overcome these limitations, Leins and Charman (2016) devised an alternative methodological approach that provided them with a way to objectively measure the accuracy of innocent people's alibis: They created a Time 1 event for participants, who approximately 1 week later (and ostensibly as part of a separate study) provided an alibi for that Time 1 period. They showed that people's alibis were overwhelmingly inaccurate: Only 13% of participants provided an accurate account of their whereabouts. However, it should be noted that in order to obtain an objective measure of accuracy, this methodology requires the creation of a Time 1 event that places the future alibi providers in a situation they would not normally be in, which could result in artificially inflated levels of inaccuracy.

Given the known limitations of these paradigms, the purpose of the aforementioned studies was not to provide an estimate of the real-world rate at which innocent people provide inaccurate alibis. Nonetheless, their results suggest that innocent people often fail at providing accurate and/or believable alibis. We can extract from the existing empirical literature on alibi generation three main obstacles that are primarily responsible for this failure.

Obstacle 1: A lack of memory of one's whereabouts—but a willingness to report an alibi nonetheless. An innocent person, asked to provide an alibi for a specific time in the past (henceforth called the *critical time period*), has a difficult memory task, for reasons related to both encoding and retrieval. Since it is only in retrospect that innocent alibi providers are aware that they need to account for the critical time period, there is no motivation on their part to encode the initial memory of their whereabouts at the time it is actually occurring. Further, given that, from an innocent person's perspective, there is nothing special about the critical time period, activities during the critical time period are likely to be relatively mundane; because mundane events are encoded relatively weakly, the person's memories for his/her whereabouts should be correspondingly weak. The problem becomes worse if a significant amount of time has passed between the critical time period and their being asked to proffer an alibi, as memory deteriorates quickly (Ebbinghaus, 1885/1913). Additionally, when innocent suspects are eventually asked to provide an alibi, they are necessarily solicited via time cues (e.g., "Where were you last Wednesday at 4:00 p.m.?"). Unfortunately, time cues are extremely poor at helping autobiographical memory retrieval in general, and specifically in an alibi context, because people do not automatically encode time details of an event (Friedman, 1993; Leins & Charman, 2016; Wagenaar, 1988). For all these reasons, innocent alibi providers should tend to have difficulty recalling their whereabouts for the critical time period.

And yet, innocent alibi providers—at least those examined experimentally—nonetheless readily provide alibis. Across multiple studies, the rate at which people

reported an alibi for various time periods ranging from 2 days prior to 14 weeks prior was between 88 and 100% (Culhane et al., 2008, 2013; Leins & Charman, 2016; Olson & Charman, 2012). When investigated, however, many of these alibis turn out to be false. For instance, Olson and Charman (2012) had participants provide their whereabouts, and the evidence that could corroborate them, for four critical times: two in the near-past (approximately 3 days prior) and two in the distant-past (ranging from 6 to 14 weeks prior). Participants were then instructed to investigate those alibis during the following 48 h, at which time they returned to report the results of their investigation. Upon their return, 30% of their witnesses in the near-past condition, and 42% of their witnesses in the distant-past condition, reported having to change some aspect of their initial alibis. Although most of the reported changes were to the evidence that participants believed they could produce to support their stories (e.g., realizing that they could not produce the receipt they had originally reported having), 4% of near-past alibis and 18% of distant-past alibis required a complete narrative change, suggesting a not-insignificant rate of inaccuracy among innocent alibi providers.

Strange et al. (2014) also used this paradigm to investigate the consistency of reported alibis across time. Their participants reported an initial alibi for a time period 3 weeks prior that they were then given one week to investigate before returning to report their updated alibi. Results indicated that the consistency of people's alibis across these two time periods varied depending on the feature of the alibi (e.g., where they were, who they were with, what time they were there, etc.), but that fully consistent responding never exceeded 50% for any feature. Inconsistencies were further scored as either partially consistent (when participants were consistent about some details but not about others) or inconsistent (when they had been entirely incorrect); participants exhibited complete inconsistency (suggesting their Time 1 alibi was inaccurate) 32% of the time when reporting what they did during the critical time period.

If these innocent alibi providers lacked a strong memory of their whereabouts during the critical time period, then why did they report alibis that proved to be false, instead of simply reporting that they did not remember their whereabouts? Olson and Charman (2012) discuss this phenomenon in terms of a quantity-accuracy trade-off framework. According to Koriat and Goldsmith's (1996) metacognition model, when recalling information, people (a) judge the likelihood of correctness of any relevant information that is recalled, and (b) compare that likelihood to a reporting criterion. If the judged likelihood of correctness of the recalled information exceeds the criterion, the information is reported; otherwise, it is withheld. Consequently, attempts to produce only accurate information—which is accomplished by raising one's criterion so that only information that one is highly confident about is reported—result in less overall information meeting the criterion and thus being reported. Attempts to produce a large quantity of information—which is accomplished by lowering one's criterion—result in information that is less likely to be correct meeting the criterion and thus being reported, thereby decreasing the overall accuracy of the reported information. Thus, the observed high rate of responding among alibi providers, coupled with the

inaccuracy of many of their alibis, suggests that innocent alibi providers are using a relatively lax reporting criterion—in other words, they are including information they are unsure about when reporting their alibis.

It is understandable as to why innocent people would set a lax reporting criterion: They wish to exonerate themselves from suspicion immediately, which is difficult to do without providing some sort of alibi. But setting a low criterion when providing an alibi is potentially very dangerous, as any part of the alibi that is later shown to be false, or any attempt to later change an alibi, is regarded as highly suspicious. For instance, one study indicated that almost 90% of student-participants agreed that suspects who change their alibis after police interviews are probably lying (Culhane et al., 2008). Similar findings were observed among senior law enforcement personnel: Over 80% believed that a changed alibi is indicative of lying, as opposed to being honestly mistaken (Dysart & Strange, 2012). Similarly, other research that involved providing both laypeople as well as current and previous law enforcement agents with a hypothetical suspect's claims of innocence (Study 1) or a synopsis of an interrogation of a suspect (Study 2) showed that a changed alibi—regardless of whether it became weaker or stronger—was rated as being significantly poorer in quality and less believable than an alibi that remained consistent (Culhane & Hosch, 2012). Clearly, then, a lack of memory coupled with a low threshold for reporting an alibi is a dangerous mix for an innocent alibi provider.

Obstacle 2: Overreliance on schema-based responding. If innocent people want to provide an alibi, but lack a memory for their whereabouts, then how do they do so? Leins and Charman (2016) provide an answer to this question: People rely on their schemas—what they normally do during that time period. For instance, when asked for an alibi for two Thursdays ago at 2:00 p.m., an innocent person might lack a memory of their whereabouts, but could reason that since he normally has class between 1:00 and 2:30, that he must have been in class. This reasonable inference is then reported as the person's alibi. To test whether innocent alibi providers rely on their schemas, Leins and Charman had participants engage in a series of tasks on Day 1 (including providing a written account of what they normally do at that time, effectively providing researchers with participants' schemas for that time period), ostensibly as part of an experiment on attitudes. Upon completion, they were given the opportunity to sign up for a different, supposedly unrelated, study one week later. Upon arriving at the Day 2 study—in a different location and with a different experimenter—participants were told that the purpose of the study was to examine a new interrogation method. They were told that in order to test this method, some participants had performed a number of small "crimes" over the past week and some participants had not. In reality, no such crimes had ever been committed, and all participants thus believed they were "innocent" of those crimes. They were then given written instructions telling them that their task, given that they were innocent, was to answer the interrogator's questions completely truthfully. The interrogator then asked the participants a series of questions regarding their activities over the past week using either time cues (e.g., "Where were you last Tuesday from 2:00 to 3:00?"), location cues

(e.g., "Have you ever been in room 268?"), or time and location cues, and the participants reported their alibis.

Critically, the researchers knew the correct answer to one of the times/locations asked about—the participant had been performing the Time 1 tasks. Therefore, if participants relied on their actual memory when reporting their alibi, they should report having been performing the Time 1 tasks; if they instead relied on their schemas, they would report what they normally do during that time period. Results were clear: In the condition that most resembled an innocent person giving an alibi (i.e., the time cue condition), participants rarely provided an accurate alibi that they were performing the Time 1 tasks. However, more than three-quarters of participants' alibis were consistent with their schemas that they had provided during the Time 1 session. Interestingly, although participants cued with the location of the Time 1 event were more likely to accurately report their whereabouts than participants cued with the time of the Time 1 event (presumably because the location cue was a superior memory retrieval aid than the time cue), participants given *both* a time and location cue were as inaccurate as participants given only a time cue. Leins and Charman interpreted this finding as meaning that the ease with which the time cue invoked participants' schemas led them to quit searching for memory information that they could have accessed via the location cue.

In a follow-up study, Leins and Charman (2016) manipulated the schema-consistency of the critical event. Each participant engaged in one schema-consistent event during a critical time period (attending class) and one schema-inconsistent event during a second critical time period (participating in an ostensibly unrelated experiment during class time), and was a few days later questioned about his/her whereabouts during those two critical time periods using the same cover story as the first study. Again, results supported the idea that innocent alibi providers rely on their schemas instead of their memories when reporting their alibis: Although 83% of participants accurately reported their whereabouts for the schema-consistent event, only 11% accurately reported their whereabouts for the schema-inconsistent event.

One of the reasons innocent people fail to report accurate alibis, then, is that they often rely on their schemas of their normal whereabouts during the critical time period. Of course, alibi providers might, on occasion, not rely on schemas if, for instance, the schema-inconsistent behavior in which they were engaged during the critical time period was particularly memorable (e.g., being in a car accident). And to be sure, schema-based responding will often be accurate; after all, schemas are based on what we normally do during that particular time period. Nonetheless, there are two major problematic issues with reporting one's schema as an alibi. First, although schema-based responding might result in alibis that are accurate broadly speaking, it can nonetheless result in errors in the details surrounding that alibi. For instance, an innocent suspect might rely on her schema to accurately report having been at work three Tuesdays ago, and might further state that her co-worker can support her alibi. But if her co-worker happened to be sick that day and not at work, then the claimed corroborating evidence will be shown to be mistaken, even though the overall alibi itself was generally accurate. Second, we are not *always* engaged in

schema-consistent behavior; if the innocent suspect's actual whereabouts and behavior happened to deviate from her schema during the critical time period, then the alibi provided will be mistaken.

Even when schema-based responding results in accurate alibis, this accuracy is, in a sense, "accidental," as it does not reflect an actual memory of one's whereabouts. This is an important point for future alibi researchers to consider: A hypothetical intervention that increases the accuracy of innocent people's alibis might not be as beneficial as it first appears, if the actual effect of the intervention is simply to shift people toward relying on their schemas. Increased schema reliance would (accidentally) increase alibi accuracy if the alibi provider was in fact engaged in a schema-consistent activity during the critical time period; however, the same intervention would *decrease* alibi accuracy if the alibi provider was instead engaged in a schema-inconsistent activity. Partly for this reason, it is critical for alibi researchers to differentiate between schema-based responding and memory-based responding among alibi providers.

Obstacle 3: Difficulty of providing corroborating evidence. Even if an innocent alibi provider can overcome the previous obstacles and provide an accurate, memory-based alibi, it is unlikely to be believed by others unless the suspect can also provide witnesses or physical evidence to corroborate it. Unfortunately, research indicates that this is a difficult task as well, for numerous reasons. An alibi provider might have been alone for the critical time period and unable to offer anyone to corroborate the alibi. Olson and Charman (2012), for instance, found that 21% of participants reported having no one to corroborate their whereabouts for a time period weeks in the past; about 10% reported having no one to corroborate their whereabouts for a time period two days in the past (for similar findings, see Culhane et al., 2008, 2013). Providing physical evidence might be even more difficult: The above studies report innocent alibi providers being unable to provide physical evidence between 64 and 84% of the time. Strange et al. (2014) found that almost half of their participants could provide neither physical evidence nor a witness to corroborate their alibi. As Olson and Charman demonstrated, this problem of lacking corroborating evidence for one's alibi is exacerbated the more removed in time the alibi provider is from the time period he or she needs to account for. Likely this occurs because physical evidence is lost (or forgotten to have existed in the first place) and corroborators' memories deteriorate. To make matters worse, alibi providers tend to overestimate the amount of evidence they can produce to corroborate their alibi; upon investigation, witnesses' alibis were about three times as likely to lose corroborative evidence as to gain it (Olson & Charman).

Furthermore, the type of evidence that innocent people provide tends not to be strongly believed. People spend the majority of their time with friends and family—the very people who are least believed by evaluators (Olson & Wells, 2004). Law enforcement personnel, for instance, report that alibi providers are most likely to put forth friends, family members, and significant others to corroborate their alibis, the types of witnesses those same personnel perceive as most likely to lie for the alibi provider (Dysart & Strange, 2012). It is no surprise then that the vast majority of

alibi witnesses that people provide are those who are perceived as motivated to lie for them (Culhane et al., 2008, 2013; Olson & Charman, 2012).

Unfortunately for innocent alibi providers, the very alibi witnesses most likely to be believed—people not motivated to lie for the alibi provider—tend to be strangers, people presumably most likely to forget having interacted with the alibi provider. To examine potential alibi corroborators' memories for a brief encounter with a stranger, Charman, Reyes, Villalba, and Evans (2017) had student-participants (representing future innocent alibi providers) each engage in a brief, scripted interaction with a different university employee (representing potential alibi corroborators). Twenty-four hours after the interaction, a research assistant presented each employee with either a photograph of the student or a photo array containing the student with whom he/she had previously interacted, and asked if he/she recognized the person from the day before. Only 37% of potential corroborators reported recognizing the student with whom they had previously interacted (collapsed across single photo and photo array conditions, which did not significantly differ from each other); of those, only about one-third could also report the approximate time and nature of the interaction. Attempts to increase the recognition rate by cueing the potential corroborator as to the approximate time of the interaction failed to appreciably increase recognition. It is important to note that this poor recognition rate occurred after a delay of only a single day; given the time it can take to procure a suspect, real-world alibi corroborators are often contacted after much longer delays (see also Dysart & Strange, 2012). These data paint a pessimistic picture as to whether a stranger would be able to remember someone with whom the alibi provider briefly interacted.

Charman et al.'s (2017) student-participants also estimated, immediately after having interacted with their potential future corroborator, the likelihood that they would later be recognized. Consistent with research on the spotlight effect, which demonstrates that people have a tendency to overestimate how noticeable they are to others (Gilovich, Medvec, & Savitsky, 2000), students overestimated their likelihood of later being recognized. If generalizable to actual alibi providers, this finding means that innocent suspects will often be overconfident in the strength of their alibis, leading them to report the existence of a corroborator who subsequently fails to recognize them—something that might make their alibis appear particularly suspicious to law enforcement (Culhane & Hosch, 2012; Dysart & Strange, 2012).

A Theory of Alibi Generation Among Innocent Suspects: The Schema Disconfirmation Model

There are clearly a plethora of reasons why innocent alibi providers fail to produce accurate and believable alibis, and as such, one of the most important issues that alibi researchers face is in developing recommendations to improve the alibi generation process. It is our belief that one of the most effective ways to develop

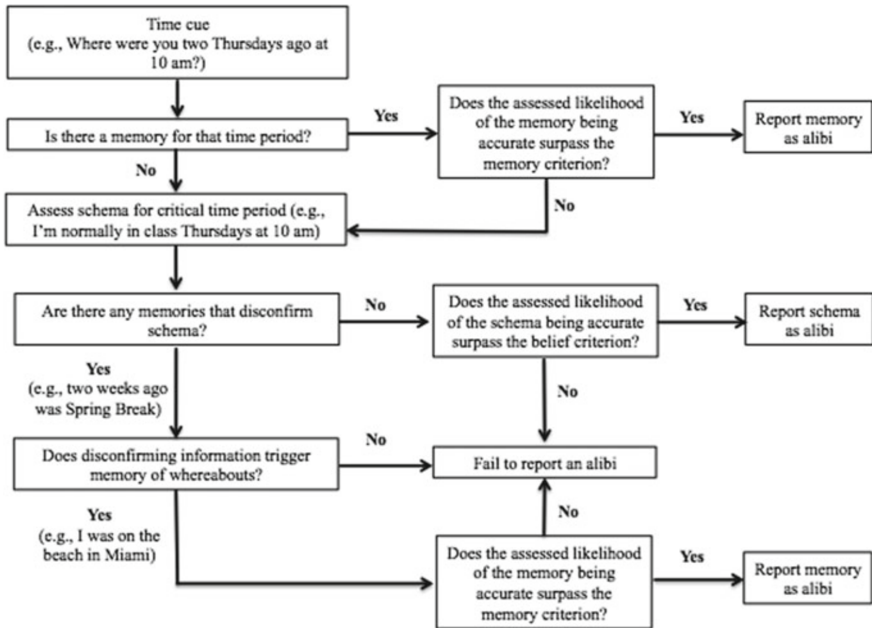

Fig. 1 The schema disconfirmation model

interventions that help innocent alibi providers is by developing a strong theoretical understanding of the alibi generation process. To that end, we propose a theoretical model of alibi generation among innocent alibi providers: the schema disconfirmation model. This model is displayed in Fig. 1.

The schema disconfirmation model is based in part around Mazzoni and Kirsch's (2002) metacognitive model of autobiographical memory. According to this autobiographical memory model, when people are asked whether a given event happened to them, they engage in a two-stage process. The first stage, which is roughly equivalent to Koriat and Goldsmith's (1996) metacognition model, is that people engage in a memory search for that event. Any potentially relevant memory that is accessed is then evaluated in terms of its subjective probability of being correct (what Koriat and Goldsmith call a *monitoring* process). This probability of being correct is then compared to the person's memory criterion, which represents the minimum assessed likelihood that a memory is correct before the person is willing to report it as a memory (what Koriat and Goldsmith call a *control* process). If the assessed probability of the memory being correct exceeds the memory criterion, it is reported as a memory; otherwise, it is not.

But whereas the Koriat and Goldsmith (1996) metacognition model stops at this point, with the person simply withholding a response if the best candidate memory fails to exceed the criterion, Mazzoni and Kirsch's (2002) metacognitive model of autobiographical memory states that people enter a second stage, in which

autobiographical beliefs are accessed. First, people determine whether an absence of memory is diagnostic of the nonoccurrence of the event in question. If they determine that it is diagnostic, they will report the event as having not occurred. If they determine that the absence of memory for the event is not diagnostic of its nonoccurrence, they then access various inferences and beliefs regarding the event, such as its plausibility. Based on this inferential process, people assess the probability that the event occurred, which is then compared to a belief criterion—the minimum judged probability that the event occurred that is required before reporting the event as having occurred. Again, if the assessed probability exceeds the criterion, the event is reported as having occurred; otherwise, it is not.

For instance, imagine someone is asked whether they were fed as a 2-year-old. People will lack any direct memory of that event having occurred, due to childhood amnesia (Eacott, 1999); in other words, no memory is accessed that exceeds the memory criterion. However, they will recognize that the absence of a memory of being fed at age two is not diagnostic of not having been fed, because they would not expect to remember that event. Thus, they access information to form inferences about whether they were fed. People will confidently infer that since they are alive they obviously must have been fed at age two, and consequently, the assessed probability of having been fed will exceed their belief criterion, and people will respond in the affirmative to this question, despite lacking a direct memory of it.

This metacognitive model of autobiographical belief was created in order to account for the role that non-memorial belief processes play in influencing the reporting of autobiographical memory, and to that extent, it offers an appropriate framework in which to consider the alibi generation process, which involves both autobiographical memory and inferential-based responding (i.e., a reliance on schemas). However, there are a few notable differences between this model and the proposed schema disconfirmation model. Most importantly, the metacognitive model of autobiographical belief is invoked to explain responding when people are asked whether a specific event happened. In contrast, alibi generation is necessarily invoked when people are asked what they were doing at a specific time. Because time cues are so ineffective at retrieving memories, most of the time alibi providers will lack a memory of their whereabouts. There are exceptions, however. A specific meaningful date might allow access to memories. For instance, people who are asked to report on their whereabouts on December 25 of last year might use the fact that they know that was Christmas to help retrieve a memory. Or, if the date was in the very recent past—such as the day prior—the memory might still be strong enough to be invoked by the time cue. If a memory is able to be accessed, it will be compared to the suspect's reporting criterion and reported as the suspect's alibi if it exceeds the criterion. If either no memory is accessed, or if the accessed memory does not exceed the reporting criterion, alibi providers will pass to the second, inferential stage of the model.

Whereas the metacognitive model of autobiographical memory postulates that at this stage people determine whether the lack of a memory is diagnostic of a specific event's nonoccurrence, this part of the model is unnecessary for the schema disconfirmation model, as the alibi provider is not being asked about *whether* a

particular event occurred, but is rather being asked *what* event actually occurred during a critical time period. Alibi providers know they must have been doing *something*, and so a lack of memory can never be diagnostic that *nothing* occurred. Consequently, following a failure to produce a memory that exceeds their memory criterion, alibi providers immediately begin accessing information to help them form inferences as to what they were doing during the critical time frame.

The inferential information alibi providers access as a result of having been cued with a specific time will tend to be their schemas for what they normally do during that time period. This schema becomes their default alibi. But, unlike the metacognitive model of autobiographical memories, the schema disconfirmation model postulates that after retrieving that schematic information, alibi providers engage in an additional memory search, effectively using the accessed schema as a new memory cue. Since their schemas have become their default alibi, this memory search will probe specifically for any information that might *disconfirm* that they were engaged in a schema-consistent activity. This occurs because confirmatory information should be perceived as relatively non-diagnostic: By definition, schemas represent what people normally do, and so people should be able to access autobiographical memories that are consistent with their schemas—but that would not be evidence of whether that activity occurred specifically during the critical time period. Consequently, a memory consistent with one's schemas should not much affect the assessed likelihood of the schema being correct. But a specific memory that one was not engaged in a schema-consistent activity would be highly diagnostic; alibi providers should thus lower the assessed likelihood that the schema is correct. Given the much greater informational value of disconfirming, rather than confirming, information, people will search memory for information that could contradict their schemas. Given people's natural tendencies to search for confirming, as opposed to disconfirming, information (e.g., Nickerson, 1998), this search might be relatively superficial; nonetheless, given the acknowledged importance of providing an accurate alibi, the schema disconfirmation model predicts that alibi providers will engage in at least a cursory memory search for possible disconfirming information.

Two outcomes of this disconfirmation search can occur. First, the alibi provider might fail to uncover any disconfirming memorial information (e.g., "I am normally in class on Thursdays at 10:00 a.m., and I have no reason to believe I deviated from that schedule on that specific Thursday two weeks ago"). In this instance, the schema becomes the alibi and its assessed likelihood of being accurate is compared to the suspect's belief criterion to decide whether to report it or not. For example, alibi providers might use the ease with which the schema was accessed, or their beliefs regarding their likelihood of deviating from their schema, to assess the likelihood that the schema-based alibi is accurate. The assessed likelihood of the schema being accurate will tend to exceed the criterion for two reasons: (a) by definition, their schemas are what they are normally doing during that time period, which should result in a high assessed likelihood of being correct, and (b) alibi providers should tend to have a relatively low belief criterion, given their motivation to remove themselves from suspicion. Thus, people's schemas often get reported as their alibi.

The second possible outcome of the disconfirmation search is that the alibi provider might uncover disconfirming information (e.g., “I am normally in class on Thursdays at 10:00 a.m., but two weeks ago was Spring Break, so I couldn’t have been in class”). This new uncovered information might act as a cue to trigger additional memory searches (“Spring Break is when I took a trip to Florida”) and/or belief searches (“I normally sleep in during Spring Break, so I was probably sleeping at home”); the outcome of these new search processes then becomes the information that the alibi provider assesses and compares to a criterion.

We argue that the schema disconfirmation model fits the alibi generation data well. It explains the tendency for time cues to fail to help memory retrieval, but to invoke schema-based responding (Leins & Charman, 2016). It also explains why so few innocent alibi providers respond that they do not remember their whereabouts, even when they lack direct memory of their whereabouts (Culhane et al., 2008; Olson & Charman, 2012). Nonetheless, given the relative paucity of alibi generation research, there are little data to fit to it, and the model is thus in a relatively undeveloped form. Consequently, we recommend further research into the alibi generation process among innocent alibi providers in order to more fully flesh out details of the model.

Alibi Believability

Suspects’ claims that they were somewhere other than the scene of the crime are, of course, not taken at face value; it is obvious that guilty suspects would be motivated to lie about their whereabouts. An alibi, in other words, is evaluated for its believability. This evaluation process occurs both during the investigation of the crime, by police officers and detectives, as well as during any subsequent trial, by a judge or jury. Although initial alibi research showed that the mere presence of an alibi reduced conviction rates (McAllister & Bregman, 1989), more recent research has shown that this exonerating effect of an alibi depends on various factors associated with the alibi. We can broadly classify the factors that affect alibi believability into two categories: Factors associated with the alibi itself and factors external to the alibi; they are discussed separately.

Factors Associated with the Alibi Itself that Influence Alibi Believability

Alibi evaluation studies generally involve having evaluators rate the believability of alibis, the content of which varies systematically in some way. This research has uncovered three main factors that are associated with the alibi story itself that affect its believability: The type of evidence that supports the alibi, the consistency of the

alibi across time, and the salaciousness of the alibi. Each of these factors is discussed in turn.

Supportive evidence. The most obvious factor that affects alibi believability is the type of evidence that is available to support it: An unverifiable alibi (e.g., that one was home alone) is much less believed than an alibi for which one can produce tangible evidence (Dysart & Strange, 2012; Jung, Allison, & Bohn, 2013; Pozzulo, Pettalia, Dempsey, & Gooden, 2015; Sargent & Bradfield, 2004). Furthermore, the more people who can corroborate a suspect's alibi, the more believable it is (Eastwood, Snook, & Au, 2016). Yet the believability of corroborating evidence is not simply based on the quantity of that evidence, but also its quality. In one of the first psychological studies on alibis, Olson and Wells (2004) investigated how the believability of an alibi depends on various characteristics associated with its supporting evidence. They reasoned that the believability of corroborative physical evidence would depend on how easy it was to fabricate: Evidence that was difficult to fabricate (such as corroborating video camera footage of the suspect) would result in more believable alibis than evidence that was easy to fabricate (such as a receipt for a transaction paid in cash). Furthermore, they reasoned that the believability of corroborative person evidence would depend on both (a) the perceived motivation that the corroborator has to lie for the alibi provider (such that corroborators perceived as motivated to lie would result in less believable alibis), and (b) the likelihood of the corroborator making a mistake (such that corroborators less familiar with the suspect would result in less believable alibis). By having participants rate the believability of a series of alibis that varied across these underlying dimensions, they could investigate the impact of those factors on alibi believability.

Their results were mixed. Although Olson and Wells (2004) found that the presence of physical evidence (regardless of its ease of fabrication) resulted in more believable alibis, they did not find that the perceived ease with which that evidence could be fabricated mattered: Alibis supported by difficult-to-fabricate evidence were no more believed than alibis supported by easy-to-fabricate evidence. Furthermore, although they found that the presence of a non-motivated corroborator resulted in more believable alibis compared to either no person evidence or a motivated corroborator, they did not find that familiar corroborators resulted in more believable alibis than non-familiar corroborators. In addition, this effect of person corroborators on alibi believability only held in the absence of physical evidence. When physical evidence was present, person corroborators had no effect on the believability of alibis.

Other research has also shown that alibi evaluators are generally quite skeptical of person corroborators who might be motivated to lie for the suspect, who, as discussed earlier, are the corroborators most likely to be proffered by an alibi provider. For instance, mock jurors are more likely to convict a defendant who produced his girlfriend, rather than his neighbor, to corroborate his alibi (Culhane & Hosch, 2004). Similarly, although having a non-relative corroborate an alibi reduced guilty verdicts among mock jurors, having a relative corroborate the alibi failed to do so (Lindsay, Lim, Marando, & Cully, 1986). In general, alibi evaluators

—whether students or police officers—are highly skeptical of corroborators who are family members of the suspect (Eastwood et al., 2016; Hosch et al., 2011), results that comport with actual police officers' beliefs about the relatively high likelihood that friends and family will lie for a suspect (Dysart & Strange, 2012). In fact, not only can a relative's corroboration of a suspect fail to help a suspect's alibi, one study showed that it might actually make the suspect appear *more* guilty (Dahl & Price, 2012).

Perceived honesty is not the only dimension along which alibi corroborators can be evaluated; models of child witness credibility postulate that cognitive ability also affects credibility (Ross, Jurden, Lindsay, & Keeney, 2003). Whether children make strong alibi corroborators is thus an interesting question: Although they are perceived as being more honest than older children and adults (e.g., Connolly, Price, & Gordon, 2010), they are also perceived as having lower cognitive ability (Nunez, Kehn, & Wright, 2011). It is perhaps due to these conflicting forces that the literature is somewhat inconsistent on this point, with some studies finding that children are more believed than adults as alibi corroborators (Dahl & Price, 2012), and some finding no difference between children and adult corroborators (Price & Dahl, 2017).

Consistency of the alibi. As previously discussed, the consistency of a proffered alibi is strongly associated with its believability, with consistent alibis considered to be more believable than alibis that change, largely because inconsistency is interpreted as the suspect having lied (Dysart & Strange, 2012). This is true even when the updated alibi becomes stronger (Culhane & Hosch, 2012). Furthermore, it is not just an alibi provider that might be inconsistent; alibi corroborators can also provide inconsistent testimony over time. For instance, Price and Dahl (2017) showed that an alibi corroborator whose testimony exhibited major contradictions across a 5-year period resulted in evaluators providing higher estimates of the likelihood that the suspect committed the crime, compared to an alibi corroborator whose testimony was consistent over the same time period. Minor contradictions (such as alibi corroborators' accounts that differed in terms of the activity in which the suspect was engaged, but not the location of that activity) did not increase the perceived likelihood that the suspect committed the crime, although a follow-up study did show that alibi corroborators whose statements exhibited minor inconsistencies lacked the exonerating value of those whose statements were completely consistent.

Consistency is also used in another way to evaluate an alibi: When an alibi provider and an alibi corroborator both give stories as to the alibi provider's whereabouts, evaluators use the consistency between those two stories to judge the veracity of the alibi (Strömwall, Granhag, & Jonsson, 2003). Ironically, however, this seemingly rational strategy might backfire. Under conditions in which pairs of liars are able to plan a false alibi, their alibi stories might be more consistent—and thus more believable—than the stories of truth-tellers (especially for less salient details: Sakrisvold, Granhag, & Giolla, 2017). This presumably occurs because truth-telling pairs do not plan their stories ahead of time to the same extent as lying pairs, as their strategy is to simply rely on their memories when reporting the alibi.

Because natural memory errors will occur with some frequency, details provided by truth-telling pairs will sometimes be inconsistent (Vredeveldt, van Koppen, & Granhag, 2014).

Salaciousness of the alibi. The nature of the activities in which the alibi provider claims to have been engaged during the critical time period has also been shown (sometimes) to affect the believability of the proffered alibi. For instance, an alibi that is particularly salacious—for instance, a claim that one was watching a pornographic movie—can increase the believability of that alibi (Allison, Mathews, & Michael, 2012). However, this finding has been difficult to replicate, with some studies showing no effect of the salaciousness of the alibi on its believability (Allison, Jung, Sweeney, & Culhane, 2014; Jung et al., 2013), and one study showing that salacious alibis were rated as less believable than non-salacious ones (Nieuwkamp, Horselenberg, & Koppen, 2016). Interestingly, however, this latter study showed that an alibi became *more* believable if it changed from a non-salacious one (helping his cousin move) to a salacious one (having an affair), representing one possible exception to the aforementioned finding that changed alibis are evaluated more harshly. The inconsistencies in this area might result from the tendency for salacious alibis to produce conflicting perceptions of the suspect: Alibi providers who claim to have been engaged in salacious activities are perceived as more honest (which would increase the believability of the alibi; Allison, Mathews, & Michael), but can result in more negative perceptions of the suspect's character (which would decrease the believability of the alibi; Jung et al.).

Factors External to the Alibi that Influence Alibi Believability

It is not surprising that the believability of an alibi is in part dependent on factors associated with the alibi story itself—its supporting evidence, its consistency over time, and its salaciousness. What is somewhat less intuitive is that the believability of an alibi is also partly dependent on factors that are independent of the content of the alibi itself. Research has uncovered three such factors.

Context within which the alibi is evaluated. An alibi evaluator might use the context in which an alibi is presented to make inferences about the strength of an alibi, which might in turn affect its believability. For instance, Sommers and Douglass (2007) reasoned that when an alibi was presented within the context of a criminal trial (as opposed to during a criminal investigation), evaluators would perceive it as less believable, since the very fact that the case had proceeded to trial would imply that the alibi could not have been that strong. Across two studies, their results supported their hypotheses: The exact same alibi was rated as less believable and credible—and the suspect as being correspondingly more likely to be guilty—when presented as part of an ostensible criminal trial summary, rather than as part of a police investigation. Furthermore, they showed that the exonerating impact of an alibi corroborator was greater when the alibi was presented in an investigative context rather than a trial context, presumably because greater skepticism of the

alibi at the trial stage undermined the believability of the alibi corroborator. As Sommers and Douglass point out, given that different alibi evaluation studies have presented evaluators with alibis at different stages in the criminal process (e.g., at the investigative stage: Olson & Wells, 2004; at the trial stage: Culhane & Hosch, 2004), it is important for future alibi researchers to consider context when interpreting the results of their studies.

Presence of other evidence. The believability of an alibi might also depend on whether it is presented alone or in the presence of other evidence. For instance, knowledge that an eyewitness identified the suspect from a lineup (versus indicating that the suspect was not in the lineup) reduces the credibility of the alibi itself (Dahl, Brimacombe, & Lindsay, 2009) as well as the credibility of alibi corroborators (Price & Dahl, 2014). It is arguable whether this represents a bias in alibi evaluation. On the one hand, the credibility of the exact same alibi depended on factors unrelated to the alibi itself. On the other hand, an eyewitness identification increases the chances that a suspect is guilty; logically one could argue that this should therefore decrease the credibility of the alibi. The issue hinges largely on how participants interpreted the credibility question: Did they believe they were supposed to evaluate the alibi's credibility in a vacuum, or within the context of the other evidence?

Charman, Carbone, Kekessie, and Villalba (2015) attempted to avoid this ambiguity by presenting participants with either only an alibi, or an alibi in conjunction with DNA evidence (either incriminating or exonerating), and asking them to evaluate how strongly the alibi implied the innocence or guilt of a suspect (thus instructing participants to evaluate only the alibi itself). Participants rated the same alibi as being more indicative of guilt if it had been preceded by incriminating DNA evidence than if it had been either preceded by exonerating DNA evidence or in the absence of any DNA evidence. It appears that knowledge of other evidence can affect an alibi's believability (however, see also Charman, Kavetski, & Hirn Mueller, 2017, for data indicating that alibi evaluation is not always affected by other evidence).

However, the impact of other evidence on alibi believability also depends on the order in which that evidence is presented to evaluators. Specifically, an alibi presented *after* other evidence is perceived as more credible and is more influential on mock jurors' final verdicts than an alibi presented *before* other evidence, especially when the alibi is strong (Charman et al., 2015; Dahl et al., 2009; Price & Dahl, 2014).

Defendant characteristics. Some limited research has also pointed to factors associated with the person providing the alibi that might affect how it is evaluated. For instance, knowledge of prior convictions can affect alibi believability: Alibis from suspects who had supposedly been previously convicted of perjury—a crime that would call into question the truthfulness of the alibi provider—are less believable than alibis from suspects who had supposedly been previously convicted of other crimes (Allison & Brimacombe, 2010). Perceptions of masculinity/femininity might also affect alibi believability: Alibis from suspects perceived as being more feminine were rated as more compelling (Maeder & Dempsey, 2013). The effect of defendant race on perceptions of the alibi is somewhat more complex:

Evaluators are more sensitive to the strength of a Black, rather than a White, defendant's alibi, but only when they were not particularly motivated to form accurate impressions (Sargent & Bradfield, 2004). In other words, under low motivation conditions, a weak alibi harmed perceptions of the Black defendant, but not the White defendant.

Is the Word "Alibi" a Loaded Term?

In testing their taxonomy of alibi believability, Olson and Wells (2004) noted that even the strongest alibis—those that were corroborated by difficult-to-fabricate physical evidence *and* were supported by a corroborator unmotivated to lie for the suspect—still received believability ratings that were only moderately high (7.4 on a 0–10 scale). On the basis of this finding, they proposed the alibi skepticism hypothesis: The mere labeling of a story as an "alibi" invokes great skepticism on the part of evaluators, as they specifically attempt to poke holes in the alibi story (see also Burke & Turtle, 2003). They argue that the very word "alibi" is loaded, as it will lead evaluators to infer that others believe the suspect is guilty—why else would they ask the suspect to provide an account of his/her whereabouts?

Testing the alibi skepticism hypothesis. Evidence for the alibi skepticism hypothesis, however, has been mixed. In support of the hypothesis, studies have found that alibi corroborators, for instance, are regarded as being generally unreliable (e.g., Fawcett, 2016); alibi believability ratings for even seemingly strong alibis rarely reach the highest end of the believability scale (e.g., Allison & Brimacombe, 2010; Dahl & Price, 2012; Jung et al., 2013); inconsistent alibis are generally perceived, by both students and law enforcement, as indicative of lying as opposed to being honestly mistaken (Culhane & Hosch, 2012; Dysart & Strange, 2012); alibi witnesses are often perceived as less credible than eyewitnesses (Dahl et al., 2009); and alibis are particularly scrutinized when presented as part of a criminal trial (Sommers & Douglass, 2007). And anecdotal evidence, such as the case of Vishnu Persad's that opened this chapter, indicates that suspects' alibis are often disbelieved (see also Wells et al., 1998, for an analysis of the first 40 DNA exoneration cases, which showed that innocent people's weak alibis were often used as incriminating evidence to convict them).

However, there also exists evidence that is more difficult to reconcile with the alibi skepticism hypothesis. For instance, Culhane et al. (2013) provided participants with a series of alibis—some of which were true and some of which were false—and had them attempt to determine the truthfulness of each alibi story. Their results indicated a truth bias: Participants were more likely to label an alibi as true rather than false, a finding seemingly at odds with the belief that evaluators will be particularly skeptical of alibis. Strömwall et al. (2003) found similar results with evaluators attempting to discriminate between truth-telling and lying *pairs* of suspects from videotaped interrogations: Participants were more likely to judge a pair of suspects as telling the truth rather than lying.

However, in neither of these studies were evaluators told that they were evaluating an alibi per se. The alibi skepticism hypothesis could still be true if it is the word "alibi" itself (and not simply an accounting of one's whereabouts) that triggers skepticism. Olson (2013) thus provided the most direct test of the alibi skepticism hypothesis. She provided evaluators with a video of a man providing his whereabouts over the course of an hour on a previous Saturday. Some participants were told that this was an alibi and some were not, prior to having them rate the believability of the alibi. If the alibi skepticism hypothesis were true, then those participants told the story was an alibi should rate it as less believable than those participants not told that the story was an alibi. However, although the results trended in this direction, this predicted difference failed to reach significance.

The alibi skepticism hypothesis: A new look. Evidence regarding the alibi skepticism hypothesis is thus somewhat inconsistent. However, we propose here a slightly modified version of this hypothesis, one that we believe is theoretically justified and consistent with prior empirical work, but is as of yet untested. Specifically, we propose that the hyper-skepticism with which evaluators can come to regard alibis is not necessarily invoked by the word "alibi" per se. Rather we propose that alibi skepticism is observed under one of two conditions. First, alibi skepticism can arise because evaluators expect too much of innocent alibi providers: Evaluators might erroneously tend to believe that autobiographical memory is stronger, and supportive evidence more readily available, than it actually is, leading them to expect a particularly strong and well-supported alibi from an innocent alibi provider. When an actual alibi fails to meet that unrealistically high expectation (which, for reasons covered in the alibi generation section of this chapter, it often will), this produces skepticism on the part of the evaluators. In support of this idea, Olson and Wells (2012) showed that the skepticism with which people evaluated alibis was attenuated when they first had to generate their own alibi. Presumably this occurred because the act of generating an alibi led people to realize how difficult it was to produce a believable alibi, leading them to lower their expectations for an alibi provider, thus minimizing the discrepancy between those expectations and the actual evaluated alibi. Thus, the failure of some past studies to find evidence of alibi skepticism might have occurred because the alibi to be evaluated was not discrepant enough from evaluators' beliefs about memory.

Second, alibi skepticism might arise specifically when evaluators are faced with the task of reconciling contradictory evidence. Consistent with Grice's (1975) maxims of conversational implicature, we propose that people generally assume other people's statements are true when presented in the absence of any contradictory information—and that this is true even if the statement is labeled as an alibi. This will produce a truth bias when evaluators are provided with alibis in the absence of any contradictory information. However, when an alibi statement is provided alongside contradictory, incriminating evidence (DNA evidence, an eyewitness identification, etc.), then the evaluator faces a dilemma: Both the alibi and the incriminating evidence cannot simultaneously be true. The evaluator must decide which evidence is to be believed. This decision will depend on numerous factors, but in general, an unsupported alibi will almost always be saddled with an

additional impediment to its believability: The alibi provider (and any corroborating friends or family) has an obvious reason to lie. Consequently, when reconciling conflicting evidence, it should tend to be cognitively easier to dismiss an alibi than to dismiss various types of incriminating evidence.

Participants in alibi evaluation studies often evaluate alibis in the absence of incriminating evidence, and this is notably true of the studies that have demonstrated a truth bias among alibi evaluators (Culhane et al., 2013; Strömwall et al., 2003). The observed truth bias might therefore simply reflect the fact that evaluators in these studies had no particular reason to doubt the veracity of the alibis. Consistent with the interpretation that the presence of incriminating evidence might be required to observe alibi skepticism, Charman et al. (2015) demonstrated that the same alibi was evaluated more harshly in the presence of incriminating DNA evidence compared to in its absence. Dahl et al. (2009) showed that an alibi was evaluated more harshly in the presence of an incriminating eyewitness identification rather than an exonerating "not there" eyewitness response. Furthermore, this interpretation is consistent with Sommers and Douglass's (2007) findings that alibis were evaluated more harshly if presented in the context of a trial rather than as part of an investigation; evaluators could reasonably infer that because the case had proceeded to trial, there must be incriminating evidence, an inference that would invoke alibi skepticism.

Thus, we propose a slight alteration to the alibi skepticism hypothesis. Instead of hyper-skepticism being an inherent part of the alibi evaluation process, as had been proposed previously, we propose that it instead arises specifically when evaluators must reconcile contradictory and mutually exclusive information (i.e., an alibi and some incriminating information). Under this formulation, alibi skepticism specifically refers to the tendency for evaluators to show greater skepticism toward the alibi than toward incriminating information, an effect that arises because of the ease with which an alibi can be discredited compared to incriminating information. However, although we believe this hypothesis to be consistent with past research, there have been no direct tests of it; future research is required to flesh these ideas out more fully.

Future Directions for Alibi Research

A perusal of the relevant literature can lead to the conclusion that alibi research is somewhat scattershot and lacking in a well-defined structure. For instance, the area contains numerous studies that catalogue effects related to alibis (e.g., listing factors that affect alibi believability, showing that innocent people generate poor alibis), but there are relatively few attempts to examine the underlying *psychology* of alibi generation and evaluation, or to develop methods of improving the manner in which alibis are treated by the legal system. One of our purposes in this chapter is therefore to suggest future research directions that we believe will provide a preliminary path to accomplishing these goals. To that end, we offer four broad suggestions for future alibi research.

Further Develop Our Theoretical Understanding of the Alibi Process

In addition to documenting the types of alibis that people generate and the errors they make in providing their alibis, researchers should focus on developing a theoretical understanding of both the alibi generation and alibi evaluation processes. For instance, the schema disconfirmation model described previously provides a theoretical model of alibi generation, but it is currently somewhat speculative and in need of refinement, as we have many unanswered questions about the process. For instance, the model assumes a specific chronology: Innocent alibi providers will engage in a memory search first, then produce their schemas for the critical time period, then engage in another memory check. Alternatively, however, it might be the case that a time cue evokes schemas immediately, without invoking a preliminary memory search. Or perhaps the memory search occurs concurrently with schema production; since accessing one's schemas should tend to occur relatively quickly compared to retrieving a memory for a critical time period, responding tends to be primarily schema-based. Further, the model currently assumes that following the retrieval of a schema, alibi providers will undergo a memory check to uncover any information that might contradict, as opposed to support, their schema, but we have no direct data to support this assumption.

Similarly, our re-interpretation of the alibi skepticism hypothesis is an attempt to expand the scope of research that has been conducted within the domain of alibi believability from simply listing factors that affect alibi believability to understanding evaluators' underlying psychology that leads them to evaluate alibis in a particular way. Although there have been some studies that have proposed theoretical frameworks by which to understand the alibi evaluation process—most notably Olson and Wells (2004) taxonomy of alibi evaluation and Hosch et al.'s (2011) evolutionary conceptualization of alibi evaluation—further progress is needed.

These types of theoretical models, if supported, would allow for the development of interventions to aid the alibi generation process. For instance, the schema disconfirmation model predicts that innocent people often provide inaccurate alibis not because their memory criterion is too low (since innocent alibi providers will by and large fail to retrieve a direct memory of their whereabouts on the basis of a time cue), but because their belief criterion is too low. In other words, they report their schemas as their alibis because they fail to uncover the appropriate memories that would disconfirm their schemas. This logic suggests that to improve the accuracy of innocent people's alibis, we can (a) develop methods to help innocent people uncover information that might contradict their schemas if they were in fact engaged in a schema-inconsistent activity, or (b) use interventions that increase innocent suspects' belief criteria. For instance, it is possible that a simple instruction to alibi providers to avoid over-relying on schemas might be effective in reducing simple schema-based responding. The effectiveness of such an instruction, though, might be dependent on alibi providers knowing that their schema-based alibis are in

fact schema-based, and not actual memories of the critical time period. Our personal anecdotal experience running alibi generation studies suggests that innocent alibi providers often seem highly convinced of the veracity of their mistaken, schema-based alibis as they are providing them, suggesting that they mistakenly believe they are accessing a direct memory for the critical time period. Nonetheless, further theoretical advancements should help to design interventions to improve the alibi generation process.

Develop Interventions to Differentiate the Types of Alibis Provided by Innocent and Guilty Suspects

Research across multiple areas within legal psychology has demonstrated that evaluators are often poor at discriminating between accurate and inaccurate claims (e.g., Bond & DePaulo, 2006; Kassin, Meissner, & Norwick, 2005; Lindsay, Wells, O'Connor, 1989). This same tendency holds true in the alibi realm: Alibi evaluators are generally poor at differentiating true from false alibi stories (Culhane et al., 2013; Strömwall et al., 2003). Interventions that allow for the increased differentiation of true from false alibi stories are thus highly desirable, and would provide researchers with recommendations to make to the legal system concerning the collection and treatment of alibi evidence—recommendations which are currently lacking. In developing these interventions, researchers should note the importance of including guilty alibi providers in their research designs, something that is relatively rare among the extant alibi research. An intervention that increases the accuracy of an innocent suspect's alibi might also increase the believability of a guilty suspect's alibi—an obviously undesirable occurrence. For instance, one simple way to potentially increase the accuracy of innocent people's alibis is to allow them access to various materials—planners, diaries, calendars, etc—prior to having them provide an alibi. However, allowing guilty people access to those same materials effectively gives them more time to plan their fabricated story and might provide them with cues as to how to fabricate a better alibi (e.g., "According to my calendar, I went to a movie on January 7th, so I could provide that as my false alibi for January 8th"). In order to test the effectiveness of an intervention on alibi quality, therefore, it is necessary to include both innocent alibi providers and guilty alibi providers in our studies to examine the effect of the intervention on both groups. An ideal intervention of course is one that improves the accuracy of innocent suspects' alibis without improving the believability of guilty people's alibis.

Consider that innocent people have difficulty providing physical evidence for their alibis (Culhane et al., 2013; Olson & Charman, 2012). This could occur not only because there is no physical evidence for them to produce, but because they are not aware of the physical evidence that might help to exonerate them (although we are aware of no research that has directly examined this possibility). For example, increased use of technology means that people's whereabouts are more

easily tracked: Photos and social media updates are often tagged with time and location. It might be possible to thus reconstruct someone's whereabouts over a time period through this information, but if innocent alibi providers are unaware of how they were tracked, they might fail to report that exonerating information. Thus, perhaps prompts by an interrogator about the types of physical evidence that could corroborate their story would help innocent people remember the existence of that evidence, which could then be validated by investigators. Note that these prompts should not help guilty people (or at least not to the same extent); their failure to produce corroborating physical evidence is not the result of unawareness of that evidence, but of its unavailability. Future research could examine whether this type of intervention would increase the believability of innocent suspects' alibis more than guilty suspects' alibis.

Additionally, perhaps there are interviewing techniques that can improve alibi reports from innocent, but not guilty, suspects. For instance, the Cognitive Interview has been shown repeatedly to increase the amount of correct information reported from witnesses (Memon, Meissner, & Fraser, 2010). A recent study also suggests that, at least under some circumstances, it can also increase the number of people one reports having had contact with during a specified time period (Mosser & Evans, in press). Given its demonstrated successes with improving memory, it is possible that the Cognitive Interview might help innocent alibi providers' reports (without concomitantly helping guilty alibi providers), ultimately allowing for better discrimination between innocent and guilty suspects' alibis.

Develop New Paradigms to Assess Alibi Accuracy

To assess whether an intervention increases the accuracy of people's alibis, we require an objective measure of accuracy. Current methodologies of estimating alibi accuracy involve either having participants investigate their own alibis, resulting in a highly imperfect measure of accuracy (e.g., Culhane et al., 2008; Olson & Charman, 2012; Strange et al., 2014), or creating artificially aschematic Time 1 events in order to measure accuracy (Leins & Charman, 2016). One of the more important challenges to alibi researchers is to develop novel paradigms that allow for better assessments of alibi accuracy. To that end, we offer two paradigms that might be able to accomplish this.

First, alibi researchers could make use of diary studies. Participants could be asked to keep a diary of their whereabouts and behaviors over the course of some period of time. Collecting these diaries would then give researchers a record of participants' actual whereabouts. At some later point in time, participants would be asked to report their whereabouts on one (or more) of those days; their alibis could then be compared to their diary entries (e.g., see Krall & Dwyer, 1987, for a similar paradigm involving memory for food intake). This methodology would thus ensure that the critical event is not artificially aschematic while still allowing for a method of assessing accuracy.

Nonetheless, alibis tend to be given for relatively specific windows of time; participants are unlikely to update their diaries more than a handful of times per day, given the burden of doing so over the course of days. This can create problems in determining the accuracy of their later alibis. For instance, if participants only update their diary entries at the end of each day, their accounts of their whereabouts at a precise time during the day are subject to inaccurate recollection. Thus, a second methodology that would circumvent these problems would be to use a modified diary study, in which participants are signaled at various points throughout the day to indicate what they are doing at that precise moment (see Mohr et al., 2013, for a similar paradigm in an alcohol consumption study). This paradigm should provide researchers with a relatively accurate account of participants' actual whereabouts and behaviors for those cued times. This should be able to be accomplished relatively easily with today's technology; phone apps could be created that notify the participants at pre-specified times to indicate their whereabouts on their phone, information that could also be collected via GPS tracking. This information could then be instantly transferred to experimenters, providing them with participants' exact whereabouts at precise times to later compare to their alibis.

Researchers should, however, be cautious with these methodologies; if, when later asked to report their alibis, participants conclude that they are being asked about times that the app notified them, the notification itself might act as a cue, resulting in artificially high accuracy rates. Thus, we suggest that when asking participants about their alibis, researchers use cover stories to minimize this possibility (e.g., by not making it apparent that the alibi study is connected to the app study), and ask participants about additional time periods during which participants did not record their whereabouts in order to alleviate suspicion (e.g., see Leins & Charman, 2016).

Increase the Diversity of Participant Samples

Virtually all alibi research has used student-participants. Students, however, are very different from non-students in multiple respects, seriously calling into question the extent to which we can generalize our findings to innocent suspects at large. For instance, students are different demographically than non-students (e.g., more intelligent, younger), are presumably less likely to be married and more likely to live with parents than non-students (thus changing the types of people who would be able to corroborate their alibis), and will have specific, non-generalizable schedules (e.g., fairly set schedules during the school year, but relatively open schedules during summer break, resulting in different schemas compared to non-students). Critically, students providing alibis in a laboratory context will presumably have much different motivation to produce accurate alibis compared to actual, real-world alibi providers, who are aware their freedom might depend on their accurate reporting of their whereabouts; the extent to which this motivation changes their reported alibis is unknown. Research has already shown that even

among relatively homogeneous student samples, there can be substantial variation in reported alibis between students of different racial backgrounds (Culhane et al., 2008) and between students from schools in different geographic locations (Culhane et al., 2013); using non-student samples might reveal even greater differences in alibi generation. Consequently, we strongly recommend that alibi researchers begin expanding the types of samples they use in their studies.

Concluding Remarks

There is one general conclusion that can be distilled from the extant research into alibis: Innocent people often fail to generate true and believable alibis, a conclusion drawn from research highlighting the various obstacles that interfere with innocent suspects' ability to generate alibis as well as research documenting the skepticism with which evaluators perceive alibis. This is an important conclusion that demonstrates yet another difficulty innocent people face when caught up in the legal system, but it is now time for alibi researchers to take the next step: to develop a system variables approach toward the study of alibis. The most important issue now facing alibi researchers is to generate practical recommendations that can help the legal system better handle alibi evidence. Currently we have few concrete suggestions to provide; the suggestions we do have—such as "be aware that inconsistencies are not necessarily indicative of guilt"—are often so general as to provide little actual guidance as to what investigators should do. Until we develop positive recommendations for the legal system, the impact of this work will be blunted. Fortunately, it is our opinion that the field is now in a position to turn its focus toward uncovering and testing theoretically derived interventions that improve the handling of alibi evidence so that we are eventually able to make those recommendations.

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Plea Bargaining: The Influence of Counsel

Kelsey S. Henderson and Lora M. Levett

Plea bargaining involves an agreement between the defendant and the state in which the defendant pleads guilty to a charge, typically in exchange for some form of leniency in sentencing or charges. Plea bargaining can result in an outcome that is desirable for both parties seeking to settle a dispute in an expedient and economic manner. Criticisms of the practice of plea bargaining focus on the infringement of defendant's Constitutional right to trial by a jury of his peers and lack of adversarial and procedural protections. Many of the protections for defendants afforded by the Constitution were designed with the trial process in mind and could be sacrificed in the decision to negotiate a disposition (i.e., plea bargain). For example, the defendant who accepts a guilty plea does not have the opportunity to cross-examine key witnesses or present contrary evidence to try and defend one's innocence. However, many characteristics of the U.S. criminal justice system, such as the high volume caseloads and overburdened trial courts, promote the use of plea bargaining and increase pressure to resolve cases prior to trial.

Given these factors, it is not surprising that the majority of convictions are obtained through plea bargaining. An estimated 90–95% of all criminal convictions are a result of guilty pleas; the remaining percentage are convictions by judge or jury (Cohen & Reaves, 2006). The vast majority, 97%, of felony defendants

Lora M. Levett, Associate Professor, Colonel Allen R. and Margaret G. Crow Term Professor, 2017–2018.

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_3

convicted in U.S. Districts courts pleaded guilty in 2013 (U.S. Department of Justice Executive Office for United States Attorneys, 2013). In 2004, of the estimated 1,079,000 felony defendants convicted in state courts, 95% pleaded guilty, 2% were found guilty by a jury, and 3% were found guilty by a judge/bench trial (Durose & Langan, 2007). Plea bargaining is not a recent development in the U.S. criminal justice system; defendants accepting guilt in exchange for some type of leniency in sentencing has existed for over a century, if not most of U.S. history (Friedman, 1979). In the 1920s, estimates suggest that guilty pleas accounted for 77% of convictions in Cleveland, 85% in Chicago, 81% in Los Angeles, and 90% in Minneapolis (Alschuler, 1979).

Despite the large number of convictions resolved via guilty plea, legal decision-making scholarship has only recently begun to examine plea bargaining practices (e.g., Redlich, Bibas, Edkins, & Madon, 2017; Redlich, Bushway, & Norris, 2016). More scholarly attention has been given to other sources of legal decision-making and wrongful conviction generally (e.g., juror and jury decision-making, eyewitness identification, confessions). Given that plea bargaining accounts for the majority of convictions (and some known cases of wrongful conviction), research is needed to understand the processes used and context in which defendants make plea decisions. Research has begun to examine variables that might influence one's decision to accept a guilty plea, including legal factors (e.g., ability to secure pretrial release, strength of evidence, prior criminal convictions), characteristics of defendants (e.g., youth, mental illness), and defendants' personal motivations (e.g., loss of hourly employment, potential loss of transitional nightly housing). There are numerous empirical sources of information regarding these topics (for example, for self-reported plea motivations see Malloy, Shulman, & Cauffman, 2014; Redlich, Summers, & Hoover, 2010). The purpose of this chapter is to examine the role of the attorney as a source of influence in defendant plea decision-making.

For defendants, the decision of whether to waive their rights and accept a guilty plea versus take their case to trial is "the most important decision in any criminal case" (Amsterdam, 1988, p. 339). Because of legal education, the attorney's legal knowledge far exceeds the defendant's own knowledge. For example, the defendant is unlikely to fully comprehend issues surrounding evidentiary rules of the court, possible defenses, and potential punishment options, whereas the attorney likely gained this knowledge through legal education and experience. Counsel's responsibility is to make every reasonable effort to protect the defendant from an ill-informed choice. Attorneys might persuade defendants, to the limits their conscience allows, to make the decision that is in the defendant's best interest, which typically is the guilty plea (Amsterdam, 1988). The attorney, however, must remind the client that even if he insists on going to trial, the attorney will zealously represent the defendant in court. Even though the attorney must give the client the benefit of his professional advice, the ultimate plea decision remains with the defendant. In fact, a recent United States Supreme Court (USSC) decision reaffirms that the choice of how to plead, amongst other legal decisions, remains with the defendant, not his attorney (*McCoy v. Louisiana*, 2018). Examining plea decision-making and the role of attorneys in that context will contribute to the

understanding of this critical component of the U.S. criminal justice system. Specifically, attorneys play a special role in the plea bargaining process and likely affect a defendant's understanding of his case, which then ultimately influences the defendant's decision to plead guilty or go to trial.

We will begin by exploring the attorney's role in the legal context, established by legal precedent, examining how those guidelines extend to plea bargaining negotiation, advising, and counseling. In examining the legal context, we review several decisions addressing the defendant's 6th Amendment right to effective counsel, ranging from the 1963 decision in *Gideon v. Wainwright* to a more recent pair of cases, *Lafler v. Cooper* (2012) and *Missouri v. Frye* (2012). We will then discuss the attorney's role in the context of the dominant theoretical perspective applied to plea decision-making: the shadow of trial theory. Following this, we explore how the social psychological process of social influence could help account for how defendants' plea decisions are influenced by their attorneys. We will then delve into research examining legal and extra-legal factors that influence attorney decision-making and recommendations. Then, we examine whether research on the attorney's role in plea bargaining sheds light on the standards used to define effective assistance of counsel. For example, one variable that might affect an attorney's advice is the race of the defendant. We will explore this variable and how the idea that race might affect plea outcomes through attorney advice has implications for what constitutes effective assistance of counsel. Further, we will explore whether defendants over-rely on attorney advice, making decisions that are against their own best interests and that they might not have made in the absence of such advice. Last, we provide suggestions for future research that will contribute to the understanding of the relationship between attorneys and their clients, and how this relationship plays a role in defendants' plea decisions.

The Defense Attorney's Role

There are three phases in the plea bargaining process: the preparation phase, negotiation phase, and client-counseling phase (Alkon, 2016). The first phase involves the defense attorney preparing to meet the client, conducting client interviews, investigating the case, establishing legal background of the case, gathering information, and preparing the client for the plea negotiation phase (Alkon, 2016). This phase is relatively straightforward, and during this time the defense attorney will orient himself to the case, client, and other legal actors involved (i.e., prosecutor and possible judges).

The second of these phases is the plea negotiation phase. During the plea negotiation phase, the defense attorney and prosecutor discuss possible plea offers and counter-offers (Alkon, 2016). When settling a criminal case, the parties involved must attempt to reach an agreement on the disposition of a case that satisfies the interests of both the prosecution and defense, without proceeding to trial (Amsterdam, 1988). If the risks at trial for the defendant are deemed to be

large, then effective assistance of counsel is securing a plea deal for the client (Amsterdam, 1988). Thus, during the negotiating phase, the defense's goal is to secure the least damaging plea deal for the client. The negotiation phase typically begins early, as there might be an incentive for the defendant to accept a plea offer quickly and for the defense attorney to gain access to discovery as soon as possible. Even if the defense attorney has an opinion about whether the case would be best suited for trial or a guilty plea, the defense attorney has an obligation to explore negotiation with the prosecutor if the client appears open to the possibility of a guilty plea (Amsterdam, 1988).

The final phase is the client-counseling phase, which occurs once the prosecutor has offered a plea and the defense attorney counsels his client about the plea offer. This phase is arguably the most important phase in which to examine the influence of the attorney. If the defense attorney has determined that accepting a plea offer is in the client's best interests and the attorney advises the client of this, the attorney should thoroughly explain his reasoning to the client (e.g., the evidence against the defendant, perception of the probability of conviction at trial; Amsterdam, 1988). The attorney should advise the client of not only the benefits but also the consequences associated with accepting the guilty plea (see discussion of collateral consequences, below).

Research suggests attorneys follow this standard. For example, one study examining plea decision-making from the perspective of juvenile defense attorneys reported that attorneys engaged in three strategies to help prepare their juvenile clients in making plea bargain decisions: (1) discussing the disposition or sentence the juvenile would be facing, the charges, and evidence the state would likely use against the client at trial; (2) making sure the client understood the rights the client would waive upon accepting a guilty plea; and (3) discussing the collateral consequences that result from accepting a guilty plea (Fountain & Woolard, 2018). Following this phase, the client will make the decision of either accepting or rejecting the guilty plea offer, taking into consideration his own personal situation, beliefs, and attorney's recommendation. If the client chooses to reject the guilty plea offer, the client could choose to fight for a better offer or take the case to trial. Effective assistance of counsel is required at each stage of the process for the defense attorney to secure the best outcome for his client (Alkon, 2016). In the next section, we will explore the concept of effective assistance of counsel, explaining the precedent and assumptions underlying those laws.

Legal Precedent: A Defendant's Right to Counsel

Right to counsel in the legal system is a fundamental issue first included in the Constitution and defined by precedent in subsequent years. In *Gideon v. Wainwright,* (1963), one of the landmark decisions regarding right to counsel in the United States, the USSC extended the right to counsel for indigent defendants to state courts. The decision in *Gideon* overturned an earlier decision in *Betts v. Brady*

(1942) that denied defendants in state courts the same right to counsel as defendants in federal courts (*Johnson v. Zerbst,* 1938) or narrowly applied only to defendants accused of capital crimes (*Powell v. Alabama,* 1932). The decision in *Gideon* was later extended to include all defendants charged with a misdemeanor offense carrying the potential for loss of liberty (i.e., imprisonment; *Argersinger v. Hamlin*, 1972) and to include juvenile defendants (*In re Gault*, 1967). Additional considerations of the constitutionality of plea bargaining focusing on fairness were addressed in *Santobello v. New York* (1971). In this decision, the USSC determined that, for a plea bargain to be valid, a prosecutor has to adhere to the plea agreement offered to a defendant at sentencing.

Gideon (1963) established the standard of effective, appointed counsel for indigent defendants as fundamental to fairness, as part of the due process clause of the 14th Amendment. Following the *Gideon* decision, the USSC further addressed the constitutionality of plea bargaining and established that a defendant must knowingly, voluntarily, and intelligently accept a guilty plea, thereby waiving his 5th Amendment rights (*Boykin v. Alabama*, 1969). The decision to accept a guilty plea is one of the most important legal decisions the defendant will make, and part of the defense attorney's role is to help ensure the defendant's decision falls into the parameters of a knowing, voluntary, and intelligent decision. The USSC has established that a plea is voluntary even if a defendant accepts a guilty plea while still proclaiming innocence (*North Carolina v. Alford*, 1970), or pleads guilty to avoid the death penalty (*Brady v. United States*, 1970). More information on whether plea decisions are knowing, voluntary, and intelligent is available elsewhere (e.g., see Redlich, 2016); as the focus of this chapter is the role of counsel, we will next turn to that role as established in law.

In *Gideon* (1963), the USSC established the right to counsel but did not address what constitutes effective assistance of counsel. This question was later put to rest in *Strickland v. Washington* (1984). To help dictate what constitutes ineffective assistance of counsel, *Strickland v. Washington* (1984) offered a two-prong test: (1) Was counsel's performance deficient, falling below an objective standard of reasonableness; and (2) If there was deficiency, is there a reasonable likelihood that, if not for counsel's deficient performance, the outcome would have been different? Given the threshold established in *Strickland*, it is difficult to prove ineffective assistance of counsel. Not only does the defendant have to prove that his counsel's performance was ineffective, but also that the outcome at trial would have been different if not for his counsel (effectively having to prove one's innocence in a *Strickland* test). Thus, the 6th Amendment's right is implied to mean "effective assistance of counsel"; however, the threshold for what constitutes effective assistance of counsel according to the *Strickland* test might not necessarily represent what one intuitively thinks of as good counsel.

That is, there have been numerous anecdotal accounts of attorneys behaving in a way that arguably does not represent good counsel, yet passes the *Strickland* test. This is likely due to the second part of the standard requiring that the outcome at trial would have to be different. For example, the USSC has ruled that an attorney meets the "effectiveness" standard if he is conscious (i.e., awake) for a "substantial"

portion of trial (*Muniz v. Smith*, 2011). In this particular case, the defendant's attorney was asleep while his client was being cross-examined by the prosecution. While the USSC acknowledged that this qualified as deficient, the defendant did not prove with reasonable probability that the outcome would have been different had his attorney not fallen asleep (*Muniz v. Smith*, 2011).

A similar example can be found in the New York State Appeals Court Decision in *People v. Badia* (1990). In this case, the Court upheld Badia's murder conviction; however, it also acknowledged that Badia's attorney was under the influence of heroin and cocaine during the trial. Badia's attorney was subsequently convicted for conspiracy to distribute narcotics and was arrested just a month after Badia's trial. The Court cited that although the attorney was under the influence, he provided meaningful representation or assistance of counsel (*People v. Badia*, 1990). For a discussion of other cases involving attorneys who have been under the influence during the trial, but did not meet the threshold for ineffective assistance of counsel under the *Strickland* test, see the Marshall Project's report (Armstrong, 2014).

Given the high standard set by the second prong of the *Strickland* test, prevailing in an ineffective assistance of counsel appeal is a difficult task. Further, it places the burden entirely on the defendant. Data from the Innocence Project suggest that ineffective assistance of counsel can be an antecedent of wrongful conviction. Of the first 255 people who were exonerated with the help of the Innocence Project, 54 exonerees (21%) raised claims of ineffective assistance of counsel and the appellate courts rejected 81% of these claims (West, 2010). However, in these cases, the outcome of trial arguably should have been different—in some cases, at least in part due to the actions of counsel or the (in)effectiveness of counsel. For example, in the wrongful conviction case of Earl Washington Jr., Washington was charged with the 1982 rape and murder of a woman in Culpeper, Virginia (innocenceproject.org). Biological testing of semen found at the crime scene conducted prior to trial excluded Washington as the perpetrator (i.e., the test detected a rare plasma protein in the sample that Washington did not possess; innocenceproject.org). His attorney failed to present this exculpatory evidence at trial.

Washington was convicted in 1984 and sentenced to death (West, 2010). He was exonerated 16 years later; at one time, coming within only 9 days of his execution date (innocenceproject.org). Washington's claim of ineffective assistance of counsel was not granted by the court, which claimed that there were other pieces of inculpatory evidence presented at trial, so that counsel's failure to include the exculpatory evidence would not have changed the outcome of the verdict (*Washington, Jr. v. Murray, Director, Virginia Department of Corrections; Thompson, Warden, Mecklenburg State Correctional Facility*, 1993). While the examples provided here of possibly ineffective lawyering are rare and egregious, they shed light on the issues underlying *Strickland* and call into question whether the standard used to determine effective assistance of counsel at trial really translates to good counsel. However, the question remains of how the standard established in *Strickland* translates to plea bargaining. Next, we will explore the concept of effective assistance of counsel as it relates to the attorney's role in the plea bargaining process.

Legal Precedent: Attorneys and Plea Bargaining

As demonstrated in the section above, the *Strickland* test sets the bar high to prove ineffective assistance of counsel at trial and places a heavy burden on the defendant. However, we have not addressed what constitutes ineffective assistance of counsel in plea bargaining. The situational environment in which guilty pleas are negotiated and accepted is very different from the environment in which a trial takes place. That is, proving deficient attorney performance could actually be easier for those defendants who went to trial, as counsel's comments and general conduct are matters of public record (Alschuler, 1986). Most plea negotiation and counseling take place in an unmonitored environment. Thus, proving an ineffective assistance of counsel case for defendants who accepted a guilty plea could be even tougher, as many of the interactions and conversations do not take place in open court (and therefore, are not documented by public record).

However, despite these obstacles, over the last few decades, the USSC has extended precedent established in *Strickland* by applying standards governing ineffective assistance of counsel specifically to issues involved with guilty pleas, and most relevant to this chapter, the defense attorney's role in these cases. Again, extending precedent governing ineffective assistance of counsel from the public forum (the trial) to the more private forum (plea bargaining) might not take into account important differences between those two contexts. We will highlight a few of the influential decisions (and the importance of the context in which the plea negotiation takes place) below.

In the plea bargaining context, the defendant must be able to show that he would not have pleaded guilty if he had received competent legal advice (i.e., effective assistance under the *Strickland* standard; *Hill v. Lockhart*, 1985). That is, *Hill v. Lockhart* (1985) established the rule that the defendant must prove that, if it had not been for counsel's ineffective, deficient performance, he would not have accepted the guilty plea and waived the right to trial. In *Hill v. Lockhart,* Hill argued that his guilty plea was involuntary due to ineffective assistance of counsel, who allegedly gave erroneous information regarding Hill's parole eligibility. The USSC found that Hill provided no support for the argument that he would not have accepted the guilty plea, and instead would have gone to trial if it had not been for his counsel's influence. The fundamental question of *Hill v. Lockhart* (1985) was whether or not counsel's deficient performance caused the defendant to waive his right to trial.

Hill v. Lockhart (1985) demonstrated that the USSC has extended the mandate of effective assistance of counsel (and the *Strickland* test for determining whether counsel is ineffective) to the plea bargaining context. In addition, the USSC also has begun to consider the issue of *what* constitutes effective assistance of counsel in the context of plea bargaining. In these cases, the defendants raised claims of ineffective assistance of counsel on the basis that the attorney neglected to advise the defendant of a consequence of accepting a guilty plea (deportation, *Padilla v. Kentucky*, 2010), gave flawed advice (*Lafler v. Cooper*, 2012), or did not advise the defendant of a plea deal offered by the prosecutor (*Missouri v. Frye*, 2012).

The first of this trio of decisions, *Padilla v. Kentucky* (2010), extended the role of the attorney in plea bargaining by ruling that counsel has a responsibility to advise his client of any possible threat to immigration status (i.e., deportation) as a result of accepting a guilty plea. Prior to this decision, counsel only needed to advise his client of direct consequences (e.g., possible maximum sentence, likely sentence as a result of plea negotiations, fines), not collateral consequences (i.e., the additional state and federal legal and regulatory sanctions attached to criminal convictions).

However, threat to immigration status is just one possible collateral consequence. With funding from the National Institute of Justice, the American Bar Association developed the National Inventory of the Collateral Consequences of Conviction database, which provides information on the over 40,000 separate collateral consequences based on geography (https://niccc.csgjusticecenter.org/map/). These consequences include sanctions such as inability to receive welfare benefits, ineligibility for jury duty, loss of right to vote, and ineligibility to hold public office, amongst others. The question left open after *Padilla* is whether attorneys should be required, or have the responsibility, to notify their clients of other potential collateral consequences in addition to threats to immigration status. That is, given that attorneys have the responsibility to advise a client on one collateral consequence, it is unclear whether attorneys have the responsibility to advise clients on other potential consequences, or which of those consequences meet the threshold for disclosure. If attorneys have the obligation to inform clients of multiple collateral consequences, it could place a heavier burden on attorneys to investigate and inform clients of these consequences, especially if the attorney practices in multiple jurisdictions requiring informing clients of various collateral consequences.

The following two cases also address attorney advisement, specifically, the content of that advice regarding the plea offer (*Lafler v. Cooper*, 2012) or failure to inform the client of a plea offer (*Missouri v. Frye*, 2012). In the first of these cases (*Lafler v. Cooper*, 2012), Cooper's counsel advised him to reject the prosecution's initial plea, giving flawed advice regarding the state's ability to convict on the basis of the victim's injuries. Cooper was subsequently convicted at trial and sentenced to a prison term four times the length of the initial plea offer. The USSC agreed that Cooper suffered prejudice because he sufficiently demonstrated that he would have accepted the plea if it had not been for his counsel's advice, and he was sentenced to a lengthier term after trial. The USSC acknowledged that due to counsel's constitutionally flawed advice, Cooper lost out on the opportunity to accept the initial plea offer which would have substantially shortened his sentence.

In *Missouri v. Frye* (2012), the prosecutor mailed Frye's public defender an "exploding" plea offer, meaning that Frye would need to accept the plea offer before the designated expiration date (roughly 6 weeks after the letter was mailed). Frye's attorney never notified Frye of the plea offer and he learned of the initial plea after being arrested and convicted on another charge. Frye argued that his attorney never conveying the plea offer to him violated his constitutional rights and resulted in a more unfavorable sentence. The Court agreed. In the latter two cases, the USSC

established that effective counsel must inform a client of all plea offers and must not give flawed advice regarding accepting or rejecting a plea offer.

In these cases, the USSC acknowledged that the U.S. criminal justice system is a system of pleas, not a system of trials. Thus, more attention should be paid to the decision-making processes in plea bargaining, including the unique role of the attorney in plea negotiations, counseling, and defendant decision-making. However, as Justice Kennedy acknowledged in his majority opinion in *Frye*, defining the duties and responsibilities of defense attorneys in the plea bargaining process is difficult (*Missouri v. Frye*, 2012). Bargaining and lawyering is an individual skill and attorneys engage in that skill in countless differing ways. Justice Kennedy went on to explain that it is neither prudent nor practical to define or dictate standards for proper participation of defense attorneys in the plea bargaining process (*Missouri v. Frye*, 2012). However, given the miscarriages of justice that have resulted, at least in part, as a result of a plea bargaining, it is prudent to explore the attorney's role in the plea bargaining process and how legal and extra-legal factors affect attorney advice (and how a defendant acts upon that advice) from a social scientific standpoint.

While these cases have shed light on the issues of effective assistance of counsel in plea bargaining, they have also raised more questions for the Court to address, such as the limit of the attorney's obligation to inform defendants of the consequences of accepting a guilty plea. Along those lines, the Court could further define and refine what constitutes proper participation of defense attorneys in the plea bargaining process. Given the 'behind closed doors' nature of the plea bargaining process, the Court could address whether attorney involvement is something that should be monitored or standardized. Future cases will likely more closely examine these questions, and the role of the attorney in the plea bargaining arena will continue to evolve as efforts are made to refine the definition of effective assistance of counsel in this context. Social scientists have also begun to explore decision-making in plea bargaining, providing theoretical and empirical work to aid in understanding what affects defendants' plea decisions. We will turn to that work next to help elucidate how the attorney affects defendant plea decision-making.

Theoretical Perspectives Informing How Attorneys Influence Plea Decisions

The empirical work exploring plea decision-making has been largely done so within the context of the most popular theory to explain plea bargaining—the shadow of trial theory (Mnookin & Kornhauser, 1979). In this section, we will explore the shadow of trial theory, explaining how the attorney's role can be understood through the tenets of the theory. In addition, we will argue that the shadow of trial theory should be expanded to account for social influence variables that might be important in the interaction between the attorney and defendant in the plea bargaining process.

The Shadow of Trial Theory

The shadow of trial theory is common to legal and economic research and has been applied to plea bargaining (Mnookin & Kornhauser, 1979). It is one of the most common theories referenced in relation to plea bargaining, and has spurred numerous empirical studies that explore the factors that affect the plea decision-making process.

Basic Tenets of the Theory. When applied to plea bargaining, the theory posits that the decision to accept a guilty plea is based on the defendant's perceived outcome at trial, which is determined by the strength of evidence in the case (Mnookin & Kornhauser, 1979). The defendant has two choices: the unknown trial outcome (conviction and unknown sentence or acquittal) versus the known plea outcome (known conviction and sentence). The theory introduces the idea of plea discounts or trial penalties, meaning that defendants who plead guilty are sentenced to significantly shorter sentences compared to the sentences they would receive had they been convicted at trial; research supports these notions (Ulmer & Bradley, 2006). Defendants who reject a plea offer and instead go to trial and are found guilty are likely penalized through longer sentences (Mnookin & Kornhauser, 1979).

The theory predicts variation in the amount of plea discount (defined as leniency in sentencing or other benefit gained based on accepting a guilty plea) based on the evidence (Bushway & Redlich, 2012). That is, plea discounts are expected to be large when the probability of conviction is low (i.e., the prosecutor could offer more lenient sentences in cases with weaker evidence). Conversely, plea discounts are expected to be small when the probability of conviction is high (i.e., the prosecutor could offer less lenient sentences in cases with stronger evidence). Therefore, if a defendant perceives a large sentencing discount by accepting a guilty plea, then he is more likely to accept that plea and forgo trial compared to if he perceives a small sentencing discount by accepting a guilty plea.

While the shadow of trial theory was designed to account for defendant decisions, it can be applied to the decision-making of other legal actors as well (Bushway, Redlich, & Norris, 2014). Considering that defendants' perception of these factors might be shaped through their interactions with their defense attorney, we address how these legal variables could affect defense attorney decision-making. Theoretically, within the shadow of trial theoretical context, an attorney might recommend that a client accept a guilty plea because the attorney perceives the client's chance at trial to be unknown or too risky. Similarly, the attorney might perceive the magnitude of a plea discount or risk of trial penalty differently than the defendant. As such, the attorney's perception or advice might influence the defendant's perception of the plea discount and/or trial penalty. The defendant's perception likely affects his plea decision. Conversely, an attorney could advise his client to reject a guilty plea offer because the offer is comparable to the estimated sentence at trial if found guilty; or because the defense attorney's perception of the evidence is such that he believes the defendant would likely be found not guilty at

trial. The attorney could influence the defendant by confirming his concerns regarding differences in punishments between the plea bargaining and trial phases.

Expansion of the shadow of trial theory. Bibas (2004) has argued that the shadow of trial theory should be expanded to account for psychological processes and structural influences that prevent defendants and legal actors from making rational plea decisions. Similarly, Redlich and colleagues have noted that defendants' decision involves a combination of cognitive biases, heuristics, and social influence pressures, in addition to consideration of legal factors (Redlich et al., 2017). The shadow of trial theory suggests that defendants and attorneys will strike bargains on the basis of the strength of the evidence and perceived outcome at trial (Mnookin & Kornhauser, 1979). Bibas suggests that even though legal factors incorporated into the shadow of trial are important factors, structural influences (e.g., poor lawyering, attorneys' self-interests) and psychological biases (e.g., stereotyping, risk aversion, racial bias) could distort bargaining and punishment in certain cases (2004). In addition, the attorney might have different perceptions of base rates of accepting guilty pleas. That is, the attorney could have preconceived opinions regarding the frequency at which guilty plea acceptance occurs or approach the plea situation with a very different idea of how often a defendant should accept a guilty plea. This could vary by type of practice (e.g., a public defender might expect that more of his clients would accept guilty pleas versus a private defense attorney). The difference in base rates might affect the way an attorney approaches an offer compared to a client—the attorney approaches the offer with the idea that the defendant will likely plead guilty, whereas the defendant might approach the offer averse to the idea of accepting a guilty plea. These perceptions could also be influenced by differences in risk-seeking behavior; that is, defendants could be more risk-seeking, while defense attorneys more risk-adverse, or vice versa.

Other factors might also affect the attorney's perception of the guilty plea offer. For example, in addition to making recommendations that are in the defendant's best interest, attorneys might also make recommendations to their clients that are not in the client's best interest for many reasons, such as they fear their client will be stereotyped by the jury, they have an overwhelming caseload, they are operating in the context of maintaining relationships with the judge and/or prosecutor, etc. Regardless of the factors that affect an attorney's perception of a guilty plea offer or advice given to a client, the attorney's recommendation likely affects the defendant's perception of the guilty plea offer and the possible trial outcomes. Social psychological research on social influence could help elucidate the processes through which this influence occurs.

Social Influence

The relationship and interaction between client and counsel can be framed through the lens of social influence theory. Social influence involves behavioral or emotional changes that occur through one's willingness to comply with or conform to

the request or behaviors of others (Cialdini & Goldstein, 2004). One of the attorney's main task is to provide sound and helpful advice to his client. As discussed above, it is reasonable for a defendant to follow the advice of his attorney, as the attorney certainly has more legal knowledge of the situation (and possible outcomes) compared to the client. In addressing how the defendant might perceive the attorney's advice and respond behaviorally in decision-making, we will discuss principles of conformity and compliance (Cialdini & Goldstein, 2004).

Compliance can either occur explicitly (e.g., a campaign organizer directly soliciting a vote for a particular candidate) or implicitly (e.g., advertisements designed to influence attitudes and opinions, which should in turn influence votes). Regardless of whether a request for compliance is implicit or explicit, the target understands that a particular outcome is being requested (e.g., the vote; Cialdini & Goldstein, 2004). Similarly, in the case of a defendant considering a plea bargain, the attorney's advice could either serve as a request for compliance explicitly (e.g., the attorney directly advising the client to accept a guilty plea or go to trial) or implicitly (e.g., the attorney providing information about factors likely to influence a defendant's perception of the plea offer, likelihood of conviction), which then affect the defendant's ultimate plea decision. In the former case, the client might choose to comply because he trusts the attorney's opinion or expertise. In the latter case, the client might choose to comply because he changes his attitudes or perceptions about factors that affect his perception of the plea deal. It is important to note that the attorney's tone, attitude, or other information shared could also affect the client's decision through implicit routes.

Conformity, on the other hand, differs from compliance in that conformity refers to a person changing his behavior to match the behavior of others (Cialdini & Goldstein, 2004). Again, considering the criminal defendant, a defendant might have an opinion prior to meeting with the attorney on whether he would like to accept a guilty plea or go to trial. The attorney might advise a different decision, and the client could change his decision to conform to the attorney's opinions.

Conformity and compliance occur as a result of people's need to make accurate decisions (Cialdini & Goldstein, 2004). In the case of the plea bargain, an accurate decision could have multiple definitions. First, an accurate decision could be one that maximizes outcomes for the defendant. That is, the most accurate decision is the one that results in the most favorable outcome for the defendant—either a reduced sentence or an acquittal. Conversely, an accurate decision could be one that results in a just outcome—a not guilty verdict for an innocent client and a conviction for a guilty client. Given the nature of the attorney–client relationship, the former is more likely to be the goal of the attorney—the maximized outcome for the client, regardless of actual guilt. It might also be the most accurate decision to plead guilty if there is a high probability the defendant will be found guilty at trial and therefore could be subjected to a trial penalty. In this case, the guilty defendant will likely serve a reduced sentence by pleading guilty. In making these decisions, it is likely the defendant will consider the advice of his attorney because he is the expert in this context. That is, the attorney holds the position of power in the relationship because he has the knowledge to better predict outcomes in the legal arena.

Overview of Research Showing How Attorneys Influence Plea Decision-Making

Due to the attorney's relative position of power or expertise in this area, the attorney's advice likely plays an integral role in the defendant's decision-making process. Attorneys might try to convince clients to follow their recommendation of accepting a plea or going to trial (Smith, 2007). Research supports this notion; for example, defendants who pleaded guilty reported being advised by their attorney to accept a guilty plea (Viljoen, Klaver, & Roesch, 2005). In another study, defendants who self-reported that they accepted a false guilty plea noted that feeling as though their attorney was incompetent was a motivating factor in their decision (Redlich et al., 2010). Further, variations in advocate advice in an experimental simulation of a plea bargaining scenario affected defendant decisions (described in more detail below; see Henderson & Levett, 2018). These studies collectively demonstrate that attorneys have potential to influence plea outcomes.

Further, research suggests that an attorney's recommendation might have differing effects on innocent versus guilty defendants. In one study, feeling pressured by one's attorney was a self-reported motivation for false guilty pleas (Redlich et al., 2010). Juveniles self-reported higher false guilty plea rates if they also indicated their attorney befriended, deceived, or threatened them compared to juveniles who did not indicate their attorney behaved in such a manner (Malloy et al., 2014). These attorney behaviors were not associated with true guilty pleas (Malloy et al., 2014). These high-pressure tactics might have a more detrimental effect on innocent defendants than guilty defendants, especially considering that experimental research suggests innocent defendants are more likely to see their innocence as a protective factor and want to take their case to trial (Tor, Gazal-Ayal, & Garcia, 2010),

Other experimental work exploring the influence of an advocate/attorney suggests that attorney advice is more likely to influence innocent defendants than guilty defendants (Henderson & Levett, 2018), which is particularly problematic because it suggests that attorney advice is influential in false guilty pleas. In this study, innocent and guilty students were accused of a crime of academic dishonesty and presented with two different options for handling their case: either admitting guilt and accepting a punishment or consequence set by the professor in charge of the lab (analogous to a guilty plea) or taking their case before the student conduct committee (analogous to a trial, where the outcome was more unpredictable). The punishment set by the lab remained constant, and participants were reminded that they could be found not guilty by the student conduct committee and face no punishment, but if found guilty, could face a range of punishment options. Prior to making a decision, students spoke to a university student advocate, who, based on random assignment, advised them to accept the plea, go to trial, or gave education/unbiased advice; alternatively, they did not speak to an advocate (control group).

In this study, the percentage of false guilty pleas was lowest when a participant was advised to go to trial ($M = 4\%$), compared to the highest percentage of false guilty pleas when advised to accept the guilty plea ($M = 58\%$).

Importantly, advocate recommendation influenced innocent participants' plea decisions but had no significant effect on guilty participants' plea decisions. Innocent participants also rated the influence of the advocate higher than guilty participants, suggesting that innocent defendants might be more susceptible to social influence pressures than guilty defendants. This may have occurred because innocent defendants' plea decisions might be influenced by their attorney (an external source), whereas guilty individuals might be influenced more by internal feelings such as remorse, accountability, and responsibility (e.g., guilty defendants were more likely than innocent defendants to report accepting the guilty plea as "the right thing to do"; Redlich & Shteynberg, 2016). This would align with hypotheses regarding true and false confessions (while there are differences, both a confession and acceptance of a guilty plea are an admission of guilt; Houston, Meissner, & Evans, 2014). Although research on the topic is still limited, it suggests that the presence and recommendation of an attorney influences defendants' plea decisions; this still leaves open the question of what influences attorneys' plea recommendations to their clients in the first place.

Overview of Research Showing How Various Legal and Extra-Legal Factors Affect Attorneys' Advice

The idea that attorneys will influence their clients' plea decision-making is not necessarily problematic. The role of the attorney is to provide expert skill and advice to the defendant's situation and help ensure the defendant has had a rigorous and thorough defense. In addition, if that advice is affected by legal factors, such as the strength of evidence or probability of conviction at trial, certainly the advice would be sound and helpful for the defendant. However, the advice could become problematic if it makes false guilty pleas more likely or differs based on extra-legal factors that should not have an effect on outcomes in the criminal justice system. In this section, we will first examine those legal factors that influence attorney advice, and then we will turn to how extra-legal factors could also play a role in attorney advice.

Legal Factors

To understand how attorneys assess plea offers, and ultimately advise their clients, we have to first start with a discussion of legal variables. Legal variables such as the defendant's probability of conviction, and the strength and type of evidence in the case, are factors that influence attorneys' plea decisions and recommendations, and legally, should influence outcomes. While attorneys use these factors to calculate likely trial outcomes, it is possible that attorneys might be overconfident in their abilities, which could also weigh into their plea recommendations.

Strength of evidence and probability of conviction. Using the shadow of trial theory as a guide, it is expected that the strength of evidence and probability of conviction are likely to be the most important factors influencing attorneys' case outcome predictions and subsequent recommendations. Overall, research supports this theory. In one study, defense attorneys rated the most influential factors in their decision to recommend a guilty plea as the likelihood of the defendant's conviction based on the strength of the evidence and the value of the plea based on the possible sentence if convicted at trial (Kramer, Wolbranksy, & Heilbrun, 2007). The least important factors were the impact of losing at trial on the attorney's professional reputation and if the attorney's current caseload was high (Kramer et al., 2007). In this study, defense attorneys were given information regarding a fictional client's possible sentence if convicted at trial, the client's wishes (trial vs. plea), and the likelihood of the client being convicted at trial (Kramer et al., 2007). Generally, the defendant's wish to go to trial was met with the attorney's strongest recommendation to plead guilty in most conditions (particularly when the evidence against the defendant was strong). The weakest recommendation to plead guilty was when the possible sentence if convicted at trial was short and the evidence weak; this is the only condition in which the attorney's recommendation matched the client's wish.

Other research has confirmed that the defendant's probability of conviction weighs into the attorney's recommendation to accept a guilty plea or go to trial (McAllister & Bregman, 1986). In this study, defense attorneys' willingness to plea bargain was assessed using a hypothetical scenario manipulating the severity of the sentence if convicted at trial (2 years v. 5 years) and the probability of conviction at trial (20% v. 50% v. 80%). As the defendant's probability of conviction and possible sentence if convicted increased, defense attorneys were increasingly more likely to recommend accepting the guilty plea (McAllister & Bregman, 1986). For example, when the defendant's likelihood of conviction was 20% and possible sentence 2 years, 10.3% of defense attorneys were willing to plea bargain compared to 71.8% being willing to plea bargain when the defendant's likelihood of conviction was 80% and possible sentence 5 years.

These findings suggest attorneys are considering the legal variable of evidence strength, and the possibility that weak evidence will lead to a favorable verdict at trial (considering the defendant's likelihood of conviction). Although, as a whole, the attorney's preference of accepting a guilty plea or going to trial did not match up with the defendant's preference (Kramer et al., 2007). However, another study showed that defense attorneys did not override a juvenile client's wishes, even if those wishes were in conflict with what the attorney believed to be the best course of action (Fountain & Woolard, 2018). Instead, they would engage in a variety of counseling strategies (e.g., spending extra time with the client to try and better educate them in developmentally appropriate ways, explicitly telling the client they disagreed with the client's decision but agreeing to the decision anyway).

As these studies demonstrate, there is concern that attorneys are more likely to recommend accepting a guilty plea than going to trial and are more attuned to legal variables than their clients' preferences when making recommendations (Kramer et al., 2007). This reflects one of the main functions of the attorney—to ground the

defendant and offset any irrationality. So, it is not necessarily troublesome that the attorney recommended accepting a guilty plea rather than going to trial, even if the defendant had different wishes. That is, in the abovementioned study (Kramer et al., 2007), the strength of evidence was driving attorneys' recommendations. Further, the attorney is still obligated to go along with a defendant's wishes, even if those wishes are contrary to the best course of action from the attorney's perspective. However, a disconnect between attorney and client preferences could lead to lack of trust between the defendant and attorney, which could hinder effective lawyering. These results offer evidence that appropriate, legal factors influence attorney advice.

Type of Evidence. In addition, other research explores how attorneys consider various pieces of evidence as factors in their plea recommendations, not simply the strength of the evidence. In one study, judges, prosecutors, and defense attorneys participated in a plea decision-making task, in which they read a case and then chose facts to view and consider in their judgments (Redlich et al., 2016). In total, there were 31 folders available to view, consisting of defendant characteristics (e.g., prior criminal history), evidentiary factors (e.g., confession evidence), and non-evidentiary factors (e.g., defendant's race). Allowing legal actors to choose which files to open, and in which order, allows a better understanding of the factors and order of importance that legal actors consider in determining acceptable plea offers. Defense attorneys and prosecutors were equally likely to view "evidentiary factor" folders (more so than judges), and defense attorneys viewed more "non-evidentiary factor" and "defendant characteristics" folders than both prosecutors and judges (Redlich et al., 2016). Evidentiary factors such as the confession, physical evidence, eyewitness identification, and DNA evidence were viewed by over 80% of the defense attorneys in the study (N = 835 defense attorneys).

In this same study, researchers manipulated the length of the defendant's criminal history and the presence or absence of confession evidence, eyewitness evidence, and a DNA match. All legal actors were asked to choose if the best resolution to the case was accepting a guilty plea or going to trial. The majority of the sample indicated that accepting the guilty plea was the best resolution. The presence of confession, DNA, and eyewitness evidence significantly affected plea rates; when these pieces of evidence were present all legal actors were more likely to choose the plea option. However, the defendant's prior criminal history did not significantly influence defense attorneys' plea decisions (nor did it influence judges or prosecutors; Redlich et al., 2016). Similarly, another study showed that defense and prosecuting attorneys considered their perceptions of the strength of eyewitness evidence (e.g., cross-race identifications, familiar vs. unfamiliar identifications) in their willingness to plea bargain (Pezdek & O'Brien, 2014).

Case predictions. One key element of the shadow of trial theory is that the decision to accept a guilty plea should be weighed against the defendant's probability of conviction at trial. The most reliable and likely source for this information is the defense attorney, who communicates the likely probability of conviction, based on the strength of the evidence, with his client. Thus, attorneys' abilities to predict case outcomes for their clients plays a key role in defendants' decisions. In one study, researchers examined final case outcomes compared to a priori case

predictions for over 450 attorneys (it should be noted that 70% of these cases were civil cases; Goodman-Delahunty, Granhag, Hartwig, & Loftus, 2010). Overall, attorneys tended to be far more overconfident in their case predictions than under-confident (Goodman-Delahunty et al., 2010). In plea bargaining discussions, this overconfidence is likely to affect the counseling phase between attorney and client. Attorneys who are overconfident might not effectively communicate risks and benefits with their clients, who are likely to experience disappointment if the outcome does not match with the attorney's previously communicated information. It is also possible that attorneys suffering from an overconfidence bias will exercise poorer judgment when advising clients of their options (Goodman-Delahunty et al., 2010).

Thus, the probability of conviction, based on the type and strength of the evidence, contributes to calculations of case outcomes, which defense attorneys convey to their clients, who ultimately use that information in their plea decisions. Consistent with the shadow of trial theory, attorneys consider legally appropriate facts in determining their opinions and in giving advice. However, attorneys can be overconfident in their case predictions, which could be compounded by the issue of possible gaps in evidentiary knowledge due to lack of evidence disclosure from the prosecution. There exist state-by-state variations in evidence disclosure rules, with some states promoting open-file discovery rules, and others, more restrictive guidelines (Turner & Redlich, 2016). Open-file discovery rules result in more thorough and predictable disclosure of evidence than more restrictive guidelines (Turner & Redlich, 2016).

While defense attorneys attempt to offset any irrationality on the defendant's part (by making an informed recommendation based on likely trial outcomes considering legal factors), discovery rules and overconfidence might affect the accuracy of case predictions, subsequent attorney recommendations, and ultimately defendants' plea decisions. It should be noted that overconfidence bias would suggest that attorneys recommend going to trial because they believe they will win; however, research suggests that attorneys are more likely to recommend accepting the guilty plea to their clients, not going to trial (Kramer et al., 2007). However, it could be in those cases with ambiguous evidence strength that overconfidence biases are more likely to play a role (e.g., in weak evidence conditions, attorneys were less likely to recommend accepting the guilty plea; Kramer et al., 2007). This overview provides support that legal factors play a role in attorneys' abilities to advise and make recommendations to their clients.

Extra-Legal Factors

In considering what factors affect attorneys' opinions of their clients' cases (and therefore the advice that they give), thus far we have considered attorneys' reports of what affects their decisions, based on variations in evidentiary quality, strength of

evidence, and/or defendant preference. It is important to note that extra-legal factors such as race and type of counsel might also influence the advice an attorney is likely to give a defendant.

Race of the defendant. Disparities on the basis of defendant race exist in plea bargaining similar to those seen in sentencing at trial. Research suggests that minority defendants receive smaller sentencing discounts than their white counterparts when convicted of the same crime (Albonetti, 1997; Zatz, 1984; for an overview of information on racial disparities in plea discounts and trial penalties, see Spohn, 2000). Similarly, research suggests that the race of the defendant plays a role in attorneys' plea recommendations as well (Edkins, 2011). In one study, with options ranging from less severe to more severe (i.e., probation to lengthier prison sentences), there was a significant difference in the plea deal defense attorneys would recommend for Caucasian clients ($M = 2.22$) compared to African American clients ($M = 2.88$). Attorneys recommended accepting a guilty plea that included lengthier jail/prison time for African American clients than they did for the Caucasian clients (Edkins, 2011). This effect was not moderated by perception of client's guilt, which would have indicated that attorneys believed the African American client to have been more culpable for the crime and thus influenced decisions to recommend accepting a guilty plea. In fact, attorneys perceived the Caucasian client as more likely to be guilty than the African American client.

It is possible that defense attorneys are aware of systematic racism and fear that their minority clients will be judged more harshly at trial, and should avoid a trial at all costs. However, in this particular study (Edkins, 2011), defense attorneys did not differentially rate the defendants' perceived probability of conviction at trial. As Edkins noted, if attorneys had believed their minority clients would have been more likely to be convicted at trial, that effect should have been evident in their probability of conviction ratings (2011).

Type of counsel. In addition to characteristics of the defendant that might drive the advice attorneys are likely to give a client, an important variable to explore is if there are differences in plea decisions and outcomes based on type of counsel. In plea bargaining research, this has typically been considered in light of insiders and outsiders of the courtroom workgroup (Blumberg, 1967). This environment creates an in-group (prosecutors, public defenders, judges) and out-group (privately retained counsel and defendants).

The workroom environment of the court typically suggests that public defenders and prosecuting attorneys might be working towards the common goal of securing a quick resolution through plea bargaining (Sudnow, 1969). It is possible that courtroom workgroup insiders will be more knowledgeable of the norms and situational concerns of a particular jurisdiction (judge, prosecutor, district attorney, or jury pool), and therefore be in a better position to advise their clients. However, it is also possible that attorney compensation affects the amount of time and energy attorneys are able to devote to a specific case (Alschuler, 1975), and thus private defense attorneys might be at an advantage over public defenders, who are paid a fee or salary by the state. For example, public defenders report not having sufficient

time, due to excessive caseloads to perform tasks such as client communication, discovery/investigation, and many aspects of case preparation (for a typical misdemeanor case; American Bar Association, 2014). Because of these distinctions, research has explored if defendants represented by an attorney within the courtroom workgroup favor better than those represented by an attorney outside of the workgroup, although these results are not consistent (Hartley, Miller, & Spohn, 2010; Roach, 2014).

The extra-legal factor of type of counsel is an important consideration, as a large majority of defendants in the U.S. are represented by public defenders or assigned counsel (over two-thirds of felony defendants in federal and large, state courts; Harlow, 2000). In a survey of prosecutors, when asked if they believe it makes a difference in the terms of the plea agreement whether the defendant is represented by a public defender as opposed to a private attorney hired by the defendant, roughly 66% responded that it makes a difference (Champion, 1989). Out of the 110 prosecutors who reported that it does make a difference, 42 (38% of the sample) reported that a public defender made a difference in their plea negotiations, and of those, 86% indicated that the difference would be *less* favorable to the defendant. The other 68 prosecutors (62% of the sample) reported that a private attorney would make a difference, with 96% indicated that the difference would be *more* favorable to the defendant (Champion, 1989).

Some research suggests there are no differences between types of counsel. For example, one study found no significant differences in bail decisions, plea decisions, and two sentencing decisions between public defenders and private attorneys (Hartley et al., 2010). Overall, legally relevant factors were most influential in predicting case outcomes: seriousness of the offense and prior criminal record (Hartley et al., 2010). However, findings suggest that type of counsel might have a contextual effect; that is, in certain situations, defendants benefited from having a public defender and in others, benefited from having a privately retained attorney. For example, attorney type had no significant effects on incarceration or sentence length for defendants who pleaded guilty, but those who went to trial were more likely to be sent to prison and receive longer sentences if they were represented by a private attorney at trial. The courtroom workgroup might prove more advantageous at some decision-making stages and/or in certain types of cases than others.

Other research suggests there are differences between types of counsel. In one study, case outcomes were compared between public defenders and assigned counsel (both serve indigent populations; Roach, 2014). Assigned counsel generated less favorable outcomes for their clients than public defenders on various measures, including: likelihood of being convicted of the most serious charge, sentence length, and the speed in which cases were resolved (Roach, 2014). It could be that public defenders, who operate within the courtroom workgroup and are not assigned indigent defense, benefit from being insiders as opposed to the attorneys who do not work frequently with the prosecutors in a particular jurisdiction.

In another example, in Philadelphia, indigent capital defendants are randomly assigned to defense attorneys (i.e., 4 in 5 attorneys are court-appointed private attorneys, and 1 in 5 are public defenders). In comparing differences between these

cases, public defenders reduced their clients' conviction rate by 19%, the likelihood their client received a life sentence by 62%, and overall prison time served by 24%, compared to the court-appointed private attorneys (Anderson & Heaton, 2012). In this particular jurisdiction, interviews with legal actors suggest various institutional and professional reasons why the public defenders might fare better than court-appointed attorneys (Anderson & Heaton, 2012). It is possible that court-appointed attorneys have more conflicts of interest, suffer from limited compensation, and practice in relative isolation (i.e., most of these types of attorneys are sole practitioners, or work in single-person law firms; Anderson & Heaton, 2012). Overall, this gives support to the notion that courtroom workgroup insiders might be able to generate better outcomes for their clients than courtroom workgroup outsiders.

Attorneys serving the indigent defense population likely struggle with unique challenges, different from private criminal defense attorneys. In the *Gideon* and *Argersinger* decisions, the USSC made the far-reaching mandate of providing counsel to all indigent defendants but left the requirement of *how* to accomplish this task up to the states. In recent years, public defenders offices have filed lawsuits challenging the lack of funding available for indigent defense work (Laird, 2017), which can lead to violations of defendants' constitutional rights. To deal with indigent defense budget cuts, offices have had to cut investigative work and staff (Nixon, 2013). For example, in Delaware, public defenders had to take 15-day furloughs (Nixon, 2013). In New Orleans, the public defender's office at one point put cases on a waiting list and had just eight investigators for 21,000 cases (Laird, 2017). According to one chief public defender, defendants are aware when their attorney does not have the time or resources to mount a rigorous defense of their case, and instead they plead guilty, possibly even when they are not guilty (Cooper, 2017). This suggests that defendants' perceptions of their attorney, and their abilities, affect decision-making.

More research is needed to explore how the type of counsel affects case outcomes, and specifically, to tease apart how some of these differences influence the attorney–client relationship, and decision-making. Attorneys serving the indigent defense population are often viewed as "working for the state" and are perceived as lower quality than "street lawyers", who are perceived as stronger advocates for their clients because clients pay their fees (Casper, 1970). The ideology of "you get what you pay for" and "nothing good comes for free" belittles the work and role of court-appointed attorneys as advocates for their clients. In one study, when defendants were asked if their attorney was on "their side", 100% of defendants represented by a private attorney responded "yes", compared to just 20.4% of those represented by a public defender (Casper, 1972). Additionally, defendants represented by privately retained attorneys report higher levels of trust in their attorneys than those with court-appointed attorneys (Boccaccini & Brodsky, 2002). These attitudes likely influence the relationship between client and counsel and can hinder the attorney's ability to effectively represent his client (e.g., defendants who do not assist in their own defense because they do not trust their attorney). Thus, the source of compensation and perceived allegiance seem to affect perceptions of counsel,

which can influence the effectiveness of communication and level of trust between client and counsel, and ultimately defendants' decision-making. Some of these gaps in the literature are proffered as possible areas for future research (see below).

Future Directions

Research investigating the role of the attorney in plea bargaining is ripe for future empirical psychological research. Below we present a few directions we believe researchers could take that would contribute to the understanding of attorney influence in plea bargaining negotiation, counseling, and defendants' plea decisions.

First, while *Lafler v. Cooper* (2012) and *Missouri v. Frye* (2012) brought greater attention to the high proportion of convictions comprised of guilty pleas and the attorney's role in plea bargaining, explicit recommendations or reforms were not given (rather the justices indicated that such issues could be addressed by future cases or legislation). Research could help fill in some of these gaps. That is, researchers could explore effective lawyering in each of the three phases of plea bargaining: preparing, negotiating, and counseling. One such possibility is examining if the system would benefit from more explicit guidelines concerning attorneys' responsibilities to their clients, such as how attorney communication about collateral consequences might affect plea decision-making. Broadly, more information is needed regarding effective assistance of counsel in plea bargaining—what it is and what it is not.

Second, past research has yielded mixed findings regarding disparities in case outcomes between privately retained attorneys and court-appointed attorneys (and differences within the latter, that is, between public defenders, contracted services, and those assigned by the judge). Research could explore these interactions further at every stage of plea bargaining. For example, in the preparation stage if certain types of attorneys are able to devote more time and effort to case preparation (e.g., those who have more autonomy over their caseloads), this difference in case preparation could lead to differences in plea recommendations. Or, researchers could examine the negotiation practices between defense attorneys (those considered courtroom insiders versus outsiders) and prosecutors in the plea negotiation stage as it affects final plea offers. Furthermore, researchers could explore regional variations or differences attributable to how jurisdictions handle indigent defense representation. It would be beneficial to examine not only the impact of attorneys on defendants' plea decisions but the cumulative effect of interactions prior to those decisions.

Third, along these lines, research could explore the situational constraints of the job for court-appointed defense attorneys. The American Bar Association dictates that attorneys have a responsibility to be a representative of their client (1983), as an advisor (providing the client with information), an advocate (zealously representing the client), a negotiator (seeking a result advantageous to the client), and an evaluator (examining the client's case and reporting on it). But recent information regarding cutting of indigent defense budgets presents concern for how attorneys

can effectively maintain their duty to their clients in light of constraints. The results of these cuts have been furloughed or laid off employees and staff members, and less funds available for expert witnesses, investigative work, and case-related travel (Nixon, 2013). Without the necessary resources, court delays ensue that potentially violate the defendant's right to a speedy trial. Further complicating this problem is the possibility of unfairly incentivizing a guilty plea for defendants who have court delays and are unable to post bail and secure pretrial release. Questions remain of how to alleviate these challenges affecting the work of those providing representation to indigent defendants, allowing attorneys to devote more time and energy to the continued pursuit of the best outcome for their clients.

Fourth, in considering defense attorneys' involvement in plea bargaining, one important area to delve into addresses the question of how clients perceive effective assistance of counsel and what contributes to client satisfaction with their experience with the criminal justice system. Research consistently points to client involvement as a factor in increasing client satisfaction with their attorney and the process. Clients who were allowed and asked to participate reported greater levels of trust in their attorneys compared to those not allowed or asked to participate (Boccaccini, Boothby, & Brodsky, 2004). Additionally, trust in attorney scores were highly correlated with overall satisfaction; defendants reporting higher levels of trust in their attorneys were more likely to be satisfied with their attorney and sentence (Boccaccini et al., 2004). Research suggests there are five factors important for the attorney to consider in obtaining client satisfaction and cooperation with the process: asking the client his opinion, listening to the client, examining the prosecutor's evidence, focusing on the client's case during meetings, and informing the client of potential consequences (Campbell, Moore, Maier, & Gaffney, 2015). The more these factors are present, the more likely the client is to be satisfied with the handling of his case (Campbell et al., 2015).

Both of these studies support adopting a more client-centered lawyering approach as a means of contributing to client satisfaction and cooperation. More work is needed in this area to better understand the relationship between client and counsel, particularly from the view of the defendant. Because many defendants facing criminal prosecution do not have the resources to select their attorney (82% of felony defendants in large, state courts are represented by court-appointed attorneys; Harlow, 2000), it is reasonable to expect defendants to have varying degrees of confidence in the counsel they can afford or are assigned. High satisfaction and perceptions of effective assistance of counsel likely contribute to an increased perception of legitimacy in the criminal justice system. Tyler's work on legitimacy and procedural justice suggests that the fairness of the process is more influential in shaping satisfaction with and evaluations of the criminal justice system than the outcome achieved (see Tyler, 1988 for an overview). For example, procedural justice was influential in shaping individuals' willingness to accept court decisions and overall views of the court system (Tyler, 2007). Research could continue to explore the connection between client satisfaction, defendants' plea decisions, and clients' overall perceptions of fairness of the plea bargaining process and how that contributes to perceived legitimacy of the criminal justice system overall.

Further, research could explore the relationship from the attorney's viewpoint. That is, research shows that defendant race likely affects the advice attorneys give to clients (Edkins, 2011). It is possible other defendant characteristics, characteristics of the crime, or characteristics of the plea deal could also affect the attorney's perceptions and advice. Further, characteristics of attorneys themselves could affect the advice they give to clients. For example, attorney attitudes or propensity for risk-seeking may affect the advice given to clients. In addition, the sociodemographic backgrounds of attorneys could affect their perceptions of their clients' situations, and therefore, affect advice. In addition to exploring the social characteristics of the attorney, client, and plea deal proffered, the social interaction between attorney and client is also a fruitful area of future research, as evidenced by the initial work in the area (Fountain & Woolard, 2018).

Conclusion

As mentioned in the introduction of this chapter, guilty pleas constitute the majority of criminal convictions in the United States (roughly 90–95%; Cohen & Reaves, 2006). Acknowledging this reality, the USSC recently focused specific attention to the relationship between the defendant and his counsel in plea bargaining (*Lafler v. Cooper*, 2012; *Missouri v. Frye*, 2012). A defendant's right to effective assistance of counsel extends beyond trial, to plea bargaining as well. In these decisions, the Court has begun to address what constitutes effective assistance of counsel in plea bargaining. The Court established that effective assistance of counsel must appropriately advise defendants of plea offers (*Missouri v. Frye*, 2012) and risks to their immigration status (*Padilla v. Kentucky*, 2010), and give sound advice on potential outcomes (*Lafler v. Cooper*, 2012). Beyond these factors, many questions remain unanswered about what constitutes effective assistance of counsel. If extra-legal variables such as the defendant's race or attorney's working relationships factor into recommendations and outcomes, it is possible the assumptions of effective assistance of counsel are not being met. Legal decisions have established a special, privileged relationship between the defendant and his attorney, but this relationship and the factors that influence decision-making in the plea bargaining context are complex. We hope in this chapter to have provided some examples of the mechanisms by which attorneys likely influence plea decisions, and those factors that not only influence attorneys' advice and recommendation to their clients, but also the attorney–client relationship in general.

According to the shadow of trial theory, defendants will weigh the known plea outcome against the unknown trial outcome, based on their likelihood of being convicted at trial calculated by the strength of the evidence (Mnookin & Kornhauser, 1979). Similarly, attorneys consider the same factors in determining what to recommend to their clients. Bibas (2004) has argued for a more expanded model of the shadow of trial theory, one that incorporates psychological processes and structural influences that affect rational decision-making. In congruence with Bibas'

recommendations, we make the argument that looking at the plea decision-making process through the lens of social influence theories helps to elucidate how the attorney can offset any irrationality on the defendant's part (but also further incentivize the plea for innocent defendants; see Henderson & Levett, 2018).

The attorney is the most likely source of information regarding the strength of the evidence and probability of conviction at trial, the two key variables in the shadow of trial theory. In line with social influence theories, not only will the defendant look to his attorney for advice and a recommendation, but also his interpretation of the probability of conviction at trial is likely influenced by information from his attorney. Further, the attorney's perception of the case is likely to be influenced by both legal and extra-legal factors, indicating the theory must account for those sources of variance in plea decision-making. That is, while the shadow of trial theory accounts for arguably the most influential legal variables that affect decision-making and research has supported this model (Kramer et al., 2007; McAllister & Bregman, 1986), attention must be given to the other structural influences and psychological processes that likely affect decision-making as well (Bibas, 2004). One likely psychological process could be explained using basic social psychological theory examining social influence.

We view the *Lafler* and *Missouri* decisions as a call to action, prompting further exploration of the many complexities of plea decision-making (*Lafler v. Cooper*, 2012; *Missouri v. Frye*, 2012). Research must work backwards and explore the psychological processes, biases, and structural influences that affect decision-making for each legal actor at individual decision-making points. Ultimately, uncovering those factors that affect decision-making in plea bargaining will lead to a better understanding of the mechanism by which most defendants are convicted. Importantly, researchers must continue to explore how factors in plea bargaining affect decision-making for both innocent and guilty defendants, with the goal of helping defendants make choices in the criminal justice system that are both informed and in their best interest.

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Post-identification Feedback to Eyewitnesses: Implications for System Variable Reform

Amy Bradfield Douglass and Laura Smalarz

Eyewitnesses to criminal events are subject to a host of social influences on their recall and testimony. We use the term *social influence* to reflect the process by which interactions with other people (e.g., co-witnesses; police investigators) influence an eyewitness's memory or testimony about a witnessed event. One key form of social influence is *post-identification feedback*. As originally demonstrated by Wells and Bradfield (1998), post-identification feedback given to witnesses following an identification decision distorts a wide variety of witness self-reports that are critical to assessing their accuracy. Perhaps most importantly, confirming post-identification feedback—feedback that suggests that the witness made a correct identification—inflates witnesses' recollections of how confident they were at the time of the identification. This post-identification feedback effect is particularly pernicious in the context of false identifications because confirming feedback produces confident—but inaccurate—eyewitness evidence against a suspect.

In recent years, research on the post-identification feedback effect has been featured in court cases around the country and has served as justification for reform recommendations intended to enhance the reliability of eyewitness identification evidence (e.g., Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, 2013; *Oregon v. Lawson*, 2012). In the current chapter, we briefly review extant literature on the post-identification feedback effect, including the implications of feedback-contaminated witnesses for evaluations of eyewitness testimony. Next, we discuss the role of post-identification feedback research in court decisions and legislated eyewitness identification procedures. We end with a discussion of the relationship between post-identification feedback and the system variable reform

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_4

recommendations (Wells, 1978) presented in the recent memorandum published by the United States Department of Justice (January, 2017). In particular, we examine potential directions for future research stemming from the intersection of post-identification feedback and system variable reforms.

What Is the Post-identification Feedback Effect?

Early research on post-identification feedback was inspired by the case of one real witness. This case involved a female witness who pored over a photospread for 30 min, eventually making an identification. Several months later, while testifying at trial, the witness confidently stated, "There was no maybe about it, I was absolutely positive" (as cited in Wells & Bradfield, 1998, p. 360). This witness's transformation from someone who was clearly uncertain—as demonstrated by her lengthy deliberation—to someone who was "absolutely positive" is a fascinating psychological puzzle. Although we cannot be sure what transpired between the time of the witness's identification and the trial, Wells and Bradfield (1998) introduced post-identification feedback as one possible explanation for the witness's inflated confidence.

As a means to explore the potential contaminating effects of post-identification feedback on witnesses' confidence and other self-reports, Wells and Bradfield (1998) created the basic feedback paradigm that is still in use today. Participant-witnesses first see a crime stimulus and attempt an identification. Following their identification, some witnesses—but not others—receive feedback about the supposed accuracy of their identification decision. All witnesses then answer questions about their confidence in their identification and about various aspects of the witnessed event. In the original paradigm, participant-witnesses were randomly assigned to three experimental conditions: confirming feedback ("Good, you identified the suspect."), disconfirming feedback ("You identified ____. Actually, the suspect is ____ [a different photo than the one identified]."), or no feedback (control).

Most of the questions assessing witnesses' self-reports were retrospective in nature, meaning that they assessed elements of the witnesses' experience that happened *before* feedback was administered. For example, witnesses were asked to recall how certain they were *at the time they made their identification*. In addition, questions assessed both narrow aspects of the witnesses' experiences (e.g., how well were you able to make out specific features of the culprit's face?) as well as global self-evaluations (e.g., how good are you at identifying the faces of strangers?). Questions included both subjective measures (e.g., how easy was it for you to make your identification?) and objective measures (e.g., how many seconds was the culprit's face in view?). Almost without exception, confirming feedback-inflated witnesses' responses to these questions (we discuss the exceptions in detail later). Disconfirming feedback produced similar—albeit smaller—effects in the opposite direction. Since 1998, many versions of this basic paradigm have been published with important variations that elucidate the breadth and boundaries of the feedback effect.

Breadth of the Feedback Effect

The feedback effect is robust and far-reaching. It affects earwitnesses (Quinlivan et al., 2009) and real eyewitnesses to crimes (Wright & Skagerberg, 2007) as well as experimental eyewitnesses. Feedback affects witness reports whether it is delivered via computer (Lampinen, Scott, Pratt, Leding, & Arnal, 2007) or by an experimenter (Wells & Bradfield, 1998). Feedback can be operationalized as a specific comment about accuracy (e.g., "Good, you identified the suspect."), information about fellow witnesses' performance (e.g., "This study has now had a total of 87 participants, 84 of them made the same decision as you;" Semmler, Brewer, & Wells, 2004, p. 338) or vague positive comments (e.g., "You have been a really great witness;" Dysart, Lawson, & Rainey, 2012, p. 315). Feedback affects witnesses who have been given biased instructions (e.g., Wells & Bradfield, 1998) and unbiased instructions (e.g., Semmler et al., 2004). It affects children ($M_{\text{age}} = 11.5$), college students ($M_{\text{age}} = 19.0$), and senior citizens ($M_{\text{age}} = 74.5$; Hafstad, Memon, & Logie, 2004; Neuschatz et al., 2005, respectively).

The breadth of the post-identification feedback effect is corroborated by the results of two meta-analyses. In the first meta-analysis on the feedback effect, 14 studies with 2477 participants revealed an average effect size of $d = 0.79$ for the effect of confirming feedback (vs. none) on witnesses' retrospective certainty judgments (Douglass & Steblay, 2006). Similarly large effect sizes emerged on two other dependent measures: willingness to testify ($d = 0.82$) and ease of making an identification ($d = 0.80$). Measures on which smaller effects were observed included participants' estimates of how far the camera was from the culprit in the video ($d = 0.12$) and how long the culprit was in view ($d = 0.29$).

Nearly ten years later, a second meta-analysis was conducted to incorporate additional research produced after 2006. This meta-analysis included 20 published studies with 6200 participants (Steblay, Wells, & Douglass, 2014). Nearly doubling the sample size revealed similar patterns of effect sizes as in the first meta-analysis. For example, comparisons between confirming feedback and control conditions revealed larger effect sizes than in the 2006 meta-analysis: $d = 0.98$ on both retrospective certainty and willingness to testify. Small effect sizes in the 2006 meta-analysis were slightly smaller in the updated meta-analysis: the amount of distance between the culprit and the view from the camera (or the witness; $d = 0.00$) and how long the culprit's face was in view ($d = 0.04$).

Boundaries of the Feedback Effect

Research on post-identification feedback has also established important boundary conditions in which feedback effects are reduced or even eliminated (see Steblay et al., 2014). In an early test of a boundary condition, Wells and Bradfield (1999) asked participants to think privately about some judgments (e.g., certainty) before

receiving feedback. Among those participants who received this *private-thought* instruction, feedback effects on many self-reports were eliminated. Wells and Bradfield interpreted this pattern as evidence that self-perception (e.g., Bem, 1967) is largely responsible for feedback effects. Specifically, they posited that witnesses do not form judgments about testimony-relevant reports until they are first asked about these judgments, and hence do not have memorial traces on which to rely when forming the judgments. At that point, witnesses who have received confirming feedback make inferences about these judgments using the confirming feedback as a guide (e.g., "I must have had a good view—I identified the right person!"). In contrast, witnesses who think about these judgments *before* receiving feedback establish an internal memory trace of their pre-feedback judgments which they can rely upon when they are asked about those judgments later. Accordingly, these witnesses are less susceptible to the external influence of feedback on their judgments.

Subsequent research has tested additional manipulations designed to moderate or eliminate feedback effects. Manipulations that successfully reduce the feedback effect include providing feedback from unreliable sources such as children (e.g., Skagerberg & Wright, 2009), telling participants that feedback was determined randomly (Lampinen et al., 2007), telling participants that the feedback was delivered mistakenly and is invalid (Charman, Carlucci, Vallano, & Gregory, 2010; Quinlivan, Wells, & Neuschatz, 2010), having feedback delivered by someone presumed to be blind to the suspect's identity (Dysart et al., 2012), and causing witnesses to view feedback providers with suspicion by using a second experimenter to impugn the honesty of the experimenter who delivered feedback (e.g., Neuschatz et al., 2007).

Although such manipulations provide useful information for theoretical purposes, they provide little practical guidance regarding how to reduce or manage the feedback effect in the real world. For example, researchers would never suggest that investigators make witnesses suspicious of their credibility. Nor do these manipulations suggest anything useful for defense attorneys who are confronted with a witness whose judgments have already been inflated by feedback. Indeed, defense attorneys and defendants are in particularly difficult positions when confronting feedback-contaminated witnesses because witnesses are unable to accurately estimate the extent to which the feedback has influenced their responses (e.g., Charman & Wells, 2008; Wells & Bradfield, 1998). One moderator variable that has some potential practical value is the private-thought instruction, which theoretically could be implemented as part of standard lineup procedure. However, the private-thought instruction has the undesirable effect of itself inflating witnesses' certainty, and hence is not a viable reform (Wells & Bradfield, 1999).

Another boundary of the feedback effect involves variability in the extent to which different judgments are affected by feedback. For example, so-called "objective" judgments (e.g., how long a culprit's face was in view; how far the culprit's face was from a video camera) tend to be less affected by feedback than are so-called "subjective" judgments (e.g., how easy the identification was; how quickly the identification was made; Steblay et al., 2014). The relative immunity of

objective judgments to feedback has not yet been fully explained. One interpretation is that objective judgments tend to be verifiable (e.g., how long was the culprit's face in view on the video?), whereas subjective judgments are not; there is no means of "verifying" a witness's own certainty rating. However, eliminating the verifiability of objective judgments—for example, by making it obvious that the experimenter did not know how long witnesses studied a particular photo (i.e., by turning her back to the witness)—did not result in feedback effects on these judgments (Douglass, Brewer, & Semmler, 2010a).

More recent research suggests that the key difference between these two types of questions might be that witnesses do not believe that confirming feedback is relevant for making objective judgments. Indeed, feedback effects do emerge on witnesses' distance and time-in-view judgments when the feedback manipulation is explicitly made relevant to those judgments, such as "The results from our experiment so far indicate that people are more likely to make a correct identification when they have had sufficient time to view the target's face and when the distance was not too far." (Bhaskara, Semmler, Brewer, & Douglass, 2016). Additional research will be necessary to further understand the small feedback effects on these measures.

Why Does Feedback Affect Witnesses' Judgments?

Initial interpretations of the feedback effect were that it reflected witnesses' self-perception: Witnesses who receive confirming feedback make inferences about their certainty and the quality of the witnessing conditions in light of the feedback they received (e.g., *I must have had a good view because I made the right decision*). This explanation is consistent with evidence that telling participants to think privately about their judgments reduces the feedback effect because it establishes memory traces, or cues, on which witnesses can rely when asked to make their judgments (e.g., Wells & Bradfield, 1999). It is also consistent with evidence showing that accurate witnesses are less susceptible to feedback effects than are inaccurate witnesses—namely, because accurate witnesses' recognition experience provides a useful internal cue when testimony-relevant judgments are made (Bradfield, Wells, & Olson, 2002). This cue-accessibility conceptualization (e.g., Wells & Bradfield, 1998) is a compelling explanation for the original pattern of feedback effects, but it falls short in explaining more nuanced patterns of data. For example, why does feedback affect participants who are told to ignore the experimenter's comment, but *not* participants who are told that their feedback was randomly determined (Lampinen et al., 2007)? Why are disconfirming feedback effects weaker than confirming feedback effects (e.g., Steblay et al., 2014)?

To answer these important questions, Steve Charman and colleagues developed the *selective cue integration framework* (Charman et al., 2010). According to this framework, when witnesses are asked to provide testimony-relevant judgments, they embark on a three-step process. First, they assess the strength of their own

internal cues to those judgments. If these cues are strong (e.g., because they are easily accessible), witnesses provide an answer. If these cues are weak, the witnesses move into the second stage: searching for information with which to answer the question posed. If no information exists, the question is answered without the influence of external information. However, if the information does exist—such as post-identification feedback—witnesses then move to the third stage in which they assess the credibility of the external information. If it is credible, they use it to answer the question; if it is not credible, they disregard the external information.

The selective cue integration framework is consistent with much of the extant research on post-identification feedback (e.g., Steblay et al., 2014). For example, feedback said to be determined randomly does not affect testimony-relevant judgments because participants' search process reveals that the feedback is not credible (Lampinen et al., 2007). However, if the search process reveals that the feedback is credible—even if people are told to ignore it—judgments will be distorted by feedback (e.g., Lampinen et al.). The selective cue integration framework also explains why disconfirming feedback has weaker effects on witnesses' judgments than does confirming feedback: Thanks to the natural tendency to discount information that contradicts their prior beliefs (e.g., Edwards & Smith, 1996; Lord, Ross & Lepper, 1979), witnesses are more likely to carefully evaluate disconfirming feedback and are therefore more likely to dismiss it.

Feedback Effects on Evaluations of Eyewitnesses

Because of concerns surrounding the potential for feedback-contaminated witnesses to serve as compelling evidence against criminal defendants, research has examined the impact of feedback on people's subsequent evaluations of eyewitness testimony. In the first examination of this issue, feedback-contaminated witnesses who made false identifications were videotaped responding to testimony-relevant questions of the sort typically asked in feedback studies (Douglass, Neuschatz, Imrich, & Wilkinson, 2010b). Evaluators who viewed these videotapes rated witnesses who received confirming feedback as more accurate than they rated witnesses who received no feedback, despite the fact that all of the witnesses were inaccurate. This pattern persisted even when an explicit certainty statement was removed from witnesses' testimony, suggesting that confirming feedback changes witness demeanor beyond simply inflating scores on a certainty scale. The effect also persisted when evaluators saw the actual identification procedure in which feedback was delivered, even when they were told that feedback can distort eyewitnesses' certainty reports and were instructed to ignore the feedback.

Unfortunately, confirming feedback is more insidious than simply creating a main effect increase in witness believability. Indeed, subsequent research testing evaluations of accurate and inaccurate witnesses shows that feedback impairs evaluators' ability to distinguish between accurate and inaccurate witnesses (Smalarz & Wells, 2014b). Whereas evaluators were able to reliably discern

eyewitness accuracy when the witnesses had not received feedback, this discriminability was completely eliminated when the witnesses had received confirming feedback, with mistaken eyewitnesses being believed just as often as accurate witnesses. Moreover, confirming feedback interacted with eyewitness accuracy to influence evaluators' judgments in this way despite the fact that the witnesses' own self-reports showed only a main effect of feedback. Smalarz and Wells reasoned that these discrepant patterns of results between witnesses' self-reports and evaluators' judgments might suggest that feedback influences eyewitness testimony in complex ways that are not captured by the standard self-report measures.

Feedback-Contaminated Witnesses in Court: Judicial Decisions About Eyewitness Admissibility

As the single largest cause of wrongful convictions exposed through post-conviction DNA testing (Garrett, 2011), eyewitness evidence and its potential for error has reached the attention of courts across the United States. Depending on the case, the problems associated with post-identification feedback have been addressed with varying degrees of detail. For example, feedback featured prominently in New Jersey and Oregon state court decisions with each court taking a different approach to preventing unreliable witnesses from inappropriately persuading jurors. When the U.S. Supreme Court considered *Perry v. New Hampshire* (2012), however, there was only a brief reference to the feedback effect in Justice Sonia Sotomayor's dissenting opinion. Before reviewing these recent cases, we briefly discuss the existing legal framework used by the majority of trial courts for determining the admissibility of eyewitness evidence in cases involving suggestive influences such as post-identification feedback.

Existing Legal Framework for Evaluating Eyewitness Evidence

In *Manson v. Braithwaite* (1977), the U.S. Supreme Court endorsed a two-pronged approach for evaluating the admissibility of eyewitness evidence obtained through the use of suggestive procedures. The first prong involves determining whether the identification procedures were in fact "impermissibly suggestive." If there is a finding of impermissible suggestiveness, then the court moves on to the second prong of the analysis, which involves weighing the potential influence of the suggestion against five criteria intended to assess the reliability of the identification: the witness's opportunity to view the offender, the witness's degree of attention during the crime, the accuracy of the witness's description of the offender, the time elapsed between the crime and the pretrial identification, and the level of certainty

demonstrated by the witness at the time of the identification (*Manson v. Braithwaite*, 1977; see also *Neil v. Biggers*, 1972).

The basic idea behind this two-pronged approach is that even in the presence of impermissible suggestion, a witness's identification might be sufficiently reliable to warrant its admission. Although there is nothing inherently wrong with the idea that memory might sometimes be strong enough to overcome the effects of suggestion, the method used by the court to assess reliability under conditions of suggestiveness is fundamentally flawed. Specifically, the factors that the courts use to determine whether an identification is reliable *despite* the presence of suggestion are the very factors that are *inflated* by suggestive procedures. Consider a witness who was given confirming post-identification feedback following her identification. In an effort to assess whether the eyewitness's identification is reliable enough to assuage concerns about the presence of feedback, the trial court would inquire about the witness's level of certainty, the quality of the witness's view, the degree of attention paid by the witness during the crime, and so forth. Yet, as is demonstrated in the research on the post-identification feedback effect, these are the very criteria that are distorted by feedback. As described by Wells and Quinlivan (2009), this amounts to an "ironic test" in which "the *Manson* reliability factors [come into consideration] under precisely the conditions that make the Manson criteria questionable and likely misleading" (p. 16). Moreover, even if judges limit their assessment to one report—say, quality of view—research shows that high reports on some judgments cause people to assume that witnesses would have had similarly high reports on other judgments (Bradfield & Wells, 2005). The cumulative effect of this research is the conclusion that the *Manson* framework for evaluating admissibility is flawed in such a way that identification evidence that has been contaminated by suggestion is virtually guaranteed to pass the reliability test and be admitted into evidence (Wells, Greathouse, & Smalarz, 2012).

Fortunately, the flaws inherent in the *Manson* admissibility test are increasingly being recognized in light of the science of eyewitness identification (see Smalarz, Greathouse, Wells, & Newirth, 2016; Wells & Quinlivan, 2009), and courts have begun to seek other methods for assessing the admissibility of eyewitness evidence. We now discuss decisions from two state supreme courts that recently implemented such reforms. We follow our analysis of those cases with a discussion of the U.S. Supreme Court's decision in the case of *Perry v. New Hampshire* (2012).

Oregon v. Lawson (2012): Shifting the Burden of Proof

In *Oregon v. Lawson* (2012) the Oregon Supreme Court confronted a case in which one of the victims, Sherl Hilde, initially stated that she "had not seen the perpetrator's face and could not identify him" (*Oregon v. Lawson,* p. 48). Over the next months and years, Sherl Hilde was shown the defendant multiple times, eventually identifying him two years after the incident "under circumstances comparable to a showup" (*Oregon v. Lawson,* p. 48). When she testified at trial, she was queried

about whether she was uncertain in her identification. At that point she stated, "Absolutely not. I'll never forget his face as long as I live" (pp. 48–49).

Post-identification feedback offers a simple explanation for how Sherl Hilde could have initially been unable to identify the defendant and then *two years later* been completely confident in her identification. Indeed, the court explicitly acknowledged the potential for feedback effects on her certainty, stating, "[t]he alterations in Mrs. Hilde's statements over time are indicative of a memory altered by suggestion and confirming feedback" (*Oregon v. Lawson,* p. 48). The court remanded the case for retrial and in the process set out new guidelines for how eyewitness evidence is treated in Oregon. In particular, the court shifted the burden of evidentiary admissibility from the defense—who under Oregon's version of the *Manson* standard had the burden of proving not only that suggestion was present but also that the suggestion undermined the reliability of the identification (*Oregon v. Classen*, 1979)—to the prosecution to demonstrate in all cases that the identification evidence is admissible. To do so, the state must prove a number of elements by a preponderance of the evidence, including that the witness's identification is "rationally based on the witness's perceptions" and, therefore, grounded in a permissible basis rather than an impermissible one, such as suggestive police procedures (*Oregon v. Lawson,* pp. 34, 36; see also *New Jersey v. Henderson*, 2011).

It remains to be seen whether shifting the burden of proof to the state will result in a greater number of suppressions of identification evidence at trial; to our knowledge, there are no data available to speak to that question. However, there is a reason to believe that the admissibility standard set forth in *Lawson* might not help in cases involving post-identification feedback. If, for example, the courts interpret "identification" in a narrow sense—i.e., to mean simply the witness's decision from the identification procedure—then the problem of feedback becomes irrelevant. After all, feedback comes *after* the witness has already made an identification decision and hence does not pose a threat to the reliability of the identification itself.

Rather than using this narrow definition of identification evidence for purposes of assessing admissibility, we recommend that courts adopt a broader definition—namely, one that includes not only the witness's identification itself but also the witness's certainty in that identification. Wilford and Wells (2013) made a similar point in their consideration of the extent to which eyewitness accuracy is a system variable. In particular, they argued that a mistaken eyewitness who is highly confident is *more* inaccurate than a mistaken witness who is unconfident. According to this reasoning, eyewitness accuracy is a system variable because the legal system can make mistaken witnesses *more* inaccurate by virtue of falsely inflating their certainty through post-identification suggestion. Similarly, legal evaluations of eyewitness identification evidence should include an assessment of the witness's self-reported certainty and an inquiry into whether that certainty might have been contaminated by suggestive factors such as post-identification feedback. Failing to consider eyewitness certainty in admissibility determinations omits a central and critical part of what ultimately constitutes identification evidence at trial.

Despite this potential limitation of the *Lawson* standard as it applies to post-identification feedback, it is important to recognize that the *Lawson* decision

made some very important breakthroughs. First, it abandoned the faulty *Manson* standard for determining admissibility in favor of a framework that is far more responsive to the science on eyewitness identification. Second, it rejected the "false dichotomy" that trial judges are often faced with—namely, to permit the eyewitness to testify or suppress the evidence altogether (Wells, Greathouse, & Smalarz, 2012). Instead, the court offered a number of intermediate remedies such as the use of expert testimony and case-specific jury instructions in cases in which full suppression might not be appropriate. In response to concerns about post-identification feedback in particular, the *Lawson* court endorsed the remedy of partial exclusion of eyewitness testimony—for example, prohibiting witnesses from testifying about their certainty in the event that it was contaminated by feedback, but allowing witnesses to testify about other aspects of their memory. Unfortunately, the extant research on the efficacy of the partial exclusion remedy suggests that evaluators still tend to over-believe feedback-contaminated witnesses even when the witnesses do not testify about their level of certainty (e.g., Douglass et al., 2010b).

New Jersey v. Henderson (2011): Scientific Jury Instructions

In *New Jersey v. Henderson* (2011), the court evaluated an identification procedure in which the witness, James Womble, was shown a set of photos by a police officer who testified that he did not know who the suspect was (i.e., a double-blind lineup administration). The officer read instructions to Womble, shuffled eight photos, and presented them to Womble sequentially. Womble narrowed the set of eight photos to two, but claimed he could not make an identification from the two remaining photos. The case detectives, who were not in the identification room, concluded that Womble was refusing to make an identification out of fear. The detectives then entered the identification room and assured Womble that they could protect him against any threats he might encounter. One of them told Womble, "…just do what you have to do, and we'll be out of here." The detectives then left and the double-blind lineup administrator re-entered the room. He re-shuffled the photos, handed them to Womble, and Womble made a positive identification of Larry Henderson.

The New Jersey State Supreme Court in *Henderson* recognized the defects of the *Manson* admissibility standard, noting that, "it does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct." In addition to requiring that courts take consideration of the full body of scientific literature on eyewitness identification in their evaluations of the admissibility of eyewitness evidence, the New Jersey State Supreme Court issued a call for new scientifically based jury instructions that identify and explain the factors that could have affected the reliability of the identification evidence presented at trial. These instructions include factors such as filler selection, instructions prior to an identification procedure, and double-blind procedures; the entire set of instructions is approximately

2500 words. Individual judges can select portions of the instructions so that they are "tailored to the facts of the case" (*New Jersey v. Henderson,* p. 1002). In the section relevant to post-identification feedback, the jury instructions are as follows:

> Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event. (https://www.njcourts.gov/attorneys/assets/criminalcharges/idoutct.pdf, downloaded 7/11/17)

Similar instructions have been instituted elsewhere (e.g., by the Supreme Judicial Court Study Group in Massachusetts). Although these instructions accurately reflect the science on eyewitness identification, they are somewhat incomplete in the sense that they explicitly address only two of the variables known to be influenced by feedback: view and certainty. It might be possible that evaluators take such instructions to mean that those judgments are the *only* ones vulnerable to feedback effects.

There are other reasons to be cautious about the actual impact that instructions such as these will have on legal outcomes in cases involving contaminated eyewitness evidence. First, according to the standards in Massachusetts and New Jersey, jury instructions on post-identification feedback are only delivered if feedback was an "issue." How do courts determine if feedback was an issue? If jurisdictions videotape identification procedures, this question could be easy to resolve, assuming the feedback is captured on video and does not occur after the recording is stopped. However, most jurisdictions do *not* videotape eyewitness identification procedures (Police Executive Research Forum, 2013). In these cases, courts are left to rely upon the recollections of witnesses and lineup administrators regarding whether feedback was delivered. This is risky. Lineup administrators must not only recall having delivered feedback but must be willing to report having done so. And although some research suggests that witnesses might be able to accurately report whether they received feedback, they are not able to accurately assess whether that feedback has affected their judgments (Wells & Bradfield, 1998; Charman & Wells, 2008). In the original Wells and Bradfield study (1998), for example, witnesses who reported that they were not influenced by the feedback produced effects of a similar magnitude compared with those who said the feedback did influence them.

Moreover, feedback is always present for witnesses who testify at trial: The mere fact of being subpoenaed to testify at trial communicates to witnesses that they identified the "right" person. This possibility was acknowledged in the Massachusetts Supreme Judicial Court Study Group's analysis of eyewitness evidence: "[eyewitnesses] may also obtain feedback from other sources, such as news accounts identifying the suspect as the perpetrator, conversations with other witnesses, or pretrial witness preparation sessions" (2013, p. 83). Therefore, even if

police appropriately refrain from delivering feedback in the identification procedure itself, witnesses who go to trial are always exposed to some form of feedback, even if only the fact that the case has proceeded to trial (Smalarz & Wells, 2015).

Second, if instructions work as intended, they should reduce belief in eyewitness evidence when it is weak by virtue of highlighting weaknesses (e.g., single-blind procedures, biased instructions, unfair lineups, confirming feedback) but should not reduce belief in the evidence when it is strong. In other words, eyewitness-specific instructions should produce decisions comparable to a standard instructions condition for strong eyewitness evidence but reduce belief of weak eyewitness evidence. In one experiment testing the *Henderson* instructions, however, mock jurors were overall less believing of eyewitness evidence when they received the 2500 word *Henderson* instructions, regardless of whether the eyewitness evidence in the case was strong (i.e., obtained using recommended procedures) or weak (Papailiou, Yokum, & Robertson, 2015). These findings suggest that the new instructions might reduce overall belief in eyewitnesses without sensitizing jurors to the quality of the evidence.

However, even though post-identification feedback was one of the manipulated factors, it was manipulated along with multiple other variables (e.g., whether the lineup administrator was double-blind, whether unbiased instructions were used). Therefore, it is difficult to know whether a case that turns more narrowly on post-identification feedback would produce the desired sensitizing effect. A recent study addressed this question by manipulating a smaller number of variables to create weak versus strong eyewitness evidence, with one of the manipulated factors being confirming post-identification feedback (Jones, Bergold, Dillon, & Penrod, 2017). Even here, *Henderson* instructions did not sensitize mock jurors beyond the differences already apparent in reactions to weak and strong versions of the eyewitness evidence.

Perry v. New Hampshire: Only Police-Induced Suggestion "Counts"

In *Perry v. New Hampshire* (2012), the U.S. Supreme Court considered the question of whether identification evidence obtained using suggestive procedures that were not the product of state action are subject to a judicial inquiry into the reliability of the identification evidence. In the case, Barion Perry was identified by a witness who was standing in her second-floor apartment gazing into the parking lot below. She identified the man standing near a police officer as the person responsible for breaking into cars in the parking lot. This identification "procedure" was functionally a show up—deemed inherently suggestive by previous Supreme Court jurisprudence (e.g., *Neil v. Biggers*, 1972)—because Barion Perry was the only black man standing in the parking lot next to the officer.

However, the suggestiveness of the procedure resulting in Barion Perry's identification was not orchestrated by the police. Indeed, it was entirely independent of their actions. Therefore, the question before the Court was whether a suggestive procedure that resulted from circumstances outside of the police's control justified a pretrial hearing. In the first hearing of eyewitness identification issues in the United States Supreme Court since *Manson v. Braithwaite* (1977), the Court produced a lopsided 8-1 decision in which the majority opined that suggestiveness that was not police-arranged did not warrant a pretrial hearing because "[w]hen no improper law enforcement activity is involved,[…]it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt" (*Perry v. New Hampshire*, 2012, p. 2).

It is important to note that from a psychological perspective, contamination is contamination when it comes to suggestiveness-induced memory distortion. Whether the contamination stems from police-arranged procedures or by some other means, it has the same effect—namely, to undermine the reliability of the identification evidence. This point was made by the lone dissenter in *Perry v. New Hampshire* (2012), Justice Sonia Sotomayor, when she argued that "eyewitness recollections are highly susceptible to distortion by postevent information or social cues" (p. 16). Indeed, Justice Sotomayor cited Douglass & Steblay's (2006) meta-analysis of the feedback effect in making this point. Justice Sotomayor also noted that the Supreme Court's own precedent acknowledges the possibility for unintentional influence on witness decisions (e.g., *U.S. v. Wade*, 1967). Therefore, to allow a pretrial hearing for "police-arranged" suggestion but to disallow it when suggestion spontaneously emerges from witness (or others') actions undermines the Court's claim that the purpose of pretrial hearings is to assess reliability.

Moreover, in contrast to the rather rosy view that the "rights and opportunities" afforded to criminal defendants will be corrective in cases involving suggestive procedures, court observers note that such safeguards work poorly in cases involving suggestiveness-contaminated eyewitness evidence. For example, cross-examination of a mistaken eyewitness is ineffective because most mistaken witnesses genuinely believe their identification is correct. Because there is no intentional deception, cross-examination is ineffective in helping jurors determine whether to believe the eyewitness (e.g., Wells, Lindsay, & Ferguson, 1979). As another example, recall that the *Henderson* jury instructions did not appropriately sensitize jurors to variations in eyewitness evidence strength and instead simply reduced belief in eyewitnesses (Jones et al., 2017; Papailiou et al., 2015, see also Alvarez, Miller, & Bornstein, 2016).

As we discuss in detail later, the *Perry* decision has direct implications for eyewitnesses who undertake their own investigations, for example, by accessing photographs available on social media. In the course of a self-guided investigation, an eyewitness can create suggestive procedures that could undermine the reliability of any identification decision, certainty statement, report of event details, or eventual

testimony. However, according to *Perry v. New Hampshire* (2012), the mistakenly identified defendant will be relegated to using the usual safeguards of cross-examination, expert testimony, and jury instructions. Unfortunately, in the face of a confident eyewitness, these safeguards are poor substitutes for a trial in which unreliable eyewitness evidence has been appropriately excluded in a pretrial hearing.

Feedback-Contaminated Witnesses and System Variable Reforms

Research summarized thus far paints a bleak picture of the ability of trial remedies to improve the accuracy of legal outcomes in cases involving feedback-contaminated eyewitness testimony. Fortunately, there are evidence-based recommendations for improving the collection and preservation of eyewitness evidence at the "front end." In the next section, we review recent recommendations published by the U.S. Department of Justice ("DOJ", 2017) and note how these recommendations address concerns about feedback-induced contamination of eyewitness evidence. We focus on this DOJ memorandum rather than earlier alternatives (e.g., Technical Working Group for Eyewitness Evidence, 1999) because it reflects the most current thinking of professional law enforcement on research-informed eyewitness identification procedures. In addition, because the DOJ memorandum was issued by the top federal law enforcement agency in the United States, it is likely to carry weight in state-wide and local department-level procedural guidelines and in future court decisions.

Where relevant, we draw particular attention to research questions that arise from the procedural recommendations as they interface with the post-identification feedback effect. Specifically, we review the extent to which post-identification feedback research strengthens calls for reform and/or could provide empirical data for relevant reform proposals. We believe that feedback might be interwoven with many of the procedural recommendations in ways that have yet to be addressed in any systematic fashion. Therefore, there might be important refinements to reform recommendations as a function of post-identification research. Before discussing the Department of Justice recommendations in detail, we provide some context on the system variable approach to eyewitness identification research and reform efforts.

A Brief Review of the System Variable Approach

Recommended changes to eyewitness identification procedures are classified as *system variable* reforms in recognition of a seminal methodological commentary on eyewitness identification research: the distinction between *system variables* and

estimator variables (Wells, 1978). Wells wrote that system variables are variables that are "manipulable by the criminal justice system" (1978, p. 1552). These include instructions given to eyewitnesses and how photos are displayed to witnesses, among others. In contrast, *estimator variables* are those over which it is impossible to exert control in real cases (e.g., the race of the perpetrator or the lighting conditions at the crime scene). Because the criminal justice system cannot manipulate estimator variables in real cases, the contribution of estimator variable research lies predominantly in the fact that it can be used to assist fact finders in evaluating the reliability of an eyewitness' identification. System variable research can also assist in the evaluation of eyewitness evidence (because system variables affect eyewitness accuracy). Importantly, however, system variable research has the additional advantage of being able to suggest specific changes to the criminal justice system in order to improve the reliability of eyewitness evidence. Because of this unique feature of system variable research, Wells argued that "[s]ystem-variable research in eyewitness identification may, as a general rule, have greater applied utility for criminal justice than does estimator-variable research" (p. 1555).

Post-identification feedback has properties of both system and estimator variables. Feedback is a system variable because law enforcement is in control of whether witnesses hear comments from the lineup administrator following their identification decision. Feedback is also an estimator variable because "confirmation" might come from nonsystem actors such as co-witnesses or the media; neither of those elements is under the complete control of the justice system. Moreover, like all system variables, feedback is an estimator variable in the sense that knowledge about the type(s) of feedback that a witness received can inform fact finders' evaluations of the eyewitness' likely reliability.

In the 40 years since Wells published his commentary, eyewitness researchers have developed and refined a set of system variable recommendations for collecting and preserving eyewitness identification evidence. An important collection of these system variable recommendations appeared in 1998 with the *White Paper* published by the American Psychology–Law Society (Wells et al.). The *White Paper* presented four guidelines: using double-blind administration in which the lineup administrator does not know which lineup member is the suspect and which are merely fillers; delivering unbiased instructions that alert the witness to the possibility that the culprit might not be in the photos; ensuring that the suspect does not stand out in the lineup; and obtaining an immediate certainty report from the witness following an identification decision. The guidelines laid out in *The White Paper* were largely mirrored by those issued by the Department of Justice in 1999 in a publication entitled *Eyewitness Evidence: A Guide for Law Enforcement* (Technical Working Group for Eyewitness Evidence, see also a report by the National Research Council, 2014).

On January 6, 2017, Deputy Attorney General Sally Yates issued a new Department of Justice memorandum entitled *Eyewitness Identifications: Procedures for Conducting Photo Arrays*. This memorandum is more comprehensive than either the 1999 Department of Justice report (Technical Working Group for Eyewitness Evidence) or the American Psychology–Law Society White Paper (Wells et al., 1998),

reflecting the additional research conducted in the intervening 20 years. The memorandum comments on the following aspects of eyewitness identification procedures: (a) location of the photo array, (b) photograph of the suspect, (c) selection of filler photographs, (d) method of presenting photographs, (e) administrator's knowledge of the suspect, (f) instructions to witness, (g) multiple witnesses, (h) administrator feedback, and (i) documentation. In the sections below, we discuss each element of the memorandum by noting its connection with extant post-identification feedback research (if any) and we make suggestions for future research at the interface of the recommended reforms and post-identification feedback.

Location of the Photo Array

The Department of Justice memorandum recommends conducting identification procedures out of earshot and view of others and away from "information or evidence that could influence the witness's identification" (p. 1). This includes shielding the witness from any images of the suspect including wanted posters, other photographs, or the suspect him/herself (p. 1). This recommendation is important in light of research showing that suggestive pre-lineup influences can increase false identifications and confidence in those identifications (Quinlivan et al., 2012). With regard to post-identification suggestion, the prospect of wanted posters serving as confirmation of a witness's decision (if observed after an identification) is an interesting potential source of feedback. To our knowledge, no research testing post-identification feedback has operationalized feedback in the form of a wanted poster or other incriminating photographs left in the presence of a witness. As described in detail below, given the potential for witnesses to encounter to-be-identified individuals on social media, researchers should consider testing the impact of such post-identification exposure to the identified individual as a form of confirming feedback.

Photograph of the Suspect

The photo of the suspect should be recent and "should resemble the witness's description of the perpetrator" (U.S. Department of Justice, 2017, p. 1). Moreover, each array should include only one suspect. We address each of these elements in turn. First, the degree to which a photo of the suspect is similar to the witness's description might influence the magnitude of feedback effects on witnesses' testimony-relevant self-reports. Although feedback effects on witnesses' judgments occur regardless of whether the identified individual is similar or dissimilar in appearance to the actual culprit (Smalarz & Wells, 2014a), there is some reason to expect that feedback might produce stronger memory distortion following an

identification of an individual whose resemblance to the witness's description is weak (e.g., if an outdated photograph of suspect is used). In particular, feedback effects could be especially powerful due to the lack of strong internal cues preceding the witness's choice (e.g., Charman et al., 2010). Moreover, this effect would be even stronger if the witness's identification was inaccurate, rather than accurate (Bradfield et al., 2002).

The second component of this recommendation—ensuring that each array contains only one suspect—is important because witnesses who are inclined to choose will have their guesses distributed across known-innocent lineup members who are not at risk of being prosecuted if they are identified. Interestingly, from a feedback perspective, this recommendation also obviously limits the potential for confirming feedback in a non-blind procedure because confirming feedback will be administered only following an identification of one of the lineup members (the suspect). Disconfirming feedback, on the other hand, might commonly be delivered in single-suspect lineups as lineup administrators react to identifications of known-innocent fillers. Indeed, field studies and archival data indicate that real witnesses identify a known-innocent filler roughly one-third of the time that they make an identification (see Wells, Steblay, & Dysart, 2015). Yet, only a small number of studies have investigated the implications of disconfirming feedback given to eyewitnesses. This is likely due to the fact that researchers' primary concern in an applied context has tended to be about the risk of wrongful conviction that results from mistaken eyewitnesses providing feedback-inflated testimony. Steblay et al.'s (2014) meta-analysis reports only seven studies that have compared disconfirming feedback to a control condition for culprit-absent lineups (compared with 19 studies testing confirming feedback vs. control for culprit-absent lineups). Nevertheless, across these studies, disconfirming feedback deflated witnesses' retrospective certainty and their recollections of various aspects of the witnessed event. Moreover, giving witnesses disconfirming feedback following an initial mistaken identification (i.e., informing them that the lineup did not contain the culprit) impairs witnesses' memory of the original culprit (Palmer, Brewer, & Weber, 2010). We encourage researchers to continue pursuing questions about the effects of disconfirming feedback, even if they are potentially less germane to the applied issue of wrongful convictions.

Selection of Filler Photographs

The suspect's face should be embedded in photos that are "sufficiently similar so that a suspect's photograph does not stand out, but not so similar that a person who knew the suspect would find it difficult to distinguish him or her" (U.S. Department of Justice, 2017, pp. 1–2). Ensuring that the suspect does not stand out in a set of photos is critical so that witnesses do not make assumptions about the "correct" person to identify based on the fact that one photo stands out from the others.

Indeed, a meta-analysis on the effects of filler similarity on eyewitnesses' identification decisions showed that eyewitnesses are more likely to identify the suspect from low similarity lineups than from moderate-similarity or high-similarity lineups, regardless of whether the suspect is actually guilty or innocent (Fitzgerald, Price, Oriet, & Charman, 2013).

Ironically, the effect of feedback on witnesses' self-reports might actually be greater in fair lineups than in biased lineups because identifying the suspect from a fair lineup is likely to be more difficult than identifying the suspect from a biased lineup. Therefore, witnesses' internal cues to accuracy might be weaker for witnesses who identify the suspect from a fair lineup, thereby making these witnesses particularly susceptible to the influence of feedback. Of course, to the extent that fair lineups exacerbate the effects of post-identification feedback in this way, it certainly would not mean that biased lineups are preferable to fair lineups. After all, there are other ways to address concerns about contamination from post-identification feedback (e.g., use double-blind procedures and collect a pristine certainty statement before the witness has the opportunity to be exposed to feedback), whereas biased lineups irreparably increase the risk of mistaken identification. Further developing our understanding about how lineup fairness might interact with feedback effects will nevertheless be an important direction for future research.

Method of Presenting Photographs

There are two primary methods for presenting photos to eyewitnesses: simultaneous and sequential. In a simultaneous lineup, all individuals are presented to witnesses at the same time. This method tends to promote comparisons among the lineup members and increase identifications of whichever person looks most like the culprit, even if that person is innocent (Wells, 1993). Consequently, an alternative procedure was developed in which photos are displayed sequentially. In sequential lineups, witnesses see each lineup member individually and make a decision about that person before seeing subsequent lineup members (Lindsay & Wells, 1985; Steblay, Dysart, & Wells, 2011). The Department of Justice does not make a recommendation regarding the sequential or simultaneous presentation of photos, noting that "it is not possible to say conclusively whether one identification method is better than the other" (2017, p. 8; for additional detail, see Carlson, Gronlund, & Clark, 2008; Clark & Davey, 2005).

Only one study has compared feedback effects in simultaneous and sequential lineups. The hypothesis in that study was that the sequential procedure would reduce the feedback effect because sequential procedures require witnesses to make a conscious decision about whether each person is the perpetrator before seeing the next person (Douglass & McQuiston-Surrett, 2006). That a decision had to be made about each photo before seeing the next photo was theorized to draw witnesses' attention to their pre-feedback judgments (e.g., how confident they were) in a way

that might not happen with a simultaneous array in which people could scan the entire array without individually considering each photo. In this way, the sequential procedure was thought to produce similar effects as the private-thought manipulation of Wells and Bradfield (1999) where witnesses are explicitly instructed to consider judgments like confidence before receiving feedback. However, in two experiments, post-identification feedback measures revealed similar effect sizes for confirming feedback versus control conditions regardless of whether participants saw a sequential procedure or a simultaneous one.

Administrator's Knowledge of the Suspect

The Department of Justice endorsed one of the most important recommendations made by eyewitness researchers: Lineups and photospreads should be administered by someone who is "blind" to the identity of the suspect. The *double-blind procedure* is designed to prevent administrators from influencing whom the witness identifies and/or the witness's certainty in his or her identification. According to the DOJ memorandum, when blind administration is "impracticable," departments can consider a "blinded" procedure in which lineup photos are shuffled or otherwise manipulated so the detective cannot see which photo the eyewitness is examining at any time (2017, p. 3). Double-blind administration has been endorsed both by scientists who focus on psycholegal issues (e.g., the American Psychology- Law Society, see Wells, et al., 1998) and by scientists whose expertise extends beyond the psycholegal domain (e.g., National Research Council, 2014). In the legal sphere, courts around the country recommend double-blind procedures. For example, the Supreme Judicial Court Study Group on Eyewitness Evidence (MA) recommends that "when showing a photo array or conducting a lineup, the police must use a technique that will ensure that no investigator present will know when the witness is viewing the suspect" (2013, p. 88).

A number of studies have investigated the effects of administrator knowledge on eyewitness identification behavior and certainty. These studies tend to show that single-blind administrators emit more biasing behaviors during the lineup than do double-blind administrators (Charman & Quiroz, 2016; Greathouse & Kovera, 2009). And eyewitnesses pick up on these behaviors: Witnesses are more likely to identify the suspect under single-blind than under double-blind conditions, though this effect is sometimes moderated by other variables (e.g., whether the lineup was simultaneous or sequential; Charman & Quiroz, 2016; Greathouse & Kovera, 2009; Phillips, McAuliff, Kovera, & Cutler, 1999). Administrator knowledge also influences eyewitnesses' certainty in their identifications. In one study, witnesses whose identification decisions were consistent with the lineup administrator's expectations (i.e., about which lineup member was the suspect) expressed greater certainty in their false identifications than did witnesses whose identification decisions were inconsistent with the administrator's expectations (Garrioch & Brimacombe, 2001; see also Charman & Quiroz, 2016).

With regard to post-identification feedback effects, double-blind procedures are the only surefire way to prevent post-identification feedback from being delivered at the time of the identification procedure. As noted earlier, the delivery of some form of feedback is inevitable in real cases and is likely to emerge from multiple sources (Smalarz & Wells, 2015). Therefore, it is critical that lineup administrators create a record of a witness's certainty statement immediately following the witness's identification, before the witness can be exposed to inevitable contaminants. Indeed, the coupling of the double-blind procedure and collection of a certainty statement was specifically endorsed in the first-ever feedback paper, where the authors "strongly advocate[d] double-blind testing and asking eyewitnesses about their certainty at the time of the identification" (Wells & Bradfield, 1998, p. 375). This recommendation has been supported by subsequent research: post-identification feedback does not affect witnesses when delivered by a lineup administrator presumed to be blind to the culprit's identity (Dysart et al., 2012).

Instructions to Witness

Administrators are encouraged to provide witnesses unbiased instructions that "the group of photographs may or may not contain a photograph of the person who committed the crime of which you are the victim [or witness]" (U.S. Department of Justice, p. 3). Further, administrators are encouraged to inform witnesses that they will be asked for a statement of their certainty in the event that they make an identification: "Please let me know if you recognize the person who committed the crime [or the actions you witnessed]. If you do recognize someone, please tell me how confident you are of your identification" (U.S. Department of Justice, p. 4). We address these separate components of the instruction recommendation in turn.

First, unbiased instructions are a critical recommendation because they reduce witnesses' likelihood of making a false identification (e.g., Steblay, 1997). Unfortunately, this decrease in the rate of false identifications from target-absent lineups is typically accompanied by a decrease in the rate of accurate identifications from target-present lineups (Clark, 2005). This "tradeoff" problem has led some researchers to question the desirability of the lineup instruction reform recommendation as well as other reforms (e.g., Clark, 2012). Others, however, have argued against the supposition that culprit identifications obtained using suggestive procedures such as biased lineup instructions are actually legitimate or "true" accurate identifications (e.g., Wells, Steblay, & Dysart, 2012).

In the early feedback research, most studies used biased instructions because the goal was to examine how feedback affected people who made false identifications. Therefore, introducing a procedural feature to reduce the rate of false identifications would have been counterproductive. Subsequent studies have introduced unbiased instructions and found that witnesses subjected to this procedure also produce feedback-inflated reports (e.g., Semmler et al., 2004). A benefit of unbiased instructions in the context of real cases, of course, is that fewer witnesses will make

false identifications, meaning that there will be fewer opportunities for photospread administrators to inappropriately confirm those identifications.

Second, no published research has investigated the potential effects of merely instructing witnesses that their certainty will be solicited following an identification decision. It is conceivable that knowing that their certainty will be solicited makes witnesses more cautious decision-makers and hence less likely to make an identification in the first place. It might also be the case that such an instruction influences eyewitnesses' certainty by prompting witnesses to consider the reasons why they are certain enough to make an identification. With regard to potential feedback effects, instructing witnesses that they will be asked about their certainty following an identification might function to buffer them from feedback effects much like the private-thought manipulation does (Wells & Bradfield, 1999). Specifically, such an instruction might lead witnesses to think about their certainty prior to receiving feedback, thereby establishing internal cues to certainty that make them less susceptible to external influence from feedback. Instructing witnesses that their certainty statement will be recorded might also make the potential for testimony salient. Knowing that a public statement of certainty will be given might affect witnesses' self-reports because certainty statements vary as a function of whether witnesses give them privately or in public (Shaw, Appio, Zerr, & Pontoski, 2007).

Multiple Witnesses

In cases involving multiple witnesses, each witness should be separated from the others, including isolating a witness who has seen the array so that the witness cannot "return to the same area when other witnesses are waiting to see the array" (U.S. Department of Justice, p. 4). This recommendation is important because many crimes are observed by multiple eyewitnesses. For example, among 60 real witnesses surveyed in England, 88% reported witnessing the crime with at least one other person; the average number of people present as co-witnesses was 4.02 (Skagerberg & Wright, 2008; see also Paterson & Kemp, 2006; Wright & McDaid, 1996). Extant research has demonstrated that feedback delivered via a co-witness produces distorted retrospective reports (e.g., Skagerberg, 2007). As described in detail below, future research should address the implications of *delivering* feedback to co-witnesses for a focal witness's judgments, not just a focal witness receiving feedback from co-witnesses.

Administrator Feedback

In order to limit potential influences on the witness, "the administrator must avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is" (U.S. Department of Justice, p. 5). This recommendation goes to the heart of

concerns about post-identification feedback effects: Comments from a lineup administrator can have far-reaching implications for both witnesses' self-reports of testimony-relevant judgments and evaluations of those witnesses down the line. Importantly, however, this recommendation also highlights a weakness of extant feedback research. To date, operationalizations of feedback have been relatively narrow, consisting mostly of verbal comments delivered by a lineup administrator/co-witness or by a computer. To our knowledge, there is no empirical research testing the impact of "sounds" or "expressions" as a form of post-identification feedback although the effects of such nonverbal signals before and during an identification procedure have been demonstrated in experiments measuring the impact of non-blind lineup administration (e.g., Greathouse & Kovera, 2009). These represent important potential sources of feedback *following* an identification decision, and ones that might be especially difficult to uncover, especially in the absence of video records of identification procedures in which both the witness and the lineup administrator are within the camera's view.

Documentation: Recording the Identification Procedure

The Department of Justice's 2017 memorandum recommends video or audio recording a witness's identification procedure. Barring that, the memorandum recommends "writing down as close to verbatim as possible the witness's identification and statement of confidence, as well as any relevant gestures or nonverbal reactions. The witness should confirm the accuracy of the statement." (U.S. Department of Justice, p. 6). Other groups endorse this recommendation. For example, the National Academy of Sciences recommends "that the video recording of eyewitness identification procedures become standard practice [because] it is necessary to obtain and preserve a permanent record of the conditions associated with the initial identification attempt" (National Research Council, 2014, pp. 108–109, see also, e.g., Kassin, 1998).

In addition to establishing a record of exactly what occurred during the lineup procedure, a key purpose of this recommendation is to provide evaluators with evidence of pre-feedback certainty reports. With such a record, evaluators will be able to compare certainty at the time of the identification with certainty expressed during the trial. If those judgments are different, defense attorneys could use the initial time-of-identification certainty as a way to challenge the inflated time-of-trial certainty. This expectation is sensible, in theory. However, research demonstrates that evidence of certainty inflation does not necessarily impugn an eyewitness's credibility. If evidence of low(er) pretrial certainty is presented in written documents submitted at trial, for example, it has no impact on ratings of an eyewitness's credibility (Douglass & McQuiston-Surrett, 2006). In contrast, if evidence of inflation is presented in the form of a videotaped identification procedure, evaluators do rate witnesses as less credible and less accurate (Douglass & Jones, 2013).

Nevertheless, research suggests that witnesses might be able to "explain away" changes in their certainty in a manner that evaluators find acceptable (e.g., Jones, Williams, & Brewer, 2008).

Important questions about videotaped identification procedures still exist. For example, to date, there is little discussion of who sees the videos of identification procedures, when in the investigation/prosecution process they might be viewed, and how viewing videos influences the evaluation of eyewitnesses. Moreover, there is no published research on how the act of videotaping itself might affect witness behavior. In the interrogation context, informing police that they are being videotaped reduces their use of coercive techniques and improves their ability to distinguish between innocent and guilty interviewees (Kassin, Kukucka, Lawson, & DeCarlo, 2014). Determining whether any changes in behavior are observed among witnesses who know they are going to be videotaped is critical. As just one example, will witnesses shift their decision criterion to be less willing to make an identification because the videotape makes the public nature of their identification salient (e.g., Shaw et al., 2007)?

Moreover, little is known about how evaluators might respond to viewing videotaped procedures in which the lineup administrator provides feedback to the witness. Past research has been mixed on the question of whether showing evaluators a video of the witness's identification helps evaluators make more accurate determinations of an eyewitness's identification accuracy (e.g., Kassin, Rigby, & Castillo, 1991; Reardon & Fisher, 2011). In a recent study that investigated whether such a manipulation influences evaluators' perceptions of eyewitness testimony in cases involving feedback, viewing a video of the lineup procedure in which the witness received feedback did not assist evaluators in discerning whether witnesses were accurate or inaccurate (Beaudry et al., 2015).

This lack of improvement from viewing a videotape of the identification procedure has been observed even when the evaluators were informed about the post-identification feedback effect and instructed to evaluate witnesses independently of the feedback (e.g., Douglass et al., 2010b). An important follow-up to this research would be to investigate the extent to which watching witnesses receive feedback at the time of an identification influences evaluators' judgments directly (i.e., through their hearing the administrator give feedback to the witness, which evaluators might presume is informative of the witness's accuracy) or indirectly via changes in the witness's testimony. It is possible that both routes independently influence evaluators' judgments and attempts to mitigate such effects will require that reforms address each process separately.

And what about the impact of watching one's own videotaped identification procedure? Witnesses might watch their videotaped identification procedure if—for example—prosecutors show witnesses their videotaped identification procedure in preparation for trial. Absent external influences such as feedback, watching one's own identification procedure enhances the certainty–accuracy relationship, presumably because it provides people with access to internal cues to their own certainty (Kassin, 1985; Kassin, Rigby, & Castillo, 1991). In the presence of feedback, however, watching a videotape of one's own identification procedure might inflate

the feedback effect by virtue of drawing attention to the feedback or increasing the salience of weak internal cues to memory (e.g., because witnesses see themselves struggling to make an identification). The unanimity of videotape recommendations requires closer attention to the implications of this recommendation for eyewitnesses' identifications and evaluations of their testimony.

Documentation: Recording the Certainty Statement

In addition to video or audio recording witnesses, the Department of Justice (2017) memorandum recommends that the administrator write "as close to verbatim as possible the witness's identification and statement of confidence…" (p. 5). As noted above, this recommendation ensures that jurors have a source of comparison between certainty statements at trial and any prior statements made by the witness. Although mock jurors are not always capable of adjusting assessments of eyewitnesses whose certainty has been inflated, an appropriate adjustment *cannot* happen without an initial certainty statement (Douglass & Jones, 2013; Douglass & McQuiston-Surrett, 2006; Jones et al., 2008).

Recent research also suggests that more attention needs to be devoted to the question of how evaluators interpret certainty statements (e.g., Dodson & Dobolyi, 2015). For example, witnesses sometimes justify their certainty statement with an explanation. In one study, people rated the certainty of witnesses who provided no justification (e.g., "I am very certain") and witnesses who provided justification for their certainty statement (e.g., "I am very certain, I recognize his eyebrows"). If the identified person's eyebrows were distinctive, people rated the witness who provided a justification as equally confident to the control (no justification) condition. However, if the feature was *not* distinctive, people rated the witness who provided justification as less confident than the witness who provided no justification (Cash & Lane, 2017).

The recent meta-analysis on post-identification feedback suggests that measures of a witness's willingness to testify might also be useful to document at the time of the identification (Steblay et al., 2014). In part, this is because this measure is as vulnerable to inflation as is retrospective certainty. But perhaps more importantly, because this measure signals a future behavioral intention, it might have implications for prosecutors' decisions to charge a suspect, a defense attorney's decision to recommend plea acceptance, and the eventual credibility of a witness at trial. As noted by Steblay et al., "any presumption of the legal system that the willingness of an eyewitness to testify against a criminal defendant is a product of the trustworthiness of the witness's memory is undermined by feedback" (p. 13).

Future Research on Post-identification Feedback

In the last 10 years, an impressive array of changes to the legal system has been instituted in an attempt to enhance the protections for innocent suspects placed in police lineups. These include formalizing science-based recommendations for collecting and preserving eyewitness identification evidence (e.g., U.S. Department of Justice, 2017), as well as establishing safeguards once the reliability of an eyewitness' identification has been compromised (e.g., scientific jury instructions; shifting the burden of proof to the prosecution to show that the eyewitness identification should be admitted). However, as the preceding section shows, there is much to learn about how post-identification feedback interacts with these reforms. We describe a few of the most promising directions for future research below.

How Do Attorneys and Judges Evaluate Feedback-Contaminated Witnesses?

To date, most of the research examining evaluations of feedback-contaminated witnesses have placed participants in the role of jurors. In one way, this choice is sensible because mistaken eyewitnesses who testify at trial create a significant risk of wrongful conviction. However, in other ways, this choice is puzzling because more than 90% of criminal defendants plead guilty (Pastore & Maguire, 2003) and many trials are bench trials in which judges are the only evaluators of eyewitnesses. Therefore, most eyewitnesses are never evaluated by jurors in the context of a criminal trial. However, there is almost no research on how feedback-contaminated witnesses influence other parties in the criminal justice process such as prosecutors, judges, or defense attorneys. For example, prosecutors must weigh the strength of the evidence brought to them by police when deciding whether to pursue charges against a suspect. The accumulated evidence in any case file is undoubtedly stronger with a confident eyewitness than with an unconfident one. Are prosecutors sensitive to the fact that the police might have manufactured the witness's certainty by confirming the witness's identification? On the defense side, attorneys might be more inclined to advise their clients to plead guilty if there is a confident eyewitness who is willing to testify against the defendant. What strategies are available to defense attorneys who must assess whether certainty is a genuine product of the witness's memory? Finally, judges are the ultimate arbiters of whether to accept identification evidence as reliable and permit its admission when a case does go to trial. Although some evidence suggests that judges report knowing that post-event information affects witnesses (e.g., Wise & Safer, 2010), there are many reasons why judges are often unwilling to suppress the testimony of an eyewitness, even when the witness encountered suggestive procedures such as post-identification feedback (Wells, Greathouse, & Smalarz, 2012).

Does Evaluation Context Matter?

In addition to questions about how individual players in the system react to feedback-contaminated witnesses, there is a need for research to investigate how evaluation context might affect evaluations of these witnesses. The criminal justice system operates sequentially: Police investigate a case. Once they have determined they have sufficient evidence, they present it to a prosecutor. After the prosecutor reviews the case, charges might be filed. Assuming charges are filed, a defense attorney is then retained and reviews the accumulated case materials. Assuming the case then goes to trial, a judge and/or jury evaluate the evidence. As a result of this sequential encountering of evidence, each party "downstream" evaluates the case with the knowledge that individuals "upstream" have already deemed the case strong enough to go forward. How might an evaluator further downstream (e.g., a juror) in a criminal case react differently than one further upstream (e.g., a prosecutor)?

Some evidence suggests that upstream individuals might be in a better position to critically evaluate potential influences of feedback on witness reports. This is because the downstream context (i.e., a trial) itself suggests that the evidence has surpassed a certain credibility threshold. As a consequence, variables that might otherwise moderate evaluations of credibility are rendered weaker. An experiment in a closely related context makes this point: An alibi evaluated in a police evaluation context is stronger when it is accompanied by corroborating evidence than when it is not. However, ratings of that same alibi are unaffected by the presence or absence of corroborating evidence when the context is described as a criminal trial, presumably because people in the trial context conclude that the corroborating evidence was insufficient to prevent the case from coming to trial (Sommers & Douglass, 2007). In the context of post-identification feedback, future research should manipulate the context for evaluators of feedback-contaminated witnesses to determine whether there are conditions under which evaluators are more (or less) sensitive to feedback's effects on witness reports.

Social Media: A New Source of Feedback

Recent changes in access to information—particularly on social media—require additional protections in order to reduce the chances that post-identification feedback will be implicated in future cases of wrongful conviction. In the first author's recent conversations with defense attorneys, social media factors into eyewitnesses' independent investigations of the crime. Most of these "investigations" consist of searching social media for recognizable photos. For example, in one case a victim was assaulted by an unknown male. At the scene, the unknown male was accompanied by an acquaintance of the victim. Subsequent to reporting the assault,

the victim searched Facebook for photos of the acquaintance. The victim then "identified" the assailant from a photo on the acquaintance's Facebook page.

In another case, a woman was stabbed in a melee after closing time at a bar. Several days later, she and a friend who had witnessed the stabbing were shown an Instagram photo of a potential suspect by a friend (it remains unclear how the friend encountered the photo). The witness positively identified the photo as the culprit and then searched for additional photos online to "confirm" her identification. Eyewitnesses who undertake their own investigations obviously cannot benefit from the science-based recommendations designed to preserve the integrity of eyewitness evidence. As just one example of the potential problems in a self-guided investigation, witnesses who search for photos alongside co-witnesses might be especially likely to encounter suggestion or feedback from their co-witness. Of course, any formal identification procedure that follows these self-guided identifications—no matter how pristine—cannot undo the effects of suggestion, feedback, or bias in the initial identification attempt. For this reason, some police departments explicitly tell victims and witnesses to avoid conducting their own investigations (Brooks, 2017).

Some effects of social media could be exacerbated by the presence of co-witnesses. As noted above, co-witnesses delivering feedback can inflate witnesses' retrospective judgments (Skagerberg & Wright, 2008). What is not clear yet is the impact of *delivering* feedback on witnesses. Suppose, for example, an eyewitness confirms a co-witness's identification decision. If the co-witness's identification was made tentatively, confirmation might be received with muted enthusiasm. In contrast, if the co-witness made her own identification with high confidence, confirmation from a fellow witness might be received with hearty endorsement. A witness who experiences different reactions when confirming a fellow witness's decision might produce correspondingly different levels of retrospective certainty. Future research on the interplay of feedback between co-witnesses will be important. We turn next to mechanisms for limiting the influence of feedback-contaminated witnesses in the pursuit of justice.

Recommendations for Additional Safeguards

As described above, the key solutions for the problem of feedback-contaminated witnesses are: mandate double-blind lineup administration, video record all identification procedures, and record immediate certainty statements. That these recommendations have been endorsed by the Department of Justice (2017), multiple state courts (e.g., *New Jersey v. Henderson*, 2011; *Oregon v. Lawson,* 2012), and an impressive array of psychological scientists speaks to the potential for lasting improvement in the collection and preservation of eyewitness evidence. We provide some additional recommendations below.

First, we recommend that police adopt a reasonable suspicion standard for putting people in lineups and photospreads (Wells, Yang, & Smalarz, 2015).

As described by Wells et al., a low base rate of culprit presence in a lineup dramatically inflates the chance that a mistaken identification will be made. Using estimates of accurate and mistaken identification rates from nearly 100 studies, Wells et al.. calculated the probability that an identified suspect is actually guilty versus innocent across all possible levels of the base rate. With a culprit-present base rate of 75% (meaning that 75% of all police lineups contain the actual culprit), for example, the chance that an identified suspect is actually innocent is only 9%. However, if the base rate of culprit-presence shrinks to 25%, the chance that an identified suspect is actually innocent jumps to 47% (see also Wells & Quigley-McBride, 2016). Because police agencies are not currently held to any kind of reasonable suspicion standards before placing a suspect in a lineup, it is likely that many police jurisdictions are operating much closer to (or even lower than) the 25% figure than to the 75% figure. Importantly, as Wells et al. showed using a measure called "base-rate effect-equivalency" (BREE) curves, even modest increases in the base rate can dwarf the impact of system variable manipulations that have received the bulk of the attention in the eyewitness literature (e.g., lineup instructions; simultaneous vs. sequential administration). With regard to post-identification feedback, in particular, decreasing the rate of mistaken identifications by increasing the base rate of culprit presence also decreases the risk of falsely inflating the certainty of mistaken eyewitnesses through post-identification reinforcement.

Second, we recommend that videotapes of eyewitness identification procedures not be shown to eyewitnesses until more is known about how the videotapes might be used and how they will impact eyewitnesses' subsequent testimony. As for showing the videotapes at trial, there is some evidence that doing so will sensitize evaluators to certainty inflation (e.g., Douglass & Jones, 2013), but other evidence indicates that videotaped testimony does not help mock jurors differentiate between accurate and inaccurate eyewitnesses (e.g., Beaudry et al., 2015). More research on the impact of videotapes for eyewitnesses and evaluators is sorely needed.

Third, we find it perplexing from a psychological perspective that witnesses are permitted to testify about their retrospective certainty and their recollections of event-related details months or even years after the witnessed event and identification took place. The practice of having witnesses testify at trial is legally justified in light of constitutional protections that allow the accused to confront his or her accusers in a court of law. But the presumption that the testimony offered by witnesses on the stand is a high-fidelity report of their original recollections is at odds with basic human memory research and with documented cases of mistaken eyewitnesses whose testimony at trial was demonstrably inconsistent with their earlier behaviors and reports—such as with the witness whose transformation from being indecisive at the time of the identification to being "absolutely positive" at trial inspired the original research on the post-identification feedback effect (Wells & Bradfield, 1998). Accordingly, we think it would be entirely reasonable for courts to require documentation of a pristine record of an eyewitness's identification-time certainty as a minimal prerequisite for admitting the identification evidence at trial (e.g., Sauer & Brewer, 2015). If law enforcement officers fail

to make such records despite being reasonably able to do so, then the identification evidence should be suppressed.

Although suppressing identification evidence whenever law enforcement fails to collect a certainty statement might sound like a drastic measure, it is arguably consistent with numerous existing regulations surrounding the collection of other forms of incriminating evidence to which the police are already well-accustomed. For example, incriminating physical evidence is inadmissible if it was obtained in violation of constitutional search-and-seizure protections. Confession evidence is inadmissible if law enforcement failed to administer constitutionally provided Miranda warnings to custodial suspects (but see Smalarz, Scherr, & Kassin, 2016 for a psychological analysis of the inadequacy of Miranda as a safeguard). Why not make eyewitness identification evidence inadmissible if law enforcement failed to create pristine records of the evidence? Such a practice would establish a strong incentive for police to make these kinds of records and, as a result, would improve the quality of eyewitness identification evidence used to prosecute criminal suspects.

Conclusion

An initial critique of the post-identification feedback phenomenon was that the statement delivered in the original feedback paradigm was unrealistic: detectives would never openly comment on a witness's accuracy in real cases. However, as just one example, consider the mistaken identification of Ronald Cotton by Jennifer Thompson. After identifying Ronald Cotton from a live lineup, Thompson asked Detective Mike Gauldin whether she got the right guy. He said, "We thought that might be the guy. It's the same person you picked from the photos" (Thompson-Cannino, Cotton, & Torneo, 2009, p. 37). This comment served to cement Jennifer Thompson's certainty in the accuracy of her identification and contributed to the conviction of Ronald Cotton, who ultimately served 11 years in prison for a crime he did not commit. The post-identification feedback might have even contributed to Thompson's inability to identify the real perpetrator, Bobby Poole, when confronted with him at Ronald Cotton's second trial (see Smalarz & Wells, 2014a).

Other real cases suggest that post-identification feedback might be even more impactful than the rather tepid exchange between Jennifer Thompson and Detective Gauldin and the casual comment delivered by experimenters in the typical feedback experiment. For example, David Bryson was convicted in Oklahoma of kidnapping, rape, oral sodomy, and anal sodomy. He was sentenced to 85 years and served 20 before being exonerated by DNA evidence (for additional details about the case, see https://www.innocenceproject.org/cases/david-johns-bryson/). During the assault, the victim bit the perpetrator's penis and escaped. David Bryson became a suspect because he sought medical assistance for an injury to his penis shortly after the assault occurred. When the witness identified Bryson from a photospread, the investigating detectives confirmed her identification by telling her that Bryson had an injury to his penis.

In conclusion, the damage caused by feedback-contaminated witnesses is serious and lasting. Currently available mechanisms for undoing feedback effects are either ineffective or impractical. The methods for increasing evaluators' ability to differentiate between accurate and inaccurate witnesses have proven difficult to develop. Therefore, the best possible solution is to insulate witnesses from feedback and establish a clear record of testimony-relevant judgments *at the time of the identification.* This point in time is critical for establishing an uncontaminated record. However, given the increasing access to other sources of feedback (e.g., social media), it is also critical for law enforcement to collect information about witness exposure to other sources of feedback and for researchers to begin to understand how these other forms of feedback affect eyewitness memory reports. Preserving the integrity of eyewitness evidence is a key function of ensuring justice. Limiting or eliminating the effects of post-identification feedback will make a significant contribution to that laudable goal.

Acknowledgements We thank the Bates College Summer Research Apprentice Program and Paola Herrera for assistance in preparing this chapter. Portions of work on this chapter were supported by the National Science Foundation under Grant No. SES-1627433 to Amy Douglass and Neil Brewer. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the National Science Foundation.

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Psychological Explanations of How Gender Relates to Perceptions and Outcomes at Trial

Tyler N. Livingston, Peter O. Rerick and Monica K. Miller

For decades, researchers and legal scholars have examined the relationships between gender and various aspects of the legal system (e.g., Villemur & Hyde, 1983; Yamamoto & Maeder, 2017). For instance, trial consultants are often hired by legal counsel in part to determine whether jurors with certain characteristics (e.g., gender, occupation, political beliefs) are likely to side with their client—even though attorneys are prohibited from using peremptory challenges during jury selection based solely on gender (*J.E.B. v. Alabama*, 1994). This practice—and anecdotal evidence—assumes that gender and other characteristics might influence how jurors perceive and evaluate case facts. In George Zimmerman's trial for the shooting of Trayvon Martin, for example, the defendant's trial consultants concluded that female jurors might be more empathetic than male jurors to Zimmerman's claim that he was experiencing fear when he shot Martin (Alvarez & Buckley, 2013). Zimmerman's six-person jury was composed entirely of women who found Zimmerman not guilty of second-degree murder and manslaughter (see Diamond, 2013).

The study of gender effects on trial outcomes is not exclusive to jurors, however. Male and female *defendants* might receive sentences that vary systematically, and *victim* gender might influence observers' perceptions of the alleged crime. The gender of professional legal actors (i.e., attorneys and expert witnesses) might affect

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_5

trial outcomes. Although legal decision-makers likely believe they do not consider gender in their deliberations, people are not always aware of their biases and the effects of those biases on decision-making (e.g., Chapman, Kaatz, & Carnes, 2013; Spencer, Charbonneau, & Glaser, 2016). This chapter explores the variety of ways that gender can affect legal outcomes.

Although some people identify with genders outside of a masculine–feminine binary, psychology and law research conducted to date has primarily examined gender as a dichotomous male–female variable. In our discussion of gender-related effects at trial, we use the word *gender* to refer to a set of either masculine or feminine traits primarily associated with men or women, respectively. All empirical research reviewed and discussed herein was conducted using cisgender samples, meaning that participants' self-reported gender identity was congruent with their biological sex (i.e., male or female). Additionally, the experimental studies reported here manipulated gender (i.e., of the attorney, victim, defendant) as a binary factor in simulated trials. Although a small (and growing) body of research explores effects related to gender nonconforming persons (e.g., Jackson, McDermott, & Miller, 2018), our discussion is limited to gender differences associated with biological sex and cisgender people.

The purpose of our chapter is to synthesize the legal and psychological literature regarding the relationship between gender and trial outcomes and perceptions, with specific emphasis on the effects of gender of these five primary legal actors. The chapter offers empirically and theoretically supported explanations for observed gender differences, synthesizing relevant social scientific research and identifying omissions in the field's current understanding of these issues.

Gender and the Law

Judges, lawmakers, and even U. S. presidents have addressed the effects of gender in the legal system through court rulings, policymaking, and jury instructions. Most relevant to the current discussion are legal actions that address gender issues related to jurors. Some jurisdictions barred women from jury service until a 1975 U.S. Supreme Court ruling (*Taylor v. Louisiana*, 1975) forbade their categorical exclusion. Four years later, the court in *Duren v. Missouri* (1979) held that the defendant's request to exempt all women from the jury was unconstitutional. The most substantial ruling came in 1994, when the U. S. Supreme Court ruled that peremptory challenges based solely on the potential juror's gender were unconstitutional (*J.E.B. v. Alabama*, 1994). Since then, attorneys must demonstrate (if asked by opposing counsel or the judge) that the reason for the potential juror's exclusion was gender neutral. These rulings were largely intended to protect women's Equal Protection rights and the defendant's right to a fair trial (under the 14th and 6th Amendments, respectively).

More broadly, policymakers have passed laws that prohibit bias on the basis of gender. The Civil Rights Act of 1964 explicitly prohibits discrimination on the

basis of several demographic characteristics, including gender (see Title VII). Since then, the Act has protected women's rights and has expanded to a variety of gender-related circumstances. Employers may not refuse to hire women who have children while hiring men who have children (*Phillips v. Martin Marietta*, 1971); sexual harassment in the work environment is a valid claim under the Act (1986); same-sex sexual harassment falls under the Act (*Oncale v. Sundowner Offshore Serv., Inc.*, 1998); and the Act also applies to gender stereotypes (e.g., a woman who is discriminated against for being "too masculine;" *Price Waterhouse v. Hopkins*, 1989). Most recently, the Equal Employment Opportunity Commission (EEOC) ruled in 2012 that the Act extends to employees of varying gender identities (Quinones, 2012).

The Equal Protection Clause of the Fourteenth Amendment to the Constitution has also been the basis of court rulings regarding equal treatment based on gender (e.g., *United States v. Virginia*, 1996) and transgender status (*Glenn v. Brumby*, 2010). For instance, the Court in *U.S. v. Virginia* (1996) held that "separate but equal" military training units violated the Equal Protection Clause.

Although most of the above-discussed legal actions protect *women's* rights, some legal actions were designed to protect *men's* rights. In the late twentieth century, courts began abandoning the "tender years" doctrine, which was a principle derived from common law that favored women in divorce-related custody disputes (Vasterling, 1989). Courts now favor the "best interests of the child" standard which is presumed to be gender neutral. More recently, the Supreme Court in *Sessions v. Morales-Santana* (2017) held that the Immigration and Nationality Act violated the Equal Protection Clause of the Constitution on the basis that foreign-born children to single mothers could more easily gain U.S. citizenship than could foreign-born children to single fathers. At about the same time, the court in *Sassman v. Brown and Beard* (2015) held that, under the California Alternative Custody Program, men had to receive the same rights as women to serve the last 24 months of their sentence in the community.

Other gender-related legislation includes: (1) the Pregnancy Discrimination Act (1978), which protects women's employment rights before and during pregnancy; (2) the Fair Housing Act, which prevents gender discrimination in the sale, rental, or financing of housing; and (3) the Equal Pay Act (1963), which prevents gender discrimination in salaries. The enactment and affirmation of these policies demonstrate that men and women are legally entitled to equal treatment on the basis of their gender.

U.S. presidents can also dictate policies that directly relate to gender. A prime example is the rights of transgender people who want to serve in the military. In 2017, President Trump issued a policy banning transgender service members. However, courts in 2018 prevented the implementation of the ban (Holliday, 2018; *Karnoski v. Trump*, 2017).

Advocates for gender equity in the legal system recommend reducing gender bias in written materials as well, including legal statutes and jury instructions. To address concerns of gender-biased language that might inadvertently affect jurors' perceptions of case facts, legal experts and policymakers have removed gendered

language from domestic violence statutes (see Czapanskiy, 1993). Domestic violence statutes now include gender-neutral language in reference to the victim and the aggressor in a dispute, which might reduce jurors' assumptions that men are more likely than women to commit domestic violence. These changes prompted legal experts and policymakers to provide updated jury instructions that used gender-neutral language rather than gender-specific nouns and pronouns (The Florida Bar, 2016). Guidelines written by the Florida Supreme Court include the recommended use of gender-neutral words such as "firefighter" rather than "fireman" in jury instructions to deemphasize the importance of gender during litigation (The Florida Bar, 2016).

These legal actions, among others, attempt to neutralize the effects of gender. Using this understanding as a legal foundation, this chapter will focus solely on gender effects on trial perceptions and outcomes. Despite advances aimed at reducing gender bias, gender-related extralegal factors still tend to influence trial outcomes implicitly and explicitly.

The Effects of Gender at Trial

Although the gender of legal actors should not affect interpretation and application of the law, experimental research and real-world legal data suggest that it sometimes does (e.g., Starr, 2012; Wilczynski, 1997). The literature review below is concerned primarily with gender effects associated with five legal actors: the criminal defendant, the victim, the attorney, the expert witness, and the legal decision-maker (i.e., the jury or the judge). This typology provides the structure for this section, which synthesizes past research findings regarding the effects of gender on trial outcomes and perceptions.

Defendants

There is much nuance to the ways in which gender can affect defendants' outcomes at trial. The concept of chivalry, used here to refer to courtesy extended to female defendants, often leads to less harsh verdict judgments and perceptions for female defendants compared to their male counterparts (e.g., Starr, 2012). Even so, other variables, such as a prior criminal history, can actually reverse this trend and lead to comparatively harsher outcomes for women (Tillyer, Hartley, & Ward, 2015). The main effects of gender—and exceptions to these effects—are discussed below, including possible explanations for these effects found in the empirical psychological literature.

Main effect of defendant gender. Perceptions of culpability can vary as a function of the defendant's gender (see Supriya, Sorensen, & Oaxaca, 2007).

Laboratory studies (Cox & Kopkin, 2016; Sommer, Reynolds, & Kehn, 2015) and real-world data (Starr, 2012) demonstrate that verdicts tend to be harsher for male than female defendants. Indeed, men received 60% longer sentences than women who committed similar crimes in one analysis of actual case outcomes (Starr, 2012). Even when the crime is held constant in a mock jury paradigm, male criminal defendants are likely to receive more guilty verdicts and longer sentences compared to female defendants (Wilczynski, 1997). This effect, often discussed in terms of chivalry, holds for cases of sex offenses (Mackelprang & Becker, 2017), assault (Meaux, Cox, & Kopkin, 2018), stalking (Gavin & Scott, 2016), murder (Strub & McKimmie, 2016), human trafficking (Francis, 2016), and domestic violence (Hodell, Wasarhaley, Lynch, & Golding, 2014). Chivalry can be attributed to legal decision-makers believing either that women require additional protections compared to men or women are too fragile for the harsh prison system (see Pollak, 1961). These beliefs lead to the conclusion that it is less appropriate to incarcerate a woman compared to a man, thus women should receive more lenient sentences (e.g., McCoy & Gray, 2007). A modest amount of research has supported the female leniency effect, though the next section highlights exceptions.

Moderators and exceptions to the gender of defendant effect. Findings related to defendant gender are mixed, and moderating variables alter these relationships. Although the leniency effect toward female defendants is common, some research has demonstrated null effects of defendant gender (e.g., Blais & Forth, 2014; Mossière & Dalby, 2008; Pozzulo, Dempsey, Maeder, & Allen, 2010), perhaps because gender effects are rightfully suppressed by case facts. An experimental test of the hypothesis that gender-stereotypic crimes (e.g., a man charged with auto theft or a woman charged with shoplifting) would be punished more harshly than gender-incongruent crimes also found no significant difference as a function of defendant gender (Maeder, McManus, Yamamoto, & McLaughlin, 2018). Yet other research shows that women receive *harsher* punishments compared to men (e.g., Tillyer et al., 2015), suggesting that case type and other defendant characteristics can moderate gender's effect on verdicts.

Other moderators, such as parental status and prior criminal history, also influence the effects of defendant gender on perceptions. Men are more likely than women to be found guilty of sexual abuse, especially when they are parents to the victim (McCoy & Gray, 2007; for review see Bottoms, Golding, Stevenson, Wiley & Yozwiak, 2007). These findings also provide further evidence in support of a female leniency effect in certain circumstances (Wilczynski, 1997). Among defendants who have short or no criminal histories, female defendants receive more lenient sentences compared to males. However, for defendants with long criminal histories, females are more likely to receive harsh punishment compared to male defendants (Tillyer et al., 2015). These data suggest that criminal history can moderate gender effects.

Men and women might receive different legal outcomes for similar crimes in part because mock jurors believe men and women commit crimes for different reasons. For instance, women are less likely than men to be prosecuted for filicide (i.e., the killing of one's child; Wilczynski, 1997). When women *are* prosecuted for filicide, they often receive more psychiatric and noncustodial sentences compared to men,

in line with the stereotype that "men are bad and normal, women are mad and abnormal" (Wilczynski, 1997, p. 419). Mock jurors more often attributed filicide to perversity when the defendant was a man, and more often attributed the same crime to mental illness when the defendant was a woman (Saavedra, Cameira, Rebelo, & Sebastião, 2017). These attributions led to harsher punishments for men compared to women. Such studies indicate that attributions—like other factors discussed above—complicate the relationship between defendant gender and trial outcomes.

Summary of defendant gender effects. The literature reviewed above suggests that perceptions of culpability and sentences can vary based on the defendant's gender, generally resulting in decreased punitiveness toward women compared to men (Supriya et al., 2007). Researchers often attribute these observed leniency effects to a modern conceptualization of chivalry (Visher, 1983), although leniency effects are sometimes suppressed by case facts (e.g., Mossière & Dalby, 2008) or reversed when female defendants have criminal histories (Tillyer et al., 2015). Juries might have less sympathy for women who violate gender roles by acting aggressively compared to men who act aggressively (see Gilbert, 2002). Legal decision-makers do not consider the gender of defendants in isolation, however: Empirical research has examined the effect of *victim* gender in the context of mock jury paradigms and secondary analyses of real case verdicts, as discussed next.

Victims

Victim gender can affect trial outcomes. Although legal decision-makers likely believe they do not consider the gender of the victim, people are not always aware of their biases and the effects of those biases on decision-making (e.g., Chapman et al., 2013; Spencer et al., 2016). Experimental research suggests that, in general, the leniency effect for female *defendants* appears to hold for female *victims* as well, in a variety of situations. This effect manifests as more severe sentences for defendants who injure female victims, more favorable attitudes toward female victims, and increased support for female victims as compared to their male counterparts (Henning & Feder, 2005; Judson, Johnson, & Perez, 2013). The main effects of gender and exceptions to these effects are discussed below, including possible explanations for these effects found in the empirical psychological literature.

Main effect of victim gender. Two general case types—sexual assault and death penalty cases—are discussed herein. Leniency effects are observed across both case types. Lay observers tend to have more negative attitudes toward male victims of sexual coercion compared to female victims (for review see Davies, 2000), and mock jurors are more likely to recommended that female victims receive support services compared to male victims (Judson et al., 2013). When perpetrator gender was held constant (i.e., the perpetrator was a man), observers reported more sympathy for female versus male sexual assault victims (Burczyk & Standing, 1989) and perceived male victims as more blameworthy (Groth & Burgess, 1980).

The disparity in how male and female victims of sexual assault are perceived could be due to gender-based expectations regarding sex, such as beliefs that (a) male victims of sexual assault by a female were more likely to have invited the sexual contact compared to female victims of sexual assault perpetrated by a male, or (b) only "weak" men are sexually assaulted (see Stanko & Hobdell, 1993).

Effects of victim gender are also prevalent in cases that involve the death penalty, domestic abuse, or both. The finding that female (vs. male) victims of domestic abuse are more likely to be acquitted of murdering their abuser (Hodell et al., 2014) is consistent with evidence that jurors tend to consider domestic assault against women to be a more serious crime compared to domestic assault against men. Assailants of female (vs. male) victims are also more likely to receive guilt judgments and longer sentences (Henning & Feder, 2005).

Moderators and exceptions to victim gender effects. Case characteristics can moderate the main effects of victim gender on perceptions and outcomes at trial (see Mazzella & Feingold, 1994). In fact, in Mazzella and Feingold's (1994) meta-analysis of victim characteristics that affect mock juror judgments, victim gender emerged as one of the most consequential variables, such that female (vs. male) victims elicited the harshest verdicts. An analysis of cases that went to trial in Georgia revealed that raping a victim, forcing a victim to disrobe, and killing an unclothed victim exacerbated the effect of victim gender on sentencing decisions (Williams, Demuth, & Holocomb, 2007). That is, sex-related crimes strengthened the relationship between victim gender and legal outcomes such that they increased verdict harshness, but only when the victim was a woman. The defendant's gender can also moderate victim gender effects: Female victims elicit more sympathy and harsher sentences for defendants when the defendant is a male (Cox & Kopkin, 2016).

Findings related to victim gender are not entirely consistent, as evidenced by studies finding null effects in the context of mock sexual assault cases (e.g., Bottoms & Goodman, 1994; Pozzulo et al., 2010). In contrast to previous research (e.g., Smith, Pine, & Hawley, 1988), these studies demonstrated that mock jurors perceived male and female victims as equally credible in the presence of relatively serious allegations (i.e., gender differences only emerged when allegations were less serious). Researchers have also observed null effects in analyses of actual cases; indeed, a large-scale study of Georgia's death penalty demonstrated that female victims elicited harsher *jury* decisions (vs. male victims), but victim gender was not associated with *prosecutorial* decisions (Williams et al., 2007).

Summary of victim gender effects. This body of research demonstrates that jurors implicitly or explicitly consider victim gender in their decision-making processes at trial. Generally, women victims receive more favorable jury perceptions, garner more sympathy, and elicit longer sentences for their assailants compared to male victims (Hodell et al., 2014; Judson et al., 2013; Stanko & Hobdell, 1993). Other data have revealed only null effects of victim gender on jury perceptions (see Pozzulo et al., 2010). Variables that moderate the potential relationship between victim gender and legal outcomes are less commonly observed compared to moderating variables of other gender-outcome relationships (i.e., those

involving defendants, attorneys, etc.), but sexualized crimes seem to exacerbate existing gender effects (Williams et al., 2007). The effects of attorney gender, discussed in the following section, tend to be somewhat more complicated.

Attorneys

Attorneys are jurors' primary source of contact with the information presented at trial, and therefore attorney characteristics such as gender are likely salient to jurors. It might seem intuitive that attorney gender could influence perceptions and decisions. For instance, Republican leaders in the U.S. Senate Judiciary Committee hired a female attorney to question Christine Blasey Ford following her allegations of sexual assault committed by Supreme Court nominee Brett Kavanaugh (Birnbaum, 2018). Republican leadership likely believed that observers would perceive a female attorney more favorably than a male attorney in the context of sexual assault allegations, and this notion is supported by some research (e.g., Szmer, Sarver, & Kaheny, 2010). The main effects of attorney gender—and exceptions to these effects—are discussed below, including possible explanations for these effects found in the empirical psychological literature.

Main effects of attorney gender. Attorney gender can influence jurors' perceptions of case facts as well as jurors' verdict judgments (e.g., Hodgson & Pryor, 1984). Results of studies about attorney gender effects on case outcomes are mixed: Sometimes men are perceived more favorably and achieve better outcomes than women (Salerno, Phalen, Reyes, & Schweitzer, 2018), and sometimes women outperform men in these respects (Szmer et al., 2010). Yet other times, attorney gender does not affect attorney success (Abrams & Yoon, 2007). Mixed results indicate a lack of universal bias against a specific gender. Specific investigations that have illuminated bias, however, show that observers do not always perceive male and female attorneys equally. Some studies that revealed potential biases are reviewed below.

Indicating that female attorneys might fare better than their male counterparts, a review of judgments in U.S. Courts of Appeals found that judges were significantly more likely to side with female attorneys compared to male attorneys (Szmer, Kaheny, Sarver, & DeCamillis, 2013). Experimental studies support this analysis, demonstrating that female attorneys were more effective than male attorneys, contrary to the researchers' hypotheses (Abramson, Goldberg, Greenberg, & Abramson, 1979; Villemur & Hyde, 1983).

In one study finding opposite effects (Hodgson & Pryor, 1984), researchers presented mock jurors with the same arguments from male and female attorneys in the form of audio recordings. Male and female mock jurors responded to items assessing their perceptions of attorney credibility. The male and female voices did not differ significantly in actual rate of speech, pitch, accent, or nonfluencies (e.g., "um…"). Female participants rated the female attorney as less intelligent, less friendly, less pleasant, less capable, less of an expert, and less experienced than the

male attorney. In addition, both male and female participants indicated that they would be more likely to retain the services of the male attorney than the female attorney. Because the arguments of the male and female attorneys were held constant, these findings are likely due to stereotypes that suggest men are more aggressive and effective at arguing their points in court.

Survey research conducted with both the general public and attorneys supports Hodgson and Pryor's (1984) experimental findings. One survey of laypersons found that 45% of respondents believed male attorneys were taken more seriously than female attorneys (vs. 10% of respondents who believed female attorneys were taken more seriously; Brown & Campbell, 1997). Another survey conducted with a sample of attorneys showed that 37% of surveyed female attorneys reported receiving unfair treatment in court due to their gender, compared to just 0.8% of males (Collins, Dumas, & Moyer, 2017).

Gender differences in speech patterns might explain differential outcomes in court for male versus female attorneys. Overall, observers rated three forms of speaking primarily associated with women (e.g., tag questions: "It's hot outside, *right*?"; hedging: "*I guess* it's hot outside"; and the use of interrogative rather than declarative requests: "Will you hand me that pen?" vs. "Hand me that pen") as less assertive than alternative forms of speaking primarily associated with men (i.e., fewer tag questions, less hedging, and more declarative statements; Newcombe & Arnkoff, 1979). These findings might explain why attorneys who are more assertive —usually men—tend to achieve better outcomes for their clients (Sigal, Braden-Maguire, Hayden, & Mosley, 1985).

Speech interruptions are also characteristics of interpersonal communication that can influence jurors' perceptions of male and female attorneys in the courtroom (see Reed & Bornstein, 2018). When attorneys object to evidence presented during testimony or to arguments presented by opposing counsel, they must interrupt the proceeding to declare their objection. Jurors might perceive an objecting male attorney more favorably than an objecting female attorney because interruption is considered an act of dominance in communication (Kennedy & Camden, 1983; Orcutt & Harvey, 1985) typically associated with men (Youngquist, 2009). Gender differences in perceptions of interruptions might mean that female attorneys have to be more careful about when and how to object compared to their male counterparts (Reed & Bornstein, 2018).

Moderators and exceptions to the attorney gender effect. Several variables can moderate the effects of attorney gender on case perceptions and outcomes. An attorney's presentation style can affect jurors differently depending on the attorney's gender. Hahn and Clayton (1996) found a three-way interaction between attorney gender, attorney presentation style, and juror gender. Their results indicated that male and female mock jurors responded most favorably to attorneys of their own gender, but male mock jurors in particular rated the effectiveness of aggressive male attorneys as *lower* than that of aggressive female attorneys. Female mock jurors were not significantly influenced by attorney aggressiveness (Hahn & Clayton, 1996).

Case type can also moderate the effects of attorney gender on legal outcomes. Although men might be more effective at arguing their cases due to increased baseline rates of assertiveness, female attorneys are more effective than their male counterparts specifically in women's issues cases (Szmer et al., 2010). This finding indicates that observers might perceive female attorneys to be more credible than male attorneys in cases that make gender salient, perhaps because women are considered to have unique expertise in these areas.

Summary of attorney gender effects. Survey data using layperson and attorney samples demonstrate a bias in favor of male attorneys (Brown & Campbell, 1997; Collins et al., 2017). Mixed experimental findings provide only partial empirical support for conclusions drawn from these survey data: Although some investigations show that male attorneys are advantaged (e.g., Salerno et al., 2018), others show that female attorneys are more likely to win their cases (Szmer et al., 2010, 2013). Attorney gender effects might only occur in some male participant samples and when the attorney is aggressive (Szmer et al., 2010). Other legal actors, such as expert witnesses, might similarly affect outcomes, as discussed next.

Expert Witnesses

The gender of an expert witness can affect an expert's perceived credibility, which is essential to the expert's persuasiveness (Brodsky, Griffin, & Cramer, 2010). Research on the effect of gender on perceptions of credibility of a witness has revealed mixed findings. Moderators such as complexity, case type, and behavior during testimony help explain these inconsistencies (see Neal, 2014). The main effects of gender and exceptions to these effects are discussed below, including possible explanations for these effects found in the empirical psychological literature.

Main effects of expert witness gender. Expert witnesses are regarded as authorities on the topic of their testimony. Ideally, expert gender would not influence observers' perceptions of their expertise. However, there is some evidence to support the notion that men and women are perceived as more credible when the area of their expertise is congruent with gender stereotypes: Research demonstrates that women are more effective than men when their expertise is consistent with gender stereotypes (e.g., for battered woman syndrome, see Schuller & Cripps, 1998; for child custody, see Swensen, Nash, & Roots, 1984), and men are more effective when their expertise is congruent with expectations associated with masculinity (e.g., for tire/automotive service, see McKimmie, Newton, Terry, & Schuller, 2004).

Experts sometimes must field intrusive questions that seem personal or gender-specific and irrelevant to their objective expertise. The way experts respond to these questions can influence observers' perceptions of their knowledge and character (Larson & Brodsky, 2010). Experts of both genders are more likely to be asked gender-intrusive questions by the opposing attorney merely by working on a

gender-related case compared to a case that does not make gender salient (Daftary-Kapur, O'Connor, & Mechanic, 2014). Examples of these questions include inquiries about the female expert's family life, past victimization, or personal involvement in feminist movements. When expert gender is irrelevant to the proceeding, women are still more likely than men to field gender-intrusive questions (Daftary-Kapur et al., 2014). When experts feel that they are under personal attack, they might assume the proceeding is about their personal ability to respond to questions rather than the importance of their answers to the case—sometimes leading female experts to appear more biased, less qualified, or less prepared than a male counterpart (Gutheil & Simon, 2005). Gender-intrusive questions can sometimes have the opposite effect—that is, they can *bolster* a female expert's effectiveness—if she calmly points out that the questions are inappropriate and outside the scope of the case (Larson & Brodsky, 2010).

In a survey of expert witnesses, women did not report experiencing gender-based treatment more than male experts (Kaempf, Baxter, Packer, & Pinals, 2015). This finding suggests that male and female experts receive gender-intrusive questions—one form of gender-based treatment—at approximately equal rates. Male experts too can benefit from the appropriate fielding of intrusive questions by responding assertively and pointing out the inappropriateness of the questions (Larson & Brodsky, 2010). Although the absolute effects of expert gender on perceptions and case outcomes are mixed, research to date has specified moderating variables of interest that more consistently influence perceptions and outcomes, as discussed next.

Moderators and exceptions to the expert witness gender effect. Two studies indicate that case complexity might moderate the relationship between expert gender and juror decisions. First, in highly complex cases, the testimony of a male expert witness is judged to be more persuasive than the testimony of a female expert. However, in less complex cases, female experts are judged to be more persuasive than male experts (Schuller, Terry, & McKimmie, 2001). Second, when mock jurors are under conditions of high cognitive load and the expert uses complex rather than simple language, a female expert for the plaintiff yields lower damage awards than a male expert (McKimmie, Newton, Schuller, & Terry, 2013). This pattern of results might be an indicator that mock jurors perceive men to be more capable than women at very complex tasks. However, female expert witnesses in other research were *more* effective than males, but only when the complexity of their testimony was high; when complexity was low, male and female experts were equally effective (e.g., Maeder, McManus, McLaughlin, Yamamoto, & Stewart, 2016).

Other research has demonstrated that an expert's gender might interact with case type. For example, female experts are judged to be more convincing than male experts when testifying in cases involving battered woman syndrome (Schuller & Cripps, 1998), sexual discrimination (with a female plaintiff; Carson, 2008), or child custody disputes (Swenson et al., 1984). In a mock civil trial, male experts garnered greater damages than female experts in a trial involving a construction company, but female experts garnered greater damages in a trial involving the women's clothing industry (Schuller et al., 2001). Researchers hypothesize that

experts are generally perceived as more credible when their gender is congruent with the type of case in which they are testifying (e.g., McKimmie et al., 2004).

The expert's character and behavior can also moderate the effects of expert gender on trial perceptions and outcomes. People have different expectations for the behavior of men and women, and those expectations sometimes influence their perceptions of experts' behavior (Rudman & Glick, 2001). For example, eye contact between the expert and observers can moderate experts' effectiveness, such that less eye contact hindered a male expert's effectiveness (relative to more eye contact) but did not significantly influence a female expert's effectiveness (Neal & Brodsky, 2008). Likeability and perceived knowledge similarly moderate the effect of gender on perceptions of an expert's credibility. When the expert was rated as having low likeability and knowledge, observers perceived male experts to be more credible than female experts; however, when likeability and knowledge were high, there were no gender differences (Neal, Guadagno, Eno, & Brodsky, 2012). Other research indicates that gender does not influence perceptions of an expert witness across several areas of expertise (e.g., see Couch & Sigler, 2002, for automotive engineering; Memon & Shuman, 1998, for medical malpractice; Vondergeest, Honts, & Devitt, 1993, for polygraph examination; see also Parrot, Neal, Wilson, & Brodsky, 2015).

Summary of expert witness gender effects. Men and women are likely to be considered credible when their expert testimony is consistent with gender stereotypes (McKimmie et al., 2004). Gender-intrusive questions during cross-examination sometimes disadvantage female experts (Daftary-Kapur et al., 2014). Nevertheless, these questions can also *bolster* expert testimony when experts effectively field such questions in front of the jury (see Larson & Brodsky, 2010). Experts of either gender can diminish gender effects during testimony via displays of assertiveness (Larson & Brodsky, 2014), knowledge, and likeability (Neal et al., 2012). Mock jurors might perceive male experts to have more authority than female experts when testimony is complex, indicating a bias among mock jurors in favor of male experts (Schuller et al., 2001, 2005). Observers also differentially perceive the meaning of eye contact from male versus female experts (Neal & Brodsky, 2008). Observed effects of expert gender depend on the perceptions and decisions of legal decision-makers who make judgments in real-world and mock-jury cases (Carson, 2008; McKimmie et al., 2004). As such, it is important to consider the similarities and differences among verdict judgments made by men and women, as discussed next.

Legal Decision-Makers: Jurors and Judges

Jurors' gender can influence their attention to particular case facts during trial, as well as what jurors later remember during deliberation (Maeder et al., 2016). Gender effects have been mixed in studies examining decisions made by judges (e.g., Boyd, 2016; Steffensmeier & Hebert, 1999). The main effects of juror and

judge gender—and exceptions to these effects—are discussed below, including possible explanations for these effects found in the empirical psychological literature.

Main effects of juror gender. Male jurors, in general, are more punitive than female jurors (e.g., Batchelder, Koski, & Byxbe, 2004; Haney, 2005). This generalization, however, neglects the nuances of legal cases and the many ways that mock juror gender is made salient in the context of trial. Women, in fact, tend to be more punitive than men when the contents of the case seem especially relevant to their gender such as cases involving sexual assault (Anwar, Bayer, & Hjalmarsson, 2017; Batchelder et al., 2004; Osborn, Davis, Button, & Foster, 2018), child abuse (Golding, Bradshaw, Dunlap, & Hodell, 2007; Kovera, Levy, Borgida, & Penrod, 1994; McCauley & Parker, 2001), or stalking (Dunlap, Hodell, Golding, & Wasarhaley, 2012; Dunlap, Lynch, Jewell, Wasarhaley, & Golding, 2015). Conversely, when the defendant is a battered woman, women (compared to men) give less harsh punishments (Schuller, 1992), acquit the defendant more often (Mossière, Maeder, & Pica, 2016), and believe the defendant's actions were more reasonable (Terrance, Matheson, & Spanos, 2000). Together, these findings demonstrate that women and men are equally capable of rendering harsh verdicts and assigning blame when the topic of litigation is personally relevant.

As mentioned above, victim gender can produce differences in the way men and women jurors perceive sexual assault cases (Hodell et al., 2014; Stanko & Hobdell, 1993). Women are also more pro-prosecution than men in response to allegations of sex crimes (e.g., Fischer, 1997; Golding, Bradshaw, Dunlap, & Hodell, 2007). Male mock jurors were more likely than female mock jurors to hold negative views of male victims who are sexually assaulted by females (Davies, Walker, Archer, & Pollard, 2013). Specifically, male mock jurors were more likely to blame the male victim, were less likely to have sympathy for the male victim, and were less likely to perceive adverse consequences for the male victim compared to female mock jurors (Davies et al., 2013). Regarding sex crimes in general, female mock jurors are often more punitive than male mock jurors when the case involves sexual assault allegations (Bottoms et al., 2014; Quas, Bottoms, Haegerich, & Nysse-Carris, 2002).

Extralegal variables such as defendant attractiveness can affect both male and female jurors' perceptions and decisions (Beckham, Spray, & Pietz, 2007; Coons & Espinoza, 2018), although women are more sensitive than men to emotional testimony in the context of a murder trial simulation (Voss & Van Dyke, 2001). The effects described in this section, however, are very broadly stated and often moderated by factors such as case characteristics and displays of emotion during the trial.

Moderators and exceptions to the juror gender effect. Although men are generally more likely than women to vote for the death penalty (vs. life without parole; O'Neil, Patry, & Penrod, 2004), juror empathy can reverse this relationship. Whereas the experience of empathy does not significantly alter men's legal decisions, women who experience empathy for the victim are more likely than women who do not experience empathy to vote in favor of the death penalty (Myers, Lynn, & Arbuthnot, 2002). This finding is consistent with social

neuroscience research indicating that women express and experience more empathetic arousal compared to men (see Rueckert & Naybar, 2008).

Interactions among actual jurors can also alter the effects of juror gender on decisions. In a secondary data analysis of 675 capital cases in North Carolina between 1991 and 2016, juries consisting of equal numbers of men and women were more likely to recommend the death penalty than either female-majority or male-majority juries (Richards, Bjerregaard, Cochran, Smith, & Fogel, 2016). Richards and colleagues (2016) suggested that factors related to the group dynamics of gender-equal juries contributed to increased punitiveness compared to other jury gender compositions.

Juror gender might become especially relevant in cases in which sexuality and gender are salient. For example, in a study involving a male victim accusing a female defendant of sexual harassment, the victim's attractiveness significantly influenced *female* jurors' individual verdicts when the defendant was unattractive, but not when she was attractive (Wuensch & Moore, 2004). Findings were the opposite for *male* mock jurors: Attractiveness only influenced males' verdicts when the defendant was attractive. When the victim and the defendant were differentially attractive, female jurors were significantly more likely than male jurors to conclude that sexual harassment had taken place (Wuensch & Moore, 2004). Other research has yielded null effects of juror gender on verdict judgments (Braden-Maguire, Sigal, & Perrino, 2005; Najdowski & Bottoms, 2015).

Main effects of judge gender. Findings regarding the effects of judge gender on legal decisions are mixed. Broadly speaking, male judges are significantly less likely to rule in favor of plaintiffs than female judges (Chew, 2017). In sex discrimination cases specifically, a large-scale analysis of judicial decisions in 13 different legal jurisdictions found that male judges were 10% less likely than female judges to rule in favor of a plaintiff alleging sex discrimination (Boyd, Epstein, & Martin, 2010; see also Boyd, 2016). Female judges were also significantly more likely to rule in favor of the plaintiff in sexual harassment cases than their male colleagues (Peresie, 2004). These results could be due to increased personal relevance for female judges compared to male judges. Female judges likely have more personal experience with these issues, which are more relevant to the daily lives of women than men. Even so, there is some evidence that the effect is broader than sexual harassment and discrimination cases. In criminal courts, some evidence suggests that female judges are more punitive than male judges (see Steffensmeier & Hebert, 1999).

Indirect effects of judge gender on trial outcomes also exist. The mere presence of a female judge on an appellate panel can influence male judges' decisions (see Peresie, 2004 for review). The presence of one or more female judges on federal appellate panels increased the likelihood that male judges favored the plaintiff (Massie, Johnson, & Gubala, 2002). This finding was supplemented by a second study demonstrating that all-male panels were less likely than gender-mixed panels to favor plaintiffs in employment discrimination cases (Farhang & Wawro, 2004). These studies suggest that female judges influence their male counterparts and indirectly affect case outcomes. Despite these findings, research has found support for the opposite main effect of judge gender on rulings: Male judges in one study

were more likely to side with plaintiffs on women's issues than were female judges (Segal, 2000). It is possible that female judges, who have succeeded in a historically male profession, feel less empathy for women (compared to men and less-powerful women) with regard to women-specific issues.

Moderating effects of judge gender. Relatively sparse research has examined variables that could moderate the effects of judge gender on judges' perceptions and decisions. These studies have mainly examined how interpersonal contact between male and female judges can moderate existing effects. Although male judges might be less likely to side with plaintiffs than female judges (Chew, 2017), this effect is moderated by the interaction between male and female judges (Peresie, 2004). For instance, the presence of a female judge on an appellate panel can be conceptualized as a moderator of the relationship between male judge gender and trial outcomes (see Boyd et al., 2010; Peresie, 2004). Male judges might temper their opinions in the presence of female judges in an implicit or explicit effort not to appear gender-biased. Thus, regardless of the position a female judge takes, male judges might be more likely to favor the plaintiff when sitting on a panel with a female judge (vs. an all-male panel).

Yet other analyses of judge decisions found no significant effects of judge gender on rulings when controlling for other variables such as presidential appointment and the judge's religious ideology (Gottschall, 1983; Songer, Davis, & Haire, 1994). Inconsistent findings demonstrating opposite or null effects of judge gender on case outcomes indicate a need for more research in this area to explain how other variables might moderate these relationships.

Summary of jury and judge gender effects. A review of research regarding the effects of juror gender on perceptions and verdict judgments suggests that men are more punitive than women in general (see Haney, 2005), but women are more punitive then men when the topic of the legal proceeding is especially relevant to women's lives (e.g., Anwar et al., 2017; Golding et al., 2007; Osborn et al., 2018). Alternatively, women are more likely to acquit defendants accused of gender-relevant crimes (e.g., battered women who kill; Mossière et al., 2016; Terrance et al., 2000), less likely to favor the death penalty (Cochran & Sanders, 2009; Lambert et al., 2016), and more likely to take a pro-prosecution stance in sexual assault cases compared to men (Golding et al., 2007). Juror empathy can moderate the relationship between gender and death penalty sentencing, increasing the likelihood that women compared to men will vote for capital punishment (Myers et al., 2002).

The effects of judge gender are mixed. Female judges are generally more favorable toward plaintiffs than are male judges (Chew, 2017), especially in cases that make gender issues salient (e.g., sex discrimination; Boyd et al., 2010; sexual harassment; Peresie, 2004). The presence of a woman judge on an appellate court panel can indirectly affect case outcomes by increasing the likelihood that male judges favor the plaintiff (Massie et al., 2002). The effects of decision-makers' gender are of unique importance to trial consultants and attorneys who can tailor selection procedures and arguments to appeal to men and women.

Summary of the Reviewed Literature

Experimental investigations (e.g., Coons & Espinoza, 2018; Cox & Kopkin, 2016) and real-world court data (e.g., Anwar et al., 2017; Chew, 2017) suggest that the gender of legal actors tends to influence verdicts and sentences as an extralegal variable. Perceptions of culpability sometimes vary as a function of the defendant's gender, often leading to leniency toward female defendants (Starr, 2012). Victims sometimes also receive differential treatment on the basis of their gender, particularly when the facts of the case make gender salient (e.g., sexual assault cases; Schutte & Hosch, 1997). Attorney gender also influences perceptions at trial because legal decision-makers are exposed to attorneys' arguments and presentation styles, which are differentially effective depending on whether attorneys act in accordance with gendered expectations (Hahn & Clayton, 1996). The effects of defendant, victim, and attorney gender often interact with juror gender because men and women on the jury sometimes attend to and remember different information from trial (Maeder et al., 2016). Although studies demonstrate mixed findings regarding the influence of judge gender on the outcomes of civil cases, psychological perspectives on gender roles and gender stereotyping might elucidate the origin of these relationships. Psychological explanations, discussed next, can provide an overarching theoretical account of the effects described above.

Psychological Explanations for Gender Differences at Trial

The empirical findings discussed above demonstrate that gender differences are repeatedly observed in the context of trial. Although it is important to continue researching gender differences, it is also important to apply psychological theory to explain why researchers observe these main effects. Social scientific theory can guide further empirical examinations of gender differences on trial outcomes and improve social scientists' and legal scholars' understandings of the psychological processes that underlie the gender effects observed in the context of simulated jury studies and during litigation of actual civil and criminal cases. Through a comprehensive understanding of theory, experts can design sound studies and recommend changes to the legal system to reduce gender biases.

Symbolic interactionism serves as the overarching and primary basis for our proposed explanations for the underlying gender effects discussed above. The symbolic interaction framework suggests that gender differences might emerge due to the way in which gender is socially constructed through repeated interpersonal interaction (see McCall, 2006). The symbolic interaction framework can describe how gender differences emerge in society and how this process and its outcomes affect perceptions of men and women at trial (Brenner, Serpe, & Stryker, 2014; Lorber, 2007). The framework suggests that sociocultural characteristics establish

gender roles that govern socially accepted behavior of men and women (Witt & Wood, 2010). The establishment and performance of these gender roles can influence the behavior of men and women, as well as the way in which they are perceived by others, sometimes as a function of the perceiver's gender (e.g., Bennett, Gottesman, Rock, & Cerullo, 1993). In turn, preconceived expectations for how men and women should act in accordance with their gender roles can influence others' perceptions of the appropriateness of their behavior. Actions that are consistent with gender-based expectations might be perceived more favorably by legal decision-makers compared to behavior that counters gendered expectations (Herzog & Oreg, 2008; Nemeth, Endicott, & Wachtler, 1976). Stereotypes that emerge via social cognitive bias can influence spontaneous judgments of legal actors (see Bodenhausen, 1988). These judgments can affect trial proceedings and the outcome of the decision-making process. Although rapid and sometimes automatic, these judgments have the ability to influence verdicts and perceptions.

The ensuing subsections describe the symbolic interaction framework and how it applies to the formation of gender roles and gender stereotypes. These psychological perspectives help explain the main effects of gender on perceptions and outcomes at trial. Where applicable, each psychological explanation is applied to the five legal actors who are the primary focus of this chapter: defendants, victims, attorneys, experts, and decision-makers. The aim of these applications is to promulgate social scientific explanations and encourage further research that examines the extralegal effects of gender on the trial process.

Symbolic Interaction and the Social Construction of Gender

Symbolic interactionism, a primarily sociological framework proposed by Mead (1929) and further developed by Blumer (1973), was designed to help social scientists interpret social interactions (see Alver & Caglar, 2015). The symbolic interaction framework proposes that human behavior is guided by the ascribed meanings given to items (i.e., objects and other people) in a person's environment (Blumer, 1973). How people interact with these items depends on the meaning these items convey. Therefore, *meaning* is of central relevance to symbolic interactionists because meaning helps determine how people perceive and react toward targets in their social worlds. The determinant relationship between meaning and behavior, however, is conceptualized as bidirectional. Just as meaning guides behavior, the framework proposes that the meaning of a given object is socially derived and modified through interpersonal interaction (Blumer, 1973). Thus, the meanings of items in the environment are often conceptualized as socially constructed: An object, an action, or an idea is only as meaningful as social actors and society at large determine it to be.

The symbolic interaction framework suggests that gender is one of these socially constructed concepts of which meaning is emergent and modified through ongoing social interaction (Lorber, 2007). Gender, like other concepts, items, and ideas,

is not inherently meaningful to symbolic interactionists. Rather, the gender differences that social scientists and legal experts observe at trial are attributable to processes of meaning-making that occur interpersonally and through interactions with society at large. Whereas the symbolic interaction framework serves as a good explanation of gender differences in court for defendants, victims, and experts due to the nature of meaning-making for these legal actors, the symbolic interaction framework is less relevant to attorneys and legal decision-makers because construal of the meaning of their actions is less prominent compared to that of other legal actors. Thus, the following sections describe the symbolic interactionist account of how the gender of defendants, victims, and experts can influence perceptions in the court room.

Defendants and the meaning of criminal actions. Differences in perceptions of criminal culpability could in part be due to the way in which the meaning of crimes is differentially constructed on the basis of the defendant's gender. Through socialization, people learn that men and women commit crime for different reasons (e.g., a man who hurts a child is evil, but a woman who hurts a child is ill; Wilczynski, 1997; Yamamoto & Maeder, 2017). These differences in the attributions and meaning of crime influence jurors' perceptions. Even when the type of crime and the severity of the crime are held constant, men are more likely to receive harsher verdict judgments and longer sentences compared to women (Starr, 2012; Wilczynski, 1997). Empirical examples of this differential might be attributable to the way in which defendant gender influences observers' perceptions of the meaning of alleged illegal activities. These inequities in perceptions of criminal intent can result in more lenient punishment for female defendants compared to male defendants.

Victims and the meaning of victimhood. The social construction of victimhood can affect the way in which male and female victims are perceived in court. Through social interaction with others and with news media, potential jurors create representations of what it means to be a victim of crime. These representations can differ depending on the victim's gender: In sex crimes that involve child victims, researchers often observe differences in mock jurors' perceived credibility and perceived responsibility of the child victim dependent on that victim's gender (Pozzulo et al., 2010). The gender effects might be explained by the sociocultural meaning of sexual contact with an older, opposite-gender perpetrator. Whereas the victimhood of female child sexual assault victims is more well recognized by mock jurors, male victims are perceived as less credible witnesses and more responsible for their victimhood. This gender difference is perhaps due to the social construction of what it means to engage in sex as a young male versus as a young female (Judson et al., 2013; Mitchell, Hirschman, & Hall, 1999): Young men "come of age" when they have sex, but young women are often encouraged to maintain their virginity. The socially constructed representation of male victimhood erroneously omits the long-term effects sex crimes can have on young men (Denov, 2004). These differences in the meaning of victimhood across gender might explain some of the differences in verdict judgments in such cases.

Experts and the meaning of authority. Similar to the way in which legal decision-makers harbor mental representations of what it means to be victimized, jurors also create representations of the meaning of authority that can influence their perceptions of expert witnesses and their verdicts. Jurors might trust male experts more than female experts to testify competently about complex issues relevant to litigation because representations conveyed and reinforced through culture and interpersonal interaction cast men as the prototypical authority. Male experts might be more persuasive than female experts in cases involving male-dominated industries (e.g., construction; Schuller et al., 2001) because the meaning of the expert's authority is more clearly defined in gender-congruent situations. The same is true for female experts who testify in gender-congruent cases: Their authority on case-relevant issues might be better understood and more easily recognized by legal decision-makers because of the meaning their authority conveys. Gender-based differences additionally emerge in the meaning of nonverbal behavior of expert witnesses and how these behaviors convey authority. The socially constructed meaning of eye contact, for example, is more clearly defined for men than it is for women (i.e., a man who makes eye contact is assertive and confident, whereas a woman who makes eye contact might be perceived as inappropriately confrontational). Jurors might perceive male experts who fail to make eye contact with other legal actors during trial as less credible than female experts who fail to make eye contact because the meaning of authority for women does not heavily emphasize this particular nonverbal behavior.

The socially constructed meanings of criminal activity, victimhood, and expert authority are continually modified and reinforced through social interaction. These emergent meanings produce gender roles with which people expect legal actors to comply. Gender roles and associated stereotypes provide novel psychological explanations for observed gender differences, as discussed next.

Gender Roles and Stereotypes

The symbolic interaction framework describes how people and societies prescribe specific behaviors to men and women (West & Zimmerman, 1987). These behaviors, examples of which include displays of kindness on the part of women and displays of toughness on the part of men, constitute what social scientists refer to as gender roles. The conceptualization and enactment of gender roles occur through a process of socialization by which children construct and imitate idealized versions of what it means to be feminine or masculine (Adler, Kless, & Adler, 1992). The construction of gender roles continues throughout childhood and into adulthood as a person's gender role often becomes a central aspect of the self (Stryker & Serpe, 1994). Through feedback during interpersonal interactions and messages from news and entertainment media, sociocultural characteristics maintain these gender roles by encouraging men and women to act in accordance with their gender (Witt, 2000). People are especially likely to enact their gender roles

when gender is salient (Brenner et al., 2014), such as during litigation of a sexual assault case. Even when gender is not salient men and women can act in accordance with their gender roles due to their socialization. That is, men and women act as they believe men and women should act, and most people expect that others' actions will also be gender-congruent.

Whereas gender roles prescribe behavior for men and women (i.e., how men and women *should* behave), stereotypes describe beliefs about how men and women *actually* behave (Davies, Spencer, & Steele, 2005). Social cognitive scientists study expectations and stereotypes to better understand how people make quick and visceral judgments about themselves and about others to reduce the complexities of social thinking (e.g., Shah & Oppenheimer, 2008). Stereotypes describe oversimplified beliefs and schemas that are widely held and unlikely to change even in the presence of new information (Haines, Deaux, & Lofaro, 2016). They can affect peoples' own behavior (Bargh, Chen, & Burrows, 1996) or their expectations for others' behavior, and might be particularly influential in the court room when men and women deviate from expected behavior.

The enactment of gender roles is especially relevant to the way in which legal decision-makers perceive defendants, victims, attorneys, and experts. Prevailing gender roles are additionally relevant to the behavior of legal decision-makers whose gender roles might implicitly influence their interpretation of case facts and their ultimate verdicts. Legal actors who violate gender-based stereotypes face a variety of social cognitive judgments that can lead to both positive and negative outcomes at trial. These outcomes can consist of increased punitiveness or leniency for defendants, increased or decreased responsibility attributed to the victim, more favorable or unfavorable perceptions of attorneys and experts, and more or less biased judgments from legal decision-makers. The following sections describe how gender roles and gender-based stereotypes can account for some of the differential perceptions of defendants, victims, attorneys, experts, and decision-makers in the courtroom.

Defendants and gender-congruent characteristics. The effects of chivalry on verdicts might be understood in the context of traditional gender roles. The chivalry hypothesis (Crew, 1991; Erez, 1992) suggests that legal decision-makers show leniency toward female defendants due to a belief that women are too fragile to endure the harsh prison system. Other studies have found a more complicated relationship between chivalry and legal outcomes, suggesting that the application of chivalrous leniency toward women is selective (Herzog & Oreg, 2008; Visher, 1983). Selective chivalry occurs when legal decision-makers render more lenient verdicts to female defendants who enact traditional gender roles compared to those whose behavior is gender-incongruent (Steury & Frank, 1990). Female defendants with traditional marriages and families tend to benefit from chivalrous treatment because legal decision-makers recognize their gender roles as wives, mothers, and family nurturers (Bickle & Peterson, 1991; Corley, Cernkovich, & Giordano, 1989; Crew, 1991). By contrast, female defendants whose behavior is inconsistent with traditional gender roles—such as women who are unmarried or do not have children—receive verdict judgments similar to men (O'Neil, 1999; Steury & Frank, 1990).

Legal decision-makers, therefore, might interpret deviance from traditional female gender roles as evidence that a woman deserves harsh treatment.

The leniency effect is especially potent for women who exhibit stereotypic female characteristics (Visher, 1983). Herzog and Oreg (2008) tested the leniency effect as a function of *hostile* and *benevolent* sexism. Whereas hostile sexism refers to attitudes or behaviors that degrade women, benevolent sexism refers to subtle forms of sexism that might appear prosocial (e.g., offering special help to a woman) but originate in sexist beliefs (e.g., a belief that women are less competent than men; see Glick & Fiske, 1996). Scores on a measure of benevolent sexism were unrelated to perceptions of crime severity, but mock jurors high in hostile sexism found crimes committed by a woman to be more serious than those committed by a man (Herzog & Oreg, 2008). This effect did not occur for mock jurors who scored low on a scale of hostile sexism. These results demonstrate that women with stereotypically feminine characteristics can expect more leniency than women whose characteristics are less feminine, indicating jurors' bias in favor of gender-congruent presentation.

Compared to male defendants with criminal histories, female defendants with criminal histories are less often afforded leniency (Tillyer et al., 2015). Researchers might observe these effects because repeated unlawful behavior violates traditional female gender roles (O'Neil, 1999). The violation of gender roles has great potential to influence sentencing in the prosecution of violent crimes. For example, in the presence of emotional victim impact statements, participants reported feeling more anger toward female (compared to male) defendants (Forsterlee, Fox, Forsterlee, & Ho, 2004). Aggression toward a victim of this type is associated with males more so than females, rendering female defendants in violation of their gender roles as empathetic nurturers.

Research on stereotypes, however, shows that stereotypic (vs. non-stereotypic) perpetrators might be more likely to receive harsh verdicts. Jurors might be more willing to render a harsh verdict judgment toward a male defendant compared to a female defendant because the alleged crimes are consistent with stereotypes of male violence. This assertion is supported by research showing that defendants receive harsher punishment for stereotypic (vs. non-stereotypic) crimes (see Jones & Kaplan, 2003, for a discussion of *race-based* crime congruency). When an alleged perpetrator is non-stereotypic, jurors can more easily attribute the crime to situational motives rather than to disposition (Maeder et al., 2018). For instance, because violent crime is not typically associated with women, jurors might believe that a woman who committed an act of violence must have had a respectable motive for committing the alleged crime. This attribution of honorable motives to female defendants can result in decreased punitiveness.

Victims and gender-congruent behavior. Stereotypes regarding the gender of victims are rampant in the court room, especially in the context of sexual assault (see Ellison & Munro, 2009). Male and female victims of sexual assault often receive blame for their victimhood due to gender-based stereotypes about sexual intent and interest. A prevailing stereotype about men, for example, is that men are readily willing to have sex and are therefore unlikely to be the recipients of

unwanted sexual advances (see Denov, 2004; Judson et al., 2013). This stereotype can contribute to negative perceptions of male sexual assault victims, potentially leading jurors and others to question men's allegations. Stereotypes about men's desires for sex can also lead jurors to misattribute responsibility to male victims (Davies et al., 2005). Researchers might observe this effect because jurors expect males to make initial sexual advances that could lead to sexual contact, which could seem to place some of the responsibility on the male victim.

Jurors might also misattribute responsibility to female victims of sex crimes due to erroneous expectations associated with women's behavior. Victim-blaming behavior is often studied in the context of sexual assault cases that involve female victims (Davies et al., 2013; Suarez & Gadalla, 2010). For instance, stereotypes regarding women who wear specific types of clothing or makeup that are misinterpreted to convey sexual availability can influence juror perceptions of victimhood. Due to stereotyped thinking, jurors might believe that a woman who arrived at a bar or a party dressed in particular attire expected to have sex. Stereotypes regarding women's style of dress in sexual assault cases can lead jurors to render lenient verdicts against defendants, in part because jurors might perceive female victims as partially at fault (see Grubb & Turner, 2012, for a review of rape myth acceptance).

Attorneys and gender-congruent presentation. Jurors tend to perceive male and female attorneys differently, even when features of their presentation styles are held constant (Hahn & Clayton, 1996). Differences in perceptions of attorney presentations as a function of attorney gender might occur due to inconsistencies between attorney presentation styles and socially constructed gender roles. Potential jurors tend to prefer others who enact their gender roles according to societal expectations (e.g., Rudman & Glick, 2001). Male attorneys who convey an aggressive presentation style might be perceived as acting in congruence with their gender roles, producing more favorable ratings among mock jurors compared to male attorneys who convey a passive presentation style characterized by qualifiers and hedged statements (see Newcombe & Arnkoff, 1979). On the other hand, female attorneys who convey an aggressive presentation style are comparatively less successful at arguing their cases compared to aggressive male attorneys due to inconsistencies between aggressive female attorneys' behavior and their prescribed gender roles (see Reed & Bornstein, 2018).

Experts and gender-congruent knowledge. Legal decision-makers might assume that male experts are more competent than female experts in their gender-congruent topic areas—and vice versa (e.g., Schuller et al., 2001). This assumption is related to gender roles that prescribe particular behavior to men and women. In turn, legal decision-makers might believe that experts of different genders possess unique, gender-specific knowledge. Expertise that conflicts with prescribed gender roles can reduce an expert's persuasiveness because jurors might have difficulty conceptualizing knowledge that seems inconsistent with traditional gender roles. Gender bias in favor of male experts in cases involving high complexity could be explained by observers' belief that men are generally more "expert" in a variety of fields compared to women (Schuller et al., 2001). Jurors might

perceive men as more persuasive experts (compared to women) in highly complex cases because lay jurors might associate the development of professional skills more strongly with men than with women. However, specific skills that are traditionally associated with women, such as family matters or issues of sex discrimination, might be gender role congruent with female expert witnesses. This belief could explain why female experts are more effective at educating jurors on gender-congruent (vs. noncongruent) topics (Carson, 2008; Swenson et al., 1984).

Stereotypes about masculine and feminine behavior influence jurors' perceptions of expert witnesses (Rudman & Glick, 2001). These stereotypes can be based on the knowledge conveyed by experts or based on the way in which experts conduct themselves behaviorally. Regarding knowledge-based stereotypes, male experts might be more persuasive than female experts regarding stereotypically male topic areas, whereas female experts might be relatively more persuasive regarding stereotypically female topic areas (Schuller et al., 2001). A more complex relationship exists between expert gender and stereotypes about expert behavior in court. Gender-based stereotypes involving expert behavior are not always detrimental to experts of either gender. For instance, the stereotypically masculine trait of assertiveness can equally influence ratings of credibility for male and female experts (Larson & Brodsky, 2014), perhaps because assertiveness is a stereotypical trait of any expert regardless of his or her gender. Jurors might perceive experts' assertiveness as evidence of their knowledge of the topic as it is applied to the case at hand regardless of behavioral stereotypes.

Decision-makers and gender-congruent judgments. Much jury research indicates that male jurors render harsher verdict judgments, on average, than female jurors (e.g., Haney, 2005). This relationship is especially perilous in capital cases wherein men are more likely than women to vote in favor of the death penalty (O'Neil et al., 2004) and receive death qualification due to their more favorable attitudes toward the death penalty (Lambert et al., 2016; O'Neil et al., 2004). The tendency for men to render harsher verdict judgments compared to women can be explained by jurors' enactment of culturally prescribed gender roles. For instance, men might be more likely than women to vote for harsh sentences because punitiveness and aggression are more closely associated with masculinity than femininity. In contrast, women might be more likely than men to favor rehabilitation of defendants because caregiving and nurturing are more closely associated with femininity than masculinity (see generally Applegate, Cullen, & Fisher, 2002). The enactment of gender roles helps explain why women are more likely than men to favor principles of restorative justice, which emphasize rehabilitation over punishment for wrongdoing (Daly & Stubbs, 2006).

These gender-dependent associations between jurors and their judgments are reversed in the presence of several circumstances and case characteristics. For instance, in cases that involve sexual assault or child victims, the relationship between gender and punitiveness tends to reverse: Women render harsher verdicts compared to men (e.g., Quas et al., 2002). Although seemingly contradictory to socialized masculinity and femininity, these patterns of juror judgments can also be explained by socially constructed gender roles. As compared to men, women who

enact traditional gender roles tend to perceive children as more believable and have more empathy for victims (Bottoms, 1993), in part related to women's roles as "nurturers" of children. Although punitiveness toward defendants is seemingly contradictory to women's gender roles, women might seek justice for victims whom jurors perceive as particularly defenseless. The effect of juror gender on verdict decisions in sexual assault cases is partially explained by female jurors' ability to empathize with victims (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). The enactment of gender roles provides a psychological explanation for women's punitive judgments in the presence of specific case characteristics.

Judges, like jurors, are also influenced by the enactment of their socially constructed gender roles. Socialized gender roles can explain some counterintuitive findings related to judges' rulings in cases in which gender is salient. It might be surprising that male judges, compared to female judges, are significantly more likely to rule in favor of the plaintiff in gender discrimination cases (Terpstra, Honorée, & Fridel, 2013). A layperson might assume that female judges would be more likely than male judges to rule in favor of the plaintiff because gender discrimination tends to affect female professionals at higher rates than male professionals (Nieva & Gutek, 1980). One way to explain these findings is in the context of gender role socialization, which can bias male judges in favor of protecting female plaintiffs in gender discrimination cases. Female judges, in contrast, do not enact the same socially prescribed gender roles that encourage men to protect women. The effect of judge gender on rulings in sex discrimination cases, therefore, is elucidated in the context of gender roles.

Prevailing gender roles consist of a set of appropriate behaviors for men and women (West & Zimmerman, 1987). These gender roles are reinforced through interactions with others and with society at large via media and culture. They can create expectations and stereotypes for how men and women should think, feel, and act in the court room. Legal actors who are socialized to practice and expect traditional gender roles might experience surprise or discomfort when others break from these expectations or violate these stereotypes. The following section describes the formation of gendered expectations and stereotypes and how these preconceived notions of gender-appropriate behavior can influence perceptions and outcomes at trial.

People can also have stereotypes for *their own* behavior (Bargh et al., 1996). Findings that verdicts rendered by women tend to be more lenient than those rendered by men in the context of most criminal cases (Haney, 2005; but see Myers et al., 2002) can be elucidated in the context of stereotypes jurors have for their own behavior on the basis of their gender. Stereotypes for men often include aggressiveness and protectiveness, which influence their behavior in court. Male jurors might render harsher verdicts because aggression toward norm-violators and protection for victims are gender-based stereotypes that men attempt to enact both implicitly and explicitly (Bickle & Peterson, 1991). Traits like aggressiveness and values like protectiveness that help define men's expectations for their own behavior are contrasted with women's gender-based values of kindness and empathy. Female jurors might be more likely to render lenient verdict judgments

compared to men due to the stereotype that acts of aggression, such as expressing favorable attitudes toward capital punishment, are not "womanly."

Directions for Future Research

Although research regarding the effects of gender at trial has revealed important findings and existing psychological explanations provide valuable insight into how these processes affect legal actors, there is still much to be learned. These topics are especially relevant to today's world, as research informs a more nuanced understanding of gender that will continue to influence trial. Future research should examine changing perceptions of gender in the legal system, study the effectiveness of updated judge's instructions to reduce gender bias, identify additional moderators and higher order interactions, and adopt psychological theory to explain mixed effects and inform new hypotheses.

Perceptions of Gender in the Legal System Continue to Change

The way that people think about gender has changed rapidly in recent years. For example, by the year 2000, females comprised 28.8% of all practicing attorneys (U. S. Census Bureau, 2000). That number rose to 35% of practicing attorneys in 2017 (American Bar Association, 2018). Similarly, the percentage of female state court judges has risen from 25 to 33% from 2008 to 2018 (The American Bench, 2018). As such, future research should attempt to replicate gender effects discovered several decades ago because the way legal actors think about gender is arguably changing quite quickly. The increase in the number of women legal professionals could be changing the nature of gender roles and stereotypes in this context.

Research should investigate the effects of gender in the courtroom beyond the male/female binary. Decision-makers' perceptions of transgender or gender nonbinary legal actors remain generally unstudied. As transgenderism becomes more widely recognized and accepted (Clark & Jackson, 2018), gender nonbinary defendants and decision-makers will exert increased influence on perceptions and outcomes at trial. Plumm and Leighton (this volume) note that transgender (vs. cisgender) people are at a higher risk for being victims of gender-motivated crime, increasing the likelihood that jurors must evaluate transgender victims' credibility during trial. Jurors' perceptions of gender nonbinary or nonconforming victims, attorneys, and expert witnesses will become increasingly pertinent as our collective understanding of gender continues to evolve.

Investigations of differences in legal outcomes for gender nonconforming (vs. cisgender) defendants and victims are also a relevant avenue for future research. For

instance, it is currently unclear whether female leniency effects (Cox & Kopkin, 2016; Sommer et al., 2015; Starr, 2012) hold for male-to-female transgender defendants who are women both legally and psychologically. Alternatively, male-to-female defendants could receive *harsher* judgments due to their nonadherence to traditional gender roles. Similarly, defendants, victims, or attorneys who prefer gender-neutral pronouns or have an appearance that is not clearly feminine or masculine might receive harsher judgment because they are not "doing gender" in the socially prescribed manner. Future research should explore these topics.

Updated Judge's Instructions Might Reduce Gender Bias

A potential avenue for future research is the examination of the effect of judge instructions to a jury to ignore victim gender in rendering a verdict judgment. Inadmissible evidence often influences juror judgments regardless of judge's instructions to ignore such evidence (for meta-analysis, see Steblay, Hosch, Culhane, & McWethy, 2006). An empirical examination of the effectiveness of judge's instructions related to gender could reveal new ways to write more effective instructions. If people who are made aware of their controlled and automatic biases are better able to correct for them (e.g., Pronin & Kugler, 2006), education on gender-related biases for judges and jurors might reduce differences in perceptions of and outcomes for legal actors who do not accommodate traditional gender roles (i.e., gender nonconforming victims or defendants). Updated and comprehensive jury instructions could reduce gender bias—but this hypothesis remains largely untested.

Additional Moderators and Higher Order Interactions Can Inform Theory and Practice

Sparse research has investigated variables that moderate gender effects, especially for judges. Research on moderators of this relationship among jurors can inform these investigations. Empathy, which differentially affects jurors' decisions on the basis of their gender (e.g., Myers et al., 2002), might also moderate this effect among judges; as might superfluous characteristics of defendants and victims such as physical attractiveness (Vrij & Firmin, 2001) or status as a parent (Supriya et al., 2007). A judge's propensity to morally disengage might influence his or her judicial decisions. For instance, a higher propensity to morally disengage might strengthen gender effects if judges are able to justify unequal treatment of defendants on the basis of their gender (for a measure of moral disengagement in a legal context, see Kirshenbaum, Miller, Cramer, Neal, & Wilsey, 2018).

More research is necessary to examine higher order gender interactions between various legal actors. All five of the legal actors discussed in this chapter are often present during the course of one trial, yet most research has examined only two-way gender interactions (e.g., juror gender x attorney gender). These two-way interactions might vary depending on third, fourth, or fifth factors. For instance, the symbolic interaction framework predicts that men and women jurors might differentially construct the meaning of assault depending on the gender of the victim and that of the perpetrator. Although effects of these moderating variables and higher order interactions can be inferred, empirical examination should test this speculation.

Future Research Should Be Theory-Based

Much of the research reviewed herein found mixed effects of gender. Research should continue to examine the causes of these mixed findings in an attempt to organize findings into a comprehensive framework that explains and predicts gender-related perceptions and outcomes at trial. For instance, researchers might investigate variables that predict the circumstances in which female judges will be *more* or *less* favorable toward female plaintiffs in women's issues cases, and why these relationships might exist. Mixed findings in the present data could be due to individual differences among samples that currently remain untested.

Future studies should adopt specific theories as their bases. Much of the research presented above tests hypotheses derived from common sense and past findings. Future research can more specifically test the theories discussed above. For instance, we speculated above that women who are married with children get more lenient sentences than women who are single or childless because they fit the socially prescribed gender roles. This could lead jurors to believe that the woman has stereotypical feminine characteristics of being a caregiver and nurturer—someone undeserving of the harsh punishment of prison. Studies have supported this chivalry hypothesis that women receive more lenient verdicts compared to men (Gavin & Scott, 2016; Meaux et al., 2018; Strub & McKimmie, 2016). Yet, this assumption about the reasons for chivalry (i.e., jurors' beliefs and stereotypes) is untested. Researchers should test specific hypotheses about jurors' beliefs and stereotypes derived from an understanding of social cognition. These investigations can reveal mediators of the relationships between gender and verdict.

Similarly, we speculated above that jurors might have expectations and stereotypes for their own behavior. As part of their socially prescribed gender roles, men might feel the need to be more aggressive whereas women might feel the need to be more nurturing. Indeed, research has identified that men often give harsher verdicts than women (with certain caveats such as case type; see Dunlap et al., 2015; Osborn et al., 2018). As such, men and women might believe they should give verdicts according to these socially prescribed roles. However, research has not specifically identified whether this thought process actually occurs either implicitly or

explicitly. Questions could measure such explicit beliefs, and tools such as the Implicit Associations Test (Greenwald, McGhee, & Schwartz, 1998) could test these implicit beliefs. Such individual differences could be mediators. Alternatively, beliefs in the importance of "proper gender roles" might moderate some of the gender effects described above. Based on empirical work related to implicit beliefs, it could be hypothesized that jurors who believe it is important (vs. unimportant) that men and women play the roles and have the characteristics assigned by society will perceive cases more strictly in terms of gender. This individual difference could produce a stronger effect of defendant gender on verdict judgments. This and other moderators should be explored.

Future research should draw testable hypotheses from symbolic interactionism and a social psychological understanding of gender roles and stereotypes to address the effects of gender-variant legal actors on trial perceptions and outcomes. For instance, if people are more likely to act in accordance with their prescribed gender roles when gender is made salient (Brenner et al., 2014), it could be hypothesized that the presence of a gender nonconforming defendant or victim in the courtroom could exacerbate juror gender effects. It is also possible that the mere presence of a gender nonconforming defendant could elicit unfavorable evaluations from both men and women who themselves enact traditional gender roles, thus perceiving gender nonconformity as deviant or a characteristic of one's outgroup. Investigations of these matters will continue to inform scientific understanding and legal policy and practice. In sum, specific questions and methods—drawn from the theories discussed above—would determine whether our speculation about the causes of gender effects are accurate.

Conclusion

Research has produced evidence of gender effects during litigation both experimentally (e.g., Mazzella & Feingold, 1994) and in analyses of actual legal judgments (e.g., Starr, 2012). This chapter has synthesized the myriad ways in which the gender of five legal actors can relate to perceptions and outcomes at trial. The effects of gender are often mixed but can be explained from various psychological approaches including symbolic interactionism and meaning-making (Alver & Caglar, 2015; Blumer, 1973), gender role enactment (Davies et al., 2005; West & Zimmerman, 1987), and stereotypes (Haines et al., 2016). Each of these psychological perspectives offers a unique social psychological perspective on the origins of observed gender effects during litigation. Future studies should more directly apply these theories to determine whether they can explain the effects described above. A comprehensive understanding of gender at trial can inform both research and practice relevant to psychology and the law.

Acknowledgements We would like to thank Brielle Jackson for their help in preparing this chapter.

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Sexual Orientation and Gender Bias Motivated Violent Crime

Karyn M. Plumm and Kristen N. Leighton

Sometime between the evening of August 6th and the morning of August 7th, 1988 in Lafayette, Indiana, Timothy Schick murdered Stephen Lamie (Schick v. State, 1991). Schick confessed the events of the evening to two different friends, one of whom eventually contacted police who then found Lamie's body at a baseball field. Schick was intoxicated and told his friends that he had asked Lamie where he could get a "blow job" to which Lamie replied that he could handle that. The two drove to a baseball field where Lamie began to perform the requested act. Schick then beat and kicked Lamie until there were "gurgling noises coming from his chest and throat." Schick then took money from Lamie's wallet and left. Schick was arrested and charged on five counts: murder while attempting to commit a robbery; voluntary manslaughter; robbery resulting in serious bodily injury; confinement by fraud, enticement, force and threat of force from one place to another, resulting in serious bodily injury; and confinement by confining another without his consent, resulting in serious bodily injury. In 1991, a jury found him not guilty of Count I (murder) but guilty on all other counts. The trial court then sentenced Schick to consecutive sentences of 20 years for voluntary manslaughter, four years for theft, and 4 years for confinement. The defense at the trial argued successfully (against the murder charge) that there was no intent to murder the victim because Schick's actions were the result of panic brought on by the homosexual advances of Lamie (Schick v. State, 1991). The defense was known as "homosexual panic defense" or "homosexual advance defense" and had been used in other cases (see ABA Resolution 113A, 2013). This defense implied that it was acceptable to murder a gay man under certain circumstances. Jury members, at least in this case, apparently agreed. Despite the facts of the case, Schick v. State (1991) was not prosecuted as a

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_6

bias-motivated assault. Although the concept of an assault toward someone because of his sexual orientation seems fitting to be charged and prosecuted as a hate crime, it would not be until many years later that the category of sexual orientation as a basis for bias-motivated assault would find its way into legal statutes.

Since the idea of hate crimes began to emerge publicly in the 1980s, hate crime has been referred to fairly often in the national and global media (e.g., Magane, 2017; Stack, 2017). The majority of recent stories focus on race or religiously affiliated violent crimes as well as crimes committed against transgendered people. Although the idea that people could be targeted on the basis of their minority group status began long ago, there are problems policing and prosecuting such crimes, as is identified in the media. For example, incidents that appear to be motivated by bias are charged as crimes such as "road rage" instead of being charged as hate crimes. This leads to public outcry over what is perceived to be a lack of willingness to charge some incidences as hate crime (Magane, 2017; Stack, 2017).

The purposes of this chapter are two-fold. The first is to present the contentious background of hate crime legislation and to provide the current state of research that focuses especially on violent, bias-motivated crimes (i.e., assault, homicide) committed against people because of their sexual orientation, gender identity, or gender. The second purpose is to identify gaps and needed research on this important topic. The current literature faces challenges in providing a broad conceptual understanding of LGBT hate crime but postulates similarities and differences among some areas that begin to illustrate the need for future research.

Background of Hate Crime and Bias-Motivated Legislation

At the same time Schick v. State (1991) was being tried, public and legal attention was being paid to similar crimes that targeted religious and racial minorities. The U.S. Department of Justice and Federal Bureau of Investigation began collecting data on crimes that targeted members of minority groups. This data collection would eventually include sexual orientation and gender identity minority group members as well.

Hate crime data collection first began in 1990 (Hate Crime Statistics Act, 1990). These data would result in myriad research and subsequent federal legal statutes related to bias-motivated violent crime. The most recent federal statute is the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (AKA Public Law No. 111-84) enacted in 2009. Bias-motivated crimes, also known as hate crimes, are defined by the U.S. Department of Justice (2015) as "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity" (Hate Crime Statistics Act, 28 U.S.C. § 534). The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (2009) expands this definition for violent crimes to be considered a hate crime if the crime was committed because of the actual or perceived race, color, religion, or national origin of any person or the crime was committed because of the actual or perceived religion, national origin,

gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction. All but four states (AR, IN, SC, WY) now have hate crime legal statutes. However, some still exclude particular groups from protection under these laws. Only 18 states and the District of Columbia have addressed bias-motivated crimes based on sexual orientation and gender identity (CA, CO, CT, DE, HI, IL, MD, MA, MN, MO, NV, NJ, NM, NY, OR, RI, VT, WA). Twelve others have laws that include sexual orientation only (AZ, FL, IA, KS, KY, LA, ME, NE, NH, TN, TX, WI). The rest have laws that address hate or bias but do not include sexual orientation or gender identity as protected categories (Human Rights Campaign, 2017a, b). Despite the variability of hate crime statutes by state, the Hate Crime Statistics Act (1990) federally mandates the reporting of hate crimes, which has led to greater understanding of what these crimes entail.

Hate crimes differ from other types of crime in that they typically involve excessive violence; are more likely to be committed against strangers; are often not planned; are typically committed by young, white males; and are likely to involve more than one offender (Downey & Stage, 1999; Gruenewald, 2012; Herek, Gillis, & Cogan, 1999; McDevitt, Balboni, Garcia, & Gu, 2001; Rose & Mechanic, 2002; Stacey, 2011; Stotzer, 2015). The Hate Crime Sentencing Enhancement Act (1993) was created, in part, to account for the specific ways in which hate crimes are directed not only toward the person against whom the crime was committed but toward the group to which that person belongs. These crimes have negative implications then, not only for individual victims of such crimes but for their community and society as a whole by creating fear among members of targeted groups (Bell & Perry, 2015; Herek, 1994; Lannert, 2015). Current data indicate that 6,885 hate crime offenses occurred in 2015 (US DOJ, 2015). Of those, 17.8% (n = 1,219) were motivated by sexual orientation bias. Of that subset specifically, 62.2% were classified as antigay (male) bias, 19.3% were prompted by an anti-lesbian, gay, bisexual, or transgender (mixed group) bias, 13.8% were classified as anti-lesbian bias, 2.9% were classified as anti-bisexual bias, and 1.9% were the result of an anti-heterosexual bias. Further, 1.7% (n = 118) stemmed from gender identity bias, with 75 incidents identified as anti-transgender and 43 as anti-gender non-conforming bias. Additionally, there were 29 offenses (0.4%) based on gender, with 21 being anti-woman and 8 being anti-man. Because crimes based on sexual orientation are underreported due to fear and secondary victimization, these statistics might not adequately represent the breadth of bias-motivated crimes based on sexual orientation. Berrill and Herek (1990) describe secondary victimization as the loss victims experience by virtue of reporting a hate crime. This victimization occurs because victims essentially must “out” themselves in order to report the crime. For victims who are not yet out to loved ones or employers, reporting a hate crime that requires them to announce their minority sexual orientation might lead to loss of close relationships, employment, housing, etc.

Opposition to and Support for Hate Crime Laws

Hate crimes have been the topic of much debate among political, psychological, and legal scholars (Bell & Perry, 2015; Duncan & Hatzenbuehler, 2014; Gerstenfeld, 1992; Hein & Scharer, 2013; Jacobs & Potter, 1998; Keller & Dauenheimer, 2003; Lannert, 2015; Lemyre & Smith, 1985; McPhail & DiNitto, 2005; Petrosino, 1999; Plumm & Terrance, 2013; Stotzer, 2010; Sullaway, 2004). Arguments about determining a biased intent, policing the right of people to feel how they wish (i.e., extreme emotional dislike), and measuring a hypothetical construct such as "hate" have all been arguments against the implementation and use of hate crime laws. Arguments for establishing such statutes are related to the nature of what hate crimes entail, the impact on victims and their communities, and the necessity to have harsher penalties in place for perpetrators of such crime. Opposition to and support for bias-motivated legal statutes differ depending on the specific nature of the crime. Arguments related to sexual orientation and gender identity bias motivation tend to focus on policing and victim impact, whereas arguments related to gender tend to focus on the notion that other statutes already exist.

Powerful media attention and public outrage often reflect and perpetuate moral panic about criminal threats and can result in symbolic laws and policies. One way to explain these symbolic attempts has been referred to as Crime Control Theater. Crime Control Theater is defined as "a public response or set of responses to crime which generate the appearance, but not the fact, of crime control" (Griffin & Miller, 2008, p. 160). These policies are not intentionally malicious in nature, but rather appeal to the public's emotional response and evoke empirically questionable strategies for responding to criminal threats. These laws work to give the public a sense of assurance that lawmakers are working to address concerns, yet in reality, Crime Control Theater legal actions are not only ineffective and costly but can perpetuate misinformation about criminal threats (DeVault, Miller, & Griffin, 2016). Crime Control Theater policies attempt to solve complex societal issues through simplistic, largely superficial means. For example, Megan's Law, enacted in 2009, requires all states to establish registration programs to notify the public of registered sex offenders released in the community, yet this law has failed to reduce sex offender recidivism rates, has cost taxpayers more than $3.5 million per year, has been challenged on constitutional grounds, and has interfered with the successful reintegration of paroled offenders (Sicafuse & Miller, 2010). Crime Control Theater policies gain support due to strong emotions associated with the situation, which facilitates the belief that the risk is higher than it truly is and that such policies will reduce that risk. Additionally, such policies rely on hindsight bias and the counterfactual belief that such policies prevent worse outcomes (Alvarez & Miller, 2016). In the case of Megan's Law, narratives of a horrific, yet atypical crime invoked strong emotions which caused the public to overestimate the risks and counterfactually believe that such policies would have prevented the outcome.

Objections to hate crime statutes have been advanced by psychologists and legal scholars as only a symbolic attempt at reducing bigotry (Gerstenfeld, 1992).

Gerstenfeld (1992) noted that the major problems with this type of legislation are the difficulties surrounding the identification of these crimes, as well as the challenges of considering the offender's motives. That is, although the collection of information on hate crimes is now required, it is still difficult, if not impossible, to identify why a perpetrator commits a crime. Bias-motivated crimes might not only be due to "hate." There are a number of other reasons perpetrators commit crimes: fear, ignorance, misunderstanding, or anger. There are many situational variables that also play a role in crime. It is in these cases that teasing apart what constitutes hate crime from other types of crime becomes difficult. Beyond situational factors, inconsistent ways of collecting, reporting, and analyzing data between federal, state, and local law enforcement make the label of bias-motivated crime (hate crime) seem more figurative than literal. For example, 20 states still do not explicitly include sexual orientation or gender identity as protected categories in their hate crime statutes, making comparison rates of bias-motivated violent crime among states difficult.

Jacobs and Potter (1998) discussed other areas of debate over hate crime laws, including justification and enforcement of these laws. They outlined the reasons hate crime offenders are viewed by psychology and legal scholars as "more culpable." These reasons include the disproportionate severity of these types of attacks, both physically and psychologically, on their victims and the impact of hate crimes on third parties (i.e., reinforcing social division and hatred). Jacobs and Potter (1998) also identified problems with enforcing hate crime laws, including lack of information in the area of jury research. Twenty years later, additional research in the area of juror decision-making has provided some information about why fact-finders (i.e., judges and jurors) reach their decisions and what factors within the trial influence these decisions (Cramer, Clark, Kehn, Burks, & Wechsler, 2014; Cramer, Kehn, Pennington, Wechsler, & Clark III, 2013; Cramer, Nobles, Amacker, & Dovoedo, 2013; Cramer, Wakeman, Chandler, Mohr, & Griffin, 2013; McPhail & DiNitto, 2005; Miller, 2001; Plumm, Potter, & Terrance, 2015; Plumm & Terrance, 2013; Plumm, Terrance, & Austin, 2014; Plumm, Terrance, Henderson, & Ellingson, 2010). These studies will be described in the sections focusing on the various areas of research that make up the body of work on LGBT bias-motivated assault.

Sullaway (2004) discussed the many objections both psychology and legal scholars have to hate crime law. While some are based on constitutional law (i.e., it is a violation of the First Amendment to regulate someone's stated opinion about someone else), others concern the measurement of motivation and intent. Furthermore, although people might be motivated to commit a crime, they might have no intent to do so; and even if they had intent to commit a crime, they might not actually follow through. Therefore, distinctions between these constructs (i.e., motivation and intent) and the culpable behavior of criminals become difficult to identify. Those who criticize hate crime law from a psychological perspective argue that such laws are flawed because of the impossibility of measuring bias. Consequently, the relationship between attitudes and behavior cannot be stated as causal. Criminal law, however, tends to draw a line between motivation and intent (mens rea), with intent being more closely tied to behavior. In the instance of hate

crimes, however, it becomes difficult to tease them apart (Sullaway, 2004). Despite these concerns, Sullaway (2004) argued that legal statutes regulating bias-motivated assault serve the purpose of reducing such crimes as well as increasing awareness of the unacceptability of such behaviors.

Petrosino (1999) argued that hate crimes will become more difficult to prevent and will occur more frequently based on historical contexts of prevailing attitudes stemming from social and political environments that increase division and perpetuate acts of intolerance. This atmosphere, combined with the greater ability to cause mass destruction, could lead to an increase in crimes as well as the severity of those committed. Despite this, it could be the case that simply giving these acts the criminal label of bias-motivated crime (i.e., hate crime) might not only serve to increase awareness about the unacceptability of such behavior, but could also lead to a reduction in blaming the victim and therefore increase convictions for these types of crime. Indeed, more recent findings on the effectiveness of hate crime statutes show that, although some acts could only be symbolic (see Erba, 2014), the symbolic nature of having such statutes can make a difference. Stotzer (2010) compared the influence of having hate crime laws that include sexual orientation bias as well as mandated law enforcement training on hate crime reporting rates. She found that, on college campuses in states that include such statutes, hate crime reporting rates were higher than on campuses in states that do not include such statutes.

Legal objections aside, other arguments focus on the impact on victims and the LGBT community. Influences on a broader community often perpetuate the implementation of or changes to hate crime laws. The 1998 murder of openly gay college student Matthew Shepard not only resulted in the most recent addition to federal hate crime law but at the time had a strong, negative impact on the LGBT community nationwide. Andrew Sullivan, a gay rights advocate, commented, “I think a lot of gay people, when they first heard of that horrifying event, felt sort of punched in the stomach. I mean it kind of encapsulated all of our fears of being victimized” (“New Details Emerge in Matthew Shepard Murder.” November 26, 2004, *n.p.*).

Influences beyond physical harm have also been identified as reasons to support hate crime statutes. For example, Hein and Scharer (2013) argued that hate crimes, in particular, have three major consequences for victims beyond any direct physical harm. This kind of victimization destroys the myth of personal invulnerability, decreases feelings of self-worth, and shatters the notion of the world as a logical and reasonable place. Further, hate crimes against LGBT people can result in the LGBT community experiencing a sense of disempowerment. Related to these consequences, Duncan and Hatzenbuehler (2014) found significantly higher rates of suicidal ideation among LGBT youths who lived in neighborhoods reporting higher rates of LGBT hate crimes compared to those who lived in neighborhoods with lower rates of LGBT hate crimes. Interestingly, they did not find this pattern for hate crimes overall, suggesting that the awareness of one’s group identification as a target could play an important role in mental health and well-being for LGBT youth.

Some reasons provided for the impact of a crime against a victim on a community include minority stress, collective identity, and vicarious threat (Bell & Perry, 2015; Hatzenbuehler, Nolen-Hoeksema, & Dovidio, 2009; Keller & Dauenheimer, 2003; Lannert, 2015; Lemyre & Smith, 1985; McPhail & DiNitto, 2005). Minority stress refers to the increase in stress experienced when part of a person's identity is attached to a negative stereotype or stigma. Studies have reported increases in depression and anxiety (Keller & Dauenheimer, 2003) as well as decreases in self-control and self-regulation (Hatzenbuehler et al., 2009) related to the impact of negative stereotypes. Collective identity refers to the affiliation with a group as part of one's social identity. Social identity creates in-group and out-group comparisons that help to bolster social identity (Lemyre & Smith, 1985). In essence, the group people perceive themselves as belonging to becomes part of who they are. Vicarious threat is linked to collective identity in that if a member of the group a person belongs to is threatened, this creates a threat to part of that person's own identity.

Lannert (2015) argued that based on both minority stress and collective identity of LGBT community members, vicarious threat would result in negative stress responses for members of that community. For example, when a member is assaulted or murdered, the effects of that crime on other group members would produce negative feelings similar to that reported by Andrew Sullivan, "…like a punch in the stomach" ("New Details Emerge in Matthew Shepard Murder." November 26, 2004, *n.p.*). Bell and Perry (2015) likewise found that violence against lesbians, gay men, and bisexual people can have a profound and negative effect on the psychological and emotional well-being of nonvictim group members. They also found that knowledge of hate crimes against one's group negatively affected decisions to disclose one's sexual orientation to others.

The most recent consideration of bias-motivated violent crime is related to hate crimes based on gender. Although gender identity includes gender, the former term is often used as a category specific to transgendered people. McPhail and DiNitto (2005) explored the knowledge prosecutors had of gender as a potential motivator for hate crime as well as their willingness to charge violence against women as a hate crime. They found that prosecutors view violence against women as a matter of power and control rather than one of hate. Plumm and Terrance (2013) compared potential jurors' ratings of guilt in a case of violence against a woman when the crime was charged as either an assault or a hate crime. They found that potential jurors were less likely to find the defendant guilty when the crime was referred to as a hate crime than when it was called an assault. These studies both imply that fact-finders are unwilling or unable to see violence against women as motivated by hate.

Taken together, opposition to bias-motivated crime statutes includes the policing of motivation and the feeling of hatred, as well as the belief that other statutes exist for perpetrators of violent crime. Support focuses on the unique impact bias-motivated violent crimes have on victims and their communities. It is important to understand the arguments for and against the establishment and policing of these crimes. However, opposition to and support for hate crime statutes do not provide a full understanding of how hate crimes could be viewed and judged.

Providing some insight into the ways the people and situations involved in these types of cases are perceived can help fact-finders better understand decision making and judgment for these crime scenarios. In fact, judgment seems to be inconsistent and often relies on previous bias or extra-legal factors, as discussed next.

Judgments of Sexual Orientation and Gender Bias Motivated Violent Crime

The literature on violent hate crimes committed against lesbian, gay, bisexual, and transgendered (LGBT) people tends to take two approaches. One approach is to look at one group separately from the others, whereas the other approach is to look specifically at the effects and perceptions of these criminal cases for the entire group as a whole (e.g., minority sexual orientation). Both approaches have merits and limitations. Biases against lesbians, gay men, and bisexual men and women differ, sometimes significantly (Kite & Whitley, 1996); therefore judgments about these types of crime benefit from being viewed separately. However, broadly understanding crimes toward all sexual orientation minority group members helps researchers to identify how these types of crimes might be judged in the media and in the courtroom. Both research efforts contribute in different ways to the understanding of anti-LGB hate crimes.

Research focused on anti-transgender and anti-gender motivated violent crime will be considered separately. As a construct, gender and gender identity differ from sexual orientation. Although both are components of personal identity, they ought to be considered separately and are often erroneously coupled. Gender is commonly considered to be the characteristics by which people define masculinity and femininity, whereas sexual orientation is commonly considered to be a romantic or physical attraction to those of similar or different gender. Gender identity is described as a person's self-defined internal sense of their gender (Nagoshi, Brzuzy, & Terrell, 2012).

Research Focused on a Specific Minority Sexual Orientation

Judgments of crimes against lesbians, gay men, and bisexual men and women might vary on the basis of the victim's specific identity. Prejudice against lesbians and bisexual people differs from prejudice toward gay men (Kite & Whitley, 1996; Yost & Thomas, 2012). For example, prejudice toward lesbians tends to be polarized to include anti-feminine and uber-feminine stereotypes, whereas stereotypes of gay men are concentrated primarily on anti-masculine attributes (Kite & Whitley, 1996). Prejudices against bisexual men and women are less gendered and include negative personality characteristics (e.g., not loyal, not honest, hypersexual)

as well as a belief that the orientation does not exist or is not legitimate (Plumm et al., 2015). Very few studies have focused specifically on anti-lesbian hate crimes or on anti-bisexual hate crimes. In fact, only one study explored the influence of hate crime victimization on the lives of lesbians (Szymanski, 2005), and one other explored the perceptions of a hate crime committed against a bisexual person (Plumm et al., 2015). Internalized heterosexism in lesbians, as well as internalized sexism in women, is associated with increased psychological difficulties. Szymanski (2005) hypothesized that lesbian women face oppression based on their sexual orientation and their gender. Plumm et al. (2015) likewise hypothesized that gender intersects with negative stereotypes of bisexual people; specifically, that victim blame would be higher for male bisexual victims than for female bisexual victims of hate crime.

Plumm et al. (2015) explored beliefs about assault as a hate crime, as well as perceptions of the victim and assailant in a case including perceived bisexual orientation (i.e., the assailant believed the victim to be bisexual). An experimental design varied the gender of the victim and perpetrator (male/male vs. female/female), the sexual orientation of the defendant in the case (gay/lesbian vs. heterosexual), and the actual sexual orientation of the victim (gay/lesbian vs. bisexual vs. heterosexual). Unlike other studies of bias-motivated violent crime, this study hinged on the notion that there are no ubiquitous media reports of hate crimes committed against bisexual people, making the case an "atypical" hate crime scenario.

Plumm et al. (2015) provided additional information about how hate crimes, not only against bisexual people but also based on sexual orientation in general, are perceived. First, they found that a minority group member can be viewed as a perpetrator of a hate crime. Second, although the law utilized in the study stated that it includes the perception the perpetrator has of the victim's belongingness to a minority group, actual group belongingness mattered in terms of viewing the crime as a hate crime. Finally, the "typicality" of the case could result in differences for how the victim and perpetrator are perceived.

These studies begin to make important links to the intersectionality of sexual orientation and gender. Given the gendered stereotypes for lesbians and gay men, it is important to make distinctions in how crimes against each population might be judged. Perhaps even more importantly, they highlight the fact that very few studies investigate bias-motivated violent crimes against lesbians or bisexual people specifically.

Studies focusing specifically on bias toward gay men are slightly more prevalent (Cramer, et al., 2013a; Plumm et al., 2010, 2014). They tend to include how hate crime scenarios are perceived by those who might judge them from the perspective of a potential jury member and/or judge in a criminal case. Research focused on gay men includes various extra-legal factors (e.g., location, provocation[1], sexual

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[1]Although it is believed by some that hate crime victims could "provoke" the attack against them, it is important to note that these crimes are inflicted rather than "provoked." To ensure that readers do not lose sight of this distinction, the terms "provocation" and "provoked" will appear in quotations (see Kristiansen & Giulietti, 1990).

orientation, and potential juror personality characteristics) and primarily measures victim blame and judgments of guilt or sentencing.

Studies that measure victim blame in hate crimes committed against gay men have found that participants vary significantly in their ratings of victim blame based on location of the crime, “provocation,” perceived and actual sexual orientation, and the participant’s contact with someone in the LGB community (Cramer, et al., 2013b; Plumm et al., 2010, 2014). Plumm et al. (2010, 2014) found in separate studies that the actions of the victim were given considerable weight in the decision making of potential jurors. For example, participants responded with higher blame for the victim when “provocation” (i.e., the victim asked to buy the perpetrator a drink) was present than when absent (Plumm et al., 2010).

These findings are consistent with Kelley’s (1972) description of the use of facilitative and inhibitory causes in attribution of blame. Specifically, participants appeared to alter their attributions based on what they believed the defendant should have expected. For example, if the defendant chose to go to a gay bar, he should have expected to interact with gay men; therefore when a crime occurs in those situations, the victim is blamed significantly less (Plumm et al., 2010, 2014). Unfortunately, this finding also suggests that when not in a specific place understood as “safe” for a gay man, he is expected to inhibit his behavior. And in this case, when he does not, he is blamed for an assault against him (Plumm et al., 2010). In fact, in a more recent study, Gruenewald and Kelley (2014) found that about half of all hate crimes based on sexual orientation were committed because of a perceived slight or “provocation” on the part of the victim. For example, Plumm et al. (2014) found that participants placed a greater amount of blame on the victim when he was described as walking and shouting in a gay pride parade than when he was walking silently or only observing the parade.

Another explanation for findings of victim blame and judgments in cases of bias-motivated assault against gay men includes previously held attitudes or beliefs of the participant. For example, Cramer, et al. (2013c) found that rates of conviction and sentencing recommendations are positively correlated with participants’ levels of homonegativity and authoritarianism. To further explore the effects of homonegativity and authoritarianism not only on conviction and sentencing, but also on victim blame toward a gay man, Cramer, et al. (2013c) utilized the Perceptions of Victim Blame Scale (PVBS; Rayburn et al., 2016) within mock jury samples in a capital murder hate crime vignette. The aims of the study were to evaluate if a single or multifactor model of perceptions of victim blame is the best statistical fit and to assess the psychometric qualities of the best fit model. Cramer, et al. (2013c) first used exploratory factor analysis to evaluate the potential multidimensional factor structure of the PVBS and found three underlying subcomponents. These subcomponents were Malice, Recklessness, and Unreliability. Malice was significantly positively associated with the likelihood of assigning the death penalty. Confirmatory factor analysis indicated support for the three-factor model. Malice (intent to harm) appeared to be an important aspect of perceptions of victim blame in understanding sentencing judgments in a capital murder scenario.

Studies focusing on antigay men bias have yielded some similar findings (Cramer,et al., 2013b; Plumm et al., 2010, 2014). Extra-legal factors, including previously held biases, appear to affect perceptions and potential decision-making in the courtroom for hate crimes against gay men. Specifically, beliefs and attitudes that potential jury members hold (i.e., homonegativity and authoritarianism), as well as their personal contact with members of that particular community, can influence their perceptions of the crime. Additionally, the more "provoking" the actions of the victim appear to be to participants, the more likely they are to blame the victim for the crime committed against him.

Research Focused on Anti-LGBT[2] Bias as a Group

Although the previous section highlighted research focusing on specific sexual orientation identities related to bias-motivated crime, this section focuses on a "catch-all" category of research on lesbian, gay, bisexual, and transgender bias-motivated hate crime or compares the perceptions across the populations. The biggest limitation of this approach is the inability to address the uniqueness of each group. However, this approach affords a broad look at different aspects of hate crime that affect the LGBT community and members.

Research focused on anti-LGBT violent crime tends to fall into three areas: the effects of this type of crime on victims and the community, the perceptions of hate crime by fact-finders, and the intersectionality of sexual orientation with other social group statuses. The research highlighting the effects of hate crime on LGBT people primarily focuses on psychological well-being and help-seeking behavior in both victims and members of the community following reports of hate crime (Bell & Perry, 2015; Duncan & Hatzenbuehler, 2014; Hein & Scharer, 2013; Herek, 1989; Herek, Cogan, & Gillis, 2002; Herek et al. 1999; Iganski, 2016; Rose & Mechanic, 2002). Overwhelmingly, studies have found that the effects on victims are more negative when violent crime is bias-motivated when compared to non-bias motivated violent crime. The type of crime also contributes to help-seeking behaviors in victims. For example, lesbian women and gay men who experienced a person-based crime due to their sexual orientation within the past 5 years reported significantly more symptoms of depression, post-traumatic stress, anxiety, and anger than those who experienced a non-biased person crime or no crime within the same period (Herek et al., 1999). They were also more likely to view the world as unsafe, view people as malevolent, show a lower sense of personal mastery, and attribute personal setbacks to sexual prejudice (Herek et al., 1999).

[2]Although most studies included in this section use the term LGBT to connote the community as a whole, they also only refer to sexual orientation. Because transgendered individuals do not always identify with a minority sexual orientation, we will consider those studies separately. In order to coincide with the studies presented in this section we have used the term LGBT but we are likewise describing results specific to sexual orientation.

Additionally, both sexual and physical assault LGBT victims were significantly more likely than those threatened with violence or victims of other bias-motivated acts to report the incident to the police (Rose & Mechanic, 2002). LGBT victims of physical assault were more likely to seek medical help than LGBT victims of sexual assault; whereas LGBT sexual assault victims were more likely to seek psychological help and legal help than other LGBT victims. Help-seeking behavior was significantly associated with the level of psychological distress. LGBT victims who sought professional help had significantly higher PTSD and depression scores than those who did not seek help (Rose & Mechanic, 2002).

Similar negative consequences emerge when investigating the effects of bias-motivated violent crime on the LGBT community as a whole (Duncan & Hatzenbuehler, 2014). Duncan and Hatzenbuehler (2014) measured the effects of social environment on LGBT youths that were not direct victims of a hate crime. They compared outcomes for those residing in neighborhoods with more reported LGBT hate crimes and those residing in neighborhoods with fewer reported LGBT hate crimes. Not only were lesbian, gay, bisexual, and transgender adolescents more likely to contemplate, plan, and attempt suicide as compared to their heterosexual peers, but those residing in areas where hate crimes were high were more likely than their counterparts residing in low hate crime areas to indicate suicidal ideation or attempts. This pattern held for adult LGBT people as well. Duncan and Hatzenbuehler (2014) found that the social environment was a significant factor in risk of suicidality. Specifically, LGBT youth suicide risk is a consequence of violence toward LGBT people.

There are severe mental health consequences of lesbian, gay, bisexual, and transgender targeted hate crimes for the victim and the community (Hein & Scharer, 2013). Hate crimes based on sexual orientation result in severe psychological consequences for several reasons (Hein & Scharer, 2013). The first major consequence of sexual orientation bias-motivated hate crimes is that they destroy the myth of personal invulnerability of the individual. Second, sexual orientation bias-motivated hate crime victimization results in decreased feelings of self-worth. Finally, hate crime victimization based on sexual orientation reduces the person's ability to view the world as a logical and reasonable place. Victims are also more likely to develop internalized homophobia or negative feelings about their core sexual identity, which can increase the severity of mental health consequences (Hein & Scharer, 2013).

Research on perceptions focuses on the labeling of a crime as bias-motivated versus other crime labels (e.g., assault, murder), and similar to the studies on specific minority sexual orientation groups, it tends to measure victim blame and conviction or sentencing (Cramer, et al., 2013b, 2014; Plumm et al., 2010). These studies illustrate that, similar to previous studies measuring victim blame, the personality characteristics of the potential juror (e.g., personal support for gay community members, need for affect, and need for cognition) play a significant role. For example, Plumm et al. (2010) found that victim blame was significantly lower for participants who had a high level of support for gay community members than for participants who had a low level of support. Cramer, et al. (2013b) found that perceptions of hate crimes were correlated with individual levels of need for affect

and need for cognition. Specifically, need for affect was negatively associated with victim blame, and need for cognition was negatively associated with perpetrator sentencing and blame judgments.

Research on hate crimes against the LGBT community as a whole could decrease specific understanding of isolated groups but it also allows consideration of intersectionality. Although comparisons in biases for various hate crimes help to explain how these crimes are perceived, it is as important to consider intersectionality in experiences of victims as well as perceptions of crimes. Therefore, while the majority of research examines the severity of hate-motivated violence by focusing on either psychological effects on the victim or perceptions of the crime, it is also relevant to investigate the sociological components through an intersectional framework. Of central importance is the understanding of how people's experiences differ based on the intersection of different identities. When studies focus on the experiences of lesbians or of gay men specifically, they are unable to compare or tease out the effects of gender. Research on sexual orientation motivated bias crime with an intersectional lens focuses on the intersection of sexual orientation with gender, social class, and race (Bell & Perry, 2015; Iganski, 2016; Meyer, 2010; Stotzer, 2013).

It is important to understand how society constructs homosexuality as deviant in order to understand the motivation for antigay hate crimes. Gender roles also contribute to societal norms that promote heterosexism. The theory of "doing gender" is based on social norms that encourage others to identify as male or female and behave accordingly. Society perpetuates heteronormativity. Antigay hate crimes provide heterosexual men with the opportunity to "do gender" by proving their manhood and their endorsement of heteronormativity by punishing those who fail to "do gender" appropriately (Bell & Perry, 2015).

Victims of antigay hate crime report significant levels of fear of revictimization, behavior changes to avoid harassment or violence, acting "straight," and avoiding areas associated with lesbian and gay men. These avoidance strategies and changes in behavior could influence self-expression negatively and inhibit important interactions with other members of the LGBT community. Decreased interactions with other members of the community could also decrease access to social support and increase social isolation. Iganski (2016) identified five "waves of harm" generated by hate crimes: harm to the initial victim, harm to the initial victim's group in the neighborhood, harm to the initial victim's group beyond the neighborhood, harm to other targeted communities, and harm to societal norms and values.

These waves are dependent then on the social culture of the victim and the group to which the victim belongs. Of central importance is the understanding of how experiences differ based on the intersection of different identities. Meyer (2010) found that LGBT people's reference group affected how people perceived the severity of violent experiences. In other words, LGBT people emphasized the severity of violent experiences by comparing themselves with someone whom they perceived as experiencing relatively little violence. Specifically, low-income LGBT people of color were often encouraged by others, such as friends and family, to compare themselves with others who had encountered a lot of violence. This

comparison made their experiences seem less severe because they were not injured or killed like those they were being compared to. White, middle-class participants were more likely to have friends or family that encouraged them to view their experiences as severe and to get the help they needed. Additionally, most low-income LGBT people of color were more likely to think anti-LGBT violence could happen to them because they knew several other people it had happened to, while White LGBT people often did not know of anyone who had been attacked due to their sexual orientation (Meyer, 2010).

Stotzer (2013) investigated subgroup dynamics within each bias crime category. The study included a descriptive analysis of the racialized nature of sexual orientation bias-motivated crimes. Stotzer (2013) found that antigay crimes were more often crimes against persons and anti-lesbian crimes tended to target property. Anti-lesbian crimes were more likely to occur in private residences, while antigay crimes were more likely to occur on the street. Antigay and anti-lesbian bias-motivated crimes were primarily intraracial; however, it was not possible for the researcher to determine if antigay and anti-lesbian bias crimes were more or less interracial than non-bias crimes. When considering the intersections of sex, sexual orientation, and race/ethnicity, the results were more complex. With regards to antigay crimes, White and Black perpetrators were more likely to victimize in-group members, while Latino and Asian perpetrators showed a more ambiguous pattern of intraracial/interracial victimization. There was an extremely low incidence of Asian involvement as either victims or suspects of antigay and anti-lesbian bias-motivated crimes (Stotzer, 2013).

Research Focused on Anti-transgender Bias

Intersectionality highlights the multiple identities a person possesses. An intersectional approach posits that theory and research should be based on understanding the intersection of multiple identities. Research utilizing an intersectional approach can provide some important and unique information about specific types of hate crime. One example of this is the disproportionate number of assaults and murders perpetrated against transgender women of color (Human Rights Campaign, 2016).

Transgender people face alarmingly high rates of violence throughout their lives (Stotzer, 2010). Research reports a high prevalence of sexual violence for transgender people, as high as 50% reporting unwanted sexual activity. Differences exist between transgender women and transgender men, with rates of sexual violence generally being higher for transgender women. Additionally, the median age of one’s first sexual assault is 14 years old for transgender men and 15 years old for transgender women. Research suggests that younger transgender people could be at even higher risk of sexual assault than transgender adults (Stotzer, 2010).

Similar to the majority of sexual assault cases, the most common perpetrator of sexual assault toward transgender people is someone the victim knows (Stotzer, 2010). This could explain why transgender victims of sexual assault often believe

the assault to be motivated by negative attitudes and biases toward transgender people. Unless the perpetrator knows the victim, he would probably not be aware of the victim's gender identity. Furthermore, transgender victims of sexual violence could be unwilling to report such experiences to the police for several reasons. Some of these reasons apply to sexual assault victims generally, while others are unique to transgender victims. First, because the first instance of such victimization occurs at such a young age, transgender people might not be fully aware of whom to confide in. Second, because perpetrators are often known to victims they might not feel safe or comfortable involving the police. Third, revictimization is a common experience of transgender people who report their sexual assaults to the authorities, who are often not experienced in working with transgender people (Stotzer, 2010). Finally, revictimization, or secondary victimization, can occur in the form of loss of social support (i.e., family, friends) when someone is outed by virtue of reporting the crime against them.

Transgender people are also likely to suffer from physical violence and abuse throughout their lives. In fact, experiences of violence often start at a young age—the mean age for a transgender person's first physical assault is 16 years old (Stotzer, 2010). Understandably, when asked about feelings of personal safety, over half of transgender people reported feeling unsafe in public. This is especially concerning when considering that over half have experienced violence in their own home, suggesting a lack of places where transgendered people feel safe to be themselves. However, in the case of physical violence, perpetrators were more likely to be strangers to the victim. Nearly three-fourths of transgender people who described experiences of physical violence said they did not report any of the assaults to the police. Of those who did involve the police, 65% were dissatisfied with how the police responded. Some of the reasons for not involving police include feeling afraid of the perpetrator, feeling afraid of abuse by the medical or legal system, feeling afraid of police response, and believing that it would not make a difference (Stotzer, 2010).

The effect of violence on mental health in the transgender community could be different than for other sexual minority people. While transgender people experience high rates of violence and minority stress, research examining the psychological function associated with violence and minority stress in the transgender community is limited (Wilson, 2013). However, it is important to understand transgender people's experiences of violence, psychological functioning, and the mental health consequences associated with such violence, especially in relation to those of cisgender people.

Wilson (2013) found that transgender participants reported higher values than cisgender participants across all mental health symptoms and self-harm measures; however, when controlling for covariates, sexual orientation and income were the strongest correlates of psychological functioning. Transgender participants who reported the poorest level of psychological function were also more likely to identify as a sexual minority, had more chronic experiences of verbal and physical violence, and had more internalized identity negativity (Wilson, 2013). This is an

example of how the intersectionality of gender identity and sexual orientation becomes important in understanding outcomes of bias-motivated assault.

Perry and Dyck (2014) reported that transgender women were constantly aware that hostile language directed at them could quickly turn into physical violence. Thus, this caused an almost constant fear of safety and led to hypervigilance among transgender women interviewed. This hypervigilance and unpredictability led to isolation among transgender women. Transgender women spoke about a balancing act of managing when they needed to act more or less feminine or more or less masculine based on social expectations of behavior. A common consequence of this constant hyperawareness is a distinct level of anxiety. This constant state of fear and unpredictability causes a strain on the mental well-being of transgender women (Perry & Dyck, 2014).

Research (Perry & Dyck, 2014, Stotzer, 2010; Wilson, 2013) including transgendered people focuses solely on mental health outcomes of the victimization experienced during a hate crime, all of them negative. Clearly, what is lacking in terms of research are perceptions of potential fact-finders (e.g., judges and jurors). Currently, there are no studies looking at victim blame, sentencing, or guilt judgments in cases only of transgendered people. Research including the LGBT community as a whole could provide some evidence to glean in cases of hate crimes against transgendered people but likely does not take into account the unique prejudice against members of the transgendered community.

Research Focused on Gender Bias

The consideration of gender as a category of protection under hate crime laws is very recent. This idea has been met with skepticism and a lack of desire to emphasize misogyny as a motivation for bias crimes. A qualitative study of prosecutors from Texas assessed knowledge of gender bias-motivated crime as well as willingness to charge violence against women as a hate crime (McPhail & DiNitto, 2005). Overall, prosecutors were unaware of gender bias hate crime laws. Additionally, the prosecutors interviewed attributed violence against women not to the motive of hate but to motives of power and control. The focus, therefore, was specifically within the realm of domestic violence in which prosecutors argued that criminal statutes already existed for prosecution. Although this argument has been made in other hate crime contexts, it was highlighted as a reason in this particular instance. In general, prosecutors found hate crime laws problematic, but especially the use of gender as a status category (McPhail & DiNitto, 2005). Clearly, not all crime committed against women because of their gender arises from a domestic situation. This perspective creates assumptions that negate the experiences of female victims of gender-biased hate crimes.

Recent large-scale attacks against women have been highlighted in the media. For example, in 2014 Elliot Rodger took the lives of six college students and wounded 14 more in Isla Vista, California after uploading to the Internet a

manifesto filled with hatred toward women. Rodger shot three female students outside a sorority house before speeding through Isla Vista, striking several pedestrians with his car and shooting at others. In April of 2018, Alek Minassian drove a van onto a crowded Toronto sidewalk, killing 10 and injuring 16 people. Minassian referenced Rodger in a Facebook post just before the attack, saying, "all hail the Supreme Gentleman Elliot Rodger!" (Yan & Hassan, 2018).

However, it is not only women who stand to gain protection from the inclusion of gender as a bias-motivated category. In a study focusing on the gender of the victim as the sole bias in a crime, Plumm and Terrance (2013) varied the label of the crime charged as well as the gender of the victim (different-gender dyads were held constant). Findings indicated that similar to prosecutors' perceptions (McPhail & DiNitto, 2005), the label given to crime matters, in that potential jurors were more likely to find the defendant guilty if the crime was labeled an assault versus a hate crime (Plumm & Terrance, 2013). Potential jurors were also more likely to see the defendant as reasonable and the victim as mentally unstable in the assault condition. This finding implies that it would be unreasonable for a perpetrator to commit a hate crime on the basis of someone's gender. Participants seemed to find it more plausible that the perpetrator would commit assault because of a mentally unstable victim. Additionally, implying that it is unreasonable to commit a crime against a man because of bias against men, the female perpetrator committing assault on a male victim was viewed as significantly more reasonable if the assault was labeled a first-degree assault as compared to its being labeled as a bias-motivated assault (Plumm & Terrance, 2013).

The little research available focusing on gender as the primary bias for hate crime suggests that both prosecutors and potential jurors have a difficult time viewing gender-related violence as motivated by hate. This stands in sharp contrast to the acceptability of hate crimes based on sexual orientation and gender identity, which have been found to be perpetrated, at least partially, on the basis of the victim not performing or behaving in a gender-specific way (i.e., not "doing gender" correctly). Future research focused on the intersection among gender, gender identity, and sexual orientation would help to discern what expected motivations for gender-based crime might entail, as well as how gender becomes an extra-legal factor in cases that are seemingly not gender-specific (e.g., sexual orientation).

Discussion

The current literature on sexual orientation and gender bias motivated violent crime only begins to help form an understanding of what these crimes entail. There are some discernable, broad concepts that can be gleaned from the current state of the literature, however. First, much of the research focuses on victims. Whether the research is specifically discussing the impact of crime on the victim and the community to which the victim belongs or focusing on how much blame a potential juror could place on the victim, outcomes related to the victim seem to be an

important aspect in the research of bias-motivated crime. This makes sense given the reasons hate crime legislation (e.g., the Hate Crime Sentencing Enhancement Act) was enacted: hate crimes were seen to be more severe (i.e., greater victim impact) and to have influences on more than the immediate victim. Additionally, the entire concept of a hate crime necessitates at least the perception that the victim belongs to a group toward which the offender holds some bias. Although some research does focus on offenders, upcoming research should help to explain the motivation behind such criminal activity in an effort to reduce bias-motivated criminal activity through improved prevention strategies. Discerning between ignorance, hate, and fear as motivators for criminal activity will help to determine needed interventions.

Second, even with the many variations in crime (e.g., physical assault, sexual assault, murder), variables under consideration (e.g., extra-legal factors, location, previous beliefs), and paradigms used for study (e.g., trial transcripts, vignettes), one aspect that predicts judgments of hate crimes are the perceiver's previously held beliefs. In fact, previously held beliefs can work in favor of the victim (Plumm et al., 2015), against the victim (Cramer, et al., 2013b), or both (Plumm et al., 2010). This was the case in studies that focused on specific populations as well as those that looked at the broad "catch-all" category of LGBT. It might not only be the case then that hate crimes occur because of bias; but also that they are policed and prosecuted on the basis of that bias as well. Additional research should seek to understand how such biases might be altered or explained, especially in cases wherein victim blame is expected to be elevated. For example, empathy induction techniques that have been shown to reduce victim blame in other studies might also be applied to hate crime scenarios (Plumm & Terrance, 2009).

Finally, there are some distinct areas of research that are lacking. Researchers are just recently beginning to focus on the intersectionality of hate crimes. Despite the media coverage focused on crimes against minority race transgendered women and the record high rates of murder against this community (Human Rights Campaign 2016, 2017a, b), the few studies that exist focus solely on victim impact. There has been substantial media outcry as to why so many of these murders are not charged as hate crimes (e.g., Magane, 2017; Stafford, 2015). Upcoming research should focus on how these crimes are perceived, especially as these perceptions pertain to criminal charges and prosecution as hate crimes. Research in the area of gender as a category of hate crime is also lacking. Future studies should investigate how various types of crimes against women and men could be understood as fitting the typology of a hate crime.

Taken together, the research provides both broad knowledge of sexual orientation and gender bias motivated violent crime as well as some specific aspects of such crimes against subgroups of the LGBT community. Full comprehension of the impact of hate crimes on both victims and nonvictim community members, as well as how these crimes are perceived by the media, police, prosecutors, jurors, and judges, is only beginning to form. Bias-motivated crime legislation has continued to expand. Understanding all of the aspects that could influence the many instances of hate crimes is of utmost value.

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The Law and Psychology of Bullying

Lyndsay N. Jenkins, Michelle Kilpatrick Demaray, Nicole B. Dorio and Morgan Eldridge

The word "bullying" is often heard when groups of parents with school-age children gather together. Nearly all parents have heard stories from their children about someone being mean to them, leaving them out of a group, posting something about them online, or knocking into them in the hallway. Some of these social conflicts are normal, because no one gets along with everyone at all times, but at what point is it concerning? At what point do these conflicts turn into bullying? These are questions many parents and schools are asking themselves. As researchers in this area, we are often asked by parents, teachers, or principals what they should do about bullying. Recently, one author received an e-mail from an acquaintance who was desperate for advice about how to get a student to stop bullying his daughter. The e-mail described physical attacks (kicking, slapping, pulling hair), threatening messages ("When will you die? Do you want to die?") and destruction of property (upon returning to her classroom, she found her binder had been emptied and the papers thrown across the room). This parent was desperate for advice because his daughter was afraid to go to school and cried frequently about what she was enduring.

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_7

This situation is not uncommon, and sometimes it is much worse. Some youth tell no one that they are being victimized because they are afraid that their experience will get worse if someone tries to stop the bully. There are extremely unsettling news reports about youth who are bullied bringing guns to school to try to protect themselves or attempting suicide as a way to escape the bullying. These stories are heartbreaking and are a strong indicator that bullying is not something that should be ignored or considered "part of growing up." Though all 50 states now have anti-bullying laws (Sabia & Bass, 2017), these laws do not criminalize bullying; they only require schools to have anti-bullying policies. Preliminary investigations suggest that these laws have made negligible changes in bullying frequency (Hatzenbuehler et al., 2015; Sabia & Bass, 2017). Some parents have filed lawsuits against schools or other parents for the bullying their child has experienced, to varying degrees of success. The interaction between law and bullying is complex and will be explored in great detail in this chapter.

The goal of this chapter is threefold: (1) to provide detailed information about laws and policies related to traditional bullying and cyberbullying, with a focus on bullying that affects youth in school settings, (2) to describe the psychological characteristics of youth in various bullying roles (bullies, victims, defenders, and outsiders), and (3) to discuss the interaction of law and the psychology of bullying such as how psychology influences the development of law and how laws influence behavior. The chapter concludes with a discussion of methods of thwarting bullying behavior in youth that might be successful alternatives—or additions—to legislation.

In this chapter, traditional bullying (i.e., infliction of physical, verbal, or relational aggression that is repeated and intentional by someone with more social, physical, or intellectual power), cyberbullying (i.e., intentional and repeated harm inflicted through the use of technology), and harassment (i.e., unwelcome conduct such as verbal abuse, threats, written statements, and physical assault based on membership in a protected class) are defined and compared with characteristics of normal peer conflict (i.e., occasional social difficulties with a friend or person of equal power which is followed by remorse or steps to solve the problem). Examples and illustrations highlight overlap and distinctions between bullying, harassment, and normal peer conflict for the purpose of showing that bullying is a specific type of aggression that can sometimes also be harassment.

Laws (i.e., rules created by local, state, or federal legislative bodies that are enforced by the judicial system) and policies (i.e., guidelines meant to guide practices created by districts or employers that are enforced by the body that created them) related to bullying vary at the state level, but there is no federal law that prohibits bullying (though there are federal laws that prohibit harassment). The chapter surveys federal legislation of bullying and harassment (including civil rights laws such as Title IV and Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Titles II and III of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act) and provides a brief discussion of state-level legislation and policies. Detailed descriptions of case law outcomes related to traditional

bullying and cyberbullying are provided, including a discussion of bullies' (and their parents') criminal and civil liability for injuries caused by bullying (e.g., a victim driven to suicide). Case law descriptions focus on bullying, not harassment.

The psychological literature has clearly documented the short- and long-term negative effects of traditional bullying and cyberbullying on mental and physical health, as well as impairments in academic and social competencies (e.g., Hawker & Boulton, 2000; Nakamoto & Schwartz, 2010). Short-term and long-term psychological distress appears to be the most salient outcome that victims experience (Cole, Maxwell, Dukewich, & Yosick, 2010; Davidson & Demaray, 2007; Rudolph, Troop-Gordon, Hessel, & Schmidt, 2011). A meta-analysis of psychological outcomes determined that higher levels of depression and anxiety, and lower levels of self-esteem, were associated with peer victimization (Hawker & Boulton, 2000). In addition, victimization has been linked to lower academic outcomes, including lower grade point average (Wei & Williams, 2004), poorer performance on standardized tests (Kochenderfer & Ladd, 1996a; Thijs & Verkuyten, 2008; Woods & Wolke, 2004), poorer attitude toward school (Kochenderfer & Ladd, 1996b), and attendance problems (Kochenderfer & Ladd, 1996a, b). The chapter will describe psychological characteristics of all youth directly or indirectly involved in traditional bullying and cyberbullying.

As demonstrated in this chapter, law and the psychology of bullying interact in a bidirectional manner. For example, due to the potentially extreme negative psychological outcomes associated with involvement in bullying and harassment, as either bully or victim, there are laws and policies to address such behavior and to help youth feel protected from these harmful behaviors. However, the developmental psychology literature suggests that some youth might not be able to understand or control their aggressive behavior due to developmental limitations associated with typical or atypical cognitive, social, and emotional development. For example, a 3-year-old displaying physical aggression is fairly typical, and thus would *not* be considered "bullying," but the same act by a high school student might be "bullying" if it is repeated, intentional, and performed by a person with greater social, physical, or intellectual power. While these well-documented psychological outcomes illustrate the need for laws to thwart bullying behavior, laws might not apply or might have difficulty governing the behavior of some youth involved in bullying. The chapter discusses the benefits and effectiveness of bullying laws in particular.

We argue in the chapter that to have the greatest effect, federal and state legislations should not just create anti-bullying laws, but should also create laws and funding mechanisms that help schools implement school-wide programming to address the social and emotional needs of students. There is limited evidence of the effectiveness of anti-bullying laws (Nikolaou, 2017; Sabia & Bass, 2017), but much more evidence about the widespread benefits of social and emotional programs which indirectly reduce bullying (Durlak, Weissberg, Dymnicki, Taylor, & Schellinger, 2011; Frey, Lingo, & Nelson, 2011). The combination of laws to

prevent bullying, along with laws to assist schools to engage in prevention of social and emotional issues broadly, might be the key to greatly reducing bullying and victimization.

Before beginning, we would like to caution readers that we are not attorneys. We are researchers with an interest in bullying and how bullying laws affect schools. This chapter should not be the sole source of legal advice and we recommend consulting with an attorney for any questions you might have, as an attorney will know the intricacies of the laws in your state.

Definitions of Key Terms

Traditional bullying behavior among youth has been defined by the Centers for Disease Control (CDC) as aggressive, unwanted behavior performed by one youth or group of youths and directed toward a targeted peer. It involves a real or perceived imbalance of power; is repeated or has a high probability of being repeated; and results in social, psychological, physical, or educational harm (Gladden, Vivolo-Kantor, Hamburger, & Lumpkin, 2014). This definition was intended to apply to bullying among peers and not abuse committed by adults toward children or youth, intimate or dating relationship violence (see chapter by Mauer & Reppucci, this volume), or family violence. There are multiple components to the definition of bullying that can be further defined.

The CDC further explains key aspects of their definition. *Youth* are defined as school-aged children who are between the ages of 5 and 18 (Gladden et al., 2014). *Unwanted* was utilized to distinguish bullying behavior from teasing; during bullying, the youth who is targeted wants the perpetrator to stop the aggressive behaviors. *Aggressive behavior* is intentionally threatening or actually harmful behaviors toward another person. Examples of aggressive behavior include spreading damaging rumors, pushing, kicking, or hitting, or threatening others (Gladden et al., 2014). *Is repeated or has a high probability of being repeated* was included to account for students who change their behavior after an incident occurs. For example, if a student is bullied once in a particular hallway, he might choose not to use that hallway anymore, so he is no longer bullied, but there might be a high likelihood of that person being bullied again if they entered that hallway. Therefore, although a key aspect of the bullying definition is “repeated,” only a high likelihood of repetition is required. *A power imbalance* means that the perpetrator uses an observable or perceived characteristic (situational or personal) to exercise control over the victim (Gladden et al., 2014). The phrase “power imbalance” does not suggest that certain children should be labeled powerful or powerless, but this phrase was intended to capture differences in power within relationships. *Harm* refers to the negative experiences that can occur during or after the aggressive behavior. Social harm includes damage to relationships or social reputation. Psychological harm includes feeling depressed, anxious, or distressed. Physical harm includes bruises, cuts, or other physical pain. Educational harm

includes dropping out, poor academic engagement and performance, and absences from school (Gladden et al., 2014). This definition provides a basic understanding of bullying in general, but there are many types of bullying, as discussed next.

Types of Bullying

There are three broad types of behaviors that can be considered bullying: Traditional bullying, cyberbullying, and harassment. Each type is discussed next.

Traditional Bullying

To understand bullying, there must first be a discussion of the modes and types of behaviors that can be considered bullying. Bullying can occur in two modes: indirect or direct. Indirect aggressive behaviors occur when a perpetrator targets another person, though the person might not be present. An example of indirect bullying is rumor spreading either by mouth or electronically (Gladden et al., 2014). Direct aggressive behaviors are those that happen when the victim is present (e.g., face-to-face interactions that include pushing or direct harmful communication). In addition to these two modes of bullying, there are also different types.

Types of bullying include relational bullying, physical bullying, verbal bullying, or damage of property. Relational bullying involves aggressive behaviors intended to harm a person's relationships and reputation. Examples of direct relational bullying are isolating and ignoring the targets. Examples of indirect relational bullying are spreading rumors and posting derogatory comments either electronically or in a physical space (Gladden et al., 2014). Physical bullying occurs when a perpetrator uses physical force against a victim. Examples of direct physical bullying include thrashing, beating, pushing, tripping, and spitting on a victim. Verbal bullying occurs when the perpetrator uses oral or written language to cause harm to a person (Gladden et al., 2014). Examples of verbal bullying include name-calling, taunting, threatening, and making inappropriate sexual comments. Lastly, bullying can include damage to property such as stealing or altering a victim's property. Bullying behavior can also occur through technology; this is considered cyberbullying.

Cyberbullying

Cyberbullying, also referred to as electronic bullying or online bullying, is using technology (e.g., social websites, e-mail, chat rooms, texting, sexting, blogs, and instant message) as a method of harassment (Notar, Padgett, & Roden, 2013).

Cyberbullying is different than traditional bullying in that perpetrators can be anonymous (Barlett & Gentile, 2012). Anonymity is an important, distinctive factor of cyberbullying. Not only is it common for people who are victims of cyberbullying not to know their perpetrators, but also typically the perpetrator does not see the reactions of the victim. Another defining feature of cyberbullying is that it is not inhibited by time or space (Mehari, Farrell, & Le, 2014). Youth used to be able to escape school-based bullying at home, but with easy access to technology, it is harder for victims of bullying to escape and easier for perpetrators to bully.

Types of cyberbullying include flaming, harassment, denigration, masquerading, outing and trickery, social exclusion, and cyberstalking (Bauman, 2010). Flaming involves hostile, angry, or harmful personal attacks. Flaming happens on online discussion boards, chat rooms, instant message, and e-mail. These messages are often written in capital letters to express anger and the messages often disregard facts and reason (Bauman, 2010). Cyberbullying can also be harassment, which is the same as traditional harassment, but it is carried out through the Internet or by mobile phone. Denigration occurs when someone uses technology to disrespect or demean another person (Bauman, 2010). Negative comments are either sent directly to the person or displayed in a public setting on the Internet (via websites, Facebook pages). Masquerading occurs when the perpetrator pretends to be another person and sends messages that appear to come from that person to cause harm to the victim. For example, the perpetrator could hack into a person's account and send messages to a victim or a perpetrator could hack into a victim's account and send messages to others pretending to be the victim (Bauman, 2010).

Outing and trickery occur together and occur when a perpetrator persuades a victim to give him confidential information and then shares that information with others (e.g., through text messaging, e-mailing, or posting on a website). Gaining a victim's information is done maliciously and with the intent of making it public. It is common for the perpetrator to tell the victim he will not share it with anyone. Social exclusion occurs when a cyberbully makes it clear to the person that he is not welcomed into the group and are not wanted (Bauman, 2010). For example, this occurs when a person is defriended or excluded from conversation on Facebook. Cyberstalking is repeatedly harassing, annoying, or threatening someone using electronic means.

Harassment

Harassment is unwelcomed conduct (e.g., verbal abuse, graphic or written statements, threats, physical assault, or anything that might be physically threatening, harmful, or humiliating) which is directed toward a person of a protected class (Donato, 2014). These behaviors can occur online or in person. Protected classes include race, color, national origin, religion, sex, or disability. Examples of race and national origin harassment include taunts and insults, jokes, stereotyped comments, racial slurs, cartoons or pictures, and threatening words and acts related to the

target's race. Religious harassment includes behavior such as offensive remarks about someone's religion or being excluded due to religious beliefs. Sexual harassment examples include requesting sexual favors and making unwanted sexual advances; spreading rumors or comments about someone's attractiveness, body or sexual activity; and touching or making sounds, gestures, or comments that are sexually suggestive. Sexual assault and sex-based discrimination can occur between sexes or within the same sex. Sexual harassment is based on sex but not necessarily of a sexual nature (i.e., sex stereotyping). Disability harassment examples include belittling a student for using accommodations, blocking access to accommodations, and calling names. Disability harassment also might occur when a student is denied a Free and Appropriate Public Education under the Individuals with Disabilities Education Act (Donato, 2014). Therefore, harassment includes behavior that is threatening or harmful based on one of the six protected classes. Typically, people tend to think of the roles bully and victim or the perpetrator and target of the bullying behavior, but there are other roles to consider when investigating bullying.

Bullying Roles and Psychological Outcomes

Bullying is the most prevalent form of violence in schools (Bauman & Del Rio, 2006) and is linked to many negative outcomes for children and adolescents (Gradinger, Strohmeier, & Spiel, 2009; Hymel & Swearer, 2015; Kowalski & Limber, 2013). Bullying is social in nature and can be studied as a relationship between people taking different roles in bullying situations (Salmivalli, Lagerspetz, Bjorkqvist, Ostreman, & Kaukianien, 1996).

Five main bullying participant roles are widely accepted in the literature: bully, victim, assistant, defender, and outsider. Historically, research has focused on two main roles: the bully (who perpetrates the aggression) and the victim (who is the recipient of the bullying). Current research has been extended to study bullying as a group process, which includes other roles such as the assistant who helps the bully; the defender who stands up for the victim; and the outsider who withdraws from bullying situations (Pouwels, Lansu, & Cillessen, 2016; Salmivalli, 2010; Salmivalli et al., 1996). These roles are not mutually exclusive, meaning that a person can participate in more than one role depending on the situation, for example, a bully-victim (Pouwels et al., 2016).

Both traditional and cyberbullying negatively influence students' social, emotional, behavioral, and academic functioning, despite which role a student is participating in (Kowalski & Limber, 2013). There is a suspected bidirectional relationship between negative psychological outcomes and involvement in bullying situations (Hymel & Swearer, 2015). For example, a student might experience a negative outcome (e.g., depressive symptoms) due to being a victim of bullying; however, a student might also become a victim of bullying due to the presence of specific psychological difficulties.

Bully and Assistant

Historically, research on bullies has focused on their increased risk for externalizing problems (Haynie et al., 2001); however, more recently research has suggested that bullies experience negative outcomes in other areas, including social functioning and internalizing problems. Youth who bully tend to lack appropriate social skills (Gini, Albiero, Benelli, & Altoè, 2007), which might cause problems in their social relationships. Being a bully often leads to social withdrawal (Bender & Lösel, 2011). Further, people who bully are likely to display antisocial outcomes and behaviors (Bender & Lösel, 2011), which can increase unhealthy peer relationships. These unhealthy peer relationships can serve as negative socialization experiences that foster psychopathology (Rodkin, Espelage, & Hanish, 2015).

Engaging in bullying has been associated with fewer depression symptoms compared to other participant roles (Haynie et al., 2001). Similarly, some studies show that bullies report less depression and social anxiety than uninvolved peers (Juvonen et al., 2003). However, Baldry (2004) found that bullies report high levels of anxiety and depression. Although the findings are mixed in regard to the association between bullying behavior and internalizing problems, it is still an important potential outcome to consider for this group of students.

Much research on bullies has focused on their characterization of externalizing behaviors or antisocial tendencies, such as aggressiveness, lack of empathy, and positive attitudes toward violence (Veenstra et al., 2005). Being a perpetrator of bullying has been associated with outcomes such as increased substance use (i.e., alcohol; Kelly et al. 2015; Wolke, Copeland, Angold, & Costello, 2013). In addition, bullies display behavioral conduct and hyperactivity problems (Kelly et al. 2015), which are likely associated with their increased engagement in illegal behavior and official felony charges (Wolke et al., 2013).

In addition to perpetrating the bullying, a person might be an assistant, which is considered a pro-bullying role. Assistants do not instigate the bullying, but rather join in when someone else does, or directly help the bully by holding a target while the bully punches the person (Salmivalli et al., 1996). Limited research suggests that assistants have similar negative outcomes as those who bully (Salmivalli, 2010), most likely because people might move in and out of the bullying and assisting roles depending on the context of the situation. In summary, bullies and assistants experience a range of social, emotional, and behavioral problems.

Victim

Victims experience negative outcomes in various areas, including internalizing problems, social functioning, externalizing problems, and academic success (Hawker & Boulton, 2000; Wolke et al., 2013). Students who are victimized tend to have poor relationships with peers, which can increase the likelihood that they are

victimized or rejected more frequently (Wolke et al., 2013). Accounting for family hardships (i.e., family stability, family socioeconomic status) and psychiatric problems (i.e., depression, anxiety) in childhood, being a victim continued to strongly predict diminished social relationships in adulthood (Wolke et al., 2013).

Students who experience greater frequencies of bullying also experience greater levels of internalizing problems (i.e., symptoms of anxiety, depression, and low self-esteem; Hawker & Boulton, 2000; Kelly et al., 2015; Ledwell & King, 2015). Specifically, students who are bullied are more likely to report increased feelings of anxiety and depression and low self-esteem (Kowalski & Limber, 2013; Marini, Dane, Bosacki, & Cura, 2006; Menesini, Modena, & Tani, 2009). These internalizing problems often manifest as psychosomatic problems (e.g., stomach problems, fatigue, headaches), which can negatively affect a student's overall functioning (Kowalski & Limber, 2013). Cyberbullying has also been linked to depressive symptoms and suicidal ideation (Bonanno & Hymel, 2013).

Victims display externalizing problems as well (Kelly et al. 2015; Reijntjes et al., 2011; Veenstra et al., 2005; Wolke et al., 2013). A meta-analytic review revealed that externalizing problems were significantly associated with peer victimization. Further, externalizing problems function as both antecedents and consequences of peer victimization (Reijntjes et al., 2011).

Bully-Victim

Bullying participant roles are not mutually exclusive, meaning that people can participate in more than one role, for example, a bully-victim. Being involved as both a perpetrator and victim compounds the negative effects of bullying, which results in these people having an increased risk of various negative social, emotional, behavioral, and academic outcomes such as impaired relationships, internalizing problems (i.e., symptoms related to anxiety and depression), engagement in risky behaviors (e.g., substance use), and lower academic achievement as evidenced by standardized test scores and GPA (e.g., Copeland, Wolke, Angold, & Costello, 2013; Wolke et al., 2013). In general, boys are more likely than girls to be classified as bully-victims (Juvonen et al., 2003; Veenstra et al., 2005).

Bully-victims lack skill in understanding social cues and are often unpopular with peers (Arseneault, Bowes, & Shakoor, 2010). Bully-victims have the greatest impairment across multiple areas of functioning in adulthood in comparison to being independently a bully or a victim (Wolke et al., 2013). Students in this role experience significantly higher levels of depressive and anxiety symptoms, as well as an increased risk of suicidality compared to other youth who are not bully-victims (Copeland et al., 2013; van Noorden, Haselager, Cillessen, & Bukowski, 2015; Wolke et al., 2013). Bully-victims experience similar levels of depression symptoms as pure victims. Specifically, students in this role report higher levels of depressive symptoms compared to uninvolved students (Marini et al., 2006; Menesini et al., 2009). Further, bully-victims report significantly higher

social anxiety (Marini et al., 2006) and significantly lower levels of self-esteem (O'Moore & Kirkham, 2001) than peers who participated in only one role (i.e., bully or victim). Kelly et al. (2015) found that bully-victims display high levels of conduct disorder and hyperactivity symptoms, which is consistent with previous research. Being a bully-victim also increases the likelihood that a person will use tobacco and cannabis (Kelly et al., 2015).

Bystanders

The literature has primarily focused on bullying perpetration and victimization experiences and outcomes related to these roles; however, understanding how involvement as a bystander (i.e., defender or outsider) overlaps with these traditional roles is critical to determine whether involvement in bullying as a bystander contributes to negative outcomes for youth. Bystander research has largely focused on defenders, or students who attempt to stop bullying and comfort the victim (Pöyhönen & Salmivalli, 2008), rather than outsiders, or students who are considered passive bystanders due to ignoring or withdrawing after witnessing bullying, denying bullying is occurring, or remaining silent even when witnessing bullying (Pozzoli & Gini, 2012). The next two sections will describe outcomes for youth who are defenders and outsiders.

Defenders. Defending is a prosocial act exhibited by empathetic children (Caravita, Di Blasio, & Salmivalli, 2009; Gini et al., 2007; Pöyhönen, Juvonen, & Salmivalli, 2010). In events of bullying, defenders are the people who stand up for the victim and provide them with support (Pöyhönen & Salmivalli, 2008). Research on defending behavior has largely been focused on positive outcomes and the mediating effect it has on other students involved in events of bullying. For example, defending behavior has been associated with reducing internalizing symptoms for victims (Wu, Luu, & Luh, 2016) and helping perpetrators improve their social–emotional outcomes through learning empathy (Winslade et al., 2015). Although defending is associated with many positive traits, defenders likely experience negative outcomes through their involvement in events of bullying.

In the literature, researchers have found that defenders have high social status and more affiliations with prosocial peers (Nickerson & Mele-Taylor, 2014; Salmivalli & Voeten, 2004). They also have higher social skills (Jenkins, Demaray, Fredrick, & Summers, 2016) and are more socially accepted by their peers (Pöyhönen et al., 2010; Salmivalli et al., 1996). Furthermore, defenders appear to have high social self-efficacy (Barchia & Bussey, 2011), although this might be limited to the students who confront bullies. Although defenders are considered to be liked by peers and have many strengths, they are rated as less popular and not having as many desirable characteristics compared to students who bully (Pouwels et al., 2016), which might limit the amount of social support they receive after defending.

Defenders are exposed to peer aggression, stress related to potential retaliation from the bully, and emotional problems associated with peer pressure (i.e., pressure to intervene or not to intervene; Pöyhönen, Juvonen, & Salmivalli, 2012; Rivers, Poteat, Noret, & Ashurst, 2009; Salmivalli, 2010), which might increase their susceptibility to internalizing problems. Specifically, defenders report increased emotional anxiety, social isolation, anxiety, depression, hostility, and paranoia (Hutchinson, 2012; Nishina & Juvonen, 2005; Rivers et al., 2009). Defending is related to depression and anxiety (Demaray, Summers, Jenkins, & Becker, 2014) as well as sadness and fear (Lambe, Hudson, Craig, & Pepler, 2017).

Outsiders. Outsiders in bullying situations remain uninvolved or otherwise stay outside the bullying situation. Research is limited on the role of outsiders and potential outcomes associated with participation in this role; however, bystanders likely experience negative effects of bullying by merely witnessing it, although youth respond differently to witnessing bullying. Some youth exhibit stronger emotional and physiological reactions than others (Barhight, Hubbard, & Hyde, 2013; Caravita, Colombo, Stefanelli, & Zigliani, 2016).

Youth who witness an event of bullying experienced negative emotional responses such as feeling sick, feeling sad, or experiencing difficulty learning (Werth, Nickerson, Aloe, & Swearer, 2015). These negative effects were more likely if youth had previously been victimized. Furthermore, physical forms of bullying were more likely to cause maladjustment in bystanders than relational of verbal forms of bullying (Werth et al., 2015). Although there is limited research on outsiders, they might be negatively affected simply by being in an environment where bullying is occurring and potentially being witnessed. As this section has illustrated, all people involved with bullying can experience social, emotional, behavioral, or academic problems. These problems do not only occur at the individual level, as they can also occur at a systems level—that is, for schools.

Bullying and Outcomes for Schools

Though bullying has been linked to numerous negative psychological outcomes for youth involved in bullying in various capacities, the presence of bullying in schools can influence the global functioning of an entire school as well. Students' sense of security in the school environment is positively related to their academic performance (Ojukwu, 2017). Moreover, victimization is positively related to decreased classroom engagement through the indirect effect of feelings of safety (Côté-Lussier & Fitzpatrick, 2016). In a study by Kitsantas et al. (2004) with over 3000 participants, middle school students associated the safety of their school with the safety of their neighborhood. Perceived safety of the neighborhood also had indirect effects on school climate, suggesting that even members of the community outside of the school should be involved in methods of improving school climate. Interestingly, cyberbullying and cybervictimization are associated very little with lowered feelings of school safety among middle school students, implying that these unique

modes of bullying should be considered and studied independently from more traditional or typical modes of bullying (Varjas, Henrich, & Meyers, 2009).

Schools with low levels of bullying and teasing had dropout rates 28% *below* the state average, while schools with higher levels of bullying/teasing had dropout rates as much as 29% *above* the state average (American Educational Research Association, 2013). Less bullying and teasing in schools were associated with higher graduation rates 4 years later among a sample of 276 high school students followed from 9th to 12th grade in the United States (Cornell, Gregory, Huang, & Fan, 2013). Overall, the studies mentioned in this section highlight the connection between perceptions of safety at school and positive outcomes for students.

At Risk Youth in Schools

Some youth might be at greater risk for experiencing bullying victimization. For example, having a disability; being Lesbian, Gay, Bisexual, or Transgender (LGBT); being of a minority race, ethnicity, or national origin; and living in poverty might put a youth at risk for victimization. This is also called bias-based bullying meaning it is based on prejudice and discrimination (Baams, Talmage, & Russell, 2017). Bias-based bullying is pervasive and detrimental to youth who experience it. According to Baams et al. (2017), approximately 40% of youth report experiencing bias-based bullying. This section will describe outcomes related to bullying for youth who are at an increased risk for bullying, youth with disabilities, lesbian, gay, bisexual, and transgender youth, racial and ethnic minority youth, and low socioeconomic status youth.

Youth with Disabilities

Students with disabilities are at far higher risk of becoming victims of bullying and of suffering academic, social, and emotional consequences compared to students without disabilities (Blake, Zhou, Kwok, & Benz, 2016; Rose, 2011; Swearer, Wang, Maag, Siebecker, & Frerichs, 2012; Van Cleave & Davis, 2006). Approximately 24.5% of elementary, 34.1% of middle school, and 26.6% of high school students with disabilities report experiencing bullying (Blake, Lund, Zhou, Kwok, & Benz, 2012), and students with disabilities report more than double the rates of bullying than students without disabilities (Rose, Espelage, Aragon, & Elliott, 2011). Even preschoolers with disabilities are at risk for bullying, with up to one-third experiencing peer victimization in school (Son, Parish, & Peterson, 2012).

Research has documented that students with the following disabilities are bullied more than nondisabled peers: emotional disturbance or behavior disorders (Blake et al., 2012), intellectual disabilities (Christensen, Fraynt, Neece, & Baker, 2012; Didden et al., 2009; Reiter & Lapidot-Lefler, 2007), speech and language disorders

(Conti-Ramsden & Botting, 2004; McCormack, Harrison, McLeon, & McAllister, 2011), autism spectrum disorders (Blake et al., 2012; Cappadocia, Weiss, & Pepler, 2012; van Roekel, Scholte, & Didden, 2010), motor difficulties such as cerebral palsy (Lindsay & McPherson, 2012; Lingam et al., 2012), attention-deficit/hyperactivity disorder (Unnever & Cornell, 2003), and learning disabilities (Baumeister, Storch, & Geffken, 2008; Norwich & Kelly, 2004; Twyman et al., 2010).

Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth

Sexual minority youth (e.g., lesbian, gay, bisexual, or transgender (LGBT)) are at higher risk of being victimized (Toomey & Russell, 2016; Williams, Connolly, Pepler, & Craig, 2005) than are youth who conform to typical gender roles. Youth who are not LGBT might also experience homophobic victimization if they are perceived as sexual minorities by their peers. LGBT youth might experience similar forms of bullying as other students, such as physical, verbal, or exclusion; however, they also might experience the use of homophobic epithets directed at them (e.g., “fag”, “you’re so gay”). As much as 85% of LBGT youth experience verbal bullying and 40% experience physical bullying (Kosciw, Greytak, & Diaz, 2009). Experiencing homophobic victimization in middle school is related to anxiety, depression, personal distress, and lowered sense of school belonging for males and higher withdrawal in girls (Poteat & Espelage, 2007).

Racial and Ethnic Minority Youth

The research findings on racial and ethnic bullying are mixed. A meta-analysis of ethnic differences in victimization concluded there were very few and small effects of ethnicity on victimization levels (Vitoroulis & Vaillancourt, 2015). However, some research has found ethnic differences in involvement in bullying behaviors. For example, African American adolescents were involved in *more* bullying (physical, verbal, or cyber) and *less* victimization (verbal or relational) than Caucasian and Hispanic youth (Wang, Iannotti, & Nansel, 2009). Another study found that African American adolescents experienced more bullying victimization than White, Latino, and Asian students (Rhee, Lee, & Jung, 2017). Youth who are immigrants also experience more bullying victimization than their nonimmigrant peers, and this victimization is associated with personal, social–emotional, and health problems (Maynard, Vaughn, Salas-Wright, & Vaughn, 2016).

Given the importance of the sociocultural context of bullying, it is important to consider the context and setting of bullying. Graham (2006) has conducted research investigating the ethnic context of peer victimization. As discussed by Graham (2006), students who are ethnic minorities within a given school are at higher risk for

experiencing victimization, the distinction being that victimization is not directly associated with any given ethnicity, but is instead associated with which ethnicities are minorities and majorities in a given school. For example, in more diverse schools, students report less victimization and vulnerability. Graham (2006) hypothesized this is because there is less imbalance in power among the racial groups.

Socioeconomic Status

An additional demographic variable that has been associated with bullying behaviors is Socioeconomic Status (SES). Research is beginning to investigate the association between lower SES and bullying perpetration; however, the results are mixed. Some research has found that youth from lower SES engage in more bullying behaviors (Jansen, Veenstra, Ormel, Verhulst, & Reijneveld, 2011), and other research has found no differences in bullying behaviors among SES groups (Shetgiri, Lin, & Flores, 2012). A meta-analysis that included 28 studies focused on bullying behavior and SES found that bullies, victims, and bully-victims were more likely to come from low socioeconomic households (Tippett & Wolke, 2014). As illustrated in this section, special groups of youth are at an increased risk for being involved in bullying. These special groups are often legally protected from bullying, which will be discussed in greater detail next.

Federal Legislation

Due to the growing concern about negative outcomes associated with bullying, there has been national attention on bullying among youth in schools. However, there are no federal laws that directly address bullying. As of March 2015, all 50 states have anti-bullying legislation (Sabia & Bass, 2017). There are federal laws, however, that protect people from harassment based on protected class. Thus, if bullying behaviors are also considered discriminatory harassment, people are protected under federal civil rights laws.

The relevant civil rights laws enforced by the Department of Education and the Department of Justice include three laws that protect youth with disabilities: (a) the Individuals with Disabilities Education Act (IDEA); (b) Section 504 of the Rehabilitation Act of 1973; and (c) Titles II and III of the Americans with Disabilities Act. Two additional laws are (d) Title IV and Title VI of the Civil Rights Act of 1964 which both prohibit discrimination on the basis of race, color, or national origin and (e) Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex.

The U.S. Department of Education has provided guidance on policies regarding bullying via their “Dear Colleague” letters. Together, the U.S. Department of

Education and Office for Civil Rights released a Dear Colleague letter on October 26, 2010 focused on discriminatory harassment of youth based on race, color, national origin, sex, or disability. In 2013, another Dear Colleague letter was released that focused on bullying of youth with disabilities in schools. The letter highlighted that bullying of youth with disabilities might result in students not obtaining a Free Appropriate Public Education (FAPE) and can impede their ability to achieve their academic potential (United States Department of Education, 2013).

In sum, if harassment or bullying is directed toward youth from a protected class that child is protected under the abovementioned civil rights laws (Cornell & Limber, 2015). Schools must abide by these laws if (a) the harassment is based on a student's race, color, national origin, sex, or disability; (b) it is severe and persistent; and (c) it creates a negative school environment.

It is important to note that not all bullying behavior is considered discriminatory harassment. For example, if the conduct is not directed toward someone in a protected class it is not discriminatory harassment and does not fall under the category of a federal civil rights violation. Additionally, not all discriminatory harassment is bullying, for example, if the behavior does not meet the definition of bullying (e.g., it is not repetitive or there is not a power differential between the perpetrator and the victim). However, if any behavior, including bullying behaviors, can also be considered discriminatory harassment, schools must address this issue. The Dear Colleague letter from the Department of Education (mentioned above) recommends that once a school knows student-on-student harassment has occurred, the school must appropriately and immediately investigate the situation with the goal of eliminating the harassment and any potential school environment that is supporting harassment.

As noted earlier, LGBT youths are at risk for increased rates of victimization (Toomey & Russell, 2016; Williams et al., 2005). It should be noted that although Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex, it does not include sexual orientation. However, the law protects all students, including LGBT youth, from sex-based harassment. Harassment based on sex and/or sexual orientation is not mutually exclusive. If students are harassed based on their actual or perceived sexual orientation, they might also be subjected to forms of sex discrimination recognized under Title IX.

In August of 2010, the federal government held its first summit on bullying in Washington, DC. The content of the summit focused on research, programs to address bullying, and policy. After the summit, in December of 2010, the Department of Education released a Technical Assistance memo to aid states and school districts with developing anti-bullying laws and policies. The Department of Education identified 11 components in the current state laws they reviewed on bullying. These 11 components are in Table 1.

Table 1 Department of Education Technical Assistance Memo: 11 components found in State Laws on Bullying

1.	**Purpose Statement**
	Outlines the range of detrimental effects bullying has on students, including impacts on student learning, school safety, student engagement, and the school environment
	Declares that any form, type, or level of bullying is unacceptable, and that every incident needs to be taken seriously by school administrators, school staff (including teachers), students, and students' families
2.	**Statement of Scope**
	Covers conduct that occurs on the school campus, at school-sponsored activities or events (regardless of the location), on school-provided transportation, or through school-owned technology or that otherwise creates a significant disruption to the school environment
3.	**Specification of Prohibited Conduct**
	Provides a specific definition of bullying that includes a clear definition of cyberbullying. The definition of bullying includes a nonexclusive list of specific behaviors that constitute bullying, and specifies that bullying includes intentional efforts to harm one or more individuals, may be direct or indirect, and is not limited to behaviors that cause physical harm, and may be verbal (including oral and written language) or nonverbal. The definition of bullying can be easily understood and interpreted by school boards, policy-makers, school administrators, school staff, students, students' families, and the community
	Is consistent with other federal, state, and local laws. For guidance on school districts' obligations to address bullying and harassment under federal civil rights laws, see the Dear Colleague letter: harassment and bullying issued by the Department's Office for Civil Rights on October 26, 2010, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf)
	Prohibited Conduct also includes:
	Retaliation for asserting or alleging an act of bullying
	Perpetuating bullying or harassing conduct by spreading hurtful or demeaning material even if the material was created by another person (e.g., forwarding offensive e-mails or text messages)
4.	**Enumeration of Specific Characteristics**
	Explains that bullying may include, but is not limited to, acts based on actual or perceived characteristics of students who have historically been targets of bullying, and provides examples of such characteristics
	Makes clear that bullying does not have to be based on any particular characteristic
5.	**Development and Implementation of LEA Policies**
	Directs every LEA to develop and implement a policy prohibiting bullying, through a collaborative process with all interested stakeholders, including school administrators, staff, students, students' families, and the community, in order to best address local conditions
6.	**Components of LEA Policies**
	A. Definitions
	Includes a definition of bullying consistent with the definitions specified in state law
	B. Reporting Bullying
	Includes a procedure for students, students' families, staff, and others to report incidents of bullying, including a process to submit such information anonymously and

(continued)

Table 1 (continued)

	with protection from retaliation. The procedure identifies and provides contact information for the appropriate school personnel responsible for receiving the report and investigating the incident
	Requires that school personnel report, in a timely and responsive manner, incidents of bullying they witness or are aware of to a designated official
	C. Investigating and Responding to Bullying
	Includes a procedure for promptly investigating and responding to any report of an incident of bullying, including immediate intervention strategies for protecting the victim from additional bullying or retaliation, and includes notification to parents of the victim, or reported victim, of bullying and the parents of the alleged perpetrator, and, if appropriate, notification to law enforcement officials
	D. Written Records
	Includes a procedure for maintaining written records of all incidents of bullying and their resolution
	E. Sanctions
	Includes a detailed description of a graduated range of consequences and sanctions for bullying
	F. Referrals
	Includes a procedure for referring the victim, perpetrator, and others to counseling and mental and other health services, as appropriate
7.	**Review of Local Policies**
	Includes a provision for the state to review local policies on a regular basis to ensure the goals of the state statute are met
8.	**Communication Plan**
	Includes a plan for notifying students, students' families, and staff of policies related to bullying, including the consequences for engaging in bullying
9.	**Training and Preventive Education**
	Includes a provision for school districts to provide training for all school staff, including, but not limited to, teachers, aides, support staff, and school bus drivers, on preventing, identifying, and responding to bullying
	Encourages school districts to implement age-appropriate school- and community-wide bullying prevention programs
10.	**Transparency and Monitoring**
	Includes a provision for LEAs to report annually to the state on the number of reported bullying incidents, and any responsive actions taken
	Includes a provision for LEAs to make data regarding bullying incidence publicly available in aggregate with appropriate privacy protections to ensure students are protected
11.	**Statement of Rights to Other Legal Recourse**
	Includes a statement that the policy does not preclude victims from seeking other legal remedies

Note From the December 16th, 2010 Key Policy Letters from the Education Secretary and Deputy Secretary. https://www2.ed.gov/print/policy/gen/guid/secletter/101215.html

State Legislation

In response to the two Dear Colleague letters in 2010 from the Department of Education Office of Civil Rights states without existing anti-bullying laws created legislation in line with the Department of Education's recommendations. Some states began adopting anti-bullying laws as early as 2001, but it was not until 2015 that all 50 U.S. states had adopted anti-bullying legislation. There are substantial differences in state anti-bullying laws (Hatzenbuehler et al., 2015; Sabia & Bass, 2017); however, there is a common theme across all state anti-bullying legislation. Most legislation is geared toward requiring school districts to create a system of identifying, measuring, reporting, and addressing bullying in local schools. A detailed description of all state bullying laws is beyond the scope of the current chapter, but there are many resources listed at the end of the chapter that can be utilized for those interested in the components of the laws in individual states.

According to the U.S. Department of Education's Analysis of State Bullying Laws and Policies, there has been movement at the state level to enact legislation against bullying. Their analysis of state bullying laws and policies was published in 2011 and can be found at https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf. In addition to requiring schools to prohibit bullying, some states have moved toward stricter requirements such as mandating school employees to report bullying or requiring school districts to have policies in place enumerating when law enforcement agencies need to be contacted by the schools to determine if a behavior has possible criminal sanctions. For example, in Missouri, schools can impose sanctions on school staff who do not follow law enforcement reporting requirements (*Mo. Rev. Stat.* §167.117.1). North Carolina passed a law to criminalize cyberbullying in which cyberbullying is now considered a misdemeanor for youth under the age of 18 (*N.C. Gen. Stat.* §14-458.1). Other states, such as Idaho, Kentucky, and Virginia, have made similar moves to build bullying-related sanctions into the state's criminal code. In Massachusetts, criminal charges were filed against five students for involvement in a case of persistent bullying of another girl which ended in death by suicide (Sullivan, 2011). The five students were charged with assault, criminal harassment, and civil rights violations and were sentenced to probation and community service. Some view this ruling as an important legal precedent because students faced criminal charges for bullying.

Though not all states criminalize bullying, four towns in Wisconsin and a town in New York recently received media attention after passing laws that allowed parents to be charged if their child is guilty of bullying, which could result in a fine or jail time (Dupuy, 2017). It is unclear if these types of local laws will become more common in the future or will be adopted at the state level; however, there are already laws allowing parents to be charged for their child's illegal behavior. Parental responsibility laws are used to hold parents accountable for their children's delinquent behavior (Brank, Green, & Hochevar, 2011), and all 50 states have laws that allow for parents to be responsible for the illegal acts of their children (Brank, Kucera, & Hays, 2005).

In summary, many states have not criminalized bullying behavior. State-level legislation regarding bullying focuses on creating requirements for schools to monitor and respond to bullying. At the local level, only five towns have criminalized bullying behavior. That is, police and/or other government officials could arrest and charge someone with bullying. Though there are currently few pathways for arresting someone for bullying to occur (unless behavior is also discriminatory harassment), a student victim's parents can file civil cases for bullying behavior, as discussed next.

Civil Law

In the United States, there are two bodies of law, criminal law and civil law. Both have a general goal of preventing and punishing serious behavior, but work in different ways. Criminal law deals with behavior that harms the public, society, or the state (e.g., murder, drunk driving, tax fraud, and assault), and charges are brought by the federal or state government. On the other hand, civil cases deal with behavior that harms a person and are filed by a private party, such as an individual person or group. The federal, state, and local laws described in the above sections are criminal laws, that is, crimes that can be charged by the government. Most legal action involving bullying has come in the form of civil law. In these cases, people (usually parents of minors) have filed a lawsuit against another party (usually a school district or parents of another student). Below are details of several civil cases filed by parents or a group of parents against school districts. Some cases described below are not cases focused on bullying, but are key civil cases involving student behavior and school district responses. Interestingly, some civil cases are filed by parents because the school did not sufficiently address bullying (i.e., parents claiming schools are not doing enough to intervene in bullying), but other civil cases are filed because the school over-addressed bullying (i.e., schools delivering punishment that is too extensive to the point that it violates students' right to free speech).

Davis v. Monroe County Board of Education (1999)

The mother of LaShonda Davis pursued a case all the way to the U.S. Supreme Court against the Monroe County (Georgia) School Board and school officials. She claimed that the district violated Title IX of the Education Amendments of 1972 when they did not respond to a fifth-grade student's (named G.F.) sexual actions toward her daughter (*Davis v. Monroe County,* 1999). Title IX of the Education Amendments of 1972 prohibits excluding a child from participating in, benefiting from, or subjecting to discrimination in education programming based on sex if the institution receives federal financial assistance (20 U.S.C. § 1681(a)). The school district did not take action against G.F although LaShonda and her parents told

numerous teachers and the principal multiple times and the sexual advances occurred for months (*Davis v. Monroe County,* 1999). LaShonda's mother claimed these sexual advances created a school environment that was intimidating, hostile, offensive, and abusive for LaShonda. The sexual conduct negatively affected her concentration on studies, grades, and overall well-being (*Davis v. Monroe County,* 1999).

The court ruled that the school district was responsible for taking action because the school was aware of the extreme and repeated harassment, which affected the victim's access to education (*Davis v. Monroe County*, 1999). Although the *Davis v. Monroe County Board of Education* ruling focused on the school's responsibility of responding to sexual harassment, this ruling established that schools have a responsibility for intervening in peer aggression and harassment between students. Therefore, schools are liable for peer harassment if they know about the harassment and do not stop it.

Tinker v. Des Moines Independent School District (1969)

Though the *Tinker v. Des Moines* case did not deal directly with bullying, the ruling about students' right to free speech is related to bullying behavior that could occur in schools. In 1969, a group of students were suspended from school because they wore black armbands to protest the government's involvement in the Vietnam War (*Tinker v. Des Moines*, 1969). When the school principals found out about the protest, they created a policy that would require the students to either remove the armbands or be suspended. The students were aware of this new policy but attended school with their black armbands. The students were sent home and were asked not to come back until they removed the armbands. The students did not return until the protest was over (about 2 weeks later). The students' parents filed a complaint and requested that the students not be disciplined for the armbands (*Tinker v. Des Moines*, 1969). The parents declared that their children's First Amendment rights were violated when they were suspended for wearing armbands to protest the war. The students were peacefully protesting against the war and were not causing a disruption. The school district believed they had the right to regulate students' speech and expression in order to maintain a nondisruptive school environment (Tinker, 1969).

The Supreme Court ruled that the First Amendment applies to public schools and students do not lose their constitutional right to free speech once they enter school (Tinker, 1969). Therefore, the Supreme Court ruled in favor of the parents. *Tinker v. Des Moines Independent School District* is an important case because this ruling indicated when schools can (or cannot) intervene with a student's First Amendment rights. School districts can only censor speech when expression would be disruptive to the school environment or violate the rights of other students (Tinker, 1969). In relation to bullying, schools must balance a potential bully's right to free speech against protecting a potential victim of bullying.

T.K. and S.K. v. New York City Department of Education (2011)

L.K. was a student with a disability who attended a public school in New York City (*T.K. and S.K. v. New York City,* 2011). She received her educational instruction in a "Collaborative Team Teaching" class for students with and without special education. L.K. was being severely bullied which resulted in her avoiding school. The parents of L.K. filed a complaint against the school principal and other staff because they did not do anything about the bullying incidents (*T.K. and S.K. v. New York City,* 2011). At L.K.'s Individualized Education Plan (IEP) meetings, her parents asked to discuss the bullying issue and the principal refused to permit the team to discuss the bullying situation. Additionally, the school did not do anything about L.K.'s reports of bullying. L.K.'s parents placed her in a private school because the educational environment in the public school was hostile and inappropriate due to the bullying (*T.K. and S.K. v. New York City*, 2011). Because L.K. had an IEP and was eligible for services because of a classified disability, she was entitled to a Free and Appropriate Public Education (FAPE). L.K.'s teachers testified that other classmates bullied her. Additionally, her academic and nonacademic developments were stalled during the bullying experiences. Her parents sued the New York City Department of Education for tuition for the private school because their daughter was denied a FAPE. The court ruled in favor of L.K.'s parents that the New York City Department of Education denied their daughter a FAPE. This case was one of the first cases to demonstrate schools have a responsibility to intervene during bullying instances (*T.K. and S.K. v. New York City,* 2011).

Kara Kowalski v. Berkeley County Schools, Manny P. Arvon, II, Ronald Stephens, Becky J. Harden, and Rick Deuell (2011)

Kowalski was disciplined by school officials for creating a myspace.com web page titled "S.A.S.H." at her home using her home computer (*Kara Kowalski v. Berkeley County Schools*, 2011). Kowalski claimed S.A.S.H. stood for Students Against Sluts' Herpes, although another classmate stated it stood for Students Against Shay's Herpes. This account was used to ridicule a fellow student peer, Shay. Other peers were invited to the web page and responded using the school computers after hours. Other peers started to post negative photos and comments about Shay. Shay's parents filed a complaint about the web page and provided the school with a copy of the web page (*Kara Kowalski v. Berkeley County Schools*, 2011). Shay did not attend school that day because she felt uncomfortable being with her classmates who had posted about her on the web page. The school district believed the web page was a violation of school policy and Kowalski was suspended from school for

10 days, although this was reduced to 5 days at the request of Kowalski's father (*Kara Kowalski v. Berkeley County Schools*, 2011). Kowalski was also on 90-day "social suspension" which prohibited her from appearing at school events, such as crowning the "Queen of Charm" and cheerleading. Kowalski argued that the discipline violated the First and Fourteenth Amendments (i.e., her free speech and due processes rights; *T.K. and S.K. v. New York City Department of Education,* 2011). Additionally, she argued the School District did not have the authority to regulate the speech because the activity did not occur during school.

The district court ruled in favor of the school district because the web page was intended to allow her and others "to indulge in disruptive and hateful conduct" which led to disruption at school (*Kara Kowalski v. Berkeley County Schools*, 2011). This is one of the first cases to address cyberbullying among peers that occurred off school grounds. School districts have the authority to intervene when bullying occurs online at home using personal technology, given that the cyberbullying can lead to disruptions at school.

J.S. v. Bethlehem Area School District (2002)

At home with his own computer, J.S. created a website titled, "Teacher Sux" and it included many negative web pages about his algebra teacher and principal (*J.S. v. Bethlehem,* 2002). The school board concluded that the website harassed school staff members, and was threatening and disrespectful. Therefore, they decided to expel J.S. His parents appealed the expulsion, arguing the Bethlehem Area School District violated his rights under the First, Fifth, Sixth, and Fourteen Amendments and in addition, the school district violated his civil rights under 42 U.S.C. 1985(3) 4(3), as well as under the Pennsylvania Constitution, and abused the legal process (*J.S. v. Bethlehem,* 2002). Later, the claims based on the Fifth and Sixth Amendment rights were dropped, but the other claims remained (*J.S. v. Bethlehem,* 2002).

On September 25, 2002, the Supreme Court ruled in support of the school district's claim that the website was disruptive to the school environment (*J.S. v. Bethlehem,* 2002). The Supreme Court did not see the website as a serious threat. Again, this is another case in which school districts have the right to discipline students who create websites and use technology off campus to hurt people in the school. If these types of behaviors change and disrupt the school environment, school districts have the authority to intervene.

T.V. v. Smith-Green Community School Corporation (2011)

Two female students (T.V. and M.K.) attended a sleepover during the summer and took pictures of themselves kissing and licking a lollipop that was shaped like a phallus (*T.V. v. Smith-Green,* 2011). Both girls posted the pictures on their

MySpace accounts. These pictures were printed out and given to the principal before the new school year started. The principal suspended both students from all extracurricular actives for the upcoming school year (*T.V. v. Smith-Green*, 2011). This was later reduced to a quarter of the year after they attended counseling and apologized to the Athletic Board, which was a group of all males. The girls believed their First Amendment freedom of expression rights were violated (*T.V. v. Smith-Green*, 2011). Additionally, they objected to the discipline because the activity took place off school grounds and did not affect the school. The school district's Student Handbook stated that the principal has the authority to exclude a student athlete from participation if the student's conduct is disrespectful or creates a disruption (*T.V. v. Smith-Green,* 2011). The United States District Court ruled in favor of T.V. and M.K. The school district could not punish out-of-school expression on grounds of disrespect to the school (*T.V. v. Smith-Green*, 2011). Though this case does not involve bullying, it is related to the extent to which schools can discipline students for actions that take place off school grounds. In this case, the school district did not have the authority to punish students for actions that occurred outside of school even if their actions might be perceived as disrespecting the school district.

D.J.M. v. Hannibal Public School District #60 (2011)

A male high school student, D.J.M., sent instant messages from his home computer to a peer about obtaining a gun and shooting other students in the school (*D.J.M.*, 2011). This peer notified an adult and together they notified the school principal. The school district notified police and D.J.M. was put in juvenile detention. Additionally, the school district suspended him for 10 days and then later for the rest of the year (*D.J.M.*, 2011). The superintendent believed that the instant message conversation had disrupted school and there was a true threat to his statements. D.J.M.'s parents brought the school district to court under 42 U.S.C. 1983 stating the school violated the student's First Amendment rights (*D.J.M.*, 2011).

Missouri federal court ruled in favor of the school district, stating the posts did represent a true threat, and therefore his statements were not protected under the First Amendment (*D.J.M.*, 2011). Additionally, on August 1, 2011 the US Eighth Circuit court agreed with the Missouri federal court's decision (*D.J.M.*, 2011). Even though this case did not involve bullying, it demonstrates that student actions off of school grounds are punishable if they significantly threaten students in the school and disrupt the school environment. This case is important given that school districts are responsible for addressing comments made on the Internet and off school grounds if a student is threatening specific people at school (*D.J.M.*, 2011).

Implications of Civil Law Cases

As demonstrated in these cases and others, courts have generally supported reasonable discipline of students if substantial disruption to the learning environment can be documented, even if the event occurred online and off campus. Though courts have a history of supporting free speech, it is not always protected, particularly if there is substantial disruption to learning or the educational process, if students have used school-owned technology, or if students have threatened other students or infringed upon their civil rights. If the alleged victim is a member or a perceived member of a protected group, the bullying may also be harassment or discrimination which is protected by federal civil rights laws. School personnel have the sensitive task of protecting students from reported bullying without over-punishing to the point that they are violating the right to free speech. It is important to keep in mind that decisions from U.S. Supreme Court cases are binding nationwide. Decisions from state-level cases are not binding nationwide, but they set a precedent that might influence other states or the U.S. Supreme Court.

Interaction of Law and Psychology

As described earlier in the chapter, there are potentially extreme negative outcomes associated with bullying, and there has been substantial media coverage of extreme cases of bullying that are linked to dropping out of school, suicide attempts and completions, and mild-to-severe mental health difficulties. All of this attention on bullying has led to anti-bullying laws in all 50 U.S. states, as well as in other countries around the world. With the push to criminalize bullying, a major question that remains unanswered is whether anti-bullying laws actually reduce bullying behavior and if laws against bullying are the best way to reduce and prevent bullying. For the point of this chapter, several other questions will be explored leading up to the ultimate question of whether laws reduce bullying: (1) Do anti-bullying laws make society feel safer?, (2) Do anti-bullying laws work?, and (3) What are the limitations of existing laws based on psychological literature?

Do Anti-bullying Laws Make Society Feel Safer?

In theory, there are several mechanisms by which anti-bullying laws could reduce violence in schools, which were outlined by Sabia and Bass (2017). First, enacting bullying laws might increase the chance that a bully would be punished for his behavior. For example, schools can increase awareness of bullying by training staff and students to recognize bullying, while simultaneously creating ways for bullying to be reported anonymously. A simple strategy used in bullying prevention

programs is to increase supervision in locations within the school that are known "hot spots" for bullying (Olweus, 1993). Increasing supervision might thwart potential bullying acts because bullies might want to avoid being caught. Also, by allowing anonymous reporting, students who are being victimized or students who witness victimization are more likely to report bullying incidents without fear of retaliation (Petrosino, Guckenburg, DeVoe, & Hanson, 2010). If schools create policies against bullying that stipulate how a student can be punished for his or her behavior, bullies or potential bullies might decide that the "cost" (i.e., punishment) is not worth the "benefit" (i.e., the perceived reward of bullying others). This would also require the bullies to be capable of rational choice, which may not be very realistic given their developmental stage and other personality traits.

A second way that anti-bullying laws could reduce violence is by increasing the severity of punishments (Sabia & Bass, 2017). As described above, there have been many civil cases filed by parents against schools and school administrators for punishments that were too harsh and reportedly violated the student's right to free speech. On the other end of the continuum, schools have been held liable for not intervening in bullying. Though clearly over-punishment or lack of acknowledgement is not acceptable practice, the middle ground between these extremes is often difficult for schools to navigate. If states allowed (or forced) schools to create a graduated system of punishments for bullying behavior, they might feel more comfortable addressing bullying and other violence in schools. Bullies might be discouraged from perpetrating if they know a school takes bullying seriously and has approved increasing punishments for violating anti-bullying policies.

Third, some state anti-bullying laws require districts not only to have anti-bullying policies and track bullying, but also require districts to educate faculty, staff, and students about the negative effects of bullying (Sabia & Bass, 2017). Many bullying prevention programs use a multifaceted approach in which bullying is defined, examples of what is considered bullying are provided, and the deleterious social, emotional, and academic effects are described. Though it might not prevent all bullying, students who believe that they have inadvertently engaged in bullying before might be more aware of their actions and potential influence on peers. Additionally, faculty and staff are provided with a more uniform description of bullying, rather than leaving the definition of bullying open to interpretation by each person.

Fourth, if required to publicly report bullying prevalence, schools might choose to allocate resources toward the implementation of higher quality bullying prevention programs. The benefit is that schools more efficiently allocate resources; however, many states do not provide additional funds to schools to implement bullying prevention programs, so resources could be shifted away from other important initiatives in a district to fund the bullying prevention program.

Do Anti-bullying Laws Work?

Two recent studies have examined the effectiveness of anti-bullying laws. Hatzenbuehler and colleagues (2015) examined the effectiveness of anti-bullying legislation in 25 U.S. states. For each of the states, Hatzenbuehler et al. examined the degree to which each state bullying law included the four broad categories of anti-bullying legislation requirements (i.e., purpose and definition, district policy development and review, school district policy requirements, and additional components such as how policies are communicated to stakeholders). They found considerable differences in the comprehensiveness of the state components, but after controlling for state-level variables, states that had at least one of the legislative components had 24% reduced odds of student-reported traditional bullying and 20% reduced odds of student-reported cyberbullying compared to states without any of the four legislative components. Additionally, three components were particularly related to decreased odds of bullying and cyberbullying: statement of scope, description of prohibited behaviors, and a requirement for school districts to develop and implement anti-bullying policies at individual schools. Hatzenbuehler et al. speculated that these three components are keys in anti-bullying policies because they increase the relevancy and specificity of school bullying policies, which allow administrators to address and punish bullying behavior.

More recently, Sabia and Bass (2017) evaluated the components of anti-bullying laws in all 50 U.S. states and the District of Columbia. Notably, there are major differences in the comprehensiveness of these laws, ranging from nonbinding recommendations to requirements for school personnel to report bullying or be penalized. Sabia and Bass examined student reports of bullying and perceptions of school safety before and after the implementation of anti-bullying policies and the comprehensiveness of these policies. Comprehensiveness was gauged by comparing the number of components in each state's anti-bullying legislation to the recommendations published by the U.S. Department of Education (i.e., the list of 11 components in the Dear Colleague letter described above in the *Federal Legislation* section). Overall, enforcing "typical" anti-bullying policies was associated with small but statistically nonsignificant differences in students' perceptions of school safety. However, once Sabia and Bass categorized anti-bullying laws into strong, moderate, and weak anti-bullying laws, they began to see differences. They found that states with strong anti-bullying laws (i.e., those that had more components) were associated with a 7–13% decrease in school violence, 8–12% decrease in bullying, and 9–11% reduction in violent crime arrests of minors. Taken together, the "average" anti-bullying law does not seem to be related to drastic reductions in school bullying; however, states with strong, specific, and comprehensive guidelines for school districts appear to have less bullying.

What Are the Limitations of Existing Laws Based on Psychological Literature?

Although attempts have been made by legislators to create anti-bullying laws, examining these laws through the lens of what researchers know about bullying from the psychological literature reveals some limitations and challenges. First, a difficulty plaguing both the psychological literature on bullying as well as people working on bullying policy and legislation is that bullying is difficult to define, partially because it overlaps with less serious behavior (such as normal peer conflict) and more serious behavior (such as harassment and other violent acts). As described at the beginning of the chapter, bullying typically has a three-pronged definition: repeated, intentional, and involving a power differential between bully and victim. However, the subcomponents are not defined. From a policy and legislative viewpoint, defining these subcomponents is an important next step. How is "repeated" defined? Is it simply two or more times or do the acts have to be done repeatedly within a certain time frame? How is "intentionality" defined and at what age do youth understand intentionality? Finally, how is "power differential" conceptualized and defined in a measurable way? These are unanswered questions that are roadblocks in understanding the psychology of bullying and how the development of laws and policies can reduce bullying.

Second, current laws do not explicitly compare and contrast aggressive behavior and what might be "normal" behavior. Does all aggressive social behavior that does not meet the full definition of bullying fall under the category of peer conflict? Peer conflict is not necessarily a bad thing, and conflict offers opportunities for youth to practice conflict resolution and apply appropriate social skills to navigate complicated social situations. But, the more serious forms of normal peer conflict can easily cause physical or emotional harm to youth. Garrity and colleagues (1997) contrast key differences between normal peer conflict and bullying. Normal peer conflict typically (1) involves peers who are friends or of equal power (vs. peers who are not friends and have a clear difference in social, intellectual, or physical power); (2) happens occasionally (vs. is repeated or predictable); (3) is accidental (vs. intentional or purposeful); (4) is usually not serious (vs. a serious conflict with threat of emotional or physical harm); (5) involves mutual emotional reactions from both parties (vs. a strong emotional reaction by the victim with little reaction from bully); and (6) involves remorse and effort to resolve the issue (vs. lack of remorse and no attempt to solve the problem). Current anti-bullying laws do not distinguish between these different degrees of peer conflict, which can create confusion.

A third limitation of current laws is that there is no consideration of developmentally appropriate behavior. There are developmental changes associated with aggression, which complicate the process of categorizing behaviors as normal peer conflict or bullying. The developmental psychology literature suggests that some degree of aggressive behavior is developmentally appropriate for young children, which would be atypical among older youth (David, Murphy, Naylor, & Stonecipher, 2004; Raikes, Virmani, Thompson, & Hatton, 2013). To illustrate,

toddlers often take toys from their peers, which is rarely viewed as "aggression," partially because young children do not have the language skills to adequately make their wants and needs known. By considering the definition of bullying (repeated, intentional, and including a power differential), it is unlikely that a 3-year-old taking a toy from a classmate would be labeled as "bullying" because it would not fully meet the definitional criteria; however, an adolescent exhibiting a similar behavior, such as grabbing a classmate's backpack or other personal belonging, is more likely to be considered bullying because that is not a developmentally appropriate behavior. Simply said, aggressive social behaviors "look" different as children get older, and the tolerance that adults have for aggression typically diminishes over time as expectations for appropriate social behaviors increase.

Call for School-Wide Preventative Programing

Currently, there is no federal law against bullying, unless the bullying behavior is also discriminatory harassment against a person who is a member of a protected class. All 50 U.S. states have adopted anti-bullying legislation (Sabia & Bass, 2017), but the focus of the legislation is to force school districts to implement anti-bullying plans, not to make bullying a criminal act. There are arguments for the criminalization of bullying. For example, categorizing bullying as a crime could thwart bullying behavior and help students feel safer to attend school. Criminalizing bullying could lead to school administrators feeling empowered to address bullying. As described in the Cival Law section above, many lawsuits have been filed against schools for delivering punishments that were viewed as too restrictive. If administrators felt that they had appropriate training and the corresponding power without the threat of a civil lawsuit, they might feel more comfortable addressing bullying in its early stages before it substantially disrupts the school environment. Confidence among administrators might indirectly increase perceptions of safety among students as well.

There are also arguments against criminalizing bullying, ranging from developmental limitations to legal complications. Moreover, preliminary research suggests that most anti-bullying legislation has limited effectiveness in drastically reducing bullying, except in states with strong, detailed, and comprehensive anti-bullying legislation. Criminalizing bullying might not be a feasible approach because the most extreme bullying behavior (e.g., assault, robbery) is already a punishable crime, there is great difficulty in defining bullying, and there is difficulty in determining when an aggressive behavior is no longer developmentally appropriate.

Because existing legislation has produced underwhelming results, we argue that, in addition to increasing the quality of state legislation and district policies, there should be a simultaneous boost in funding for bullying prevention programs and school-wide social and emotional learning curricula. Most state legislation that requires schools to create and implement bullying prevention policies is unfunded,

which is fraught with problems. For drastic reductions in bullying, drastic changes need to be made in the way in which these initiatives are funded. We recommend the following:

(1) Future work on policy and law related to bullying need to include better definitions of bullying. A common weakness in state anti-bullying legislation is that bullying is not well defined or even not defined at all (U.S. Department of Education's Analysis of State Bullying Laws and Policies, 2011). Even if it is defined with the typical three-pronged definition (repeated, intentional, and including a power differential), each of these prongs are not defined. Comparing and contrasting bullying with related constructs, such as normal peer conflict, harassment, assault, etc., would also help to elucidate what behavior is covered by these laws and policies at the district, state, and federal levels.
(2) Future legislation should focus on funding professional development for key stakeholders. Most school personnel do not have specialized knowledge about bullying. State officials ask schools to create policies without providing training, which could put pressure on a school administrator to write a policy that might not align with best practice and current research. Not only are school personnel asked to make policies, but they also have a fear of civil lawsuits for under- or over-responding to bullying. Delivering comprehensive professional development on bullying for school educators and administrators is the foundation from which other systematic changes will be facilitated.
(3) Additional funding is needed to train school personnel to implement high-quality bullying prevention programs. Assessing, reporting, tracking, teaching, and monitoring are all resource-intensive activities that are very difficult to implement with high fidelity, and to expect schools to engage in these activities without additional funding is ill-advised. The psychology literature about treatment acceptability and treatment integrity suggests that people are more likely to implement programs with high levels of integrity if they feel adequately trained and believe that the program will work to address the intended target behavior (Sanetti & Krachowill, 2009). People also need to be motivated to implement the programs. Expecting school personnel to implement high-quality bullying prevention programs without funding will likely lead to poorly trained educators attempting to address bullying with a program they are not being rewarded for using and with limited knowledge about the program's effectiveness.
(4) All students should receive social–emotional learning instruction and system-wide bullying prevention strategies. There is limited evidence of effectiveness of anti-bullying laws (Nikolaou, 2017; Sabia & Bass, 2017), but much more evidence about the widespread benefits of social and emotional learning programs which indirectly reduce bullying (Durlak et al., 2011; Frey et al., 2011). The educational and psychological literatures show that successful schools not only teach reading, writing, and arithmetic but also how to interact with teachers and other students and how to be respectful of others (Cohen, 2006). It is more effective to embed bullying prevention practices into a

school-wide system of social, emotional, and behavioral support (Good, McIntosh, & Gietz, 2011) The multitier approach would be useful in the prevention of bullying and corresponding negative outcomes. The first tier of support delivered to all students could incorporate social–emotional learning instruction and system-wide bullying prevention strategies. Additional tiers would include targeted or individual levels of supports for students who are at risk for or already involved in bullying perpetration or victimization.

Overall Summary

The psychological literature has clearly documented the short- and long-term negative effects of traditional bullying and cyberbullying on mental and physical health, as well as impairments in academic and social competencies (e.g., Hawker & Boulton, 2000; Nakamoto & Schwartz, 2010). Students also report that if there are high levels of bullying in their school, they feel less safe and less engaged at school, which can affect the overall school climate and academic performance of the entire school (American Educational Research Association, 2013; Côté-Lussier & Fitzpatrick, 2016). There is no federal legislation against bullying, but the federal Department of Education and Department of Health and Human Services have issued letters to schools to remind them that some bullying behavior might actually be discriminatory harassment and prohibited by civil rights laws. The Department of Education also outlined components of anti-bullying policies (see Table 1). All states have anti-bullying legislation, but the majority of this legislation is focused on school districts creating and implementing anti-bullying policies within their districts. There are few instances of bullying actually being considered a punishable crime, but there are civil cases related to school bullying and cyberbullying.

There are some benefits to criminalizing bullying such as making students feel safer and giving school administrators more power and confidence to address bullying in their schools. However, there are many obstacles such as defining and differentiating bullying from normal peer conflict and creating funding mechanisms that allow schools to receive resources to implement high-quality, evidence-based programs and receive professional development about best practices in bullying prevention and intervention. Overall, while bullying laws and policies are important, there needs to be more of a focus on prevention. Current anti-bullying laws at the state level are typically unfunded, meaning that states require schools to monitor, track, and respond to bullying but give schools no additional resources to do so. We argue that future legislation should be funded, which would allow school educators and administrators to receive appropriate professional development regarding best practices in bullying prevention and intervention. Funding would also give educators the ability to purchase curricula that not only address bullying

prevention but also address social and emotional learning on a broader scale for all youth in public schools. We believe that if legislators, policy-makers, researchers, and school personnel all work collaboratively to address bullying as a systemic issue, there would be much less bullying in all grade levels of school.

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The Law and Social Psychology of Racial Disparities in School Discipline

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In the U.S., schools, juvenile justice departments, and the adult carceral system have distinct primary functions: Education and the preparation of informed and productive members of society, rehabilitation, and retribution and incapacitation, respectively. In the 1980s and 1990s, the distinction between the three institutions blurred as the war on drugs, fear of "super predator" youth, and a general social policy shift toward being more "tough on crime" led policy-makers to promote and adopt increasingly punitive policies for children and youth, as well as adults (Civil Rights Project, 2000; Heitzeg, 2009; McNeal, 2016; Nance, 2016a; Redfield & Nance, 2016). By 1997, well over 90% of the schools in the U.S. had "zero-tolerance" policies mandating suspension or expulsion for possession of weapons, alcohol or drugs, or engaging in violence (Curtis, 2014; Nance, 2016a). In addition, in the interest of safety, and frequently with federal encouragement and funding, schools increasingly employed police officers to work in schools (McNeal, 2016; Nance, 2016a). The officers, trained in law enforcement but not in education, developmental psychology, or constructive discipline practices, tend to construe and respond to violations of school rules as crimes rather than actions that are not unusual developmentally for youth in the process of social learning (Nance, 2016a, b). The net result of the policies has been a substantial increase in the use of exclusionary discipline and student contact with the juvenile justice system (Nance, 2016a).

However well-intentioned, the system itself causes many problems. The weight of research results suggests that policies that remove children and youth from school are ineffective at best and counterproductive at worst at achieving the goals of improving school safety and educational outcomes (American Academy of Pediatrics, 2013; American Psychological Association, 2008). Further, many of the children and youth impacted by the increased use of punitive discipline posed no real danger. More true to the "zero tolerance" label than the harms the policies were

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_8

intended to address, the polices have been used to suspend young children who, while playing as a guard in their friends' make-believe kingdom at recess, pretend to shoot classmates with a stick (Schmidt, 2017); bite pieces off of a pastry so that it is shaped like a gun and say "bang" (St. George, 2016); or bring a clear plastic princess-themed bubble gun to school (Izadi, 2016; see also Kim, Losen, & Hewitt, 2010). Finally, the impacts of these changes tend to be concentrated on Black children and youth, contributing to the profound racial disparities in educational achievement and the carceral population (U.S. GAO, Mar. 2018).

By the early 2000s, researchers, advocates, and policy-makers began to describe the patterns of increasing prevalence of and pattern of racial disparities in exclusionary school discipline, contact with the juvenile justice system, and incarceration as the *school-to-prison pipeline* (Skiba et al., 2003; Wald & Losen, 2003). Subsequently, a substantial body of empirical research has examined the basic structural processes that make up the pipeline (Fabelo et al., 2011; Nance, 2016a; Nicholson-Crotty, Birchmeier, & Valentive, 2009), as well as proposed or tested potential solutions for disrupting those processes (Cregor & Hewitt, 2011; Cristle, Jolivette, & Nelson, 2005; Kim et al., 2010; Losen, Keith, Hodson, Martinez, & Belway, 2015a; Nance, 2016b; Redfield & Nance, 2016; Scully, 2015). Nevertheless, the same basic problems persist and the need for practical, effective solutions is as acute as ever.

Good intentions are frequently less important to the development of effective interventions than a solid theoretical understanding of the processes underlying the behavior that needs to be changed. In that regard, psychological science generally, and those working at the intersection of psychology and law in particular, have a history of contributing pragmatic approaches to practical problems based on basic scientific theory (cf. system and estimator variables in the area of eyewitness identification; Wells, 1978). Following that tradition, the goal of this chapter is to facilitate evidence-based legal reform by promoting a coherent program of theory-based research on ways to more effectively reduce racial disparities at the entrance to the school-to-prison pipeline: exclusionary school discipline. To do so, the chapter first provides an overview of the basic descriptive research documenting the scope and magnitude of racial disparities in school discipline. Then it introduces a framework for organizing and relating federal law prohibiting discrimination in school discipline and the primary categories of social–psychological factors that are thought to contribute to those disparities. Following the framework, the chapter reviews the relevant legal doctrine and empirical research regarding contributing causes. Finally, the chapter concludes with a brief discussion of the relationship between and limitations of the legal framework and psychological research, along with suggestions for further investigation.

Racial Disproportionality in School Discipline

The existence, depth, and breadth of substantial racial disparities in exclusionary discipline, particularly between Black students and those of other races and ethnicities, are well established (Girvan, McIntosh, & Smolkowski, 2018; U.S. GAO, Mar. 2018). Research documenting the disparities typically focuses either on differences in ultimate discipline outcomes (e.g., out-of-school suspensions, expulsions) or differences in significant preliminary decisions to initiate the school discipline process (i.e., teachers' decisions to send students to the principal's office).

Discipline Outcomes

To support its enforcement obligations, the U.S. Department of Education Office of Civil Rights (OCR) has collected data from schools regularly since 1968 (Lhamon & Samuels, 2014; U.S. DOE, 2016; U.S. GAO, Mar. 2018). The results are compiled in the publicly available Civil Rights Data Collection (CRDC; U.S. DOE, 2018a). Recent biannual CRDC surveys regarding school discipline outcomes are compulsory and thus very comprehensive: Almost all of the public schools in the U.S. responded for the 2011–12, 2013–14, and 2015–16 school years, respectively (Lhamon, 2016; Lhamon & Samuels, 2014; U.S. DOE, Apr. 2018b). Based on the 2013–14 data, the U.S. General Accountability Office reports that about 16% of the students enrolled in public schools were Black (U.S. GAO, Mar. 2018). Even so, Black students received approximately 35% of all corporal punishment, 32% of all in-school suspensions, 39% of all out-of-school suspensions, 30% of all expulsions, 26% of referrals to law enforcement, and 30% of school-related arrests (U.S. GAO, Mar. 2018; see also U.S. DOE, 2014). These rates are roughly three times those of White students (U.S. GAO, Mar. 2018). Examined from a student perspective, approximately 13% of Black students were suspended at least once during the 2015–16 school year compared to just 3% of White students (U.S. DOE, Apr. 2018b; see also Losen, Hodson, Keith, Morrison, & Belway, 2015b). Students with mental or physical disabilities, both Black and White, are disciplined at about twice the rate as those without disabilities (Losen, 2018; US DOE, 2014; U.S. GAO, Mar. 2018; U.S. DOE, Apr. 2018b).

As shown in Fig. 1, CRDC data going back 40 years suggest that overall disproportionality assessed through risk ratios (i.e., the ratio of the risk of being suspended for one or more days for Black students as compared to White students) has increased since the 1970s, reaching the current historically high levels—three to four times the risk—only in the 2000s and 2010s (Losen et al., 2015a; U.S. DOE, 2016; U.S. DOE, Apr. 2018b; U.S. GAO, Mar. 2018). Further analysis of the CRDC data from 2009–10 for districts in 20 large metropolitan areas shows that,

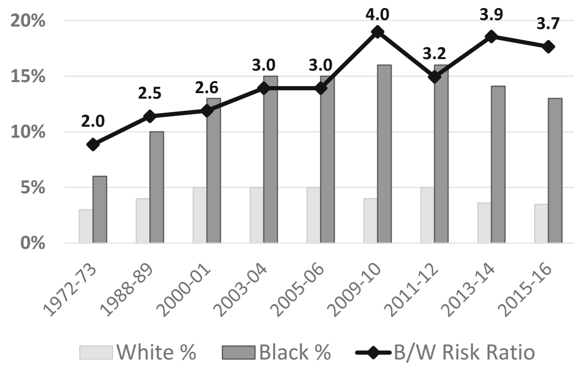

Fig. 1 Historical disparities in White and Black students' out-of-school suspension rates

although there is certainly variation between districts and schools, substantial racial disproportionality in suspensions occurs in every geographic region of the U.S. (Civil Rights Project, 2013a, b; Losen & Martinez, 2013). Figure 2 summarizes a representative selection of 10 of the findings (Civil Rights Project, 2013a, b; see also Smith & Harper, 2015; U.S. DOE, 2012). Schools in each of the cities suspend Black students at more than two-and-a-half times the rate as White students. Schools in Atlanta, Georgia; Houston, Texas; St. Paul, Minnesota; and Chicago, Illinois, each suspend Black students at six or more times the rate as White students (Civil Rights Project, 2013a, b). Unfortunately, disparities of this magnitude are relatively common. Of the 2204 high schools in the CRDC data from the 2009–10 school year with at least 10 Black and 10 White students, approximately 94% suspended Black students at higher rates than White students, with a median of 2.3 times the rate (U.S. DOE, 2012).

States collect additional data related to racial disparities in disciplinary outcomes, some of which are publicly available (Civil Rights Project, 2013a, b). Although reports analyzing these data differ in their particular focus or research questions, like those based on the CRDC survey, they consistently document substantial racial disparities. For example, in a comprehensive longitudinal study,

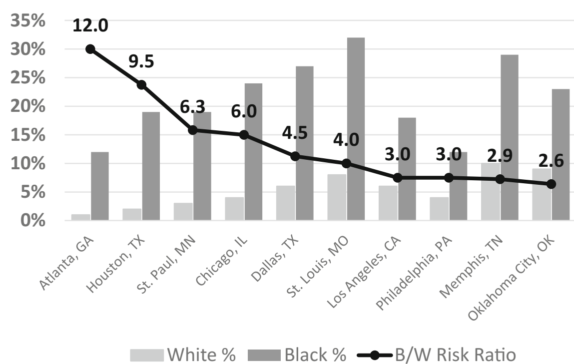

Fig. 2 Disparities in White and Black students' suspension rates in 2009–10 for 10 U.S. cities

Fabelo and colleagues (2011) examined middle-school and high-school discipline records for the three cohorts of youth who were in seventh grade in 2000, 2001, or 2002 in any public school in Texas, a total of 928,940 students. They found that approximately 75% of the Black students experienced at least one disciplinary action of some kind (e.g., in-school suspension, out-of-school suspension, expulsion) in middle or high school compared to 47% of White students. Racial disparities were higher for exclusionary discipline. Approximately 26% of Black students and 10% of White students received an out-of-school suspension for their first discipline violation (Fabelo et al., 2011; see also Anderson & Ritter, 2017; Losen et al., 2015b; Losen & Whitaker, 2017).

Office Discipline Referrals

Classroom teachers and staff generally have the authority to issue an in-school suspension (i.e., detention). Decisions regarding out-of-school suspensions or expulsions are generally made by school-level administrators, with, in serious cases, an additional hearing or review at the district level. Information about the preliminary decisions of teachers and staff to send students to the principal's office for discipline, known as office discipline referrals (ODRs), is not captured in the CRDC survey. Thus, it is not available on the same scale as data on exclusionary discipline. Even so, as with national studies of exclusionary discipline, studies of ODRs in samples of schools consistently reveal racial disparities.

For example, analysis of a sample of discipline records regarding 11,001 students from 19 middle schools in the 1994–95 school year showed that, adjusted for their relative proportion of enrollment, ODRs were more than one-and-a-half times as likely to be of a Black student than a White student (Skiba, Michael, Narado, & Peterson, 2002). Similarly, Skiba and colleagues' (2011) investigation of discipline records for over 120,000 students in 364 elementary and middle schools in the 2005-06 school year showed that 37% of Black students and 21% of White students were referred for discipline, a risk ratio of 1.8. For their part, Girvan, Gion, McIntosh, and Smolkowski (2017) analyzed a national sample of discipline records from the 2011–12 school year of over one million students from 1824 elementary, middle, and high schools. They found that that the median risk of receiving at least one ODR was approximately two times higher for Black students as White students. Finally, Girvan, McIntosh, and Smolkowski (in press) examined the discipline records of over 2000 primary and secondary schools from 47 states in each of the 2012–13, 2013–14, and 2014–15 school years. Median Black–White ODR risk ratios ranged from 1.67 to 1.71 for elementary schools, 1.78 to 1.87 for middle schools, and 1.84 to 1.92 for high schools. Although smaller in absolute magnitude than disparities in discipline outcomes, the standardized effect size of racial disparities in ODRs and exclusionary discipline outcomes are very similar (Girvan et al., in press).

The results of a substantial body of research thus show that, across the U.S., schools tend to send Black students to the office, and suspend or expel them, at

substantially higher rates than White students. In theory, anti-discrimination law has a substantial role to play in facilitating, catalyzing, or requiring the adoption of effective solutions to the disparities. As the persistence of the problem suggests, however, it has not been effective in doing so. This is likely attributable, in part, to the intersection of the current limits on the scope of students' rights to be free from racial discrimination, limits on evidence regarding the specific causes of the disparities, and limits on the availability of effective remedies.

Legal Prohibitions on and Social Psychological Causes of Racial Discipline Disparities

This section introduces an organizing framework for, and provides a review of, the legal doctrine prohibiting race discrimination in school discipline and the social–psychological research examining the causes of those disparities. The framework identifies and relates major distinctions relevant to translating between legal doctrine and social–psychological theory and research. Designing such a framework, as with the underlying interdisciplinary research itself, is an exercise in making interpretations and prioritization decisions between fields with different perspectives and goals (Costanzo, 2004; Faigman, Monahan, & Slobogin, 2014) regarding a system of complex, multifaceted processes (Gregory, Skiba, & Mediratta, 2017; McIntosh, Girvan, Horner, & Smolkowski, 2014; Morrison & Skiba, 2001; Okonofua, Walton, & Eberhardt, 2016b; Skiba et al., 2014). Accordingly, the framework and review are necessarily not exhaustive. Educational research related to racial disproportionality that is not directly related to the major organizing psychological constructs identified here, such as that into the importance of engaging high-quality instruction (Gregory et al., 2016, 2017), is not reviewed in detail. Similarly, the legal review focuses on generally available federal claims and theoretical and empirical research that bears on core social psychological theory. Federal claims that are recognized in only a few jurisdictions (e.g., claims under 42 U.S.C. § 1983 for disparate impact in violation of Title VI regulations, see *Robinson v. Kansas*, 2002; U.S. DOJ, 2017) and claims under particular state laws that protect students from discrimination in school discipline (U.S. DOE, Jan. 2017; *Ross v. Disare*, 1977; *Carr v. Inhabitants of Town of Dighton*, 1918; *Richie v. Bd. of Educ. of Lead Hill Sch. Dist.*, 1996) are not discussed here.

The General Organizing Framework

Figure 3 illustrates the proposed organizing framework of major social–psychological causes of racial disproportionality in school discipline and their general legal implications. Working from the left side of the framework, antecedent factors

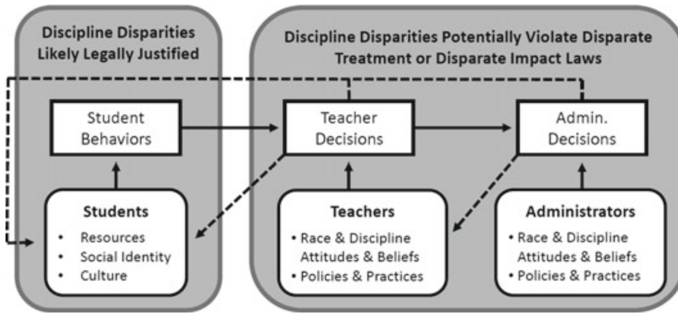

Fig. 3 Framework of theorized social psychological causes of racial disparities in school discipline and their relationship to legal prohibitions on race discrimination

(resources, social identity, and culture) may lead students to tend to behave in ways that are either consistent or inconsistent with behavioral expectations in schools. The student behaviors, in turn, result in decisions by teachers and administrators regarding how to respond, such as managing the behavior in the classroom or sending the student to the office, returning the student to the classroom, or suspending or expelling the student. Teacher and administrator discipline decisions are likely moderated by the discipline policies and practices of the school in combination with factors that impact teachers' and administrators' construal of the incident. These can include the teachers' and administrators' explicit or implicit attitudes and beliefs about race, discipline, and their students. Finally, the framework indicates that the process is iterative in that teachers' and administrators' decisions also become antecedent factors that can impact student behaviors.

In terms of legal significance, the framework divides the potential causes into those that generally would be considered legally justified and those that could result in legal liability under federal anti-discrimination law. The former category encompasses systematic differences in student behaviors and the antecedent factors that could cause them. Whatever the root cause, to the extent that Black students violate behavioral expectations at higher rates than White students, as discussed in more detail below, federal anti-discrimination law not only might not provide any protection against the resulting disparities in discipline outcomes but it likely prohibits schools from taking race conscious steps to address them (*Heyne v. Metropolitan Nashville Public Schools*, 2011; cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 2007; *Ricci v. DeStefano*, 2009). With respect to the latter category, if racial disparities in school discipline are not explained by differences in student behaviors, then from a legal standpoint there is the potential for districts and schools to be liable for them either to the students themselves or to federal regulatory agencies.

Although the social–psychological factors in the framework can have legal implications, the legal distinction between causes that are associated with liability and those that are not is not a social psychological or educational one. Inequity in educational outcomes, whatever the cause, is a problem to be understood and

addressed. Accordingly, when exploring segments of models explaining racial disparities in ultimate outcomes of interest (e.g., exclusionary discipline, high school graduation, college enrollment), psychologists could treat causal factors (e.g., disruptive behaviors in the classroom) as a criterion rather than a predictor. In such models, student behaviors are thought to mediate the relationship between antecedent factors and the final outcome. As such, unlike law, evidence that racial disparities are caused by differences in student behaviors does not imply that nothing should be done (Girvan et al., in press). Rather, it simply highlights the need to look to the antecedent factors as potential targets for interventions designed to improve equity in the ultimate educational outcomes. Similarly, to the extent that disproportionality is not a function of differences in student behaviors, the relevant insight is not that schools might be liable for violating students' rights but that other factors, such as discipline policies and practices or teacher and administrator attitudes and beliefs, could be more effective intervention targets. The scope of legal rights might, however, determine whether and the extent to which the legal system (e.g., litigation) is available as a potentially powerful institutional lever to help encourage or require these interventions.

Federal Laws Prohibiting Racial Discrimination in School Discipline

There are five primary sources of federal law prohibiting racial discrimination by school officials. These fall into two major doctrinal groups. The first, the "disparate treatment" group, creates a right for students themselves to bring a claim against schools and districts for racial discrimination that is intentional (e.g., suspending a student for questioning a teacher's lesson because the student is Black) but not policies or practices that merely happen to have a disproportionate impact on Black students. The second, the "disparate impact" group, consists of regulations that allow federal agencies to bring enforcement actions against districts and schools for policies or practices that have a racially discriminatory effect, irrespective of the decision-maker's intent. Students are not able to bring their own actions to enforce these provisions.

Disparate treatment. Students who have been discriminated against in school discipline because of their race may bring a claim against schools under the *due process* and *equal protection* clauses of the 14th Amendment to the U.S. Constitution and *Title VI* of the Civil Rights Act of 1964. If successful, they have the potential to obtain an injunction against the school or district and monetary damages in compensation for the injury, including emotional distress, caused by the intentional discrimination (U.S. DOJ, 2001, 2017).

Due process. The due process clause of the 14th Amendment prohibits states, and those acting on their behalf, from depriving people of life, liberty, or property without adequate procedural protections to help ensure fair decisions (U.S. CONST.

amend. XIV, § 1; *Goss v. Lopez*, 1975; cf. *Bolling v. Sharpe*, 1954; *Brown v. Bd. of Educ. of Topeka, Kan.*, 1955). In the abstract, students do not have a constitutional right to an education (*Gross v. Lopez*, 1975). Thus, students only have a property interest protected by the due process clause if their state's government has decided to provide a free education to them. Once a state has done so, however, schools in the state must provide procedural protections to guard against arbitrarily or mistakenly depriving them of that education by removing the student from the classroom as a disciplinary measure (*Gross v. Lopez*, 1975).

In general, due process protections require schools to provide some type of notice and an opportunity to be heard. The particular nature and extent of the protections required for use of exclusionary discipline, however, are flexible and depend upon the practical considerations inherent to the circumstances involved (*Gross v. Lopez*, 1975; *Mathews v. Eldridge*, 1976; Young, 2016, §§ 16:10 & 16:12). For example, when deciding to remove a student from school for a relatively short period of time (up to 10 days) schools must provide only minimal procedural protections such as an informal discussion, or "give-and-take," between the school administrator and student about the incident (*Gross v. Lopez*, 1975; *Donovan v. Ritchie*, 1995; *Martin v. Shawano-Gresham School Dist.*, 2002). More formality is required for severe forms of exclusionary discipline, such as lengthy out-of-school suspensions or expulsion. Even then, however, students' rights are limited (*Gonzales v. McEuen*, 1977; *Lopez v. Bay Shore Union Free Sch. Dist.*, 2009; *Newsome v. Batavia Local School Dist.*, 1988; but see *Brown v. Plainfield Cmty. Consol. Dist. 202*, 2007) and do not include the level of protections required for those accused of, or being investigated for, committing a crime (*Newsome v. Batavia Local Sch. Dist.*, 1988; *N.J. v. T.L.O.*, 1985; *Osteen v. Henley*, 1993).

More specific to the racially disproportionate discipline, the due process clause also protects students from being removed from school arbitrarily (*Gross v. Lopez*, 1975) or by a biased decision-maker (*Heyne v. Metropolitan Nashville Public Schools*, 2011). This does not mean that the decision-maker must be a neutral third party (*Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2*, 1987; *Newsome v. Batavia Local Sch. Dist.*, 1988). However, specific evidence of bias, including race-conscious decision-making, can support a due process claim. In *Heyne v. Metropolitan Nashville Public Schools* (2011), for example, a White student was suspended for injuring a Black student with his car but the Black student, who subsequently threatened the White student's life, received no punishment. In challenging the constitutionality of the discipline, the White student alleged that the principal, who was concerned that statistics showed that Black students were disproportionately disciplined in the school, had instructed his staff "to be more lenient in enforcing the Code of Conduct against African-American students" (p. 560). This allegation was specific enough to support a claim for violation of a White student's due process right to an impartial decision-maker (*Heyne v. Metropolitan Nashville Public Schools*, 2011; see also *Doe v. Miami Univ.*, 2017).

There are at least two other limits on due process protections applied to school discipline that could impact their ability to help effectively address processes in the school-to-prison pipeline. First, the protections do not necessarily apply to

discipline measures that allow students to continue their opportunity to learn. This includes in-school suspensions during which the student is required to do school work (*Laney v. Farley*, 2007; *Wise v. Pea Ridge School Dist.*, 1988) and traditional forms of corporal punishment (*Ingraham v. Wright*, 1977). Second, if the procedural protections are provided, students who violate their schools' behavioral expectations may constitutionally be suspended or expelled from school (*Mitchell v. Board of Trustees*, 1980; *C.Y. v. Lakeview Pub. Schs.*, 2014; *Remer v. Burlington Area Sch. Dist.*, 2002; *Hannemann v. Southern Door County School Dist.*, 2011; *Brown v. Plainfield Community Consol. Dist. 202*, 2007; *E.K. v. Stamford Bd. of Educ.*, 2008; *R.M.B. v. Bedford Cnty. (Va.) Sch. Bd.*, 2016). This is true even if that punishment might be regarded as extreme, such as when a student was expelled for the remainder of the year and the entire subsequent year for brushing a teacher's buttocks with the back of his hand in passing (*Brown v. Plainfield Cmty. Consol. Dist. 202*, 2007), expelled and transferred to another school for making offensive remarks about a school's basketball coaches and athletic director on Twitter (*Rosario v. Clark County Sch. Dist.*, 2013), or other severe punishments of the kind often cited in discussions and critiques of the school-to-prison pipeline (*Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 2000; Hallinan & McRoberts, 1999; Brady, 2002).

Equal protection clause and Title VI. The equal protection clause of the 14th Amendment creates a right to not be treated differently by states, or the officials acting on their behalf, based upon one's race, ethnicity, or membership in several other protected categories (U.S. CONST. amend. XIV, § 1; cf. *Bolling v. Sharpe*, 1954; *Brown v. Bd. of Educ.*, 1954; *Brown v. Bd. of Educ. of Topeka, Kan.*, 1955). In the context of racially disproportionate discipline, a claim under the equal protection clause is an assertion that the school treated the student more negatively than other similarly situated students and that the difference in treatment was based on the student's race (*Kajoshaj v. N.Y. City Dep't of Educ.*, 2013; *Roy v. Fulton County Sch. Dist.*, 2008; *Fennell v. Marion Indep. Sch. Dist.*, 2015; *J.F. v. Carmel Cent. Sch. Dist.*, 2016). Similarly, Title VI of the Civil Rights Act of 1964 (42 USC § 2000d) prohibits entities that receive federal financial assistance, including schools, from excluding people from participation, denying them benefits, or subjecting them to other forms of discrimination based upon their race or membership in other protected categories (*Alexander v. Sandoval*, 2001; U.S. DOJ, 2017). Actions under Title VI may be based upon the funded entity's affirmative policies and practices, the direct actions of its employees (*Bryant v. Indep. Sch. Dist. No. 1-38*, 2003), or indirect deprivations through deliberate indifference to, for example, ongoing harassment (*Zeno v. Pine Plains Cent. Sch. Dist.*, 2012; *Doe v. Galster*, 2014; *Fennell v. Marion Indep. Sch. Dist.*, 2015).

The equal protection clause and Title VI protect the same rights and thus, when interpreting either one courts often look to case law regarding the other for guidance (*Elston v. Talladega Cty. Bd. of Educ.*, 1993; U.S. DOJ, 2001, 2017), as well as to decisions interpreting Title VII of the Civil Rights Act, which prohibits employment discrimination (U.S. DOJ, 2001; see also *Baldwin v. Univ. of Texas Med. Branch at Galveston*, 1996; *Brantley v. Independent Sch. Dist. No. 625*, *St. Paul*

Public Schools, 1996; *JF v. Carmel Cent. Sch. Dist.*, 2016; *Rashdan v. Geissberger*, 2014; but see *Godby v. Montgomery County Bd. of Educ.*, 1998). These provisions create private rights of action for purposeful discrimination (*Washington v. Davis*, 1976; see also *Alexander v. Sandoval*, 2001; *Elston v. Talladega Cty. Bd. of Educ.*, 1993). Thus, it is not enough for a student to show that a policy, practice, or pattern of decision-making produced a discriminatory effect (*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 1977; see also Belton, 2004; *Blunt v. Lower Merion Sch. Dist.*, 2014) or even that the effect was foreseeable by or actually known to the state officials involved (*Pers. Adm'r of Mass. v. Feeney*, 1979; see also *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 2011). The critical issue in a claim under the equal protection clause or Title VI is whether the state officials enacted the policies, undertook the practices, or otherwise made the decisions in order to produce the discriminatory effect—that is, that it was done "because of" not "in spite of" the discriminatory result (*Pers. Adm'r of Mass. v. Feeney*, 1979, p. 279; see also *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 2011). Where there is no single, unified reason or motivation for an action, as is often the case when multiple decision-makers adopt a policy, the plaintiff must show that racial discrimination was at least "a motivating factor in the decision" (*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 1977, p. 265–266).

In practice, equal protection and Title VI claims tend to fall into a few basic patterns (*Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 2011; *JF v. Carmel Cent. Sch. Dist.*, 2016). The first is a challenge to a policy that is racially discriminatory on its face. Such policies violate the equal protection clause and Title VI unless the district or school can articulate why the race-based policy was necessary for and narrowly tailored to advancing a compelling government interest (*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 2007; see also *Fisher v. Univ. of Tex.*, 2016; *Regents of Univ. of Cal. v. Bakke*, 1978; *Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003). Overtly race-based discipline policies are essentially unheard of in recent history. In the educational context more broadly, however, there are recent equal protection cases challenging race-based affirmative action policies designed to produce *more* diverse student bodies (*Parents Involved in Cmty. Sch.*, 2007). Districts and schools may use student race in this way only to further a compelling government interest, such as remedying racial segregation resulting from past purposefully discriminatory laws (*Freeman v. Pitts*, 1992) but not de facto segregation resulting from housing patterns (*Parents Involved in Cmty. Sch.*, 2007).

The second, and far more common, fact pattern is one in which school officials are alleged to have administered an ostensibly racially neutral discipline policy in a way that was purposefully discriminatory by, for example, selective enforcement of the policy (*Edwards v. Ctr. Moriches Union Free Sch. Dist.*, 2012; *Vassallo v. Lando*, 2008; cf. *United States v. Armstrong*, 1996; *Yick Wo v. Hopkins*, 1886). To succeed on the claim, students must prove that the adverse disciplinary decision was made because of their race. Evidence that the racial discrimination was purposeful can be either direct or circumstantial (*Blunt v. Lower Merion Sch. Dist.*, 2014). *Heyne v. Metropolitan Nashville Public Schools* (2011), discussed above, provides an example of direct evidence. There, the plaintiff alleged that the

principal specifically encouraged teachers to be more lenient when disciplining Black students. In addition to supporting a due process claim, the court found that the statement, together with the different discipline outcomes for students of different races who were involved in the same altercation, was sufficient to support an equal protection claim by the White student. By comparison, in *Stewart v. New Castle School District* (2011a, b) the plaintiff, a Black student who was expelled for selling drugs to a student who overdosed, was not able to point to such a "smoking gun" statement. Instead, the plaintiff alleged that the school officials did not investigate a White student—although the evidence against her was just as strong as the evidence against the plaintiff—and conducted the investigation in such a way as to make sure the plaintiff would be accused. The court found that these allegations, coupled with the fact that the White student was not investigated, supported a discrimination claim by the plaintiff (see also *Roy ex rel. Roy v. Fulton Cty. Sch. Dist.*, 2007; *Biswas v. City of N.Y.*, 2013).

As a practical matter, students' abilities to obtain relief under the equal protection clause and Title VI are thus frequently limited by the absence of either direct evidence of purposeful-intent or circumstantial evidence in the form of suitably comparable students from another racial group who were treated differently. People who make purposefully discriminatory decisions based on race may tend to offer post hoc, race neutral, pretextual justifications rather than declare in writing or to a witness that they are doing so. Under these circumstances, if there are no suitably comparable students such that a school can, during litigation, explain the differences in discipline outcomes for two students from different racial groups by pointing to differences in the students' behaviors or disciplinary records, then the students will have no protections under either the equal protection clause or Title VI (*Edwards v. Center Moriches Union Free School Dist.*, 2012; *J.F. v. Carmel Central School District*, 2016; *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 2000, aff'd sub nom. *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 2001; *Gazarov ex rel. Gazarov v. Diocese of Erie*, 2003; *Griffin v. Crossett Sch. Dist., Inc.*, 2008).

Disparate Impact. Federal regulations under Title VI and the Individuals with Disabilities Education Act (IDEA) prohibit districts and schools from maintaining policies and practices that have a racially disproportionate effect on students. Federal agencies, but not students, can bring enforcement actions against districts and schools for policies and practices for violations of these regulations. If successful, the actions can result in loss of federal funding to or injunction against the school or district that violated the regulations (U.S. DOJ, 2001, 2017).

Title VI regulations. Title VI directs federal departments that provide federal assistance, including U.S. Departments of Justice (DOJ) and Education (DOE), to craft regulations to implement the statute's provisions (42 U.S.C.A. § 2000d-1). In doing so, the DOJ and DOE have interpreted Title VI to prohibit policies and practices by the recipients of federal aid that "have the effect of subjecting individuals to discrimination because of their race" (28 C.F.R. § 42.104(b)(2); 34 C.F. R. § 100.3(b)(2); Belton, 2004). Courts, in turn, have recognized that the regulations support a claim for racially disparate impacts, irrespective of intent of

the government officials involved, and are thus not subject to the purposeful-intent limitation that judges have read into Title VI itself (*Alexander v. Sandoval*, 2001; *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 1983).

The DOJ and DOE also have the authority to enforce the regulatory provisions directly (U.S. DOJ, 2001, 2017; *United States v. Maricopa, Cty. of*, 2015; *Jackson v. Birmingham Bd. of Educ.*, 2005) and, ultimately, discontinue federal assistance to the recipients for violating those regulations. To do so, the agencies must first seek voluntary compliance by the funding recipient (U.S. DOJ, 2001, 2017; 42 U.S.C. § 2000d-1; *Board of Pub. Instruction v. Finch*, 1969). If this is unsuccessful, the DOJ can initiate enforcement action on behalf of itself or another agency in Federal court (*United States. v. City and County of Denver*, 1996; *Ayers v. Allain*, 1987; *United States v. Marion County Sch. Dist.*, 1980).

When considering actions to enforce the regulations promulgated pursuant to Title VI, courts often look to disparate impact cases under Title VII regulations for guidance (*New York Urban League, Inc. v. State of N.Y.*, 1995; *Georgia State Conference of Branches of NAACP v. State of Ga.*, 1985; Ware, 2016). The cases use a two-part analysis. First, the DOJ must show that the district's or school's practice has a disproportionately adverse impact on students based on their race. This is typically done through statistical analyses (Paetzold & Willborn, 2013), supported by expert testimony, showing that there are racial disparities that are unlikely to have occurred by chance or as a result of legitimate differences between the groups in question (*Larry P. by Lucille P. v. Riles*, 1984; *Georgia State Conference of Branches of NAACP v. State of Ga.*, 1985; *Huntington Branch, N.A. A.C.P. v. Town of Huntington*, 1988). Courts do not require or recognize a particular significance threshold or magnitude of an effect as sufficiently large to meet this requirement. Even so, they do give more weight to relatively large or statistically significant discrepancies (Paetzold & Willborn, 2013). For example, in *Larry P. by Lucille P. v. Riles* (1984), the court found that an achievement test disparately impacted the school's Black student population given that Black students constituted 9% of the school's enrollment but made up 27% of the students in the special needs program (cf. *Turner v. Fouche*, 1970).

Once a racially disparate impact is shown to result from the policy or practice, then the burden shifts to the district or school to prove that there is a "substantial legitimate justification" or "educational necessity" for it (*Georgia State Conference of Branches of NAACP v. State of Ga.*, 1985; see also *Bd. of Ed. of City Sch. Dist. of City of New York v. Harris*, 1979, *New York Urban League, Inc. v. State of N.Y.*, 1995; *Elston v. Talladega Cty. Bd. of Educ.*, 1993). Even if the districts and schools are able to demonstrate this, the agencies can still succeed if they can show that there is an alternative that satisfies the same goal and is less discriminatory (*Elston v. Talladega Cty. Bd. of Educ.*, 1993).

IDEA and associated regulations. The IDEA (20 U.S.C.A. § 1400 et seq) provides federal funding to states with policies and practices in place to provide free education to children with disabilities (20 U.S.C. 1412). As with Title VI, the Department of Education is authorized to create regulations to administer and ensure compliance with IDEA (20 U.S.C.A. § 1406). Among other things, the

regulations implementing IDEA prohibit racial disparities in school discipline of children with disabilities (34 C.F.R. § 300.646). In support of this protection, the statute and implementing regulations also require states to collect data necessary to determine whether there is significant racial disproportionality in the services provided and "the incidence, duration, and type of disciplinary actions, including suspensions and expulsions" (20 U.S.C.A. §§ 1418(d)(1)(C) & (a)(1)(D); 34 CFR §300.646(a)(3). The states and the U.S. Department of Education must review this information annually to determine if corrective action ranging from technical assistance to an enforcement action and referral to the DOJ is warranted (34 C.F.R. §§ 300.600 & 300.603). Ultimately, the DOE may withhold some or all of the funds to the district for failing to comply with IDEA (34 C.F.R. §§ 300.604 & 300.605; *Blunt v. Lower Merion Sch. Dist.*, 2014).

Under the IDEA, disproportionality is generally assessed using risk ratios, or modified versions of them where appropriate, which compare the rate of disciplinary removals for the target group (e.g., Black students with disabilities) to that of all other students with disabilities (34 C.F.R. § 300.647(b)(4); 81 FR 92376; Girvan et al., in press). States themselves must set a reasonable threshold of what constitutes significant disproportionality sufficient to trigger remedial action (34 C.F.R. § 300.647; 81 FR 92376). The most common thresholds established by states for this purpose range from 3 to 4 times the risk of discipline for disabled students in the target group as those of disabled students not in that group (U.S. GAO, 2013; *Blunt v. Lower Merion Sch. Dist.*, 2014). States are also allowed to require a district to exceed the threshold for up to 3 consecutive years before triggering remedial action. This threshold is sufficiently high that, notwithstanding widespread racial disparities described above, in many states only a very small number of districts, if any, are identified as having significant disproportionality under the regulations (Strassfeld, 2017; cf. Girvan et al., in press).

Social–Psychological Factors Hypothesized to Cause Racial Disparities in School Discipline

The theoretical framework in Fig. 3 divides the causes of racial discipline disparities into two broad categories: Differences in student behaviors and the attitudes and beliefs of teachers and administrators.

Differences in student behaviors and antecedent factors. The left panel of Fig. 3 lists three broad categories of social–psychological factors that scholars, policy-makers, and others have suggested contribute to racial disparities in school discipline. Each encompasses processes that are theorized to increase the tendency of students to engage in behaviors that are, or may be perceived as, inappropriate in school settings and to be experienced at higher rates by Black students than non-Black students (Bradshaw et al., 2010b; Rocque & Paternoster, 2011; Skiba et al., 2014).

The first category of factors is a *lack of adequate resources* (Bradshaw et al., 2010b; Skiba et al., 2002, 2014; Wallace, Goodkind, Wallace, & Bachman, 2008; Wright, Morgan, Coyne, Beaver, & Barnes, 2014). Financial scarcity (i.e., poverty; American Academy of Pediatrics, 2013; cf. Sirin, 2005), deficits in primary caregiving (e.g., single-parent households, abuse and neglect; Eckenrode, Laird, & Doris, 1993), and the interactions between them are risk factors for behavioral issues in schools (Bradshaw et al., 2010b; Skiba et al., 2014). More generally, psychologically scarcity is thought to negatively impact engagement, attention, and self-control (Shah, Mullainathan, & Shafir, 2012; Hall, Zhao, & Shafir, 2014). And there is evidence that children and youth who develop anxious or disorganized attachment styles, which are associated with stressful or abusive home environments, tend to engage in more antisocial behaviors (Kennedy & Kennedy, 2004; Lockhart et al., 2017), have more difficulty adjusting to school, and have more behavioral problems in school (Arbona & Power, 2003; Granot & Mayseless, 2001).

Black students generally experience these risk factors at higher rates than those of other racial and ethnic groups (but see Arbona & Power, 2003). For example, although, in absolute numbers, White people make up most of those who live below the poverty line, relatively speaking, Black households tend to have less wealth than White, Asian, and Hispanic households, with the median Black household having approximately 60% of the income of the median White family (DeNavas-Walt & Proctor, 2014; Taylor, Kochhar, Fry, Velasco, & Motel, 2011). Black children are also approximately three times as likely as White children to live in a single-parent household (National KIDS Count, 2018) and seven-and-one-half times as likely as White children to have a parent who is incarcerated (Glaze & Maruschak, 2008).

The second category of factors are those related to *social identity*. People tend automatically to divide the world into in-groups (i.e., "us") and out-groups (i.e., "them"; Hornsey, 2008). Doing so emphasizes and exaggerates the common characteristics of in-group members and the differences between members of in-groups and out-groups, making even arbitrary in-group and out-group distinctions seem justified (Hornsey, 2008). Further, because people generally have a strong motive to form and maintain a positive self-concept. As a result, if their in-groups are socially ascribed, immutable, and of relatively low status, then they tend to redefine characteristics that make their groups unique as positive, in active efforts to directly contest status, power relationships, or both (Brewer, 1991; Hornsey, 2008). In the educational context, the extent to which students adhere to the school's behavioral expectations could thus depend on the extent to which they satisfy their motivations to establish and maintain a positive self-concept through identification with subgroups that support complying with those institutionally established behavioral expectations (Brewer, 1991; Hornsey, 2008). Students who associate strongly with deviant social subgroups (Duffy & Nesdale, 2009, Emler & Reicher, 1995, 2005) or those who oppose groups with higher status or power might thus be more likely to violate school rules (cf. Girvan, 2009). Conversely, psychological theory suggests that students who identify as members of their school

communities and have strong, positive relationships with their peers, teachers, and school administrators, tend to engage educationally and conform more to behavioral expectations (Chapman, Buckley, Sheehan, & Shochet, 2013; Kearney, 2007; cf. Dika & Singh, 2002).

Consistent with this, Fordham and Ogbu (1986) (Fordham, 1985; Ogbu, 2004) argued that Black students in particular can experience strong dissonance when engaging in efforts to be academically successful. Although academic achievement might improve individual opportunities, it will not make them members of the dominant (i.e., White) group. Further, efforts to do so could be regarded as "acting White," a rejection and betrayal of their collective African-American identity (cf. Hughes, Kiecolt, Keith, & Demo, 2015; but see Chavous et al., 2003; Horvat & Lewis, 2003). Similarly, Black students who observe racial disparities in school discipline could be more likely to disengage with school and identify more strongly with other subgroups and thus have a greater tendency to violate school rules (Okonofua, Walton, & Eberhardt, 2016b; Rocque & Paternoster, 2011; cf. Yang & Anyon, 2016; but see Huang, 2016).

The final category of factors encompasses other *cultural differences*. Here, culture is used broadly to encompass not only core constructs in cultural psychology such as levels of collectivism versus individualism (Kagitcibasi, 1997), but also factors such as differences in communication style and self-expression that could lead students to have different expectations concerning appropriate behavior than teachers. Black youth might, for example, tend to be more likely than teachers from other backgrounds to rely on collective self-concepts (Oyserman, Gant, & Ager, 1995), to value expressions of group membership, to use physical movement in communication, and to value freedom of expression (Monroe, 2005; Tyler et al., 2008). This may, in turn, lead those teachers to regard behaviors that Black students tend to engage in more frequently as disrespectful or as a challenge to their authority (Bradshaw et al., 2010b; Okonofua, Walton, & Eberhardt, 2016b).

Empirical research. Researchers have used three main approaches to investigate whether and to what extent racial disparities in school discipline are caused by systematic differences in the behavior of students from different racial backgrounds: (1) statistical analysis of student behavior as a mediator of antecedent factors that are likely to vary by race; (2) tests of interventions targeting hypothesized causes of disproportionality; and (3) statistical analysis of race as a moderator of different types of discipline decisions. The results of these studies consistently show that racial disparities cannot be fully explained directly by differences in behavior and thus, by implication or through more direct testing with statistical controls, that the antecedent factors thought to drive those behaviors identified above do not explain all of the racial disparities in school discipline.

Student behavior mediates the differential effects of antecedent causes. The first approach involves examining empirically whether the relationship between race and discipline decisions persists after measuring and controlling statistically for the main effects of the rates at which students violate behavior expectations in schools. Figure 4 illustrates the logic of the approach. It is based upon the idea that, to the extent that behavior fully mediates the relationship between antecedent factors that

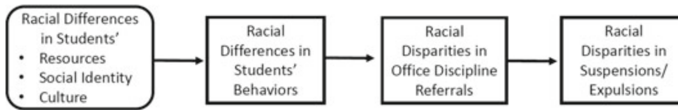

Fig. 4 Conceptual model in which racial discipline disparities result from racial differences in the incidence of antecedent factors, which tend to differ by race, mediated through racial differences in students' behaviors

tend to be related to race and racial disparities in school discipline, then the magnitude of the racial disparities should be attributable to the magnitude of behavioral differences. Conversely, to the extent that racial disparities in office discipline referrals (ODRs) and discipline outcomes persist after accounting for students' behaviors (as well as the direct impact of the antecedent factors themselves when they can be measured), potential behavioral differences between students of different racial groups are unlikely to be the cause of racial disparities in discipline.

Studies adopting this approach provide consistent evidence that ODRs and use of exclusionary discipline are highly related to, and likely largely responsive to, students' violations of behavioral expectations. They also suggest, however, that differences in student behaviors do not fully account for racial disparities in school discipline. For example, Wallace and colleagues (2008) asked a sample of over 74,000 students from the 48 contiguous states who were in 10th grade between 1991 and 2005 whether they had been sent to the office or had to stay after school because of misbehavior in the last year, or had ever been suspended or expelled. In addition, they gathered information about the students' race and gender as well as antecedent factors such as their family structure (e.g., single-parent households), parental education, urbanicity, and geographical region. Race, on its own, was a significant predictor, with Black boys and girls having 1.3 and 1.9 times the odds of being sent to the office or having to stay after school, respectively, and 3.3 and 5.4 times the odds of being suspended or expelled, respectively, as their White counterparts. Controlling for the antecedent variables reduced the magnitude of the disparity. Even so, Black boys and girls continued to have 1.2 and 1.6 times the odds of being sent to the office or having to stay after school and 2.7 and 4.4 times the odds of being suspended or expelled than their White counterparts (see also Huang & Cornell, 2017; Mizel et al., 2016).

Moving beyond student self-reporting, Bradshaw and colleagues (2010b) collected ratings from the teachers of 6988 students from 381 classrooms in 21 schools of the frequency with which the students engaged in 9 types of disruptive classroom behaviors (e.g., breaks rules, fights, harms property). In addition, they gathered information about whether the students had been referred to the office generally, for major incidents, for minor incidents, for fighting, and for disrupting the class, as well as students' race, sex, and other control variables. Using a multilevel analysis of student- and classroom-level factors, they found that teachers' ratings of students' disruptive classroom behaviors were highly related to each type of ODR. Differences in ratings of disruptive behaviors did not, however, fully explain racial

disparities in ODRs. After controlling for the ratings and main effects of the other variables, as compared to White students, Black children had 1.24 times the odds of general ODRs, 1.15 the odds of major incident ODRs, 1.82 times the odds of minor incident ODRs, 1.26 times the odds of ODRs for fighting, and 1.09 times the odds of ODRs for defiance (Bradshaw et al., 2010b; see also Rocque & Paternoster, 2011).

With respect to discipline outcomes, Petras and colleagues (2011) used teachers' ratings of students' disruptive classroom behaviors in first grade, along with students' race, sex, age, and poverty level (i.e., whether the student qualified for free or reduced price lunch) and other control variables to predict the students' odds of receiving exclusionary discipline in subsequent years. As before, teachers' ratings of their students' behaviors, along with poverty, were significantly related to discipline outcomes. Even so, after taking the ratings and other predictors into account, Black children still had 2.02 times the odds as White students of receiving their first suspension in each subsequent year (Petras, Masyn, Buckley, Ialongo, & Kellam, 2011; see also Sullivan, Van Norman, & Klingbeil, 2014). By comparison, Wright and colleagues (2014) found that racial disparities in suspensions were largely attributable to teacher ratings of prior problem behavior. In their study, after controlling for these, along with a variety of other information about the students and their prior behavior, Black students had only 1.18 times the odds of being suspended as White students, which was not statistically significant.

Rather than use students', teachers', or parents' ratings of behaviors, Skiba et al. (2014) used school records to examine the extent of racial disparities in receipt of out-of-school suspensions or expulsions in a sample of 54,592 discipline incidents, controlling for the nature of the discipline incidents themselves, as well as the number of prior incidents, student gender, and whether the student qualified for free or reduced-price lunch. Consistent with the earlier findings, the severity of the type of discipline incidents had a sizable impact. Notwithstanding these effects and those of the other control variables, racial disparities persisted: Black students' odds of suspension or expulsion were 1.52 times and 1.24 times higher, respectively, than for White students (Skiba et al., 2002, 2014; see also Anderson & Ritter, 2017).

Thus, taken together, analyses of the direct relationship between student behaviors and school discipline show that office referrals and school discipline outcomes appear to be responsive to student violations of behavioral expectations, as one would hope and expect. However, once variation in students' behaviors (and that of other antecedent factors where they were measured) is accounted for, Black students still tend to have in the range of approximately 1.2–1.6 times the odds of receiving an ODR and 1.5–2.0 times the odds of receiving exclusionary discipline as similarly situated White students.

Interventions. According to the founder of modern social psychology, Kurt Lewin (1951) (Snyder, 2009), if you want to truly understand something, you should try to change it. Following Lewin's direction, a second method for testing the extent to which racial disparities in school discipline are caused by behavioral differences, or the antecedent factors associated with them, is to attempt to change racial disproportionality using interventions that target specific factors that are hypothesized to cause it (see Fig. 5). To the extent that an intervention which

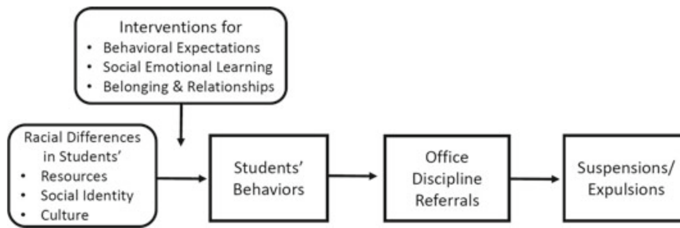

Fig. 5 Conceptual model in which racial discipline disparities can be reduced by disrupting the impact of antecedent factors, which tend to differ by race, on students' behaviors

changes or disrupts a relevant social–psychological process also results in reduced racial disparities in discipline outcomes, then it provides evidence that the process is a cause of the disparities. Conversely, to the extent that the intervention is not successful, it suggests that other factors are causing those disparities.

As described above, theory suggests that racial disparities in school discipline may result from antecedent factors like cultural differences in behavior expectations that may not align with those at school, different rates of stress at home that impact students' ability to function constructively in difficult circumstances, or from students' identification with deviant or oppositional subgroups with different behavioral norms. The first major intervention framework is based on the idea that violations of behavioral expectations at school frequently occur because students are unaware of or have inadequate incentives to comply with them, as might be the case with cultural differences. To address this, the interventions emphasize explicitly teaching and reinforcing the expectations and providing support to students who have difficulty meeting them (see, e.g., Sugai & Horner, 2006; Tingstrom, Sterling-Turner, & Wilczynski, 2006; cf. Korpershoek, Harms, de Boar, van Kuijk, & Doolaard, 2016). Among the most prominent examples of this approach is School-Wide Positive Behavior Interventions and Supports (SWPBIS; Sugai & Horner, 2006).

SWPBIS is a systemic preventative framework for school discipline based on concepts and practices from behaviorism, applied behavior analysis, social learning, and public health (Bradshaw, Mitchell, & Leaf, 2010a; Horner, Sugai, & Anderson, 2010; Sugai & Horner, 2002). Among its core components, SWPBIS emphasizes the development, proactive teaching, and use of clear, positive behavioral expectations. It also involves use of a system of rewards for students who exhibit expected behaviors and a continuum of consequences and additional instruction and support for those who do not (Horner et al., 2010). The results of randomized control trials of SWPBIS (Bradshaw, Mitchell, & Leaf, 2010a; Horner et al., 2009), as well as large-scale quasi-experimental or correlational studies (Childs, Kincaid, George, & Gage, 2016; Flannery, Fenning, Kato, & McIntosh, 2014; Freeman et al., 2016), indicate that, when implemented according to guidelines, SWPBIS reduces incidents of violations of behavioral expectations, ODRs, suspensions, and expulsions (Ögülmüs & Vuran, 2016). Further, there is evidence that SWPBIS is particularly effective at reducing discipline incidents in students who have the

highest risk for violations of behavioral expectations (Bradshaw, Waasdorp, & Leaf, 2015; Bradshaw, Mitchell, & Leaf, 2010a). In part because of the evidence of its success, SWPBIS is widely used, having been implemented at some level in more than 25,000 schools around the U.S. (Center on Positive Behavioral Interventions and Supports, 2018), and it has been recommended by the U.S. Department of Education (Swenson & Ryder, Aug. 1, 2016).

Notwithstanding the evidence of its effectiveness at reducing violations of behavioral expectations, as traditionally used, SWPBIS has not reliably reduced racial disparities in discipline (Vincent, Sprague, & Gau, 2015). Vincent and Tobin (2011), for example, analyzed changes in school days lost by Black and White students due to out-of-school suspensions in a sample of 36 schools that implemented SWPBIS and reduced their overall rates of exclusionary discipline. Results showed a reduction in the days lost by White students but not Black students. Results like these have led researchers to begin to explore variations of SWPBIS that target more specific processes, such as culturally responsive adaptations to or implementations of SWPBIS (Allen & Steed, 2016; Greflund, McIntosh, Mercer, & May, 2014; Johnson, Anhalt, & Cowan, 2017; Leverson, Smith, McIntosh, Rose, & Pinkelman, 2016; Vincent, Randall, Cartledge, Tobin, & Swain-Bradway, 2011).

A second framework for reducing student violations of behavioral expectations, social–emotional learning, is focused on helping students acquire basic skills necessary to address more general underlying deficits that can lead to destructive behavior. Similar to the research described above related to the impacts of a lack of resources, the approach is based on a constellation of theories showing that disruptive, violent, and antisocial behavior is related to students' lack of awareness and ability to manage themselves and their social relationships (Durlack, Weissberg, Dymnicki, Taylor, & Schellinger, 2011; Osher, Bear, Sprague, & Doyle, 2010). Thus, if schools explicitly teach students generalizable ways to better regulate their emotions and behavioral responses and to develop positive relationships with their peers and teachers, then the students should more constructively manage their behaviors and, ultimately, engage in less disruptive and antisocial behavior (Osher et al., 2010).

As with SWPBIS, there is a substantial body of evidence that social–emotional learning approaches, when implemented well, can reduce overall student violations of behavioral expectations. In their meta-analysis of 213 school-based social–emotional learning programs, for example, Durlack and colleagues (2011) found overall substantial reductions in conduct problems and emotional distress, as well as increases in positive social behavior, social–emotional skills, and positive attitudes. However, some research into the effectiveness of social–emotional learning interventions for Black students in high-risk urban settings in particular have found no practically or statistically significant changes in behaviors (Graves et al., 2017). This suggests that, at least as commonly implemented, the approach may not be effective at addressing racial disparities (Gregory & Fergus, 2017).

A third framework, restorative practices, focuses on the development, maintenance, and repair of positive relationships between students, their peers, and their teachers (Gregory et al., 2014). Building on ideas that have been used for some time

in the adult criminal and juvenile justice systems (Johnstone, 2013; Rodriguez, 2007), and similar to the social psychological work on social identity, restorative practices are based upon the theory that those who are part of a community tend to behave constructively within it, while those who are excluded from it are more likely to behave indifferently or destructively toward it. Accordingly, by engaging in deliberate, proactive, and inclusive community building, schools should be able to reduce disruptive, violent, and antisocial behavior. Further, when students do engage in such behavior, rather than framing and responding to the incident as merely a violation of school rules, restorative practices emphasize the harm that the student caused to people within the community and encourage the student to take responsibility for that harm including taking steps to repair it. Finally, restorative-practice-based interventions include processes to try to reintegrate the student back into the school community and help ensure that, notwithstanding the discipline incident, the student understands that he or she belongs to the school community and is still welcome in it (Gregory et al., 2014, 2016; Vincent, Inglish, Girvan, Sprague, & McCab, 2016).

Implementation of restorative practices in schools is not as widespread as SWPBIS or social–emotional learning programs, and fewer studies have been conducted on this approach. That said, early evaluations suggest that restorative practices reduce rates of exclusionary discipline. For example, Anyon and colleagues (2016) examined the extent to which several risk and protective factors explained rates of ODRs and exclusionary discipline in 183 schools in Denver, Colorado. As in the studies reviewed above, even after controlling for other factors including types of behavior, Black students had 1.55 times the odds of an out-of-school suspension as White students. Even so, odds of exclusionary discipline were significantly lower for students who received a restorative approach (cf. Okonofua, Paunesku, & Walton, 2016a). Looking at racial disparities in particular, Gregory et al. (2014) analyzed survey responses from teachers and students in 29 high schools and found that greater use of restorative practices, as reported by students, was associated with fewer referrals for misconduct and defiance, particularly and significantly for Black and Hispanic students (see also Vincent et al., 2016).

Although gaps exist and additional research is certainly needed, taken together, the results of research on the three intervention frameworks indicate that they can be effective at reducing overall levels of students violations of behavioral expectations and rates of use of exclusionary discipline by teachers and administrators. This, in turn, provides evidence that each is targeting a factor that does cause students to violate behavior expectations. Even so, there is, at best, mixed evidence that, by targeting the identified factors, the approaches also reduce racial disparities in school discipline. Racial disparities must thus be caused, in substantial part, by factors other than those the interventions target.

This is consistent and converges with the results of the research under the first approach reviewed above. The challenges and stress that students face from lack of resources, the extent to which they identify with social subgroups other than and perhaps in opposition to their schools, and cultural differences in background and behavioral expectations are all likely to cause students to behave in ways that are

inappropriate in school, resulting in ODRs and suspension or expulsion. Even so, any racial differences in student behaviors that may result from the different rates at which these antecedent factors impact students from different backgrounds do not appear to fully explain racial disparities in school discipline.

Race-by-behavior interactions. Complex interrelationships between social, structural, and psychological factors related to race can make efforts to fully statistically control or otherwise account for them, and to isolate the impacts of race in the abstract, next to impossible in field research (Reskin, 2012). A third approach, illustrated in Fig. 6, attempts to address this concern by comparing the extent to which disproportionality in discipline in decisions is similar across violations of different types of behavioral expectations for the same students. Because the decisions involve responses to different behaviors by the exact same students in the same classrooms, schools, and communities, the approach effectively accounts for any individual or systematic racial differences in exposure to antecedent factors. More particularly, if racial disparities in ODRs or school discipline outcomes differ across different types of violations of behavioral expectations from the same students, then it is more likely that the disparities are attributable to factors other than students' tendency to violate school rules, as a result of antecedent factors that may influence their behaviors or otherwise.

The strength of the inferences that can be drawn from research using this approach depends upon a basic assumption that a student's tendency to violate behavioral expectations is relatively consistent—for example, that students who tend to be disruptive in class also have a higher tendency to get into fights and destroy school property than those who do not tend to be disruptive in class (Skiba et al., 2002). This assumption generally holds for at least two of the categories of antecedent factors reviewed above. The theoretical expectation is that, all else being equal, students who have developed anxious or disorganized attachment styles from a stressful, chaotic, or abusive home life, or who have identified with deviant or oppositional social subgroups would be more likely to engage in a wide range of disruptive and antisocial behavior, including fighting, vandalism, and defying teachers and administrators. Empirically, the findings reviewed above indicating strong positive relationships between ratings of delinquency, prior problem behavior, and discipline outcomes are also consistent with this assumption (see e.g., Wright et al., 2014).

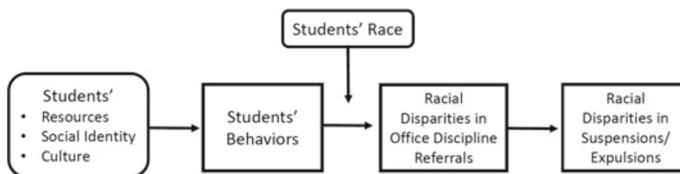

Fig. 6 Conceptual model in which racial discipline disparities result from the interaction between particular types of student behaviors and students' race

By comparison, the third category of theoretical factors, culture, does not necessarily make that assumption. It is possible, for example, for students and teachers from different cultural backgrounds to have misunderstandings about what types of communication are appropriate in school—misunderstandings that result in ODRs and exclusionary discipline related to certain types of violations, such as disrespect in the classroom—without the students and teachers having a similar misunderstandings about the appropriateness of other behaviors, such as vandalism.

Applying an exploratory interactional approach, Skiba et al. (2002) conducted a discriminant function analysis of office referrals for approximately 4500 students from 19 middle schools to assess which of 8 types of violations were most distinctly related to ODRs for either Black or White students and, for comparison, boys or girls. With respect to student gender, their analysis showed that boys were referred to the office more than girls for 11 of the 12 types of behaviors examined, the exception being truancy. This result largely supports the consistency assumption, that is, that boys tend to violate school rules generally at higher rates than girls. By comparison, referrals for White and Black students were inconsistent. White students tended to be sent to the office more for smoking, leaving without permission, vandalism, and use of obscene language. Black students tended to receive more ODRs for disrespect, excessive noise, threat, and loitering. Interpreting the results, Skiba et al. (2002) concluded that White students were referred more often for objectively identifiable events whereas Black students were referred more often for violations of behavioral expectations, the identification of which required teachers to exercise judgment and discretion.

Similarly, in their study of discipline outcomes for 928,940 students from 3 class cohorts who attended 3896 middle and high schools in Texas, Fabelo and colleagues (2011) observed differences in racial disparities for mandatory and discretionary code of conduct violations. In particular, Black students had 1.36 times the risk of being disciplined for a mandatory violation as White students but 1.60 times the risk of experiencing discipline for a violation of a code of conduct provision for which discipline was discretionary. Following up on this result, for students in their ninth-grade year, Fabelo et al. (2011) computed the likelihood of Black and White students experiencing a discretionary or mandatory disciplinary action, controlling for the effects of 82 potential student-level factors, including poverty, disability, and prior discipline experiences, as well as cohort and school- or district-level factors. Black students were 31% more likely to experience a discretionary discipline action but 23% *less* likely to experience a mandatory discipline action than White students who were similarly situated on each of the controlled factors (Fabelo et al., 2011; see also Girvan et al., 2017; Raffaele Mendez & Knoff, 2003).

The results of these studies are generally consistent with and support implications of those from the other two approaches. The results suggest that, unlike sex differences in rates of school discipline, racial disparities in school discipline are not attributable to stable tendencies of students from different groups to violate schools' behavioral expectations at systematically different rates. Accordingly, antecedent explanations that theory suggests tend to impact a broad spectrum of behaviors and that covary with race (e.g., resource scarcity and social identity), or racial

differences in behavior in general, are not likely to be the only significant causes of the racial differences in discipline decisions or outcomes. Beyond this basic, negative implication, results of research using the interaction approach also affirmatively suggest that the observed racial disparities in ODRs and exclusionary discipline are primarily attributable to those types of behavioral expectations that require judgment or the exercise of discretion by teachers and administrators enforcing them. This, in turn, provides support for causal factors that implicate more nuanced differences between students and teachers regarding behavioral expectations (e.g., cultural differences in communication style), as well as the potential operation of racial bias in teachers' and administrators' perceptions, judgments, and decision-making regarding student behavior.

Teacher and administrator decisions. The second set of potential causes of racial disparities in school discipline with substantial legal and social psychological significance are teacher and administrator perceptions, judgments, and ultimately decision-making. The right panels of Fig. 3 depict the decisions as a function of the ways in which teachers' and administrators' attitudes (i.e., positive or negative evaluations) and beliefs (i.e., stereotypes and other assumptions of fact) about school discipline, students of color, and the relevant discipline policies and practices interact to cause teachers to treat Black students differently than White students who engage in similar types of behavior (McIntosh et al., 2014; Smolkowski, Girvan, McIntosh, Nese, & Horner, 2016; Staats, 2016; Warikoo, Sinclair, Fei, & Jacoby-Senghor, 2016).

Attitudes and beliefs may be explicit or implicit (Girvan, 2015; Pearson, Dovidio, & Gaertner, 2009). Explicit beliefs and attitudes are those that someone consciously endorses (Girvan, 2015; Pearson et al., 2009). With respect to the purpose and nature of rules and punishment generally, explicit attitudes and beliefs have been linked to two consistent underlying predispositions. The first, authoritarianism, is a tendency to view the world as threatening, and as a response, to favor authority and uniformity of behavior, adherence to traditional values, and punishment of those who deviate from or threaten these norms (Stenner, 2005; Feldman, 2003). In adults, it relates to beliefs that it is better for children to follow the rules than their own conscience and respect their elders rather than think for themselves (Stenner, 2005). The second, Social Dominance Orientation (SDO; Sidanius & Pratto, 2011), is a tendency to view the world in terms of competitive zero-sum relationships, to prefer hierarchical social structures and institutions that reward winners, and to endorse values and narratives that tend to produce and justify these arrangements (e.g., nationalism, Protestant work ethic, and internal attributions for poverty, racism, sexism, etc.; Pratto, Sidanius, & Levin, 2006).

With respect to race, explicit attitudes and beliefs can take the form of traditional forms of Jim Crow racism, such as feeling more comfortable around White people than Black people or the belief that, irrespective of qualifications, White people should get job opportunities before Black people (Bobo, Charles, Krysan, Simmons, & Fredrickson, 2012; McConahay, 1986). They can also take the form of more subtle "modern" or "symbolic" forms of racism (Henry & Sears, 2002; Morrison & Kiss, 2017). Rather than overt expressions of racial superiority or

inferiority, these are expressions of racial resentment in the form of racial stereotypes that appeal to ostensibly neutral values, such as meritocracy—the belief that, if Black people would just try harder, then they could do as well as White people (Henry & Sears, 2002)—or the belief that, recently, Black people get more economically than they deserve (McConahay, 1986).

Explicit attitudes tend to be most influential when people are thinking systematically (Chen & Chaiken, 1999), reflectively (Satpute & Lieberman, 2006), or deliberately (Kahneman, 2011), such as considered and planned actions resulting from reasoned decision-making. Thus, although for different reasons, people higher in authoritarianism or SDO tend to support the selection of more punitive policies and practices for dealing with people and groups that challenge "law and order" or those of higher social status (Crawford & Pilanski, 2014; Pratto, Sidanius, Stallworth, & Malle, 1994). Similarly, even after controlling for alternative predictors like political ideology, people who are higher in modern racism tend to oppose policies that support Blacks and support those that are punitive, such as three-strikes laws, that disproportionately harm Black people (Ditonto, Lau, & Sears, 2013; Rabinowitz, Sears, Sidanius, & Krosnick, 2009).

Even so, because of social desirability concerns, people also tend not to express or behave in ways that are consistent with their explicit attitudes and beliefs that they know or fear are unpopular among their in-group (Terry, Hogg, & Blackwood, 2001) or other relevant people, as doing so would reflect poorly on them (Dovidio & Gaertner, 2000; Pearson et al., 2009). Thus, when a decision not to help or hire a Black person would likely be attributed by observers to race and racism, almost everyone will hire or help the person (Dovidio & Gaertner, 2000). When there are extenuating circumstances that could be used to justify the decision not to help or hire the person, however, far fewer people tend to do so (Dovidio & Gaertner, 2000). It is thus possible that administrators or teachers who have explicit racist attitudes would openly favor discipline policies and practices that require treating Black students less favorably than White students. Given the legal prohibitions described above as well as social norms favoring equality, however, social psychological theory suggests that it is far more likely that such individuals would only do so under the guise of favoring punitive discipline policies and practices that are neutral on their face but that tend to apply disproportionately to, or otherwise disadvantage, Black children and youth.

Implicit attitudes and beliefs represent automatic associations with, or evaluations of, members of various social groups (Fiske & Neuberg, 1990; Fiske & Taylor, 2013). Examples include the tendency to automatically associate White (Black) people with more positive (negative) concepts or to associate Black people, particularly men, with athleticism, criminality and gangs, and jazz or rap music (Devine, 1989; Johnson, Trawalter, & Dovidio, 2000; Rentfrow, McDonald, & Oldmeadow, 2009). With respect to children and youth in particular, Goff and colleagues (2014) found that people who tended to automatically associate Black people with apes also tended to systematically over-estimate the ages of Black (but not White) children and view Black (but not White) children as more culpable. Further, police officers who tended to have such automatic associations also tended

to use more force when arresting Black as compared to White children (Goff et al., 2014; cf. Van den Bergh, Denessen, Hornstra, Voeten, & Holland, 2010).

Social–psychological theory suggests that implicit attitudes and beliefs, which operate largely outside of conscious awareness, are most likely to influence perceptions, judgments, decisions, and behavior when arriving at an objectively correct response through deliberate decision-making is difficult or impossible. These include ambiguous situations that are open to interpretation; decisions about which people have substantial discretion and for which there are multiple equivalent or justifiable alternatives; or when they lack the time, opportunity, ability, or motivation to gather and consider specific information (Fazio & Olson, 2014; Petty & Cacioppo, 1986). Thus, applied to the context of school discipline decisions, to the extent racial disparities in discipline result from implicit attitudes and beliefs, they should be more likely to occur in the type of specific situations that are vulnerable to the effects of implicit bias (McIntosh et al., 2014; Staats, 2016; Warikoo et al., 2016). These may include classrooms, where teachers are multitasking, as opposed to one-on-one meetings with administrators who have more time to focus on the information at hand; at times of the day during which teachers are tired as opposed to fresh; and with respect to student violations of behavioral expectations that are relatively subjective (e.g., defiance and disrespect) rather than objective (e.g., smoking, fighting) in definition and thus which require discretion to identify (Smolkowski et al., 2016; cf. Girvan, 2016a).

Empirical research. Building on this work, Fig. 7 illustrates major potential direct and indirect relationships between teachers' or administrators' attitudes and beliefs and racial discipline disparities. In the figure, the primary proximate cause of racial disparities in exclusionary discipline outcomes is racial disparities in ODRs, which bring the incidents to administrators' attention. Racial disparities in ODRs, in turn, occur primarily when the formal characteristics of the discipline policies and practices (e.g., subjectively defined behavioral expectations) and the discipline situation (e.g., teacher is multitasking, tired, or angry) are of the kind that social

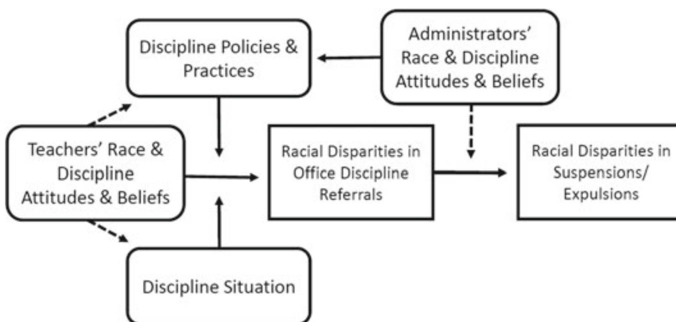

Fig. 7 Conceptual model in which racial discipline disparities result from the direct and indirect interactions between teacher and administrator attitudes and beliefs, discipline policies and practices, and discipline situations

psychological theory indicates increase the influence of teachers' attitudes and beliefs on their perception, judgment, and decision-making (McIntosh et al., 2014). Teachers may also have some influence on discipline situations through, for example, lesson planning and classroom instruction (Gregory et al., 2016; Gregory, Skiba, & Mediratta, 2017), and discipline policies and practices, through work with administration or classroom specific expectations. For their part, administrators impact the process primarily by setting (perhaps with teacher, parent, and student input) the discipline policies and practices that tend to facilitate or inhibit the factors that result in racial disparities. Secondarily, their decisions in specific incidents may also increase racial disparities in outcomes beyond that present in ODRs. However, given that their decisions are generally made with far more time and information than ODRs, their attitudes and beliefs should be less likely to bias their perceptions, judgment, and decision-making.

As compared to research on student behaviors and their potential antecedents, empirical work testing these potential relationships is relatively sparse. What exists falls under three approaches: (1) analysis of the relationships between direct measures of relevant attitudes or beliefs and discipline decisions, (2) examination of discipline disparities for patterns that are consistent with the conditions under which social–psychological theory suggests attitudes and beliefs are likely to be most influential, and (3) design and testing of interventions designed to target decision in those conditions.

Direct measures. The results of a few studies support the existence of some connection between direct measures of school administrators' explicit attitudes regarding school discipline and racial disproportionality in school discipline. For example, Skiba and colleagues (2014) surveyed over 1000 school principals about the extent to which they had a preventative or exclusionary orientation to discipline. Before accounting for these attitudes, analysis of the schools' records indicated that, controlling for type of infraction, student gender, and student poverty, Black students had 1.25 times the odds of receiving an out-of-school suspension and 1.05 times the odds of an expulsion as White students, the latter of which was not statistically significant. Adding principals' discipline orientation to the model showed that schools whose principals had a punitive orientation were generally somewhat more likely to suspend students, and significantly more likely to expel them. In addition, the odds of an out-of-school suspension for Black students and White students became essentially equal, while Black students had significantly higher odds of expulsion (Skiba et al., 2014; see also Mukuria, 2002; Skiba, Edl, & Rausch, 2007).

I am not aware of any study of school discipline directly measuring administrators' or teachers' explicit racial attitudes or beliefs. With respect to the measured impacts of implicit racial attitudes, in her dissertation, Gullo (2017) assessed the relative implicit associations 35 administrators from 22 schools had between images of White youth and youth of color to positive and negative concepts. A comparison of the results of the measure to the severity of discipline for White and Black students in the schools suggested that Black students tended to receive more severe discipline for violations of subjectively defined behavioral expectations when the school administrators tended to have stronger implicit attitudes favoring White students over students of color.

Although preliminary and involving only a small sample, the result is consistent with that of several studies finding a relationship between teachers' implicit racial or ethnic attitudes and students' educational expectations and outcomes (see Van den Bergh et al., 2010; cf. Dunkake & Schuchart, 2015).

Patterns and proxies. Research regarding the effects of restorative-practices interventions, reviewed above, also suggests that discipline rates, if not discipline disproportionality itself, are related to whether teachers and administrators have punitive versus instructional or relational perspectives (Anyon et al., 2016; Gregory et al., 2014; Vincent et al., 2016). With respect to race-based attitudes and beliefs, research showing that a substantial proportion of racial discipline disparities are attributable to relatively subjectively defined behavioral expectations, reviewed above, is consistent with social psychological predictions regarding the conditions under which subtle explicit and implicit biases are likely to be most influential (Girvan et al, 2017; Smolkowski et al., 2016; but see Anyon et al., 2017). Following this basic pattern, using six years of discipline data covering over 360,000 unique students in North Carolina, Lindsay and Hart (2017) found that, after controlling for factors such as poverty and evidence of differential assignment, Black students in elementary, middle, and high school had a lower risk of exclusionary discipline if a larger proportion of their teachers were also Black. In line with the moderating role of subjectivity, the reduction in risk was largest for discipline for defiance but nonexistent for discipline for drug use.

Moving beyond correlational field studies, at least two groups of researchers have conducted experimental studies examining processes through which teachers' stereotypes or attitudes might lead to racial disparities in discipline. Focusing on the allocation of attention, Gilliam and colleagues (2016) found that teachers who were asked to look for potentially challenging behavior in a video of a classroom tended to spend more time looking at Black, male students. However, in a subsequent task, student race was not a significant predictor of the teachers' discipline recommendations. Examining potential differences in attributions for behavior, Okonofua and Eberhardt (2015) had teachers read two vignettes involving a Black or White student who was insubordinate or disruptive. The teachers tended to respond the same, irrespective of student race, to the first incident. After the second violation, however, they tended to feel more troubled by and support more severe disciplinary actions for Black students than White students, a phenomenon the authors described as a possible "Black-escalation effect." (p. 7).

Interventions. A few interventions have been designed to reduce racial disparities in discipline by directly targeting teachers' attitudes and beliefs related to punitive discipline or by identifying situations in which social–psychological theory suggests teachers' judgments are most likely to be influenced by race-based attitudes and stereotypes and making specific policy and practice changes in the situations designed to reduce that influence. First, to moderate the potential impacts of teachers' punitive discipline attitudes, across two training sessions, Okonofua, Paunesku, and Walton (2016a) instructed 31 teachers to have a more empathetic mindset towards students. They found that doing so reduced the risk of suspension for students by half. Second, McIntosh, Ellwood, McCall, and Girvan (2017)

examined one school's discipline data for decisions that appeared to be more vulnerable to implicit bias. They found that that racial disparities in ODRs for physical aggression were substantially higher during playground sports, a situation in which assigning blame was relatively subjective, than at other times and in other locations. In response, they worked to reduce ambiguity and discretion in the situation by developing and implementing a specific set of practices and behavioral expectations for playground sports and teaching these to students. As a result, overall racial discipline disparities at the school decreased substantially (McIntosh et al., 2017). Finally, in a combined approach, in three schools, Cook and colleagues (2018) implemented a three-pronged intervention designed to provide teachers with simple strategies for improving relationships with students, increasing empathetic responses to violations of behavioral expectations, and making consistent and unbiased snap discipline decisions. The results showed that the rate of use of, and racial disparities in, ODRs in the schools were reduced by half.

The results of these intervention studies, together with those from the proxy- and direct-measure approaches, provide converging evidence that teacher and administrator attitudes and beliefs regarding discipline and race likely contribute to racial disparities in exclusionary discipline. Even so, as with the research on antecedent factors and differences in student behavior, discussed above, they do not appear to be able to completely explain the magnitude of the problem.

Conclusions

Racial disparities in school discipline continue to be a serious barrier to realizing the promise of public education as the primary mechanism for meaningful progress toward equal opportunity in the U.S. As with many complex social issues, effectively addressing the problem will require a thorough understanding of when and why it occurs, how to efficiently mitigate the effects of those causes, and the support of a legal system capable of enabling and facilitating, not hindering, meaningful reform.

As the framework captured in Fig. 3 and review of legal doctrine and social psychological factors make clear, researchers have made significant progress in cultivating that understanding. Assisted by legal requirements related to data collection and reporting, there is an impressive and thorough body of social science and education research establishing the existence and extent of racial disparities in school discipline. Building on this work, researchers have theorized about potential causes of the disparities, including antecedent factors that may differentially influence student behavior and the potential for teachers' and administrators' biases to impact discipline policies and practices. Researchers have also begun to explore predictions derived from the theories and develop interventions based on them. A strength of this work has been its focus on and attention to assessing the predicted effects in actual school settings. The weight of the results of that research suggests that disproportionality likely results from a combination of certain antecedent factors that impact student behaviors and from the interactions of teachers' and

administrators' attitudes and beliefs and school discipline policies and practices. Most of the studies supporting more specific conclusions regarding the causes of disproportionality, however, are correlational or, where experimental, tend to involve small samples, indirect proxy measures, or simply have yet to be replicated. Additional well-designed experiments directly measuring, manipulating, and testing specific causal mechanisms associated with the basic causal factors are needed.

For its part, the legal system currently provides mixed support for addressing racial disparities in school discipline. Thanks to advances made during the civil rights movement, there exists a range of potential sources of anti-discrimination law prohibiting purposeful, overt racial discrimination. If there is evidence that teachers' or administrators' explicit attitudes and beliefs caused racial disparities in school discipline, then federal laws and regulations will likely require schools to take corrective action or support claims for liability for the failure to do so. The research results reviewed in this chapter, however, suggest that these remedies are rather limited because explicit racial attitudes and beliefs are not the most significant cause of disproportionality. Absent legal reform (Girvan, 2015, 2016b), discipline policies or practices that have a disparate racial impact but are attributable to implicit racial biases, explicit or implicit attitudes and beliefs regarding punitive discipline, or subtle symbolic racial attitudes and beliefs cloaked in terms of race-neutral views about discipline and thus defensible as not purposefully discriminatory, are only likely to be addressed through actions by federal regulatory agencies. Whether the agencies pursue such actions is limited by their resources and the priorities and political will of those in charge of them. Finally, the law also limits the tools available to schools that are committed to addressing racial disproportionality directly. In particular, the U.S. Supreme Court has interpreted existing sources of anti-discrimination law to expressly prohibit race-conscious policies or practices designed to remedy racial disparities that cannot be attributed directly to earlier purposeful discrimination, such as historic race-based policies (*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 2007).

As our understanding of the causes of racial disparities in school discipline develops and matures, additional work by researchers, policy-makers, and advocates will be needed to help align the scope, and thus the incentives and authority of, anti-discrimination doctrine to those insights (cf. Girvan, 2015, 2016b). Psychology and law scholars have ample experience engaging in just that kind of iterative project. The framework, review, and information provided in this chapter can help direct and support similar efforts in the context of racial disparities in school discipline.

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Legal and Psychological Approaches to Understanding and Addressing Teen Dating Violence

Victoria A. Mauer and N. Dickon Reppucci

Adult victims of intimate partner violence frequently report that their first experiences with relationship-based abuse occurred in the context of teenage romantic relationships (Suarez, 1994). While many teen dating relationships are *healthy*, some are unfortunately characterized by aggression, hostility, and violence (Brown, 2004). Any teen, regardless of gender, race, income, and/or sexual orientation can be a victim of relationship abuse (Sousa, 1999). Social scientists and legal scholars have strived to define teen dating violence and recommend effective ways for society to address and prevent such violence. This chapter examines the intersection of legal and psychological research relevant to teen dating relationships, with a focus on victimization and perpetration of teen dating violence.

The chapter is divided into three major components. First, a brief overview of male–female teen dating relationships is presented; then various forms of dating abuse are defined and prevalence rates for both the perpetration and victimization of these acts are provided. Research on the characteristics of dating violence in the context of teen dating relationships is then discussed, focusing on what makes teen dating violence distinct from adult intimate partner violence. The second section provides an exploration of the current state of the legal response to teen dating violence, with specific emphasis on the effectiveness of current policies related to

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This chapter refers to dating violence in the context of juvenile relationships as "Teen Dating Violence" (TDV) to remain consistent with social science researchers' terminology. However, we must acknowledge that TDV is evident even in preadolescence and prevention and legal response efforts should not only be targeted at teen dating relationships, but younger juvenile relationships as well.

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
Advances in Psychology and Law 4, https://doi.org/10.1007/978-3-030-11042-0_9

protective orders and statutory relationships. In the final section, the focus is prevention of teen dating violence. Existing prevention programming and recommendations for education-based programming are examined, emphasizing programs based on findings from psychological research. In sum, legal scholars need to understand and explore ways to incorporate psychology's understanding of the emergent nature of adulthood in adolescence and how it addresses juveniles' maturity to make legally sound decisions in the context of dating relationships. By having an expanded conceptualization of the developmental implications of violence in teen dating relationships, legal actors should be able to better comprehend ways to define acts as acceptable or unacceptable for juveniles. Likewise, psychologists need to understand legal frameworks in order to tailor their research in a fashion that makes results useable within these frameworks.

Teen Dating Relationships and Violence

Teenage romantic relationships[1] allow youth to (1) learn and practice skills that serve as the foundation for their adult romantic relationships (Collins, 2003; Karney, Beckett, Collins, & Shaw, 2007), and (2) develop their sexuality and capacity for emotional intimacy with romantic partners (Furman & Flanagan, 1997; Steinberg, 2013). Adolescent dating typically begins in mid-to-late adolescence, around age 13 or 14. Nearly half of adolescents report they had at least one date before turning 12; and 90% report having had at least one date by age 16 (Steinberg, 2013). Teenagers frequently choose romantic partners based on their perceptions of how potential partners will gain them status and acceptance from their peers, which frequently results in attraction to older romantic partners who symbolize autonomy and maturity to younger adolescents (Collins, 2003; Gowen, Feldman, Diaz, & Yisrael, 2004). In heterosexual dating relationships, teenage females typically date slightly older partners, while teenage males typically date females who are their age or younger (Steinberg, 2013). Relationships with significant age gaps between partners are concerning due to the potential for statutory rape and exploitation of significantly younger partners (Oudekerk, Guarnera, & Reppucci, 2014).

Just as culture has changed over the course of history, dating practices have changed over time. Modern dating takes many forms, and teenage dating does not necessarily require exclusivity between partners (Largio, 2007). Teenagers might go on group dates with their peers in which some time is spent as a couple and some time is spent with the group. Casual dating can also involve dating exclusively as

[1]Due to space restrictions this chapter primarily focuses on heterosexual teen dating relationships. Teen dating violence in same-sex relationships, and involving teens who are gender nonconforming, raises a host of other issues, especially because LGBT youth are at higher risk than heterosexual youth for many, if not all, types of teen dating violence victimization (Dank, Lachman, Zweig, & Yahner, 2014). For an overview of LGBT youths' experiences with dating violence, see: Freedner, Freed, Yang, and Austin (2002) and Dank et al. (2014).

part of a couple. Finally, some teen romantic relationships include serious commitments to a steady boyfriend or girlfriend (Carlson & Rose, 2012).

High-quality teenage dating relationships are associated with positive outcomes, including positive commitment in early adulthood relationships and fewer externalizing behaviors (Collibee & Furman, 2016; Seiffge-Krenke, 2003; vanDulmen, Goncy, Haydon, & Collins, 2008). Furthermore, teenagers can receive considerable emotional support from their romantic relationships. For instance, in one study that asked high school students to discuss the advantages of romantic relationships, students reported support, companionship, emotional intimacy, physical intimacy, and caretaking (Feiring, 1996; Furman, Ho, & Low, 2007).

Unfortunately, teenage romantic relationships are not always positive, and even those without significant age gaps between partners can include victimization and violence (Steinberg, 2013). The breakup of adolescent romantic relationships is associated with increased risk of depression and suicidality (Joyner & Udry, 2000; Monroe, Rohde, Seeley, & Lewinsohn, 1999). Moreover, negative experiences in adolescent romantic relationships put youth at risk for short- and long-term negative health experiences, including risky sexual behaviors and intimate partner victimization in adulthood (Ackard, Eisenberg, & Neumark-Sztainer, 2007; Banyard & Cross, 2008; Gomez, 2011; Roberts, Klein, & Fisher, 2003; Smith, White, & Holland, 2003). Historically, little was known about dating violence in the context of teenage romantic relationships; however, it has recently emerged as a crucial area of study for legal scholars and social scientists (Wolitzky-Taylor et al., 2008).

Defining Teen Dating Violence (TDV) and Understanding Its Prevalence

This section overviews the research literature seeking to define TDV and examines a number of theories used to conceptualize it. Then, it describes the prevalence of victimization and perpetration of TDV.

Defining teen dating violence. Although extensive research has explored relationship violence in the context of adult romantic relationships, research on dating abuse in *juvenile* relationships has only developed during the past couple of decades (Adelman & Kil, 2007). Defining teen dating violence is paramount to this research area, and an exemplary definition of the phenomenon is essential. For example:

> Teen dating violence is defined as physical, psychological, or sexual abuse, or threats of such abuse, occurring between individuals, at least one of whom is under the age of eighteen, who are in a dating relationship; the underlying…relationship should be mutually rewarding and indicative of some form of commitment (Largio, 2007, p. 4).

TDV is characterized by repetitive acts of abuse (Carlson, 2003). Patterns of jealousy, control, threats, and violence similar to those found in adult abusive relationships occur in TDV (Suarez, 1994; Largio, 2007), which can be physical,

psychological, or sexual in nature. Physical abuse includes such actions as slapping, kicking, choking, pushing, burning, assaulting with a weapon, and punching (Offenhauer & Buchalter, 2011). Due to the physical markers of such violence, it is often the most visible form of abuse (Carlson, 2003; Largio, 2007). Conversely, psychological abuse is typically more easily hidden. It includes insults, intimidation, isolation of the victim from friends and family, persistent surveillance of the victim, and humiliation. Sexual abuse can include rape, or attempts at rape, and coercion of the victim to perform sexual acts (Carlson, 2003; Largio, 2007). A more modern and teenage-relevant form of abuse is electronic harassment, which is increasing in its prevalence (Zweig, Dank, Yahner, & Lachman, 2013). It includes actions like monitoring phone calls and sending harassing text messages. Technology-aided abuse often facilitates the perpetration of other forms of abuse (Picard, 2007). Each of these forms of abuse are described in greater detail later in the chapter to further depict how they are exhibited in the context of teen dating relationships.

The most widely used framework for describing patterns of relationship abuse is the Cycle of Violence theory (Carlson, 2003). The theory states that relationship abuse occurs in three stages of violence. In the first stage, tension-building, seemingly minor acts cause tension to build between the couple. As tension builds to a critical mass, the second stage, explosion and battering, commences. In this stage, physical, sexual, and/or psychological abuse occurs for up to several days (Carlson, 2003; Largio, 2007). In the final stage, deemed the honeymoon stage, the abuser expresses remorse for his/her actions and provides positive reinforcement to the victim for remaining in the relationship (Carlson, 2003; Largio, 2007).

The prevalence of TDV is comparable to adult domestic violence (Bennett & Fineran, 1998). However, like adult domestic violence, TDV is typically underreported, signifying that victims and perpetrators do not receive necessary services (Zosky, 2010). This is especially troublesome because dating violence is present in adolescents as young as eleven years old and continues to escalate in prevalence throughout high school (Weisberg, 2013). While specific risk factors associated with TDV are covered later in this chapter, it is important to note that even less severe abuse is associated with substantive risk, including depression, anxiety, eating disorders, suicidality, substance use, and an increased risk of pregnancy for females (Archer, 2002; Banyard & Cross, 2008; Centers for Disease Control and Prevention [CDC], 2016b; Roberts, Auinger, & Klein, 2005; Silverman, Raj, Mucci, & Hathaway, 2001). The negative risk posed by TDV can extend into adulthood, with victims being more likely to experience victimization in the context of adult romantic relationships (Exner-Cortens, Exkenrode, & Rothman, 2013). The extensive risk posed by involvement in abusive relationships and the underreporting of such abuse highlight the need for serious consideration from social scientists and legal scholars to further understand the ways in which TDV can be addressed through prosecution, intervention, and prevention efforts.

Theoretical frameworks used to conceptualize TDV. A number of theoretical frameworks have been developed to examine and conceptualize the prevalence of TDV. While it is beyond the scope of this review to provide extensive backgrounds of all such frameworks, brief descriptions of social learning, feminist, and lifestyles theories are provided below.

Social learning theory. Social learning theory states that individuals learn by observing, imitating, and modeling the behaviors and attitudes of others (Bandura, 1977). Psychologists utilize this framework to conceptualize the ways in which youth learn and perpetuate abuse in their romantic relationships. Social learning theorists propose that most teens who exhibit abuse in their dating relationships first observed similar patterns of abuse within their families of origin. Such abusive actions are later expressed in the context of their own dating relationships (McCloskey & Lichter, 2003; O'Keefe, Brockopp, & Chew, 1986). Moreover, social learning theorists also suggest that teens perceive acceptance for relationship abuse from the larger social context, in particular from their peers and mass media. Such perceived social and societal support for abuse can present itself as approval for men's use of physical and sexual aggression to dominate women in relationships (Levy, 2006).

Feminist theory. Feminist scholars conceptualize teen dating relationships within the larger culture and society. Feminist frameworks explore the ways in which teens' peer relationships reinforce gendered norms in dating relationships (Giordano, Soto, Manning, & Longmore, 2010). Feminist theory parallels social learning theory in its assertion that teenage females are particularly vulnerable to violent victimization because of socialization practices that facilitate the creation of gendered patterns of partner abuse (Anderson, 2005; Eder, 1995).

Lifestyle and routine activity theory. Lifestyle and routine activity theorists study the ways in which adolescents involved in abusive romantic relationships engage in riskier lifestyles than their peers. Such theories propose that adolescents' lives are rooted in general lifestyles, some of which promote deviancy and violence (Cohen & Felson, 1979; Riley, 1987). Studies have found that risk-taking behaviors, such as substance use and sexual promiscuity, mediate the relationship between adolescents' social ties and their risk for relationship victimization (Grover, 2004). This signifies that risky lifestyles are the means by which adolescents' peer networks place them at greater risk for dating violence victimization. Lifestyle and routine activity theory is particularly relevant to the study of dating abuse in at-risk youth because of the increased likelihood that at-risk youth will be exposed to a number of risk factors placing them in more vulnerable situations in which victimization could occur (Grover, 2004; Vézina et al., 2011).

Prevalence of TDV. Research on victimization and perpetration indicate TDV is not uncommon. Nearly 10% of all youth report experiences with physical dating violence one or more times in the previous year (CDC, 2016a). Prevalence rates increase when other forms of victimization are included. For instance, 20–30% of high school-aged teens report experiences with some form of dating violence (i.e., physical, psychological, or sexual victimization; Largio, 2007). Victimization rates increase when looking specifically at abuse experienced by adolescent females.

Table 1 Prevalence of difference types of adolescent dating violence victimization

Dating violence type	Prevalence estimates	
Physical abuse victimization	10% during the previous year (CDC, 2016a; Mulford & Giordano, 2008; Ramos, 2010)	18% lifetime victimization (Taylor et al., 2016)
Sexual abuse victimization	10.6% during the previous year (5.4% male adolescents, 15.6% female adolescents; CDC, 2015)	18% lifetime victimization (Taylor et al., 2016)
Psychological abuse victimization	20–30% in the previous year (Mulford & Giordano, 2008)	More than 60% lifetime victimization (Taylor et al., 2016)

Table 2 Prevalence of difference types of adolescent dating violence perpetration for male and female adolescents who report that they have dated or are currently dating

Dating violence type	Lifetime prevalence estimates
Physical abuse perpetration	12–32% (Taylor et al., 2016; Niolon et al., 2015)
Sexual abuse perpetration	12–15% (Taylor et al., 2016; Niolon et al., 2015)
Psychological abuse perpetration	77% (Niolon et al., 2015)

For instance, the Teen Dating Violence Education Act of 2005 states that one in five adolescent females report being physically or sexually harmed by a romantic partner (Largio, 2007). Also, while 10.3% of high school females report having ever been physically forced to have sex, only 3.1% of high school males report being forced. Numerous studies have measured the prevalence of the various forms of TDV victimization, some of which are depicted in Table 1.

Researchers have also estimated the prevalence of TDV perpetration. One in four adolescents reported perpetrating at least one form of adolescent dating violence (Reed, Silverman, Raj, Decker, & Miller, 2011). These rates increase when considering only populations of teens who have had sexual intercourse. For example, among males who have had sex, 45% reported at least one form of TDV perpetration (Reed et al., 2011). Table 2 depicts estimates of the prevalence of different categories of adolescent dating violence perpetration.

Both adolescent males and females report being victims of TDV. In fact, dating violence is often reciprocal within adolescent dating relationships (Foshee, 1996; Foshee et al., 1996; Malik, Sorenson, & Aneshensel, 1997). Over 80% of adolescent victims of abuse report that they have perpetrated some form of dating violence (Taylor & Mumford, 2016). Moreover, rates of TDV increase in high-risk, urban communities (e.g., those with high rates of poverty and crime) as compared to rural or suburban communities (Bergman, 1992; Niolon, et al., 2015). Researchers attribute this to teens' exposure to a number of risk factors (e.g., exposure to crime, low socioeconomic status) found to be associated with both TDV perpetration and victimization (Lewis & Fremouw, 2001; Niolon et al., 2015).

Characteristics of Relationship Violence in the Context of Teen Dating Relationships

Knowing the rates of the different types of TDV is not sufficient to fully understand adolescents' experiences in such relationships. The following section describes each of these forms of abuse specifically in the context of teen dating relationships. The authors then describe how teen dating violence is distinct from intimate partner violence in adult romantic relationships.

Forms of abuse. As previously mentioned, studies of TDV have documented numerous types of abuse: (1) physical abuse, (2) psychological/emotional abuse, (3) sexual abuse, and (4) technology-aided abuse. Physical dating violence includes such acts as slapping, hitting, kicking, biting, choking, pushing, grabbing, and shoving one's dating partner (James, West, Deters, & Armijo, 2000). Numerous studies find that females actually perpetrate more physical abuse in the context of teen dating relationships than males (Reppucci et al., 2013; Taylor & Mumford, 2016). However, adolescent females suffer greater physical harm from physical violence perpetrated by their male partners than males do from violence perpetrated by their female partners (O'Keefe, 2005).

Psychological dating violence, which includes both verbal (e.g., yelling, name calling) and emotional abuse (e.g., spreading rumors, humiliation), greatly contributes to unhealthy romantic relationships in adolescence. Teens' psychological abuse of their romantic partners can include making direct attempts to hurt victims' feelings, insulting victims in front of their peers, attempting to control victims' behavior, threatening victims' well-being, damaging victims' possessions, and blaming victims for the abuse (James et al., 2000). Psychological abuse can also include abusive partners spreading rumors about their partners, violating their trust, humiliating them, and even breaking up with them in public (Noonan & Charles, 2009). Psychological dating violence is often paired with other forms of abuse and can be particularly dangerous given adolescents' fragile, underdeveloped psyches (Pensak, 2015) and their increased propensity to becoming emotionally dependent on their abusive partners (Carlson, 2003; Largio, 2007).

The third form of abuse, sexual dating violence, is particularly significant in adolescence because many teens engage in sexual encounters for the first time. Due to their lack of experience, teens might not recognize sexual dating violence when it occurs (Saperstein, 2005). Further, sexual harassment, one form of sexual dating violence, often occurs concurrently with other forms of abuse, especially psychological dating abuse (Taylor & Mumford, 2016). Sexual dating violence includes overt actions, such as grabbing, touching, and rape, as well as more subtle forms of emotional manipulation, such as making threats to break up with one's partner or blackmailing the partner as a way to manipulate him or her into engaging in sexual activity (Carlson, 2003; Noonan & Charles, 2009). Teenage females are particularly vulnerable to this form of abuse because they often feel pressure to engage in sexual activity to obtain approval from males. In fact, females sometimes confuse sexual abuse for evidence that their partner loves them (Saperstein, 2005).

Sexual victimization often creates a catch-22 for females because they might feel pressure from their partner to engage in sex to keep the relationship, yet it also puts them at risk for being ostracized for being a "slut," paving the way for additional psychological victimization (Noonan & Charles, 2009). Moreover, females' tendency not to perceive such acts as abuse makes them less likely to receive necessary help when they are sexually victimized (Saperstein, 2005).

The final form of abuse, technology-aided abuse, is particularly salient in adolescence due to teenagers' excessive use of and proficiency in technology (King-Ries, 2010). Nearly 90% of all teens and young adults are online. Teens not only use technology, but they incorporate it into their romantic relationships. For instance, nearly 70% of teens report that they have shared sexually suggestive messages, pictures, and/or videos with their romantic partners (King-Ries, 2010; Picard, 2007). Parents often underestimate the extent of teens' technology use and thus do not monitor it in ways that might help prevent TDV. Moreover, the legal system's response to the harmful use of technology is underdeveloped, including a lack of resources and training to investigate things like cyberstalking (King-Ries, 2010; Madden & Rainie, 2010).

Technology-aided abuse is a major concern because it is increasing in prevalence. Over 25% of youth have experienced cyber dating abuse victimization in the previous year, and one in ten youth reported perpetrating such abuse (Zweig et al., 2013). Technology is typically used to aid stalking and the invasion of victims' privacy (Pensak, 2015). Over 25% of stalkers use some form of technology to invade their victim's privacy (King-Ries, 2010). Another form of technology-aided abuse is coercive sexual texting, which involves coercion of victims to send explicit images via technology. This manipulation can be paired with threats to break off the relationship if such images are not sent. When images are sent, abusive partners can keep them as a means to continue harm by threatening to release images if the victim tries to terminate the relationship (Pensak, 2015). There are numerous psychological and legal concerns with such acts of dating violence, including embarrassment to the victim, charges for child pornography, and legally required sex offender registration (Theodore, 2010). While technology-aided abuse clearly presents a number of concerns for the well-being of teens in romantic relationships, most teens do not perceive technology-aided abuse as problematic, which further prevents them from reporting such abuse (King-Ries, 2010). A comprehensive exploration of the issue of technology-aided abuse is beyond the scope of this chapter,[2] but existing research clearly points to the need for the legal system to recognize the risk posed by technology-aided abuse and find ways to proactively address the harm it causes.

Although each of these types of abuse can be present in teen dating relationships, there are distinct patterns of violence that encompass teen dating relationships. The following section distinguishes TDV from adult domestic violence.

[2]See King-Ries (2010) for further information on the prevalence of and need for legal response for technology-aided abuse, in particular for teenagers.

What makes TDV distinct? Given the significant harm posed by dating violence in adolescent relationships (e.g., females ages 16 to 19 make up 22% of all intimate partner homicides), scholars strive to understand what makes adolescent dating violence distinct from that of adults so that interventions and prevention efforts can be properly targeted (Weisberg, 2013). This effort is especially arduous because dating violence occurs in relationships of all races, ethnicities, income levels, religions, and sexual orientations; and both males and females perpetrate TDV (Gamache, 1991; O'Keefe et al., 1986; Sugarman & Hotaling, 1989).

Research points to the existence of two patterns of partner violence: intimate terrorism and common couple violence (Johnson, 1995). Intimate terrorism describes intimate partner violence in which one partner utilizes physical, sexual, and psychological abuse to gain power and control over the other partner (Johnson, 1995; Johnson & Farraro, 2000). This pattern of violence is most often perpetrated by male partners and typically stems from sexist, patriarchal values (Hines & Douglas, 2010). The violence utilized in intimate terrorism is more serious than common couple violence and results in more serious injuries, especially as the violence escalates (Johnson, 1995; Johnson & Ferraro, 2000). Conversely, common couple violence is a distinct pattern of partner violence that occurs during the course of couples' disagreements and is equally perpetrated by men and women. It is not connected to patterns of escalation of violence and does not typically result in serious injury (Johnson, 1995; Johnson & Ferraro, 2000). Both intimate terrorism and common couple violence can occur in the context of teen dating relationships (Foshee, Bauman, Linder, Rice, & Wilcher, 2007; Prospero, 2011); however, studies of TDV find that the *majority* of abuse in teen relationships qualifies as common couple violence (e.g., Foshee, 1996; Foshee et al., 2007; Reppucci et al., 2013).

Scholars have questioned why TDV is so prevalent in adolescence given that most teen victims are not married to their abusers, do not live with their abusers, and do not have children with their abusers (Brustin, 1995; Suarez, 1994). Further, most teen dating relationships do not include economic dependence and concerns about child welfare, which are significant influences on whether adult victims feel trapped in their relationships (Anderson, 2007). Taken together, these fundamental differences in teens' relationships imply that it would be easier for teenage abuse victims to simply leave their abusive dating relationships (Riggs & O'Leary, 1989); however, adolescents often remain in their abusive relationships and often fear that ending their relationships will not end the abuse they experience, but actually intensify it (Gamache, 1991).

Once violence occurs in teens' relationships, it is likely to occur again (Sugarman & Hotaling, 1989). The "worst" dating violence occurs in steady dating relationships (Largio, 2007; Makepeace, 1989). When comparing violent to nonviolent teenage dating relationships, researchers find no significant differences in the levels of love and intimacy experienced. However, violent relationships are characterized by more frequent contact, increased levels of sexual intimacy, and are often longer in duration (Giordano et al., 2010). Perpetrators of abuse in teen dating relationships report problematic dynamics in their relationships, including jealousy, verbal conflict, and less than favorable power balances (Giordano et al., 2010).

Qualities of abusive adolescent dating relationships illuminate the significance of their commitment and intimacy as well as their problematic dynamics, which points to the difficulty in terminating such unhealthy relationships (Giordano et al., 2010).

Social science research points to a number of powerful forces that foster violence in teenage dating relationships. First and foremost, adolescents are inexperienced with intimate relationships (Sugarman & Hotaling, 1989). Adolescents' use of physical aggression often results from a perceived inability to deal with frustration and communicate their feelings (Fredland et al., 2005; Mulford & Giordano, 2008). Adolescents can confuse acts of control, jealousy, and possessiveness for love (Sugarman & Hotaling, 1989). Moreover, acts of remorse by abusive partners can be confused with intimacy (Sousa, 1999; Largio, 2007). Inexperience means adolescents often perceive abuse as "normal" (Gray & Foshee, 1997; Levesque, 1997) and feel ill-equipped to cope with such difficulties. These obstacles to coping with abuse can cause victims to ignore the problem and avoid asking for help (Largio, 2007). Teenagers' inexperience and idealistic beliefs regarding romantic relationships can not only blind them to problematic dynamics in those relationships, but can also inhibit them from choosing effective coping strategies when conflict arises in their relationships. This can result in the use of verbal and physical aggression to cope (Kerpelman, 2007; Laursen & Collins, 1994; Mulford & Giordano, 2008).

Peer influence compounds adolescents' lack of experience with romantic relationships. Adolescence is a time in which youth feel significant pressure to conform to their peers' expectations and often look to their peers for assurance that they are acting properly (King-Ries, 2010). Adolescents generally expect their peers to adhere to gender roles especially in the context of romantic relationships, which can enhance cycles of violence and place victims in greater danger (Largio, 2007; Sousa, 1999; Sugarman & Hotaling, 1989). Gender roles that encourage adolescent females to be submissive to their male partners are, in fact, common in high school students (Largio, 2007). Expectations of gender-normed behavior in romantic relationships can influence how teens respond to witnessing acts of abuse in their peers' relationships. This is especially significant because over one in three adolescents have witnessed physical dating violence in peers' relationships (Robert Wood Johnson Foundation, 2012).

The distinct characteristics of teen dating relationships that influence violence signify the need for an understanding of TDV that is distinct from that of adult domestic violence (for further information on the need for this distinction, see Mulford & Giordano, 2008). Power dynamics, immature social skills, and the profound influence of peers that characterize adolescent dating relationships distinguish them from adult relationships (Mulford & Giordano, 2008). Historically, the law has not always reflected an understanding of these distinct differences and continues to struggle with the question of how and to what extent the legal system should govern juveniles' dating relationships. The second section of this chapter provides an overview of the legal system's response to dating violence and recommendations for necessary legal reforms to address TDV.

The Legal Framework and Responses to Teen Dating Violence

Both state and federal policies outline procedures for prosecuting perpetrators of domestic violence. In particular, federal policies such as the Family Violence Prevention and Services Act (P.L. 98-457),[3] the Victims of Crime Act of 1984 (P.L. 98-473),[4] and the Violence Against Women Reauthorization Act of 2013 (P.L. 113-4),[5] express the legitimacy of domestic violence as a human rights issue that requires national attention (Zosky, 2010). Furthermore, historical changes in state-level policies paved the way for domestic violence to transform from a family matter to a criminal concern that requires a zero tolerance response from the legal system (Zosky, 2010). However, most statutes relevant to the prosecution of dating and domestic violence were not developed with TDV in mind (Brustin, 1995) and are not sufficient for prosecuting and remedying the problem.

Three categories of legal policies are critical to the prosecution of domestic violence: (1) warrantless mandatory arrests, (2) victimless prosecution, and (3) no-drop prosecution (Bohmer, Brandt, Bronson, & Hartnett, 2002). Each of these policies contributed to the perception of domestic violence as a crime against the state (Zosky, 2010). Warrantless arrest policies permit police officers to make an arrest without having witnessed a crime (Zosky, 2010). This is important in cases of domestic violence because police are tasked with distinguishing the true aggressors of domestic violence from those reacting in self-defense, which, when inaccurately determined, can result in wrongful arrests (Hilton & Harris, 2009). However, this type of arrest is not consistently applied (see Hilton & Harris, 2009; Hilton, Harris, & Rice, 2007) and scholars express concern that warrantless arrest policies disempower victims of relationship violence by removing their decision-making power and reinforcing perceptions of victims as powerless and helpless (see Hilton & Harris, 2009; Landau, 2000; Martin, 1997). The second policy, victimless prosecution, is an extension of warrantless arrests in that it allows prosecutors to seek charges against a perpetrator without the testimony of the victim (Bohmer et al., 2002; Zosky, 2010). This policy is also inconsistent in its effectiveness, with studies showing a vast range in prosecution rates for domestic violence cases (i.e., rates vary from 2 to 35% of arrested perpetrations; Dunford, Huizinga, & Elliott, 1990; Ford & Regoli, 1993; Hirschel & Hutchinson, 1996; Sherman & Berk, 1984),

[3]The Family Violence Prevention and Services Act provides federal funding for assistance to victims of domestic violence and their children, including funding for domestic violence emergency shelters.

[4]The Victims of Crime Act of 1984 provides grants to fund survivor support agencies such as domestic violence shelters and rape crisis centers.

[5]The original Violence Against Women Act (1994) was a bipartisan effort to improve the nation's response to domestic violence, dating violence, stalking, and sexual violence. It provides federal resources to support community-based approaches to combating violence against women, legal assistance programs for victims, and recognizes these acts of violence as criminal. It was reauthorized most recently in 2013.

and although prosecutors do not require the victim's cooperation, relationships between victims and perpetrators are associated with decreased odds of prosecution (Hilton & Harris, 2009). The final critical policy, no-drop, states that once a prosecutor commences a domestic violence case the victim is not allowed to drop the charges (Goodman & Epstein, 2005). This policy was created to combat the susceptibility of victims to being coerced by their abusers or others (e.g., family members) into dropping the charges (Zosky, 2010).

While the legal system has developed policies for prosecuting domestic violence,[6] such policies have largely focused on adult victims and perpetrators of violence (Hickman, Jaycox, & Aronoff, 2004). Juveniles who experience violence in their romantic relationships often encounter substantial obstacles to seeking legal protection (Brustin, 1995). Moreover, the juvenile justice system has largely ignored the problem of dating violence by treating it as a routine juvenile offense (Brustin, 1995; Buel, 2003). The legal system's adult-centric approach to relationship violence disregards juveniles in need of protection (Largio, 2007; Levesque, 1997; Suarez, 1994) and ignores the attributes unique to TDV. We now present an overview of two policy areas addressing relationship violence, civil protection orders and statutory relationships, and introduce particular areas of difficulty that affect the prosecution of TDV. The section includes recommendations for more comprehensive policies around protection orders and statutory relationships to account for the complex nature of teens' dating relationships and ensure legal protections to juvenile victims of dating violence.

Teenage Dating Violence and Civil Protection Orders

A hallmark of the legal system's effort to facilitate the protection of victims of domestic violence is the civil protection order (CPO). Adult victims of domestic violence can apply for a CPO themselves, which not only provides them with legal protection from their abuser, but can also mandate that their abuser attend treatment programs (Largio, 2007; Smith, 2005). While legally married adult victims of domestic violence are able to press criminal charges against their abusers and file for CPOs in every state, because of the ambiguities in states' definitions of relationships, juvenile victims of dating violence are not always protected and provided remedies guaranteed to adult victims (Brustin, 1995; Largio, 2007; Levesque, 1997).

State domestic violence statutes require that victims not only establish that an act of violence occurred between victims and their partner, but also prove that there was, in fact, a relationship between themselves and their partner (Largio, 2007; Smith, 2005). In the past, the language of domestic violence statutes tended to define relationships as those between legally married, cohabiting individuals.

[6] See Hilton and Harris (2009) for an overview of the history of changes in domestic violence policies.

Since the 1990s, many states have expanded their guidelines for relationship requirements to include language that accounts for “dating relationships,” “intimate relationships,” or “continuing personal relationships” in an effort to account for nonmarital relationship violence (Largio, 2007). This addition is crucial for violence victims in dating, cohabiting, same-sex, and juvenile dating relationships (Largio, 2007; Smith, 2005).

The majority of states’ statutes contain “dating relationship” or similar terminology in their domestic violence statutes, but states are inconsistent in their inclusion of minors within the parameters of relationship requirements. For instance, Wisconsin restricts its definition of “dating relationship” to include only adults (Wis. Stat. 813.12(ag), 2006), and Washington’s definition states that teens in dating relationships need to be at least sixteen years old (Wash.Rev.Code 26.50.010, 2006; Largio, 2007). While states vary in terms of their language, statutes generally include information on the nature and length of the relationship, the amount of interaction between the couple, and, when applicable, the amount of time since the relationship ended (Largio, 2007). Juveniles are able to obtain CPOs if they qualify under statutes’ definitions of dating relationships, which can be a significant obstacle. This difficulty is due to inconsistency in how courts interpret the criteria and meaning of “dating relationship” (Largio, 2007).

There are two major approaches to defining relationships: descriptive and factor approaches.[7] Descriptive approaches include both descriptions of what dating relationships are and language detailing what they should not include. The difficulty with descriptive approaches is that, if teens’ relationships are missing even one element of the definition, then their relationships might not qualify (Largio, 2007). Factor approaches, conversely, include a list of factors for courts to consider in determining whether a dating relationship exists. With a factor approach, if one element is missing (e.g., relationship length) other factors can still allow the relationship to qualify. Scholars propose that factor approaches are better able to account for the extensive variability that comprises teen dating relationships. Nevertheless, the manner in which some states define relationships still requires that the victim and abuser be cohabiting, be involved in a sexual relationship, or even be married (Klein & Orloff, 1993; Zosky, 2010). While partners in adult dating relationships are often likely to be included in these criteria, juvenile dating relationships do not always fit statutes’ definitions of dating relationships because juveniles often do not have a child with their partner, are not married to their partner, and do not live with their partner (Saperstein, 2005).

Juveniles face further difficulty in determining whether they themselves can apply for a CPO, or if they are required to have an adult apply on their behalf. Many states restrict minors’ access to requesting orders of protection, requiring that a parent or guardian petition the court for the CPO (Largio, 2007; Zosky, 2010). If juveniles do not have access to a parent to file the petition on their behalf, the court

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[7]See Largio (2007) for an in-depth review of descriptive and factor approaches to defining dating relationships.

might appoint a guardian ad litem to do so. In some states, nonfamilial adults, such as employees of domestic violence shelters and state agency workers, can file on behalf of a minor (Largio, 2007). In the localities where juveniles cannot apply themselves, teens are forced to disclose the abuse to a parent or guardian (Brustin, 1995). The need to disclose abuse to an adult can be a strong deterrent for teens because they are often reluctant to disclose abuse to parents and other adults (Sousa, 1999). In truth, even adult victims of domestic violence can feel shame about their experiences of abuse, which might prohibit them from disclosure (Brustin, 1995). Such feelings tend to be amplified in adolescents because of their lack of experience in romantic relationships and their confusion about the violence they experience (Gamache, 1991; Sugarman & Hotaling, 1989).

Even when adolescents are able to overcome the significant obstacles to obtaining a CPO already mentioned, it is not always clear whether a CPO can be filed against a minor (Zosky, 2010). When statutes are ambiguous in their language regarding against whom a protective order can be filed, judges' discretion might rule against juvenile victims' ability to obtain a CPO against their abusive partner if that partner is a minor (Largio, 2007). While some states' statutes include provisions for minors to be the recipients of CPOs, such policies are not uniform and sometimes require interpretations from the court (see Largio, 2007). For instance, some statutes explicitly state minors can be the recipient of a CPO, such as the Illinois Domestic Violence Act (1986), which states that "[p]etitioner shall not be denied an order of protection because petitioner [victim] or respondent [abuser] is a minor" (Largio, 2007). Conversely, Michigan state law provides differing consequences for violating CPOs to perpetrators younger than 17 and 17 years and older (Mich. Comp. Laws 600.2950 (11) (a) (i)-(ii), 2006).

Finally, even if adolescents are able to establish that they were in a dating relationship and file for a CPO against a minor, the case might be heard in the juvenile court system. Hearing the case in the juvenile court system signifies that a more rehabilitative approach to addressing the abuse will be used, which is at odds with the zero tolerance policies (e.g., no-drop, warrantless arrest) that drive criminal courts' response to domestic violence perpetrators. Whether juvenile courts' response to dating violence is particularly problematic is unclear, but scholars speculate that juvenile courts might view minors as being less culpable for domestic violence offenses (Zosky, 2010) and question whether juvenile dating violence can be adequately dealt with in the juvenile court system (Brustin, 1995). For instance, if juvenile courts treat the offense as a normative juvenile offense and do not impose provisions for the domestic violence nature of the offense, this can limit victims' access to services that might protect them and limit their contact with perpetrators (Brustin, 1995; Pensak, 2015). Conversely, it is possible that zero tolerance policies are not the best approach for juveniles, especially if rehabilitation is the objective. Juvenile courts must consider provisions necessary to respond appropriately to TDV that balance a rehabilitative focus while also assuring victim protection and access to services.

Overall, while protective orders seek to provide victims with safety measures such as no-contact and stay-away orders, financial assistance, and mandated

treatment for perpetrators (Martin, 2012), juveniles' access to such services is often limited. Although juveniles are now better able to petition courts for protective orders, significant barriers still obstruct their ability to receive these protections.

Recommendations for Protective Order Reforms

In a review of the current state of legislative efforts to address TDV, Pensak (2015) recommended specific changes to legislation to increase adolescents' access to services and protections provided to victims of domestic violence. First and foremost, teen-specific language should be introduced into statutes so that the law better reflects teens' dating experiences (Brustin, 1995; Pensak, 2015). Considerations of age in determining whether dating relationships exist are necessary to account for the ways in which dating relationships differ depending on the age of the individuals in the relationship (Largio, 2007). Therefore, *every* state's domestic violence statute should include language that classifies dating relationships as a protected class, even if the parties are not cohabiting and do not have children together (Brustin, 1995; Largio, 2007; Pensak, 2015). This provision is relevant not only to adolescents in dating relationships, but would also apply to the increasing number of adults waiting until later ages to enter into marriage (Rosenfeld & Kim, 2005).

Currently, juvenile dating must meet adult dating standards set by the law (Largio, 2007). Given the considerable roadblocks to seeking protection orders for adolescent victims of relationship violence, including teen-specific language would make this process more teen-friendly, and therefore ensure increased protection for juvenile victims of relationship violence (Pensak, 2015). Largio (2007) enumerated the factors necessary for defining a romantic relationship in an effective domestic violence statute: (1) the nature of the relationship, (2) the frequency and type of interaction, (3) the duration of the relationship, and, if applicable, (4) the amount of time since the relationship was terminated. Scholars recommend that lawmakers consider such factors with an understanding of the ages of the parties involved and strive to factor age into the definition (Largio, 2007).

Furthermore, special considerations should be made for the settings in which adolescents are likely to encounter their abusers, in particular school-based settings. Protective order legislation should consider ways to extend to school and extracurricular activities where adolescents might be forced to come into regular contact with their abusers (Pensak, 2015). Conversely, the legal system must consider what supports should be in place to guarantee that both juvenile victims *and* perpetrators are able to access educational environments continuously. Policies must consider which systems and structures should be put in place to implement protective orders effectively in educational settings, while not denying perpetrators' legal right to education.

The law should also continue to clarify and determine the circumstances in which minors are able to file for a CPO without the assistance of a parent or guardian. There is considerable debate regarding whether juveniles' parents should

be notified if and when their children are in danger. However, proponents of juveniles' rights to file for CPOs themselves point to research findings that indicate adolescents are often reluctant to disclose romantic relationship abuse to adults (Gamache, 1991; Sugarman & Hotaling, 1989). Only one in 25 teens involved in an abusive relationship would seek such help (Suarez, 1994). The legal system must weigh the interest in protecting adolescents from injury against the consideration of parental control in cases of TDV (Brustin, 1995). As research continues to provide evidence for adolescents' reluctance to seek adults' assistance in situations of dating violence, the law must account for this knowledge and consider allowing juvenile victims of domestic violence to apply for CPOs themselves in all states, or at the very least without the consent of their parent or legal guardian, but with the assistance of another adult.

There is also no consistent, uniform approach to punishing perpetrators of TDV (Pensak, 2015; Suarez, 1994). Because cases involving TDV are often heard in juvenile courts, the same accountability is not required from adolescent offenders because teen dating violence is not approached with the levels of zero tolerance that form the basis of criminal courts' response to domestic violence. Legal scholars propose that the legal system should consider a compromise between the criminal system's policy of zero tolerance and the juvenile justice system's foundation of rehabilitation (Zosky, 2010). Youth do not automatically become adults, either psychologically or legally, just because they are perpetrators (Owen-Kostelnik, Reppucci, & Meyer, 2006). Therefore, the courts should take into account the ages of the parties involved when considering perpetrators' punishment (Largio, 2007). Moreover, if juvenile perpetrators need to be incarcerated, they should be housed in juvenile detention centers that can address their age-specific needs for punishment and rehabilitation (Scott & Steinberg, 2010). Juvenile perpetrators are not often referred to mandated intervention programs for perpetrators of domestic violence, which is likely because these services are not tailored to juvenile perpetrators (Buel, 2003; Zosky, 2010). By instilling uniform policies for juvenile perpetrators of dating violence that combine rehabilitation with punishment, the court system would require that juvenile perpetrators be held accountable for their violent acts, while maintaining rehabilitation as a principle by which it proceeds with punishment (Zosky, 2010). Recommendations for multidisciplinary approaches to punishment of juvenile perpetrators of dating violence include tailoring punishment and rehabilitation efforts to the perpetrator's violent reactions and revealing the irrationality of such violent responses so that appropriate communication skills can be taught (Pensak, 2015). These efforts ultimately create a rehabilitative task of increasing teens' accountability for their actions in the context of their romantic relationships (Pensak, 2015). Ultimately, the law should emphasize adolescent offenders' accountability so that adults and adolescents are less able to minimize the impact of TDV (Zosky, 2010). Legal reforms that address the potential for rehabilitation, while also emphasizing the seriousness of TDV, are key to the appropriate legislation of these crimes.

Thus far, we have reviewed legal considerations for adolescent victims' capacity to seek protection from abusive partners; however, another significant consideration of the legal system's approach to adolescent dating relationships is that of statutory relationships.

Statutory Relationships

While the majority of juveniles date other juveniles, a significant proportion of teens enter into romantic relationships with older partners. Teenage females are more likely than teenage males to date older partners, and the age difference between older and younger partners is typically one-and-a-half to 2 years (Carver, Joyner, & Udry, 2003; Kaestle et al., 2002). However, age gaps between younger and older partners vary considerably. One-third of teenage females ages 15–17 are 3–5 years younger than their sexual partners, and seven percent are 6 or more years younger than their partners (Darroch, Landry, & Oslak, 1999). Dating significantly older partners (i.e., age gap of 6 or more years) can negatively affect teens' sexual development and health and result in risky sexual behavior, including lack of contraception use and increased risk of pregnancy (Darroch et al., 1999; Kaestle, Morisky, & Wiley, 2002). Historically, concerns about the impact of unplanned pregnancy made statutory relationships between juvenile females and adult males the most troubling statutory relationships. While these relationships are perhaps the most frequent type of statutory relationship (Manlove, Moore, Liechty, Ikramullah, & Cottingham, 2005; Troup-Leasure & Snyder, 2008), both juvenile males and females can be victims of statutory rape. Male youth involved in dating relationships with older partners are just as likely as female youth to experience victimization and exhibit risky sexual behavior as the age gaps between them and their older partners widen (Oudekerk, Guarnera, & Reppucci, 2014).

Due to the significant risk posed by large age gaps between romantic partners, the legal system has created statutory rape laws to protect minors from the potential dangers of sexual activity (e.g., teen pregnancy, young mothers on welfare), especially potentially exploitative sexual relationships with older partners (Davis & Twombly, 2000; Reitz-Krueger, Warner, Newsham, & Reppucci, 2016). Statutory rape laws seek to prevent minors from being coerced into sexual relationships with older partners by determining when adolescents can legally consent to sex (Personal Responsibility and Work Opportunity Reconciliation Act PRWORA, 1996 as cited in Oudekerk et al., 2014). To justify the law's oversight regarding statutory relationships the legal system points to juveniles' lack of psychosocial maturity (Cauffman & Steinberg, 2000) and associations between statutory relationships and negative health outcomes for juveniles (e.g., risky sexual behaviors, early initiation of sex, and sexually transmitted infections; Abma, Driscoll, & Moore, 1998; Begley, Crosby, DiClemente, Wingood, & Rose, 2003; Marín, Coyle, Gómez, Carvajal, & Kirby, 2000; Young & d'Arcy, 2005).

There is considerable variability in statutory rape laws across the United States. For instance, the state of Georgia considers sexual relationships between 15- and 19-year-olds statutory rape, which carries a maximum penalty of 20 years (Ga. Code, 2011). Conversely, in the state of Virginia, the 19-year-old partner would face only a year in jail (Va.Code, 2013a), and in Maine, the relationship would be considered legal (Me. Rev. Stat. Ann., 2011; Reitz-Krueger et al., 2016). Such variability is attributed to the law's lack of consensus on the appropriate age of consent for sexual activity and what age gap between partners, particularly in relationships involving juveniles, is acceptable (Reitz-Krueger et al., 2016).

Currently, two types of laws seek to govern statutory relationships: age of consent and age gap provisions. Age of consent laws state that minors cannot consent to sex with potential partners of any age, including other minors, unless they themselves have reached a certain age, termed the age of consent (Glosser, Gardiner, & Fishman, 2004). Ages of consent typically range from 16 to 18 years old (Glosser et al., 2004; Hines & Finkelhor, 2007). While this type of law might seem appropriate in the case of, for instance, a 35-year-old dating a 15-year-old, it can also be used to convict older teen partners of a crime for being sexually involved with a romantic partner only a year or two younger (e.g., a 17- and 15-year-old).[8] The second type of law, age gap provision, determines a juvenile's ability to consent to sexual activity based on standards for the minimum age of the younger partner (ranging from 12 to 18), and whether there is a particular age gap between the two partners. The age gap deemed acceptable by the law is typically 2–4 years (Glosser et al., 2004; Smith & Kercher, 2011). Age gap provisions are supported by research indicating that wider age gaps are associated with a number of deleterious outcomes for juveniles including decreased use of protection against pregnancy and STIs, and physical, sexual, and emotional victimization (Landry & Forrest, 1995; Lindberg, Sonenstein, Ku, & Martinez, 1997; Oudekerk et al., 2014; Young & d'Arcy, 2005).

Considerations in the Prosecution of Statutory Relationships

Research findings regarding the negative impact of significant age gaps between partners in adolescent dating relationships point to the utility of age gap provisions as a means of protecting adolescents from the deleterious effects of statutory relationships (Glosser et al., 2004; Gross, 2007). Additionally, voting-age adults view age gap laws as legitimate. Young adults and parent-aged adults agree that as age gaps widen and younger partners' age decreases, the less adolescents are able to consent to sexual relationships (Reitz-Krueger et al., 2016). However, it is not yet clear which particular age gap cutoffs are most predictive of negative outcomes in

[8]See *Wilson v. State* (2007), a case in which 17-year-old Genarlow Wilson was convicted of statutory rape and sentenced to 10 years in prison after having oral sex with a 15-year-old who, although willingly participating in the act, was deemed by Georgia law unable to legally consent.

youth. It is possible that slightly older, prosocial romantic partners might be able to educate younger partners on such things as contraception use and positive communication in romantic relationships.

Further understanding of the particular elements that cause statutory relationships to be unhealthy for adolescents is necessary to properly target legal and psychological prevention and intervention efforts. Lifestyles theory points to the possibility that screening risky contexts within romantic relationships (e.g., concomitant substance use and delinquency) might illuminate negative outcomes associated with statutory relationships. Finally, any action taken against statutory relationships should acknowledge that classifying these relationships as illegal can create additional barriers for teens who need help and might cause teens to be less likely to report relationship abuse out of concern for the legal repercussions the statutory nature of the relationship presents. Statutory rape laws assume that juveniles in relationships with adults are victims. Conversely, scholars question whether youth are, in fact, victims in statutory relationships or if they are capable of consenting in relationships with adults. Greater research on questions of this nature is needed to determine if relationships between adults and minors are inherently coercive or can be voluntary (Hines & Finkelhor, 2007). Thus far, this chapter has discussed TDV and provided an overview of the law's response to it. To conclude this chapter the authors explore the need for programming to prevent TDV.

Prevention of Teen Dating Violence

Researchers and legal scholars have proposed a number of considerations in the prevention of TDV. A common recommendation is that education policy reforms should seek to provide education-based programming working with teens as well as their parents and educators. Although a number of such programs have already been implemented, these programs require continued support from government agencies, advocacy by legal scholars, and funding for research to evaluate their effectiveness. In the last section of this chapter, we examine research findings that exhibit a need for TDV prevention programming, focusing on teens' problematic perceptions of abusive behavior and risk factors associated with TDV. Additionally, we describe what types of prevention programs currently exist and the call for increased school-based prevention programming. The section closes with an overview of particular areas that should be targeted in creating TDV prevention programming.

Why Should Lawmakers Support Prevention of Teen Dating Violence?

Understanding why lawmakers should support the prevention of TDV requires a consideration of the factors that allow it to persist and how it introduces risk to

teens' mental and physical health. In the following section, we discuss research related to teens' unhealthy perception and beliefs about TDV as well as the multiple layers of risk associated with perpetrating and experiencing TDV.

Teens' problematic perceptions and justifications for relationship abuse. Many teens are unaware of the legal remedies that exist to protect them from abusive romantic partners (Brustin, 1995). This naïveté is further complicated by teens' misperceptions of what behaviors actually constitute abuse. Adolescents' beliefs regarding the meaning of domestic violence often do not align with the law's definition of domestic violence. For instance, significant proportions of teenage perpetrators and victims believe abuse is an act of love (Henton, Cate, Koval, Lloyd, & Christopher, 1983; Lavoie, Robitaille, Hébert, 2000). Teens often interpret relationship violence as an expression of many feelings, including, love, confusion, anger, sadness, and hate (Roscoe & Callahan, 1985). Teens provide a number of justifications for abuse in their romantic relationships, of which the most frequently cited reason is jealousy (Barter, 2009; Gagne & Lavoie, 1993; Lavoie et al., 2000; Roscoe & Callahan, 1985). Additional justifications include alcohol and drug use, peer influence, and sexual frustration (Gagne & Lavoie, 1993; Roscoe & Callahan, 1985). Furthermore, certain violent acts are deemed acceptable based on teens' understanding of gender norms. For instance, females' use of physical violence in romantic relationships is less likely to be perceived as unacceptable and abusive, whereas males' use of physical violence is often met with disapproval from peers and adults (see Harris, 1992; Sears, Byers, Whelan, & Saint-Pierre, 2006; Sundaram, 2013). Attitudes supporting physical dating violence are significantly associated with TDV victimization and perpetration (Ali, Swahn, & Hamburger, 2011). Researchers propose that in order for prevention programming to be effective, attitudes about traditional gender roles and the acceptance of dating violence should be targeted (Reyes et al., 2016).

Furthermore, teens who experience violence in the context of their romantic relationships often minimize the negative connotations of such abuse. This minimization likely explains why only 23% of relationships involving abuse are terminated because of that abuse. In fact, nearly a quarter of teens believe violence improves their relationships (Roscoe & Callahan, 1985). Such findings point to the need for prevention programming to address adolescents' conceptions of abusive behaviors as legitimate forms of response to conflict in their romantic relationships. This is particularly significant because when teens perceive violence as legitimate, they are more likely to be a victim or perpetrator of abuse in their relationships (O'Keefe & Treister, 1998).

Moreover, prevention programs must distinguish between and address both intimate terrorism and common couple violence. Although the typical representations of intimate partner violence in media depict intimate terrorism, the majority of relationship violence found in teen dating relationships is classified as common couple violence (Reppucci et al., 2013). Because of this, prevention programs should strive to combat the normalization of violence in teen dating relationships because teens who exhibit common couple violence are less likely to perceive it as abuse and might, therefore, be less likely to seek support for such patterns of abuse.

Table 3 Dynamic risk factors associated with teen dating violence

Dynamic risk factors associated with teen dating violence	
Sexual activity (National Institute of Justice [NIJ], 2015)	Membership in a gang (Weisberg, 2013)
Economic control dynamics (Taylor & Mumford, 2016)	Dating at an early age (Largio, 2007)
Aggression (Largio, 2007)	Stress (Largio, 2007; Wolitzky-Taylor et al., 2008)
Alcohol use (Largio, 2007)	Having friends who experience dating violence (Arriaga & Foshee, 2004)
Holding attitudes that violence is acceptable (O'Keefe, 2005)	Peer influence (Leen et al., 2013; O'Keefe, 2005)
Substance use (Ackard et al., 2007; Black, Noonan, Legg, Eaton, & Breiding, 2006; O'Keefe, 2005, Vagi et al., 2013; Weisberg, 2013)	Risky sexual behaviors (Black et al., 2006; O'Keefe, 2005, Vagi et al., 2013; Weisberg, 2013)
Mental health concerns (Vagi et al., 2013)	Depression (O'Keefe, 2005)
Anger/hostility (NIJ, 2015)	Suicidal thoughts and attempts (Banyard & Cross, 2008; Black et al., 2006; Olshen, McVeigh, Wunsch-Hitzig, & Rickert, 2007; Weisberg, 2013)
Poorer educational outcomes (Banyard & Cross, 2008; Giordano et al., 2010)	Posttraumatic stress disorder (Wolitzky-Taylor et al., 2008)
Fighting (Black et al., 2006; Weisberg, 2013)	Economic disadvantage (Giordano et al., 2010)
Access to weapons (Weisberg, 2013)	School expulsion/suspension (Weisberg, 2013)

Risks associated with TDV. In addition to problematic perceptions of dating violence, programming should address the associations between TDV and numerous health and behavioral risk factors during adolescence and young adulthood (Exner-Cortens et al., 2013). Dynamic risk factors (those factors amenable to change by intervention) are more strongly associated with TDV behavioral change than static risk factors (those factors not amenable to intervention-based change; Leen et al., 2013). Tables 3 and 4 provide an overview of many of the dynamic and static risk factors social scientists find are associated with TDV. Tables 5, 6, and 7 provide an overview of risk factors specifically associated with TDV perpetration, gender-specific risk factors associated with TDV perpetration, and risk factors associated with TDV victimization, respectively.

The risk posed by TDV is especially concerning for teens already on at-risk trajectories. Risk factors associated with TDV can function in a cumulative manner and affect teens' later experiences in and out of romantic relationships (Caspi, 1987; Eaton, Davis, Barrios, Brener, & Noonan, 2007). In other words, youth who face a multitude of environmental *and* relational risk factors in their daily lives can experience negative ripple effects as they move into emerging adulthood because the

Table 4 Static risk factors associated with teen dating violence

Static risk factors associated with teen dating violence	
Exposure to interparental violence (Arriaga & Foshee, 2004; Demaris, 1990; Foshee et al., 2008; O'Keefe et al., 1986; Vagi et al., 2013)	Prior exposure to violence (O'Keefe, 2005) and child abuse (Demaris, 1990; Foshee et al., 2008; O'Keefe et al., 1986
Coming from a divorced home (Largio, 2007)	Other traumatic experiences (Wolitzky-Taylor et al., 2008)

Table 5 Risk factors associated specifically with teen dating violence perpetration

Risk factors associated with teen dating violence perpetration	
Exposure to family of origin/interparental violence (Temple, Shorey, Fite, Stuart, & Le, 2013)	Attitudes accepting of violence (Temple et al., 2013)
High amounts of delinquency by both partners in the relationship (NIJ, 2015)	Bullying in high school (NIJ, 2015)
Involvement in and perceptions of violence in their neighborhood (Reed et al., 2011)	Believing one's friends have perpetrated TDV (Reed et al., 2011)
Marijuana, alcohol, and drug use (Niolon et al., 2015)	Support of traditional gender norms (Reed et al., 2011)

Table 6 Gender-specific risk factors associated with teen dating violence perpetration

Adolescent males' risk factors	Adolescent females' risk factors
Past dating violence perpetration (Chase, Treboux, & O'Leary, 2002)	History of dating violence victimization (Cano, Avery-Leaf, Cascardi, & O'Leary, 1998) and dating violence and bullying perpetration (Cano et al., 1998; Niolon et al., 2015)
Alcohol use (Niolon et al., 2015)	Carrying a weapon (Niolon et al., 2015)
Sexual intercourse initiation (Niolon et al., 2015)	Delinquency and using alcohol (Niolon et al., 2015)

Table 7 Risk factors associated with teen dating violence victimization

Risk factors associated with teen dating violence victimization	
Larger age gaps between romantic partners (NIJ, 2015; Reppucci, et al., 2013)	Previously the victim of one form of relationship violence (Foshee et al., 2004; NIJ, 2015)
Drinking alcohol (Foshee et al., 2004) and being around friends drinking alcohol (Howard, Qiu, & Boekeloo, 2003)	Victim of crime or peer/sibling violence (NIJ, 2015)
Peer experiences of dating violence (Foshee et al., 2004; Noonan & Charles, 2009)	Low self-esteem (Foshee et al., 2004)
Depression (Foshee et al., 2004)	Suicidal ideation (Exner-Cortens et al., 2013)
Antisocial behaviors in adolescent males (Exner-Cortens et al., 2013)	Marijuana use in adolescent males (Exner-Cortens et al., 2013)

consequences of their early experiences shape their future relationships (Pepler, 2012). Many risk factors are associated with TDV; however, because many of these factors do not cause TDV there is limited ability to state whether changing individual risk factors would result in decreased rates of TDV. The exception to this limit is the case of changing attitudes and norms associated with TDV. A prevention program, Safe Dates, seeking to do just that has demonstrated decreases in the prevalence of physical and emotional victimization four years post-intervention (Foshee et al., 2004).

Existing Prevention Programs

A number of programs have already been implemented with the goal of preventing TDV. For example, Safe Dates (Foshee et al., 1996) is a primary prevention program which includes both school and community-based activities seeking to change TDV norms, decrease gender stereotyping, and teach teens conflict management skills (Foshee et al., 1998).[9] By incorporating community activities, Safe Dates seeks to increase teens' understanding of resources available to help in cases of TDV. Safe Dates has exhibited decreases in physical and emotional victimization longitudinally among normative samples of adolescents (Foshee et al., 2004). The program now includes Families for Safe Dates (Foshee et al., 2012), which focuses on family-based prevention strategies to increase parental involvement and influence family cultures positively.

Another existing TDV prevention program is Shifting Boundaries, which is a school-based primary prevention program that includes classroom-based and school-wide interventions.[10] Shifting Boundaries' classroom-based intervention includes educational sessions in which middle school students are taught the legal consequences of dating violence and sexual harassment, strategies for communicating one's boundaries to establish safe relationships, and the importance of bystanders in intervening in situations of TDV. Shifting Boundaries includes school-wide awareness campaigns and temporary school-based restraining orders. Schools participating in Shifting Boundaries have exhibited decreases in sexual harassment, dating violence victimization, and perpetration six months post-intervention (Taylor, Mumford, & Stein, 2015).

A more recent program, Dating Matters, is a multilevel approach developed by the CDC to influence TDV outcomes across four levels of teens' social–ecological lives (CDC, 2017).[11] The program targets middle school students in high-risk, urban communities (e.g., Baltimore, MD; Chicago, IL). It seeks to affect TDV

[9]See: Foshee et al. (1996) for information on the development of Safe Dates, including its theoretical and content structure.

[10]See: Taylor, Stein, Woods, and Mumford (2011) for further information on the development and evaluation of Shifting Boundaries.

[11]See Tharp et al. (2011) and Tharp (2012) for further information on Dating Matters' program components, evaluation components, and implementation efforts.

outcomes by incorporating elements of Safe Dates and Families for Safe Dates to promote changes not only in teens but also in their peer and family networks. Further, it strives to influence local policies and community social networks to provide a comprehensive approach to targeting TDV in at-risk youth (Tharp, 2012). Dating Matters was first implemented by the CDC in 2011 and evaluations of its impact are forthcoming, but the implementation of such programming points to the increased understanding of the need for primary and secondary prevention programming that incorporates knowledge of the risk teens exhibit both individually and across their social contexts.

Reform Movements Promoting School-Based Prevention Programming

Taking into account the numerous risks associated with TDV, including the risk for relationship violence continuing into adulthood, law reform movements have already begun to address the need for prevention programming. One of the largest prevention advocacy efforts has strived to urge both federal and state governments to create legislation requiring dating violence education in middle and high schools (Weisberg, 2013). Such legal reforms are often championed by the parents of young women killed as a result of dating violence who question how many more young women need to die before the law views TDV as a serious issue (Weisberg, 2013). Because of these efforts, numerous states now have laws that highlight the need for TDV education and prevention programming in schools (Weisberg, 2013). Additionally, a number of federal programs promote the creation and implementation of such prevention programming.[12] For instance, the Saving Money and Reducing Tragedies through Prevention Act (SMART; 2013) awards federal grants for the creation, maintenance, training, and improvement of school-based dating violence prevention programs. SMART grants are specifically geared toward programming aiming to affect teens' attitudes about the acceptability of dating violence and teach them healthy, developmentally appropriate relationship skills (Weisberg, 2013).

Some prevention programs, such as Safe Dates,[13] have already exhibited positive impacts on teens' knowledge of services, attitudes toward dating violence, and reduction of dating violence perpetration (Foshee et al., 1998; Ting, 2009). Psychological and legal scholars have written about the necessary components for effective dating violence prevention programs. These include educational programming for students (especially younger students), training for school personnel,

[12]See Weisberg (2013) for more information on federal policies to fund and promote TDV prevention programming.

[13]For further information on the Safe Dates program see Foshee et al. (1996, 1998, 2004, 2008).

school-based policies outlining responses to dating violence, and dating violence education and training for parents (Weisberg, 2013). Recommendations include school-based programming because schools are ideal settings for educating teens about dating violence as schools have a legal obligation to both ensure safety and provide health education (Weisberg, 2013). Additionally, many incidences of abuse in teen dating relationships occur in public settings, in particular at school (Pensak, 2015). In fact, some states (e.g., Rhode Island) already require education about dating violence be incorporated into existing health education coursework (Weisberg, 2013).[14] While school-based prevention programs are highly recommended by both legal and psychological scholars, research points to the need for programming like Dating Matters to focus efforts on not only the teen but also all levels of the teen's ecological context: their interpersonal lives both with peers and families, as well as their neighborhood context (Champion, Foley, Sigmon-Smith, Sutfin, & DuRant, 2008; Rothman, Johnson, Azrael, Hall, & Weinberg, 2010).

Regardless of where a prevention program is implemented, it should be informed by research findings detailing components that increase program effectiveness. There are three elements to effective prevention and intervention programming: (1) cognitive–behavioral strategies, (2) selective/indicated programs targeting "high-risk youth," and (3) high-quality implementation (Guarnera & Reppucci, 2017). Cognitive–behavioral strategies to TDV programming involve more interactive approaches to instruction and focus on teens' acquisition of the skills necessary to avoid using violence in relationships. Selective targeted programs seeking to prevent TDV in "high-risk" youth would include programming smaller in scope than universal programs. When implementing selective/indicated programs, selection criteria that include factors most strongly related to TDV would likely result in more effective programming. Finally, programs should have the necessary administrative oversight, staff training, and organization to ensure the program's success (Guarnera & Reppucci, 2017). Moreover, scholars recommend that prevention efforts be geared toward primary and secondary prevention. Primary prevention focuses on preventing dating violence before it occurs. The prevalence of dating violence increases in frequency throughout adolescence (Niolon et al., 2015; O'Leary & Slep, 2012), which makes early adolescence a critical period for primary prevention efforts (Foshee et al., 1998; Niolon et al., 2015; Whitaker et al., 2006). Working on prevention with early adolescents who are just beginning to date might circumvent the normalization of abusive behaviors and attitudes toward abuse in youths' dating contexts (Magdol, Moffitt, Caspi, & Silva, 1998). Therefore, education efforts need to be introduced before adolescents reach high school. Meanwhile, secondary prevention efforts should focus on ways to intervene in situations in which dating violence has already occurred and prevent future violence (Weisberg, 2013).

[14]See Weisberg (2013) and Pensak (2015) for further information on state legislation addressing adolescent dating violence prevention in schools.

Significant Prevention Considerations

Overall, prevention efforts should emphasize educational awareness, skill building, and targeted programming for at-risk groups, and incorporate a clear understanding of the social context of teen dating (Noonan & Charles, 2009). Scholars recommend that the following areas be addressed and considered in programming: signs of dating abuse, ways to facilitate change in attitudes and norms that support dating violence, how to promote peer awareness and action, ways to increase awareness and intervention skills with important adults, and gender differences in dating violence (Pensak, 2015). Overviews of the importance of each of these areas are included below.

Recognizing signs of dating violence and shaping attitudes. Prevention programming should seek to increase teens' ability to recognize the warning signs of abusive behavior and the steps they can take if they identify dating violence in their peers' or their own romantic relationships (Pensak, 2015; Weisberg, 2013). Teens should also receive education about safe ways to end harmful relationships and seek help from adults (Pensak, 2015). This can include information on legal services, such as how to file for a civil protection order (Ramos, 2010), and the legal consequences of engaging in dating violence (Ting, 2009).

Such efforts should be combined with educational programming detailing characteristics of healthy dating relationships that challenge attitudes that support dating violence (e.g., harmful gender stereotypes; Offenhauer & Buchalter, 2011; Ramos, 2010). Many teens lack healthy ways to address problems like jealousy, rejection, and risky behaviors in their dating relationships (Noonan & Charles, 2009; Page, 1996). Additionally, teens frequently lack the skills to effectively communicate their feelings to their romantic partners (Sears et al., 2006). Teens often do not describe abusive behavior as abuse and are less likely to notice warning signs because they are naïve and have been socialized to believe abuse is normative in dating relationships (Weisberg, 2013). Prevention efforts should teach healthy communication and ways to solve problems in romantic relationships. Furthermore, efforts should address the significant overlap between contexts that permit sexual harassment and contexts that support dating violence (Taylor & Mumford, 2016).

In this chapter, we have provided extensive information on adolescents' reluctance to report dating violence. Prevention efforts seeking to change adolescents' attitudes about dating violence and to educate them on the signs of dating violence would ideally increase adolescents' willingness to report dating violence when it actually occurs (Largio, 2007). By facilitating the development of negative attitudes toward dating violence, prevention efforts can create social contexts in schools in which those present see the signs of dating violence, deem them unacceptable, and intervene appropriately (Noonan & Charles, 2009).

Peer prevention and intervention. Peers often share the same problematic attitudes and beliefs about dating violence that are found in those teens who are experiencing dating violence. As a result, peers are less likely to recognize and

report dating violence (Mulford & Giordano, 2008; Weisberg, 2013). Researchers find that teens' peers' attitudes toward dating violence largely influence their own dating violence attitudes and behaviors (Mulford & Giordano, 2008; Noonan & Charles, 2009). Throughout adolescence, peers serve as confidants, are more influential on one another than at any other stage of development, and are seen as credible sources of advice about relationship concerns (Mulford & Giordano, 2008; Noonan & Charles, 2009). This knowledge is critical because 61% of teens who do disclose their experiences of dating abuse tell a friend first (Sousa, 1999). In fact, teens rarely tell an authority figure when abuse occurs (Largio, 2007; Sousa, 1999). Unfortunately, teens often do not know how to help their peers or stop the abuse (Carlson, 2003), which can result in teens' inaction in response to abuse. Inaction can be viewed as a sign that abusive behavior is normal in dating relationships, which can further impede teens' ability to get support (King-Ries, 2010).

Programming should teach methods for peers to intervene as bystanders in situations of dating violence. Such efforts would provide adolescents with skills to respond appropriately and confidently to dating violence as well as ways to solicit help from trustworthy adults (Weisberg, 2013). Additionally, teaching peers to provide support to their friends and how to know when they should refer their friends to a supportive authority figure is crucial (Taylor & Mumford, 2016). Programs such as Green Dot and Bringing in the Bystander have already exhibited positive results in increasing young people's willingness and confidence in their ability to intervene in situations of dating violence.[15]

Programming efforts to increase peers' ability to respond effectively to situations of dating violence are critical to prevention because about 50% of TDV occurs when peers are present (Molidor & Tolman, 1998; Mulford & Giordano, 2008). Providing teens with the skills to recognize abusive behaviors and intervene non-violently as bystanders is essential to effective peer support. Acknowledging the profound influence peers play on teens' dating experiences provides a developmentally appropriate approach to preventing acts of dating violence.

Prevention efforts with parents and other important adults. Although teens do not often report situations of dating violence to adults, important adults in teens' daily lives should still be included in prevention efforts because they often hold misconceptions about teen dating relationships, at times referring to such relationships as simply "puppy love" (Largio, 2007; Sanders, 2003). In fact, over 80% of parents do not believe TDV is a necessary issue to discuss with their adolescent children (Largio, 2007). When parents respond to teen dating in ways that minimize its significance they also minimize the severity of abuse teens might experience in those relationships (King-Ries, 2010). This attitude contributes to teens' decreased willingness to go to a parent for advice or support about abuse. Further, with increased accessibility to the privacy provided by modern technology, dating violence is often hidden from parents and other authority figures that might be able to

[15]See Storer, Casey, and Herrenkohl (2015) for a review of the literature on bystander programs' efficacy in preventing dating violence amongst youth.

intervene (Weisberg, 2013). Parents should be educated about the prevalence of dating violence in adolescent relationships, signs of dating violence, how to respond when they see situations of abuse, and resources they can refer their children to (e.g., domestic abuse hotlines; Carlson, 2003). Additionally, parents should be instructed on effective strategies to use during open discussions about dating violence with their children (Weisberg, 2013).

Teachers and other school officials also tend to minimize the significance of dating violence between teens and typically ignore incidents of dating violence (Martin, 2012). Schools are supposed to be safe places for children to learn and can potentially serve as safe spaces for teens to find non-parental adults to speak with about dating violence if they are uncomfortable talking to their parents (Weisberg, 2013). The importance of school environments for the prevention of TDV signifies that school personnel should receive regular training, including the same education parents receive. School personnel training should be mandated because of their regular contact with teens in the settings where they are most likely to exhibit abusive behavior (Carlson, 2003). Daily contact with teens might allow school personnel to be the first to recognize the signs of dating violence (Weisberg, 2013), much as they are often the first to recognize the signs of other problems like child abuse. Uniform policies should be in place about who should be contacted when school personnel encounter dating violence between students, how school personnel can counsel teens who report dating violence, and the consequences perpetrators will face (Carlson, 2003). Bystander skills can also be taught to parents and school personnel so they might provide necessary supervision, role modeling, and awareness of healthy relationship skills, as well as connect youth with appropriate legal and other support services (Stueve et al., 2006; Weisberg, 2013).

Consider differences by gender in programming. Prevention programs should incorporate social scientists' understanding of the differences in dating violence exhibited by distinct genders, races, and income levels. An overview of all of the differences found in these areas is beyond the scope of this chapter, but a focus on gender differences is provided to illustrate how programming might consider such differences.[16]

Middle school youth expect gender role conformity in relationships. This conformity is characterized by females' provision of emotional support and males' provision of material support (Noonan & Charles, 2009). Teenage males show greater discomfort than females in romantic relationships due to difficulty with communication and diminished confidence in traversing the complexities of these relationships (Giordano, Longmore, & Manning, 2006). Meanwhile, teenage females typically have greater levels of experience with providing support and

[16]There are other groups at high risk of exhibiting dating abuse in adolescent dating relationships (e.g., low income, African American youth; Black et al., 2006; Henry & Zeytinoglu, 2012), but reviewing research findings about these groups are beyond the scope of this paper. It is important to note that further research clarifying *why* these groups are at risk for exhibiting higher levels of relationship abuse is necessary to develop properly targeted intervention programming most likely to be effective with such groups.

creating intimate relationships due to their friendships with other females (Call & Mortimer, 2001). Combating problematic gender stereotypes while also incorporating an understanding of the varying levels of comfort with intimacy exhibited by teenage males and females is crucial to targeting content in strategic ways that reflect gender differences in attitudes toward dating relationships.

Understanding the substantial differences in the types of abusive behaviors most often utilized by teenage males and females should also be incorporated into prevention programming. Teen females perpetrate physical and psychological abuse more often than males, while males perpetrate more sexual abuse than females (Foshee, 1996; Niolon et al., 2015; O'Keefe, 1997; Sears et al., 2006). Teenage males and females give different reasons for using violence in their relationships. Both genders become violent most frequently because of anger; attempts to gain control over their significant other is males' second most named reason, while self-defense is females' second most named reason. Jealousy is the reason mentioned third most often for both genders (Largio 2007; Levesque, 1997; Mulford & Giordano, 2008; O'Keefe, 1997). Of particular concern is the knowledge that physical violence inflicted upon females by males results in more negative consequences than physical violence inflicted upon males by females because of increased severity (Molidor & Tolman, 1998; O'Keefe, 2005). Furthermore, studies show that males who are involved in relationships involving physical violence often perceive less power in their romantic relationships when compared to those whose relationships do not include physical aggression (Mulford & Giordano, 2008). Acknowledging gender differences in justifications for and use of abusive behaviors is critical to developing prevention strategies that combat attitudes accepting of violence in dating relationships.

There is often mutual physical aggression between teenage males and females in dating relationships (Mulford & Giordano, 2008; Reppucci et al., 2013). Relationships involving mutual violence include the largest amounts of violence (when compared to relationships with one-sided violence) and are more likely to result in physical injury (Gray & Foshee, 1997; Whitaker, Haileyesus, Swahn, & Saltzman, 2007). In particular, teenage females are more likely than males to experience fear and severe forms of physical and sexual violence (Gamache, 1991). Prevention programming should, for instance, strive to combat the perception that physically abusive behaviors used by teenage females are more acceptable than physical abuse perpetrated by teenage males (O'Keefe & Treister, 1998; Sears et al., 2006). Programming should communicate that all forms of violence are unacceptable.

Some behaviors might also be seen as psychologically abusive when used by one gender, but nonabusive when used by the other (Sears et al., 2006). Teen males who treat their girlfriends well are often teased and viewed as being manipulated or controlled. Teenage males generally distrust females who seem to want to manipulate and take advantage of their male peers (Noonan & Charles, 2009). On the other hand, females receive support from peers for treating their boyfriends well. Perceptions of females as partners who might take away males' power in the relationship reflect harmful ideas about the capacity for equality in these

relationships; however, understanding the ways teens establish and hold power and control in these relationships is crucial to understanding dating violence (Nieder & Seiffge-Krenke, 2001; Sears et al., 2006). Addressing gender policing, gender role stereotypes, and peer group norms can appropriately incorporate the knowledge that teens' worlds are gendered and the gendering of their worlds makes it easier for teens to justify abuse (Noonan & Charles, 2009). However, the optimal strategy for addressing such problematic gender norms and perceptions remains unclear, specifically considering the question of whether single- or mixed-gender groups are most optimal for programming. Single-gender groups can allow males and females to address their unique perceptions of problematic gender roles, but might also serve to perpetuate the belief that males and females are inherently different and cannot learn from one another (Noonan & Charles, 2009). Alternatively, when compared to single-gender groups, mixed-gender groups produce greater effects on males' attitudes and beliefs (Clinton-Sherrod et al., 2009). Anecdotally, we are aware of clinicians who have found that single-gender groups might be more effective for females' willingness to open up about emotional and interpersonal issues and question whether mixed-gender groups might be effective *after* participation in single-gender groups. Overall, it is clear that more research is needed to determine which approach and under what conditions programming is most effective.

Conclusion

Dating can be quite positive for teens and give them the opportunity to learn to develop boundaries and intimacy with romantic partners, which positively influences how they behave in adult romantic relationships (King-Ries, 2010; Steinberg, 2013). However, when such dating involves abuse, teens are not only at risk for deleterious physical and emotional health outcomes during adolescence, but they are also at risk of experiencing and perpetrating domestic violence in adulthood. For these reasons, the law and social sciences must continue to address and prevent teen dating violence (Halpern, Oslak, Young, Martin, & Kupper, 2001; O'Leary & Slep, 2003).

This chapter has highlighted the need for appropriately targeted legal responses to TDV and calls for legal scholars and social scientists to examine which areas of legal response should be improved to address TDV effectively. It is clear that blindly applying the same policies to address relationship violence to adolescents and adults is inappropriate because of the developmental differences between the two groups. However, considering the social experimentation and sexual development that accompany adolescence, the law must carefully determine when and how it should become involved. With the changing landscape of teen dating, including the rise in technology-based abuse, the law will need to continue its endeavor to understand the complexities of TDV and how and when it can and should punish arguably "normal" juvenile dating experimentation.

Moreover, having an understanding of the developmental implications of TDV, how teens uniquely express dating violence, and potential ways to prevent such violence should allow the legal system to better comprehend ways to collaborate with social scientists to determine intervention methods to effectively address teens' conceptualizations of the acceptability of dating violence. Because problematic attitudes and beliefs about dating relationships that contribute to dating violence are not systematically prevented and challenged during adolescence, it should not be a surprise that victimization continues to be a common experience for college undergraduates in the United States, some of whom are often still teenagers in their first few years of college (Vladutiu, Martin, & Macy, 2010). Social scientists must continue their efforts to develop primary and secondary prevention programs to address dating violence *early* in adolescence. Along with the development of prevention programming, social scientists should also strive to inform the law on ways it can address TDV in an effective manner, as well as include information about laws against dating violence in their prevention efforts with teens. Overall, it is imperative that the legal and psychological fields collaborate to ensure that developmentally and legally appropriate responses to TDV are supported by policy-makers, educators, and adults in teens' lives.

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B. H. Bornstein and M. K. Miller (eds.), *Advances in Psychology and Law*,
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