

# BUILDING ON A SHAKY FOUNDATION: THE ARGUMENT FOR CHANGING INVESTIGATION PROCEDURES IN SHAKEN BABY SYNDROME CASES

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## ABSTRACT

*The thought of an adult shaking a baby to the point of death is horrific. Therefore, it would be fair to assume that accusations of infant shaking are rare and those who stand accused must be cold-hearted cowards. It may come as a surprise, then, that hundreds of parents and caregivers face criminal charges each year after children in their care are diagnosed with Shaken Baby Syndrome (SBS)—or its semantic successor, Abusive Head Trauma (AHT). Also surprising is the fact that many of the parents and caregivers accused are otherwise productive citizens who do not have violent criminal histories. These cases lead to one of two conclusions: either decent parents and caregivers in the United States are inordinately prone to randomly abusing infants, or the SBS diagnosis may not be so conclusive of criminal activity after all.*

*A growing number of professionals in the fields of science, medicine, and law have begun to agree with the latter proposition. They believe that classic SBS symptomology may actually be attributable to a whole host of other, non-criminal causes—from accidental falls to preexisting medical conditions. This shift in understanding has resulted in a steady stream of exonerations for parents and caregivers once convicted of murdering infants in their care. To avoid such errors, the criminal justice system has a duty to reform its practices surrounding SBS-based investigations and prosecutions. This reformation can begin with the investigators who make initial determinations of guilt. They must abandon the accusatory style of interrogation that has dominated United States policing for decades and instead engage parents and caregivers in cooperative interviews*

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*when children in their care have fallen ill or died. By approaching these vulnerable adults with a focus on gathering information, not just securing admissions of guilt, investigators can reduce the incidence of false confessions and distinguish situations of true child abuse from mere tragic accidents.*

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## INTRODUCTION

On June 12, 2014, a New York jury found Adrian Thomas not guilty of murdering his four-month-old son.<sup>1</sup> The acquittal marked a pivotal turning point in Thomas's six-year legal battle, which included two murder trials, five years in the state penitentiary, and constant reminders of his child's death.<sup>2</sup> Thomas's trouble began on September 21, 2008, when he found his four-month-old son, Matthew, unresponsive in bed.<sup>3</sup> Hours later, detectives began to question Thomas in their investigation of Matthew's death.<sup>4</sup> The interrogation went on for two hours before Thomas had to be hospitalized for expressing suicidal thoughts.<sup>5</sup> Upon his release from the hospital, police resumed the interrogation and grilled Thomas with accusatory<sup>6</sup> questions for a total of nine-and-a-half hours.<sup>7</sup> Ultimately, he confessed to causing his son's head injuries.<sup>8</sup> At Thomas's first murder trial in October 2009, a jury found him guilty and the judge sentenced him to twenty-five years to life in prison.<sup>9</sup> Nearly five years later, New York's highest court agreed to review Thomas's case.<sup>10</sup> The court, finding that Thomas's confession was unreliable due to coercive

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1. See Maurice Possley, *Adrian Thomas*, NAT'L REGISTRY OF EXONERATIONS (Jun. 21, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4449> [<https://perma.cc/8C5L-AB4T>] (last updated Nov. 20, 2016).

2. See *id.* (detailing Adrian Thomas's legal battle).

3. See *id.*

4. See *People v. Thomas*, 8 N.E.3d 308, 311 (N.Y. 2014).

5. See *id.* ("In between [interrogations], defendant, having expressed suicidal thoughts during the initial interview, was involuntarily hospitalized pursuant to Mental Hygiene Law § 9.39 for some 15 hours in a secure psychiatric unit.")

6. See *id.* at 311 ("The premise of the interrogation was that an adult within the Thomas-Hicks household must have inflicted traumatic head injuries on the infant . . . [and] the officers falsely represented that [Thomas's] wife had blamed him for Matthew's injuries."); see also FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS* 5 (1st ed. 2005) (stating that "[a]n interrogation is accusatory").

7. See *Thomas*, 8 N.E.3d at 311.

8. See *id.* at 312. In Thomas's first confession, "[h]e said that, about 10 or 15 days before, he accidentally dropped Matthew five or six inches into his crib and Matthew hit his head 'pretty hard.'" *Id.* However, after further questioning, he "enlarged upon his prior statement, now admitting that, under circumstances precisely resembling those specified by [the police investigator], he threw Matthew down on his mattress on the Wednesday, Thursday and Saturday preceding the child's hospitalization." *Id.* at 313.

9. See Possley, *supra* note 1 (detailing Adrian Thomas's first trial).

10. See generally *Thomas*, 8 N.E.3d at 311 (reviewing the lower courts' decisions to deny Thomas's motion to suppress his statements to police).

interrogation tactics, granted his motion to suppress statements made to police and ordered that he receive a new trial.<sup>11</sup> Adamantly convinced of Thomas's guilt, prosecutors tried the case a second time in May 2014.<sup>12</sup> When the jury stunned them with a verdict of "not guilty," the District Attorney's Office issued a public apology for Thomas's acquittal.<sup>13</sup>

Thomas's story is not unusual.<sup>14</sup> In 1996, prosecutors charged trusted neighborhood caregiver Audrey Edmunds with murdering a seven-month-old child in her care.<sup>15</sup> Like Thomas, she was convicted of murder and sent to prison until an appeals court overturned her conviction and ordered a new trial.<sup>16</sup> However, unlike Thomas, Edmunds had never confessed to mishandling the child, so when prosecutors were faced with the prospect of a second trial, they opted instead to dismiss all charges.<sup>17</sup> The juxtaposition of these cases suggests that when parents and caregivers confess to harming children, those confessions drive investigators and prosecutors to pursue shaken baby abuse and homicide convictions with heightened zeal,<sup>18</sup> despite

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11. *See id.* at 317.

12. *See* Possley, *supra* note 1 (discussing Thomas's second trial).

13. *See* Molly Eadie, *Adrian Thomas Found Not Guilty in Son's Death*, TROY REC. (June 12, 2014, 4:18 PM), <http://www.troyrecord.com/general-news/20140612/adrian-thomas-found-not-guilty-in-sons-death> ("We did the best we could with the evidence we had left in the case and unfortunately, the jury, it just wasn't enough for them," said Book. "I'm sorry that I couldn't do justice for Matthew in this case.").

14. *See, e.g.*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exonerations/Pages/browse.aspx> [<https://perma.cc/3PL6-XSJX>] (type "SBS" in search field and click "Filter") (last visited Mar. 11, 2019) [hereafter *Shaken Baby Syndrome Cases*] (listing cases in which parents or caregivers convicted of abusing infants were exonerated).

15. *See* State v. Edmunds, 746 N.W.2d 590, 592 (Wis. Ct. App. 2008); *see also* Alexandra Gross, *Audrey Edmunds*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exonerations/Pages/casedetail.aspx?caseid=3201> [<https://perma.cc/2SPL-R4FD>] (last visited Mar. 11, 2019).

16. *See* Gross, *supra* note 15 (detailing Audrey Edmunds's legal battle).

17. *See id.*

18. *Compare* Possley, *supra* note 1 (detailing Adrian Thomas's confession, first trial, conviction, appeal, and second trial), *with* Gross, *supra* note 15 (detailing Audrey Edmunds's proclamation of innocence, trial, conviction, appeal, and the dismissal of her charges). *See* Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 383 (2009) (citations omitted) ("Empirical studies have shown that confession evidence biases criminal justice officials and triers-of-fact at each stage of the criminal process. Once a confession is obtained, police tend to 'close' cases as solved and refuse to investigate other sources of evidence, and prosecutors tend to

doubt in the medical community and appellate courts regarding the reliability of shaken baby science.<sup>19</sup>

As the New York Court of Appeals noted in *People v. Thomas*, Adrian Thomas's confession was, in large part, a product of coercive police interrogation tactics.<sup>20</sup> Over the past forty years, more than half a million investigators across America have been trained to use accusatory questioning techniques designed to elicit confessions from suspects.<sup>21</sup> While these techniques have played a role in achieving many valid criminal convictions, they are nonetheless concerning in that they begin with a presumption of guilt and function almost exclusively to confirm that presumption.<sup>22</sup> This type of questioning can be particularly troublesome in Shaken Baby Syndrome (SBS) abuse and homicide cases in which officers base their investigations of parents and caregivers on a medical diagnosis that is currently entrenched in medical controversy.<sup>23</sup> Nevertheless, confessions secured under these circumstances routinely find their way into criminal proceedings with incredibly high stakes for the parents and caregivers who stand accused.<sup>24</sup> Therefore, because of the tremendous

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charge suspects with the highest number and types of offenses, set bail higher, and are far less likely to initiate or accept plea bargains.”).

19. See *Comm. v. Epps*, 53 N.E.3d 1247, 1260–61 (Mass. 2016) (citations omitted) (“Numerous studies [have] been published . . . challenging the view that shaking alone can produce the types of injuries associated with shaken baby syndrome. Although these issues [are] hotly contested in the relevant medical and scientific fields, and although the experts who would support the positions beneficial to [defendants are] in the minority in this debate, there [is] significant medical and scientific support for these minority positions.”).

20. See *People v. Thomas*, 8 N.E.3d 308, 314 (N.Y. 2014) (addressing the “patently coercive representation[s]” that investigators made during their interrogation of Adrian Thomas).

21. See Mark Costanzo, Iris Blandón-Gitlin & Deborah Davis, *The Purpose, Content, and Effects of Expert Testimony on Interrogation and Confessions*, in 2 *ADVANCES IN PSYCHOLOGY AND LAW* 141, 149 (Brian H. Bornstein & Monica K. Miller eds., 2016).

22. See *INBAU ET AL.*, *supra* note 6, at 101 (explaining that the accusatory technique is used to interrogate “suspects whose guilt seems definite or reasonably certain” and “persuade [the] guilty person to tell the truth”).

23. See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U.L. REV.* 979, 1023 (1997) (discussing the consequences of erroneously accusing a parent of killing his or her infant).

24. See, e.g., Suzie Schottelkotte, ‘He Was Laughing’: Lakeland Father Robert Graham Testifies in Shaken-Baby Death of His 4-Month-Old Son, *THE LEDGER* (Jan. 22, 2019, 10:25 AM), <https://www.theledger.com/news/20190122/he-was-laughing-lakeland-father-robert-graham-testifies-in-shaken-baby-death-of-his-4-month-old-son> [<https://perma.cc/4TE3-32H4>] (detailing the trial of Robert Graham

risk of false confessions resulting in harsh criminal convictions of innocent or merely negligent parents and caregivers, it is imperative that police agencies reject the status quo practice of accusatory interrogation and instead adopt a more cooperative interview procedure in SBS investigations.<sup>25</sup>

Part I of this Note highlights both sides of the ongoing controversy that surrounds the diagnosis of SBS.<sup>26</sup> Part II analyzes the unique positions of parties involved in SBS criminal cases; specifically, it looks at infants as a class of particularly sympathetic victims<sup>27</sup> and parents and caregivers as a class of particularly susceptible suspects.<sup>28</sup> Part III exposes the accusatory investigative techniques that have become standard practice for police agencies,<sup>29</sup> delves into the staggering frequency of false confessions, and introduces an alternative approach to police questioning—the United

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who faces up to 30 years in prison for the death of his child); *see also* George Khoury, *Criminal Charges for Shaken Baby Syndrome*, FINDLAW (Nov. 4, 2016, 3:07 PM), <http://blogs.findlaw.com/blotter/2016/11/criminal-charges-for-shaken-baby-syndrome.html> [<https://perma.cc/ZA9Y-UWSN>] (“When law enforcement investigates, officers and prosecutors have the discretion regarding whether the circumstances that led to the injury or death were criminal. . . . Parents and caregivers have faced charges ranging from criminal negligence or child abuse, to involuntary manslaughter or even murder.”).

25. *See, e.g.*, Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 34 (2011) [hereinafter *Suspect Interviews*] (noting the increase in “recommend[at]ions that the guilt-presumptive and confrontational process inherent in [accusatory interrogation] technique[s] should be replaced by a noncoercive technique such as the PEACE model used in the United Kingdom”).

26. *See infra* Sections I.A & I.B; *see, e.g.*, Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U.L. REV. 1, 16 (2009) [hereinafter *Next Innocence Project*] (“Since the mid-1990s, the science surrounding SBS has undergone striking transformation . . . leading a segment of the scientific establishment—including some formerly prominent supporters of its validity—to perceive the diagnosis as illegitimate. Others, equally distinguished in their respective fields, have responded to the new research by defending SBS against attack. Thus, despite the progression of scientific discourse, the current debate about shaken baby syndrome is remarkably polarized.”); *see infra* Part I.

27. *See infra* Section II.A; *see also* DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: “SHAKEN BABY SYNDROME” AND THE INERTIA OF JUSTICE* 14 (2014) [hereinafter *FLAWED CONVICTIONS*] (“[W]here a baby—the quintessential innocent—is readily situated as crime victim, the drive to locate an offender only gains force.”).

28. *See infra* Section II.B; *FLAWED CONVICTIONS*, *supra* note 27, at 104 (“In SBS cases, parents and often caregivers have a tremendous stake in the well-being of the critically ill baby. Police interrogators tend to capitalize on this emotional vulnerability, explicitly or implicitly appealing to the infant’s condition in an effort to elicit a confession.”).

29. *See infra* Section III.A; *see generally* INBAU ET AL., *supra* note 6.

Kingdom's PEACE method of investigative interviewing.<sup>30</sup> Finally, Part IV of this Note proposes that police agencies across America should abandon accusatory interrogation practices in SBS cases and instead adopt an investigative interviewing process, like the United Kingdom's PEACE method, to reduce the potential for false confessions of guilt by innocent or merely negligent parents and caregivers.<sup>31</sup>

### I. SHAKEN BABY SYNDROME: REALITY, FALLACY, OR UNCERTAINTY?

There is an ongoing and hotly contested debate among some of the nation's most reputable scientists and medical professionals over the validity of the SBS<sup>32</sup> diagnosis and the role that the diagnosis should or should not play in convicting parents and caregivers in criminal courts.<sup>33</sup> Proponents of SBS theory cite decades of scientific study and a long history of support from the medical and legal communities as justifications for their steadfast allegiance to the SBS

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30. See *infra* Sections III.B & III.C; Brent Snook et al., *Reforming Investigative Interviewing in Canada*, 52 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 215, 219–23 (2010).

31. See *infra* Part IV; see Saul M. Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL CRIMINOLOGICAL PSYCH. 39, 39 (2010) [hereinafter *Interviewing Suspects*].

32. The diagnosis was originally named “Whiplash Shaken Infant Syndrome.” See John Caffey, *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleedings, Linked with Residual Permanent Brain Damage and Mental Retardation*, 54 PEDIATRICS 396 (1974) [hereinafter Caffey 1974]. This diagnosis evolved into “Shaken Baby Syndrome” during the latter quarter of the twentieth century. See Stephen Ludwig & Matt Warman, *Shaken Baby Syndrome: A Review of 20 Cases*, 13 ANNALS EMERGENCY MED. 104, 104 (1984).

33. See generally Clyde Haberman, *Shaken Baby Syndrome: A Diagnosis That Divides the Medical World*, N.Y. TIMES (Sept. 13, 2015), <https://www.nytimes.com/2015/09/14/us/shaken-baby-syndrome-a-diagnosis-that-divides-the-medical-world.html> [<https://perma.cc/5N2N-ESWE>] (discussing both sides of the zealous debate over the validity of the SBS diagnosis); Debbie Cenziper, *Shaken Science: A Disputed Diagnosis Imprisons Parents*, WASH. POST (Mar. 20, 2015), <https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/> [<https://perma.cc/UJ6J-2SBG>] (detailing the criminal law ramifications of the SBS debate). See also Cassandra Ann Jenecke, *Shaken Baby Syndrome, Wrongful Convictions, and the Dangers of Aversion to Changing Science in Criminal Law*, 48 U. S.F.L. REV. 147, 159 (2014) (discussing challenges to classic SBS theory in Australia, the United Kingdom, and Canada).

diagnosis.<sup>34</sup> Conversely, skeptics call into question the very foundational science that underlies the age-old SBS diagnosis and warn against continued prosecutorial dependence on the diagnosis in criminal proceedings.<sup>35</sup> This growing disagreement has prompted many medical professionals to begin filing their SBS-based findings under the broader heading of “abusive head trauma” (AHT), which includes shaking as just one of many possible mechanisms of abuse.<sup>36</sup> Semantics aside, the two camps remain irreconcilably divided, leaving the legal community to operate in a state of limbo.<sup>37</sup>

### A. Classic SBS Theory

Since its inception, the diagnosis of SBS has garnered substantial support in both the medical and legal communities and beyond.<sup>38</sup> The diagnosis emerged in the early 1970s<sup>39</sup> when pediatric neurosurgeon A.N. Guthkelch and pediatric radiologist Dr. John Caffey each published groundbreaking papers discussing the effects of whiplash on infants.<sup>40</sup> At its core, SBS theory dictates that if doctors examining

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34. See Cenziper, *supra* note 33 (“Doctors for the prosecution [in a 2010 SBS homicide case] said [the child] had been a victim of Shaken Baby Syndrome, a 40-year-old medical diagnosis long defined by three internal conditions. . . . The diagnosis gave a generation of doctors a way to account for unexplained head injuries in babies and prosecutors a stronger case for criminal intent . . .”).

35. See Daniel G. Orenstein, *Shaken to the Core: Emerging Scientific Opinion and Post-Conviction Relief in Cases of Shaken Baby Syndrome*, 42 ARIZ. ST. L.J. 1305, 1312–14 (2010).

36. See Cindy W. Christian & Robert Block, *Abusive Head Trauma in Infants and Children*, 123 PEDIATRICS 1409, 1410 (2009).

37. See Jan E. Leestma, “*Shaken Baby Syndrome*”: *Do Confessions By Alleged Perpetrators Validate the Concept?*, 11 J. AM. PHYSICIANS & SURGEONS 14, 14 (2006).

38. See FLAWED CONVICTIONS, *supra* note 27. “By the late 1990s, SBS had become entrenched in establishment medicine, popular imagination, and criminal law.” *Id.* at 5. See generally NATIONAL CENTER ON SHAKEN BABY SYNDROME, <https://dontshake.org> (last visited Mar. 11, 2019) (providing information on SBS).

39. See John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008). The second half of the twentieth century marked an “era of government-sponsored child protective services.” *Id.* With this increase in government attention came an “explosion of interest in child abuse.” *Id.* at 454. Medical professionals vigorously studied the topic and news media outlets began disseminating tales of child abuse both locally and nationally. *Id.* at 454–55.

40. See generally A.N. Guthkelch, *Infantile Subdural Haematoma and its Relationship to Whiplash Injuries*, 2 BRIT. MED. J. 430 (1971); John Caffey, *On the Theory and Practice of Shaking Infants: Its Potential Residual Effects of Permanent Brain Damage and Mental Retardation*, 124 AM. J. DISEASES CHILD. 161 (1972); Caffey 1974, *supra* note 32, at 396.

infants detect three symptoms—subdural hemorrhaging, retinal hemorrhaging, and cerebral edema—commonly known as the “triad,” they can confidently diagnose the infant with SBS.<sup>41</sup> Estimates indicate that medical professionals diagnose over 1,000 cases of SBS each year in the United States.<sup>42</sup>

Perhaps the most notable corollary of an SBS diagnosis is the belief that a shaken infant will typically manifest symptoms almost immediately after the abusive event.<sup>43</sup> Therefore, in virtually all cases in which doctors affirmatively diagnose SBS, the last adult to care for the infant is presumed to have violently shaken or otherwise abused the baby, unless that adult is able to offer a viable explanation for the traumatic injury, such as a car accident or significant fall.<sup>44</sup> This presumption has resulted in the prosecution of hundreds of adults annually across the United States for the severe abuse or homicide of infant children.<sup>45</sup>

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41. See Orenstein, *supra* note 35, at 1308 (detailing the history of the SBS diagnosis).

42. See Brian Douglas Hoyle & Rebecca J. Frey, *Shaken Baby Syndrome*, in THE GALE ENCYCLOPEDIA OF MEDICINE 4582 (Jacqueline L. Longe ed., 5th ed. 2015) (providing an overview on the prevalence of SBS).

43. See Keith A. Findley, Patrick D. Barnes, David A. Moran & Waney Squier, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL’Y 209, 225–26 (2012) (“A corollary of the SBS hypothesis—and one that was particularly important for the legal system—was that the injury could be timed and the perpetrator identified based solely on the medical findings. Since the damage caused by the traumatic rupture of nerve fibers throughout the brain would be devastating with immediate loss of function (as in concussion), there could be no period of relative normality (‘lucid interval’) following the injury.”).

44. See *id.* at 219; see also *Next Innocence Project*, *supra* note 26, at 32 (“If, across the country over the years, defendants have been proven guilty of shaking babies to death based on the presence of retinal hemorrhages, subdural hematomas and cerebral edemas, then the presence of these symptoms must mean that someone is guilty of shaking a baby to death. All that remains is to identify the last person with the conscious child. That person becomes the suspect, who can then be confidently pursued.”).

45. See Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES (Feb. 2, 2011), <http://www.nytimes.com/2011/02/06/magazine/06baby-t.html> (“There is no exact count of shaken-baby prosecutions, but law-enforcement authorities think that there are about 200 a year.”); see also *U.S. Shaken-Baby Syndrome Database*, MEDILL JUST. PROJECT, <http://www.medilljusticeproject.org/u-s-shaken-baby-syndrome-database/> (last updated May 20, 2015) (providing a periodically updated database of SBS criminal cases in the United States). Cf. Alison Enright, *A Point of View*, MEDILL JUST. PROJECT (Sept. 19, 2012), <http://www.medilljusticeproject.org/wp-content/uploads/sites/12/2012/09/A-Point-of-View-By-Alison-Enright.pdf> (discussing reforms in the United Kingdom that have

## B. Emerging Medical Controversy

While the SBS diagnosis has enjoyed decades of widespread confidence in its validity, a growing number of critics are scrutinizing the reliability of foundational shaken baby science.<sup>46</sup> These criticisms are based on three emerging beliefs about the triad of symptoms.<sup>47</sup> First, there is now significant debate surrounding the necessary temporal link between trauma and the triad.<sup>48</sup> Whereas classic SBS science assumed that an abused infant would begin suffering symptoms almost immediately, new research suggests that an infant may actually remain lucid for up to seventy-two hours between an impactful event and the manifestation of symptoms.<sup>49</sup> Second, some critics are now calling into question the level of trauma needed to inflict the triad.<sup>50</sup> Injuries once exclusively attributed to violent abuse or catastrophic accident—like a multi-story fall or major vehicle collision—may in fact result from significantly lower impact events.<sup>51</sup> Finally, some medical professionals are now stressing the importance of differential diagnosis when they believe that a child’s preexisting health issues could trigger the triad of symptoms that is historically

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led to a drastic reduction in SBS prosecutions in the UK compared to the United States).

46. See, e.g., Molly Gena, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions*, 2007 WIS. L. REV. 701, 710 (2007) (“Today, there is no consensus among medical professionals as to whether the symptoms that have traditionally been attributed to SBS are necessarily indicative of intentional shaking.”); Deborah Tuerkheimer, *Anatomy of a Misdiagnosis*, N.Y. TIMES (Sept. 20, 2010), [hereinafter *Anatomy of a Misdiagnosis*], <http://www.nytimes.com/2010/09/21/opinion/21tuerkheimer.html>.

47. See *Anatomy of a Misdiagnosis*, *supra* note 46.

48. See Findley et al., *supra* note 43, at 214 (“[I]t is no longer generally accepted that . . . there can be no period of lucidity between injury and collapse (a key element in identifying the perpetrator) . . .”).

49. See *Next Innocence Project*, *supra* note 26, at 18 (explaining that studies now show that “children suffering fatal head injury may be lucid for more than seventy-two hours before death,” which challenges the immediacy requirement implicit in classic SBS theory).

50. See generally John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22 AM. J. FORENSIC MED. & PATHOLOGY 1 (2001) (positing that short distance falls may cause lethal head injuries in infants).

51. See *Next Innocence Project*, *supra* note 26, at 4 (citing to the case of Audrey Edmonds in which prosecution experts testified that the force necessary to inflict the infant’s injuries “was equivalent to a fall from a second- or third-story window, or impact by a car moving at twenty-five to thirty miles an hour”); see also Findley et al., *supra* note 43, at 214.

diagnostic of SBS.<sup>52</sup> Experts cite to a myriad of ailments including birth trauma, infectious disease, genetic conditions, coagulation disorders, and nutritional deficiencies, among others, that do not result from falls or injuries and may play a role in the misdiagnosis of abuse.<sup>53</sup>

### C. Criminal Implications of SBS

These increasing doubts about the validity of SBS diagnoses hold major implications for SBS-based criminal proceedings.<sup>54</sup> First, because classic SBS theory assumes a tight temporal link between the impact event and the manifestation of symptoms, a diagnosis either directly implicates a culpable party or significantly narrows the persons of interest.<sup>55</sup> However, the possibility that an infant may experience a multiday lucid interval between impact and symptom manifestation would make it much harder for investigators and prosecutors to accurately identify a suspect.<sup>56</sup> Second, whereas classic SBS theory insists that the triad of symptoms only appears after a child is severely abused, the notion that significantly lower impact events or preexisting medical conditions may also cause those symptoms

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52. See Leestma, *supra* note 37, at 15–16.

53. See Findley et al., *supra* note 43, at 214 (listing alternative causes for the triad as “prenatal and perinatal conditions including birth trauma; congenital malformations; genetic conditions; metabolic disorders; coagulation disorders; infectious disease; vasculitis and autoimmune conditions; oncology; toxins and poisons; nutritional deficiencies; [and] complications from medical-surgical procedures, including lumbar puncture”); see also *Next Innocence Project*, *supra* note 26, at 22 (listing nontraumatic causes of the triad).

54. See Debbie Cenziper et al., *Special Report: Doctors Doubt Shaken Baby Syndrome Science, Fear Bad Convictions*, DAILY HERALD (Mar. 23, 2015, 5:30 AM), <http://www.dailyherald.com/article/20150323/news/150329644/> [<https://perma.cc/AE3K-TETA>] (“[D]octors’ journeys from supporters to skeptics expose the uncertainty at the heart of a medical diagnosis that has fueled hundreds of abuse and murder cases. In courtrooms across the country, the doubting doctors are not using the same evidence that once supported a shaking conviction—medical records, autopsy reports and brain scans—to challenge the diagnosis.”).

55. See Leestma, *supra* note 37, at 15 (“A common allegation of some child-abuse experts is that all or virtually all shaken babies become ill immediately after having been shaken. Therefore, the individual present with the child decompensates is responsible.”).

56. See *Next Innocence Project*, *supra* note 26, at 18 (“Because the prospect of lucid interval lessens the ability to pinpoint when an injury was inflicted, this research dramatically alters the forensic landscape. Without other evidence, the identity of a perpetrator—assuming a crime has occurred—simply cannot be established.”).

undermines the presumption that any abuse occurred at all.<sup>57</sup> This revelation is particularly important given the fact that in many of these cases prosecutors use the violent force presumed by classic SBS theory to prove that the defendant had intent to kill or seriously injure the child.<sup>58</sup> It follows, then, that as the amount of force believed necessary to inflict the triad of symptoms dwindles, so too does the corresponding intent argument.<sup>59</sup>

For decades, a medical diagnosis of SBS has provided prosecutors with a straightforward manner of death, a clear perpetrator or slim suspect pool, and an obvious mens rea stemming from frustration or anger.<sup>60</sup> The result has been a repetitive cycle of SBS-based convictions that have served to reinforce each other and perpetuate confidence in the diagnosis.<sup>61</sup> However, in recent years, many accused parents and caregivers, with the help of a growing group of skeptics, have begun to break the cycle by mounting successful

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57. See *id.* at 17 (“An emerging body of research has undermined the scientific basis for defining the triad of SBS symptoms as exclusively diagnostic of abuse. No longer are physicians willing to state with certainty that the constellation of symptoms that once characterized SBS individually and collectively must in every case indicate that a child was abused.”).

58. See, e.g., MICH. COMP. LAWS § 750.316(1)(b) (2018). Michigan’s felony murder statute lists “child abuse in the first degree” as a predicate crime for first degree felony murder. *Id.* To prove child abuse in the first degree, the state must show that the defendant “knowingly or intentionally” caused “serious physical or serious mental harm to a child.” § 750.136b(2).

59. See, e.g., *People v. Roberts*, No. 327296, 2017 WL 2457390, at \*8–9 (Mich. Ct. App. June 6, 2017) (per curiam) (overturning a murder conviction wherein defense counsel failed to investigate the level of force necessary to inflict the victim’s injuries).

60. See Radley Balko, ‘Shaken Baby Syndrome’ and the Flawed Science in Our Criminal Courts, WASH. POST (Feb. 21, 2014), [https://www.washingtonpost.com/news/the-watch/wp/2014/02/21/shaken-baby-syndrome-and-the-flawed-science-in-our-criminal-courts/?utm\\_term=.73accbd0fd90](https://www.washingtonpost.com/news/the-watch/wp/2014/02/21/shaken-baby-syndrome-and-the-flawed-science-in-our-criminal-courts/?utm_term=.73accbd0fd90) [<https://perma.cc/DS7J-X8EG>].

61. See James Le Fanu, *Wrongful Diagnosis of Child Abuse—A Master Theory*, 98 J. ROYAL SOC’Y MEDICINE 249, 251 (2005) (“The validity of the child abuse syndromes would appear to be confirmed by the high proportion of successful convictions that followed the courts’ careful scrutiny of the allegations against parents. These convictions, however, came to rely increasingly on a circular argument—whereby the main evidence for the child abuse syndrome of which the parents were accused was that parents had been convicted of it in the past. Thus parents whose child presents with subdural and retinal hemorrhages are accused of inflicting shaken baby syndrome because, in the vast majority of cases, parents of children with subdural and retinal hemorrhages are convicted of causing shaken baby syndrome.”).

courtroom challenges to their SBS-based criminal charges and convictions.<sup>62</sup>

In 1996, the same year that a Wisconsin jury convicted Audrey Edmunds of murdering a child in her care,<sup>63</sup> a California jury convicted Shirley Smith of murdering her grandson, Etzel Glass.<sup>64</sup> Smith had discovered Glass unresponsive in the night and later told social workers that she had given him “a little shake, a little jostle” to wake him—a statement that likely sealed her fate.<sup>65</sup> Over a decade later, in 2012, Governor Jerry Brown expressed his sincere doubts about Smith’s guilt and commuted her sentence to time served.<sup>66</sup> The state of California also sent Zavion Johnson to prison in 2001 for the murder of his daughter, Nadia.<sup>67</sup> Though Johnson told investigators that he had accidentally dropped Nadia in the shower, prosecutors rejected that claim and instead relied on classic SBS theory to secure his conviction.<sup>68</sup> Nearly two decades later, controversy over the diagnosis was enough to convince a judge to set aside Johnson’s conviction in December 2017.<sup>69</sup>

In addition to Zavion Johnson’s 2017 victory, two other parents erroneously convicted of fatally harming their children by shaking were released from prison that same year.<sup>70</sup> In September and March

62. See, e.g., *Shaken Baby Syndrome Cases*, *supra* note 14 (type “SBS” in search field and click “Filter”) (displaying thirteen exonerations for SBS-based crimes posted by the National Registry of Exonerations from 2011 to 2015).

63. See *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008).

64. See Emily Bazelon, *A Vindictive Decision*, SLATE (Nov. 28, 2011, 4:58 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/11/shaken\\_baby\\_syndrome\\_and\\_the\\_supreme\\_court\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/shaken_baby_syndrome_and_the_supreme_court_single.html) [https://perma.cc/J9XS-7N77] [hereinafter *Vindictive Decision*] (detailing Shirley Smith’s case).

65. *Id.*

66. See Emily Bazelon, *Jerry Brown Shows Mercy to Shirley Ree Smith*, SLATE (Apr. 6, 2012, 4:08 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2012/04/jerry\\_brown\\_pardons\\_shirley\\_ree\\_smith\\_in\\_an\\_old\\_sad\\_shaken\\_baby\\_case\\_.html](http://www.slate.com/articles/news_and_politics/crime/2012/04/jerry_brown_pardons_shirley_ree_smith_in_an_old_sad_shaken_baby_case_.html) [https://perma.cc/DN2E-KWSU] (detailing the pardon of Shirley Smith).

67. See *Man’s Shaken Baby Life Conviction Set Aside After 15 Years*, CBS SACRAMENTO (Dec. 8, 2017, 12:38 PM), <http://sacramento.cbslocal.com/2017/12/08/shaken-baby-life-conviction-set-aside-after-15-years/> [https://perma.cc/63H4-NHA3] (detailing Zavion Johnson’s case).

68. See *id.*

69. See *id.*

70. See Maurice Possley, *Jasmine Eskew*, NAT’L REGISTRY EXONERATIONS (Jan. 25, 2018), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5267> [https://perma.cc/DN9C-H2F7]; Maurice Possley, *Krystal Voss*, NAT’L REGISTRY EXONERATIONS (Sept. 20, 2017),

2017, respectively, prosecutors officially dismissed all charges against Krystal Voss, convicted in 2004 in the death of her son, Kyran,<sup>71</sup> and Jasmine Eskew, convicted in 2014 in the death of her daughter, Brooklynn.<sup>72</sup> These two cases were ripe with common SBS issues including a fall-induced injury mistaken for a shaking-induced injury,<sup>73</sup> confusion over which adult was responsible, and a confession secured through manipulative police interrogation practices.<sup>74</sup>

Still, other problems continue to arise in the trials and appeals of SBS-based cases. First, there have been new revelations about doctors mistaking children's preexisting medical infirmities as abuse.<sup>75</sup> This development freed Arizona father Drayton Witt in 2012<sup>76</sup> and played a role in reversing the conviction of Illinois caregiver Jennifer Del Prete in 2016.<sup>77</sup> Second, some courts are finding that defense counsels' failure to present their own experts to refute the state's expert testimony amounts to ineffective assistance of counsel under *Strickland v. Washington*.<sup>78</sup> This development gave Michigan father Brian Roberts the opportunity for a new trial in 2017.<sup>79</sup> Though change is likely slow for the parents and caregivers accused of violently abusing infants, the aforementioned cases illustrate that courts are at least beginning to acknowledge the controversy.<sup>80</sup>

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<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5198> [<https://perma.cc/GU9V-GXRX>].

71. See *Krystal Voss*, *supra* note 70 (detailing Krystal Voss's case).

72. See *Jasmine Eskew*, *supra* note 70 (detailing Jasmine Eskew's case).

73. See *Krystal Voss*, *supra* note 70 (discussing conflicting medical opinions about whether Kyran's injuries could have been caused by a fall).

74. See *Jasmine Eskew*, *supra* note 70 (discussing Eskew's claim that her abusive boyfriend was the true abuser and describing the interrogation that caused Eskew's false confession).

75. See Maurice Possley, *Drayton Witt*, NAT'L REGISTRY EXONERATIONS (Nov. 1, 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4043> [<https://perma.cc/JKG3-XL3P>].

76. See *id.* (detailing Drayton Witt's case).

77. See Ben Pope, *Woman Previously Freed by Medill Justice Project Investigation to Sue Alleged Conspirators*, DAILY NORTHWESTERNER (Aug. 25, 2017), <https://dailynorthwestern.com/2017/08/25/campus/woman-previously-freed-medill-justice-project-investigation-sue-alleged-conspirators/> [<https://perma.cc/4LEC-3X9C>] (detailing Jennifer Del Prete's case).

78. See *generally* *Strickland v. Washington*, 466 U.S. 668 (1984) (explaining standard used to find whether assistance of council was ineffective).

79. See *People v. Roberts*, No. 327296, 2017 WL 2457390, at \*1 (Mich. Ct. App. June 6, 2017) (per curiam) (finding that defendant's conviction should be reversed because assistance of counsel was inadequate).

80. See *supra* text accompanying notes 61–79.

While these cases illustrate that critics of classic SBS theory have made significant headway in unraveling the perfectly packaged bundle that has secured so many criminal convictions, prosecutors across the country continue to bring SBS-based cases by the hundreds annually.<sup>81</sup> Their efforts are backed by a larger criminal justice infrastructure that maintains its allegiance to the triad as a telltale sign of child abuse.<sup>82</sup> Consequently, each year scores of parents and caregivers are uprooted from their daily lives and thrust into a cloud of criminal suspicion where the allegations are serious, the stakes are high, and the entire process may be largely unfamiliar.<sup>83</sup>

## II. THE UNIQUE NATURE OF THE PARTIES IN SBS CASES

All criminal prosecutions, SBS-based or otherwise, begin with a rather predictable set of players—police investigators, attorneys, expert witnesses, lay witnesses, judges, jurors, and the accused.<sup>84</sup> In the specific context of abuse or homicide cases, the victim is also a pivotal player.<sup>85</sup> While all abuse and homicide cases are tragic, this devastation seems to multiply when the victim is an infant and the accused is a parent or caregiver who was responsible for protecting the child's wellbeing.<sup>86</sup> Factor in that most jurors enter the courtroom with the belief that some crime has necessarily occurred, and SBS cases begin to look like recipes for conviction.<sup>87</sup>

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81. See Balko, *supra* note 60 (noting that there are about “200 or so” SBS prosecutions every year).

82. See Jenecke, *supra* note 33, at 183 (discussing the process for initiating an SBS prosecution).

83. See, e.g., Cenziper, *supra* note 33 (describing the case of Gail Dobson, a rural day-care provider of 29 years who was convicted of second-degree murder at age 54 after a baby she was caring for stopped breathing).

84. See PHILLIP P. PURPURA, CRIMINAL JUSTICE: AN INTRODUCTION 214 (1997).

85. See *id.*

86. See FLAWED CONVICTIONS, *supra* note 27, at 46 (“Consider the courtroom dynamics that bear on SBS verdicts. To begin, a baby has died or become permanently impaired. . . . The tragedy that confronts a juror (or sometimes a judge acting as fact finder) presents as a need to resolve the case on trial.”).

87. See *id.* at 46–47 (“According to [the] conventional trial narrative, the task at hand is to determine whether the defendant on trial is the culpable party. Identity is a perennial concern, and it tends to displace inquiry into whether any bad act transpired. . . . Given the standard trial model, no-crime prosecutions, as SBS cases may be, tend to lie outside the bounds of effective evaluation. Jurors may well take for granted that the involvement of law enforcement was triggered by a crime . . . and focus their deliberations on testing the connection between the crime and the defendant, as opposed to questioning the occurrence of a crime.”).

## A. Infants as Victims

It is unsurprising that people feel a heightened sense of injustice whenever a baby has been victimized, especially to the point of death;<sup>88</sup> after all, infants are the “quintessential innocents” of society—the most helpless of all humankind.<sup>89</sup> As such, investigators, medical professionals, prosecutors, judges, jurors, and the general public will naturally feel an increased duty to hold someone accountable for a child’s sudden demise.<sup>90</sup> In SBS cases, this blame typically falls on the last adult to be with the baby, which is virtually always the child’s parent or caregiver.<sup>91</sup> If accused parents and caregivers find themselves in court fighting SBS-based charges, they will likely be pitted against prosecutors with compelling “justice for the baby” arguments.<sup>92</sup> Even if such arguments somehow fail to capture juries’ sympathies, then the complex medical evidence may leave jurors bewildered enough to convict out of caution.<sup>93</sup> Either way, allegations

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88. See *id.* at 13 (“The death of a baby is one of life’s most devastating tragedies, as is the severe neurological impairment of a once-healthy child.”); see also Haberman, *supra* note 33 (“Perhaps no crime staggers the mind, or turns the stomach, more than the murder of a baby . . .”).

89. See FLAWED CONVICTIONS, *supra* note 27, at 14; see also Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1144 (2013) (“[Children] are, by design, subordinate until they are adults. This incapacity renders children dependent on adults for care, custody, sustenance, moral guidance, and political voice or agency.”).

90. See FLAWED CONVICTIONS, *supra* note 27, at 13 (“In the face of [an infant’s] misfortune, finding fault can be irresistible. The impulse to blame is powerful, not only for parents, but also for doctors, police, prosecutors, judges, and jurors (many of whom are also parents themselves).”).

91. See Findley et al., *supra* note 43, at 226 (“In effect, SBS quickly became a criminal category of *res ipsa loquitur* cases, *i.e.*, cases in which ‘the thing speaks for itself.’ This eliminated the need for any additional evidence . . . and resulted in quick, easy and virtually routine convictions of parents and caretakers . . .”).

92. See FLAWED CONVICTIONS, *supra* note 27, at 46 (“A guilty verdict [in an SBS case] is portrayed by the prosecution as a way of mitigating tragedy—or, as the typical closing argument urges, ‘doing justice’ for the baby, the quintessential innocent. The other option, a not guilty verdict, is easily perceived as the opposite—that is, failing to do justice for the baby leaving tragedy unmitigated. Under these circumstances, the pull toward conviction is powerful indeed.”); see also Brian K. Holmgren, *Chapter Fifteen: Prosecuting the Shaken Infant Case*, 5 J. AGGRESSION, MALTREATMENT & TRAUMA 275, 289 (2008) (internal quotation marks omitted) (suggesting that prosecutors use famous quotations to develop this theme—for example, “Child abuse leaves a footprint on the heart.”).

93. See Gena, *supra* note 46, at 704 (“The jury, possibly confused due to the complicated nature of an SBS diagnosis, might return a guilty verdict because of the nature of the crime—the tragic death or severe injury of a baby . . .”); see also

of infant abuse trigger uniquely vehement quests for “justice” for these most innocent victims.<sup>94</sup>

## B. Parents and Caregivers as Criminal Defendants

Just as infants make up an especially sympathetic category of victims, the parents and caregivers accused make up a unique category of criminal defendants.<sup>95</sup> In fact, some of the first people to recognize this oddity were defense attorneys who, in the course of representing parents and caregivers in SBS cases, observed that their otherwise law-abiding and decent clients were being convicted of violently murdering infants.<sup>96</sup> Today even the American Society for the Positive Care of Children, a leading crusader in the fight against SBS, acknowledges that the accused in these cases are often quite anomalous from prototypical criminal defendants.<sup>97</sup> While many assaults and homicides occur because the perpetrator acted on feelings of malice or ill will toward the victim, it is exceptionally rare for such feelings to develop in the relationship between a parent or caregiver

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Findley et al., *supra* note 43, at 217 (quoting U.S. Court of Appeals Judge Abner Mivka who said, “I do not think you can get a fair child abuse trial before a jury anywhere in the country. I really don’t . . . I don’t care how sophisticated or smart jurors are, when they hear that a child has been abused, a piece of their mind closes up, and this goes for the judge, the juror, and all of us”).

94. See *FLAWED CONVICTIONS*, *supra* note 27, at 46–48 (analyzing the obstacles defendants face in SBS cases).

95. See, e.g., *id.* at 7 (describing Jennifer Del Prete, a woman who was convicted of shaking a baby to death, who was also “[a]n older sibling; an assistant preschool teacher; a nanny; the head of a church nursery; a youth librarian; a school ‘room mom’; and . . . a . . . mother”).

96. See Steven C. Gabaeff, *Exploring the Controversy in Child Abuse Pediatrics and False Accusations of Abuse*, 18 *LEGAL MED.* 90, 92 (2016) (“Through the 1980s, as the number of [SBS] cases increased and the convictions mounted, the improbability of abuse by many of those accused became more apparent to the attorneys defending them. Some of these defendants, seemingly decent, loving caregivers, did not fit the profile of abusers by any stretch of the imagination.”); see also Le Fanu, *supra* note 61, at 253 (“The psychological profile of those who unambiguously have harmed their children reveals, as would be expected, them to be psychopaths, criminals, opioid abusers, alcoholics and so on. So when parents . . . with no blemish on their character, appear as loving, concerned parents, the likelihood must be that it is because they are loving concerned parents—and very powerful evidence is required to argue otherwise.”).

97. See *Never Shake a Baby—Shaken Baby Syndrome*, AM. SOC’Y POSITIVE CARE CHILD., <https://americanspcc.org/never-shake-a-baby-shaken-baby-syndrome/> [<https://perma.cc/LC7S-6W7A>] (last visited Mar. 11, 2019) [hereinafter *Never Shake*] (“Most people charged with shaking their baby have no previous history of violence, and the act is unintended.”).

and an infant.<sup>98</sup> Instead, prosecutors often pursue SBS-based convictions on the theory that the defendant was overcome by a moment of fleeting frustration and as a result severely—perhaps even fatally—abused the infant.<sup>99</sup> This rationale adopts a grim view of human nature when it assumes that reasonable adults who are unable to manage their frustration will react with rage and violence toward their children.<sup>100</sup> Nevertheless, SBS prosecutions based on the frustration–violence paradigm continue to produce a consistent stream of convictions and guilty pleas every year.<sup>101</sup>

While SBS trials are likely daunting for many of the crime-averse defendants who endure them, and their convictions almost certainly come as a shock, the troubles for these parents and caregivers begin long before they step foot into courtrooms.<sup>102</sup> First, investigators often accost these parents and caregivers soon after they have reported the child’s symptoms—likely during a time of extreme stress and grief.<sup>103</sup> Then, once police have made initial contact, they may

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98. See KELLY M. PYREK, *FORENSIC NURSING* 337 (2006) (“[V]ery few parents who commit homicide set out to do murder. They’re under stress; they go too far.”).

99. See, e.g., Becky Vargo, *Trial Date Set in Shaken Baby Death*, GRAND HAVEN TRIB. (Jan. 22, 2019, 7:00 AM), <https://www.grandhaventribune.com/Courts/2019/01/22/Trial-date-set-in-shaken-baby-death> [<https://perma.cc/VQ5J-KDDL>]; see also Brian K. Holmgren, *supra* note 92, at 289–90 (“Prosecutors [in SBS cases] will often not be able to point to a traditional ‘motive’ (e.g., hatred, jealousy, vengeance, greed) to explain the caretaker’s conduct. Rather they must reorient jurors to think about motive in a unique context—one that does not reflect a purposeful mental state but instead a risk factor, stressor or catalyst that prompts the caretaker’s reactive and abuse conduct. . . . [Consequently,] [t]he most common motive in SBS cases is anger or frustration resulting from the infant’s crying.”).

100. See Bazelon, *supra* note 45 (“Underlying the clash over the medical research on shaken-baby syndrome is another one about human nature. How likely is an adult with no history of wrongdoing to do terrible harm to a child by violently shaking it?”).

101. See *Next Innocence Project*, *supra* note 26, at 10 (“[A]round 200 defendants a year are being convicted of SBS. Without additional data, we cannot reasonably speculate about the number of defendants who plead guilty to this type of crime, although the estimated 1500 SBS diagnoses a year may provide an outside parameter.” (emphasis added)); see also *supra* text accompanying note 45, 81 (estimating that as of 2011 and 2014, respectively, there were approximately 200 SBS-based criminal cases filed every year—assuming every case filed does not result in a conviction, then the conviction rate may actually be decreasing compared to the 2009 figure quoted at the beginning of this footnote).

102. See Ofshe, *supra* note 23, at 1023 (noting that the “disastrous” impact of erroneous SBS investigations begin at the suspect’s first interaction with police).

103. See *id.* (discussing grieving parents who, in some cases, have “literally been taken directly from the emergency room where his or her child has been

continue to confront these suspects, possibly on multiple occasions,<sup>104</sup> with the damning narrative that scientific evidence implicates them in their children's injuries or deaths.<sup>105</sup> The accused in these situations typically respond with one of three explanations: (1) the infant's symptoms were abrupt and unprovoked; (2) the infant had recently fallen; or (3) the accused shook the infant either playfully or in attempt to revive him or her.<sup>106</sup> Ultimately, regardless of whether the proffered explanation is true, the parent or caregiver accused is immediately thrust into the same rigorous criminal justice system that routinely breaks down some of society's toughest individuals.<sup>107</sup>

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pronounced dead" to an interrogation room); see also Alan Prendergast, *Krystal O'Connell Sues Over Wrongful Conviction in "Shaken Baby" Case*, WESTWORD (June 4, 2018, 9:58 AM), <https://www.westword.com/news/krystal-oconnell-sues-over-wrongful-conviction-in-shaken-baby-case-10383040> [<https://perma.cc/BDK6-3BNR>] (describing how after Krystal O'Connell (formerly Krystal Voss) was exonerated in the death of her 19-month-old son, she brought a civil suit alleging that investigators "exploited her grief over the loss of her son to build a bogus case against her, including a coerced, false confession").

104. See Holmgren, *supra* note 92, at 276 ("The success of SBS cases depends in large measure on the ability to obtain false and changing histories from caretakers regarding the child's injuries which can be later refuted through expert testimony. This necessitates the ability to interview these caretakers on several occasions.").

105. See Le Fanu, *supra* note 61, at 252 ("[P]arents describe how, when summoned to see the consultant to learn (they presume) about their child's progress, they were 'ambushed' with the diagnosis of, for example, shaken baby syndrome, presented to them as an irrefutable fact ('your son must have been violently shaken for several minutes to cause these injuries') without any suggestion that there could be some alternative explanation."); see also *Next Innocence Project*, *supra* note 26, at 30 ("[B]ecause law enforcement officers interrogating the SBS suspect 'know' that the infant's injuries were caused by violent shaking [or other abuse]—the science is believed to prove this definitively—the narratives [given by parents and caregivers] are all perceived as false and, therefore, incriminating."). To compound the devastation, those suspects who are parents to other children face the prospect of losing custody of those children as a result of SBS homicide allegations. See Ofshe, *supra* note 23, at 1023 (detailing the case of a Los Angeles woman who "repeatedly expressed her fear of being sent to jail and losing custody of her three children" when police began suspecting her as part of an SBS-based death investigation).

106. See *FLAWED CONVICTIONS*, *supra* note 27, at 97 (listing the three most common accounts that suspects give during SBS investigations).

107. See Ofshe, *supra* note 23, at 1023–29 (discussing the use of false evidence ploys in SBS investigations).

## III. POLICE INTERROGATION PRACTICES

Long before defendants can be prosecuted in court, police investigators must gather information about the alleged crime.<sup>108</sup> In many investigations, and especially in SBS investigations where the diagnosis is often the only evidence that investigators have, police interrogation of suspects is one of the most critical steps in building a case.<sup>109</sup> Most interrogations in the United States follow the popular methodology known as the “Reid Technique” and its progeny.<sup>110</sup> While law enforcement agencies worldwide have relied on the Reid Technique for decades, the United Kingdom is leading the growing shift away from Reid-style interrogation methods toward a more cooperative investigative interview technique known by the acronym PEACE.<sup>111</sup> As PEACE has risen in popularity, its juxtaposition with the Reid Technique has prompted important discussion about the interactions between officers and suspects in criminal investigations.<sup>112</sup>

## A. The Status Quo of Police Interrogation in America

At its core, the Reid Technique<sup>113</sup> relies primarily on accusatory questioning<sup>114</sup> to elicit confessions from presumed-guilty suspects.<sup>115</sup>

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108. See DEVERE D. WOODS JR., O’HARA’S FUNDAMENTALS OF CRIMINAL INVESTIGATION 5–9 (8th ed. 2013) (discussing the “three I’s” of investigative work—information, interrogation, and instrumentation).

109. See *id.*

110. Alan Hirsch, *Going to the Source: The “New” Reid Method and False Confessions*, 11 OHIO ST. J. CRIM. L. 803, 803–04 (2014). See generally INBAU ET AL., *supra* note 6 (instructing investigators on how to employ the Reid Technique).

111. See Georgina Heydon, *Helping the Police with Their Enquiries: Enhancing the Investigative Interview with Linguistic Research*, 85 POLICE J. 101, 103 (2012). PEACE stands for Planning & Preparation, Engage & Explain, Account, Closure, Evaluation. See *id.*

112. See generally *Interviewing Suspects*, *supra* note 31 (providing an example of the Reid-style versus PEACE-style comparative discussion).

113. This Note focuses on the Reid Technique but recognizes and incorporates by reference other similar methods. See generally INTERVIEW & INTERROGATION INST., *infra* note 115.

114. See INBAU ET AL., *supra* note 6, at 5 (referring to interrogations as “accusatory” because “[a] deceptive suspect is not likely to offer admissions against his self-interest unless he is convinced that the investigator is certain of his guilt”).

115. See *General Comments*, JOHN E. REID & ASSOCS., INC., [http://www.reid.com/success\\_reid/r\\_comments.html](http://www.reid.com/success_reid/r_comments.html) [<https://perma.cc/7DVT-Q826>] (last visited Mar. 11, 2019) (touting a long list of testimonials by investigators who have secured confessions using the infamous “Reid Technique”); INTERVIEW &

It is composed of three distinct phases: (1) factual analysis; (2) behavior analysis interview; and (3) interrogation.<sup>116</sup> During the factual analysis phase, investigators consider the individual characteristics of each person of interest and compare that information against the direct and circumstantial evidence of the crime.<sup>117</sup> They then use that analysis to gauge the likelihood of each person's guilt.<sup>118</sup> Once investigators have confidently narrowed in on a suspect, they proceed to the behavior analysis interview phase in which they isolate the individual to ask general background questions and begin building rapport.<sup>119</sup> During this phase, investigators ask behavior-provoking questions to create a baseline understanding of the individual's normal range of behaviors for later reference.<sup>120</sup> Finally, once investigators are confident that they have identified the right suspect and developed a sufficient understanding of that suspect's physical and verbal inclinations, they begin the nine-step interrogation phase.<sup>121</sup> The nine steps of the Reid-style interrogation method follow a distinct progression.<sup>122</sup> In step one—direct, positive confrontation—the investigator confronts the suspect with a firm accusation of guilt then evaluates the suspect's reaction to the statement.<sup>123</sup> In step two—theme development—the investigator attempts to minimize the moral implications of the offense by offering the suspect a potential

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INTERROGATION INST., <http://www.getconfessions.com> [https://perma.cc/8PZQ-SD2R] (last visited Mar. 11, 2019). The significance of the foregoing citation is to highlight the relation between the website's host—an interrogation training company—and the contents of its domain name: "get confessions." *Id.*

116. See James Orlando, *Interrogation Techniques*, OLR RES. REP. 1, 1–4 (2014), <https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0071.pdf> [https://perma.cc/PCH9-3SDE].

117. See *id.* at 2.

118. See *id.*; see also INBAU ET AL., *supra* note 6, at 16 (instructing investigators to "[r]emember that when circumstantial evidence or especially physical evidence points toward a particular person, that person is usually the one who committed the offense").

119. See Orlando, *supra* note 116, at 2 (summarizing the behavior analysis interview phase of the Reid Technique).

120. See *id.*; see also INBAU ET AL., *supra* note 6, at 106 (noting that one Reid Technique training manual instructs investigators who are conducting a behavior analysis interview to proceed with "an assumption that the subject is operating within a 'normal range' relative to emotional, mental, cognitive, and physical health").

121. See Orlando, *supra* note 116, at 3–4 (summarizing the nine-step interrogation phase).

122. See generally INBAU ET AL., *supra* note 6 (providing a chapter-by-chapter explanation of each of the nine steps of the Reid Technique).

123. See *id.* at 107–13 (detailing step one: direct, positive confrontation).

justification for the alleged conduct.<sup>124</sup> In step three—handling denials—the investigator initially discourages the suspect from denying guilt and then rebukes all subsequent claims of innocence.<sup>125</sup> In step four—overcoming objections—the investigator entertains the suspect’s specific objections to accusations of guilt and then uses those objections to challenge the suspect’s narrative.<sup>126</sup> In step five—procurement and retention of the suspect’s attention—the investigator makes calculated physical movements to keep the suspect focused on the discussion.<sup>127</sup> In step six—handling the suspect’s passive mood—the investigator watches for the suspect’s mood to turn somber and then sympathetically offers another opportunity for the suspect to take advantage of the moral justification first proposed during step two and admit culpability.<sup>128</sup> In step seven—presenting an alternative question—the investigator asks the suspect a question that essentially requires the suspect to choose between two incriminating statements in hopes that the lesser-of-the-two-evils rationale will compel the suspect to affirmatively admit to the seemingly better option.<sup>129</sup> In step eight—having the suspect relate details of the offense—the

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124. See *id.* at 115–35 (detailing step two: theme development). For example, in the case of Adrian Thomas, one investigator “proposed that [Thomas] had been depressed and emotionally overwhelmed after having been berated by his wife over his chronic unemployment and that, out of frustration, he had . . . responded to his [son’s] crying by throwing him from above his head onto a low-lying mattress.” See *People v. Thomas*, 8 N.E.3d 308, 312 (N.Y. 2014). See, e.g., Danielle Salisbury, *‘I Gave Him a Good Shake,’ Man on Trial in Toddler’s Killing Tells Detective*, MLIVE, [http://www.mlive.com/news/jackson/index.ssf/2017/11/i\\_gave\\_him\\_a\\_good\\_shake\\_suspec.html](http://www.mlive.com/news/jackson/index.ssf/2017/11/i_gave_him_a_good_shake_suspec.html) [<https://perma.cc/P8JA-QNE6>] (last updated Nov. 15, 2017) (detailing the interrogation of a defendant accused in an SBS homicide case).

125. See INBAU ET AL., *supra* note 6, at 137–48 (detailing step three: handling denials); see also Ofshe, *supra* note 23, at 989 (describing how false confession scholars point out that an “[i]nterrogation is not simply insensitive to a suspect’s denials and protestations of innocence; it requires that both be strongly rejected” in order for investigators to follow the plan).

126. See INBAU ET AL., *supra* note 6, at 149–54 (detailing step four: overcoming objections). An “objection” is defined as “a statement that is proposed by the suspect as an excuse or reason why the accusation is false,” as opposed to a “denial,” which is defined as “a statement or action that contradicts or refuses to accept the truthfulness of an allegation.” *Id.* at 137, 149.

127. See *id.* at 155–60 (detailing step five: procurement and retention of the suspect’s attention). Examples of these physical movements include moving of chairs, increasing eye contact, and employing visual aids. *Id.*

128. See *id.* at 161–66 (detailing step six: handling the suspect’s passive mood).

129. See *id.* at 167–73 (detailing step seven: presenting an alternative question). For example, “is this the first time you did something like this, or has it happened many times before?” *Id.* at 170.

investigator, working off of the suspect's admission in step seven, guides the suspect through his or her acknowledgement of guilt and elicits details about the crime, sometimes with an additional investigator present.<sup>130</sup> Finally, in step nine—converting an oral confession into a written confession—the investigator carefully facilitates the process by which the suspect transcribes and signs his or her confession.<sup>131</sup>

Investigators have many tools at their disposal throughout the interrogation process.<sup>132</sup> One of those tools, which the United States Supreme Court has condoned, is investigators' ability to misrepresent and even fabricate evidence when confronting a suspect whom they believe is guilty.<sup>133</sup> For example, an interrogating officer may knowingly downplay the severity of a victim's injury as a ploy to minimize the gravity of the situation in the suspect's mind and compel that suspect to take responsibility for inflicting the lesser injury.<sup>134</sup> While this tool gives investigators great latitude to direct their conversations with suspects, it is not without limits.<sup>135</sup> Appellate courts in multiple states have recognized a distinction between verbal fabrications and physically manufactured evidence and have routinely

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130. See *id.* at 175–80 (detailing step eight: having the suspect relate details of the offense).

131. See *id.* at 181–88 (detailing step nine: converting an oral confession into a written confession).

132. See generally INBAU ET AL., *supra* note 6 (offering a variety of tools and techniques for officers to use during a Reid-style interrogations).

133. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that defendant's confession was admissible despite the fact that police had fabricated incriminating statements by his co-defendant during defendant's interrogation); see also INBAU ET AL., *supra* note 6, at 193 (explaining that the courts have allowed interrogators to "misrepresent the existence of incriminating evidence against the subject, such as falsely minimizing the victim's injuries, and/or by falsely telling the subject that gunshot residue was found on his person; that he was identified by eye witnesses; that surveillance video implicated him; that his blood was found on the victim; that his DNA matches the sperm recovered from the victim; that his fingerprints were found at the scene; that hair and fiber evidence places him in the victim's home or car; or, that his accomplice passed a polygraph test implicating him"). Not only is this tool available, it is widely used; a survey of 631 police interrogators revealed that 92% used false-evidence ploys "at least some of the time." See Krista D. Forrest et al., *False-Evidence Ploys and Interrogations: Mock Jurors' Perceptions of False-Evidence Ploy Type, Deception, Coercion, and Justification*, 30 BEHAV. SCI. L. 342, 343 (2012).

134. See INBAU ET AL., *supra* note 6, at 193 (discussing permissible police deception tactics).

135. See *id.* at 194 (discussing the limitations courts have placed on police deception tactics).

held the latter to be impermissible.<sup>136</sup> Still, notwithstanding this limitation on physical police-manufactured evidence, investigators' liberty to confront suspects with misrepresented or fabricated evidence is a widely used tool that rests on solid jurisprudential grounds.<sup>137</sup> Additionally, officers following the Reid Technique are allowed—if not encouraged—to work together during interrogations, often following a good cop/bad cop routine that can leave suspects perplexed at the simultaneous onslaught of aggression and amicability.<sup>138</sup> With such a deep arsenal of tactics at officers' disposal, it is no surprise that the United States criminal justice system has clung tight to the Reid Technique when investigating crime.<sup>139</sup>

## B. The Problem of False Confessions

Reid-style interrogation practices have demonstrated great success in obtaining confessions of guilt from criminal suspects.<sup>140</sup> The criminal justice system generally celebrates this outcome as a positive contribution to the fight against crime, especially because confessions are among the most damaging forms of evidence presented in criminal trials and often help secure convictions.<sup>141</sup> Unfortunately, not every confession admitted into evidence at trial is a trustworthy indicator of

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136. See *State v. Cayward*, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989) (holding that police use of manufactured lab reports during the defendant's interrogation went beyond the bounds of permissible investigative deception tactics); see also *State v. Patton*, 826 A.2d 783, 784 (N.J. Super. Ct. App. Div. 2003) (holding that police use of manufactured audiotape of a fake informant during the defendant's interrogation went beyond the bounds of permissible investigative deception tactics).

137. *Frazier*, 394 U.S. at 739 (“The fact that the police misrepresented the statements that [a witness] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.”).

138. See Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 734–36 (1994) (discussing approved police interrogation tactics).

139. See *id.* at 733–36 (detailing common tactics available to police using the Reid Technique).

140. See *Interviewing Suspects*, *supra* note 31, at 43 (acknowledging the existence of successful and socially beneficial interrogations).

141. See Ofshe, *supra* note 23, at 983–84 (discussing the critical role that confessions play in criminal trials); see also Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 433 (2012) [hereinafter *Confessions Trump Innocence*] (“Over the years, mock jury studies have shown that confessions have more impact on verdicts than do other potent forms of evidence . . .”).

a defendant's guilt.<sup>142</sup> As a result, false confessions have become one of the leading causes of erroneous convictions.<sup>143</sup>

The question that perplexes investigators, judges, jurors, scholars, and the public alike is why someone would confess to a crime that he or she did not commit.<sup>144</sup> When answering that question, experts cite to the different types of interrogation techniques police use as well as the particular vulnerabilities of individual suspects.<sup>145</sup> They hypothesize that the validity of a confession depends heavily on three key components.<sup>146</sup> First, the validity of a confession depends in part on the contextual factors of the allegations, including the seriousness of the crime and the strength of evidence presented.<sup>147</sup> Second, the validity of a confession depends in part on the custodial factors of the interrogation itself, including the location and duration of custody as well as the number of police officers involved and the tone of questioning.<sup>148</sup> Finally, the validity of a confession depends in part on the suspect's individual vulnerabilities at the time of

142. See generally *Facts and Figures*, FALSE CONFESSIONS, <https://www.falseconfessions.org/fact-a-figures> [<https://perma.cc/ZRX4-ZC32>] (last visited Mar. 11, 2019) (listing data on false confessions).

143. See Forrest et al., *supra* note 133, at 345. (citations omitted) (“[S]tudies demonstrate that defendants who falsely confess and then plead not guilty are convicted approximately 73% to 81% of the time.”). According to the National Registry of Exonerations website, 288 defendants exonerated between 1989 to January 2019 had falsely confessed to crimes including sexual assault, robbery, arson, and murder, among others. See *Shaken Baby Syndrome Cases*, *supra* note 14 (to filter, click the “FC” tab). While exonerations provide some collateral relief, by the time they are finalized the exonerees have already suffered significant damage from “the very fact of conviction, the accompanying stigma, and the punishment, which could be anything from monetary fine, to deprivation of liberty, to imprisonment.” See Boaz Sangero & Mordechai Halpert, *A Safety Doctrine for the Criminal Justice System*, 2011 MICH. ST. L. REV. 1293, 1301 (2011).

144. See Ofshe, *supra* note 23, at 981 (positing the question, “Why do the innocent confess to crimes that carry lengthy prison sentences, life imprisonment or execution?”); see also *Confessions Trumps Innocence*, *supra* note 141, at 433–34 (suggesting that the general public tends to view the phenomenon of false confessions as counterintuitive).

145. See *Suspect Interviews*, *supra* note 25, at 35 (noting that it is “generally accepted within the psychological community” that false confessions are usually attributable to suspect vulnerabilities and/or police practices); see also Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689, 692–93 (2012) [hereinafter *Correcting Injustices*].

146. See *Correcting Injustices*, *supra* note 145, at 693 (indicating that “[a]n interview’s outcome is influenced by . . . contextual factors . . . custodial factors . . . and individual differences and/or vulnerabilities”).

147. See *id.*

148. See *id.*

questioning, including his or her age, intelligence, mental health, and level of resilience.<sup>149</sup>

In classifying a confession as false, scholars and legal experts routinely consult three categories of false confessions first articulated in 1985 by Saul Kassin and Lawrence Wrightsman.<sup>150</sup> Kassin and Wrightsman argue that false confessions generally fall into three distinct categories: (1) voluntary; (2) “coerced-compliant”; and (3) “coerced-internalized.”<sup>151</sup> The first category—voluntary false confessions—includes cases where suspects willingly admit guilt to crimes they did not commit based on some ulterior motive, such as a quest for notoriety, a belief that they deserve punishment for some other reason, a hope that doing so will ensure leniency from prosecutors, or a desire to protect the true perpetrator.<sup>152</sup> The second category—coerced-compliant confessions—includes cases where suspects feel so overwhelmed by the pressures of interrogation that they view confessing falsely as the better alternative and perhaps the only way out of an unbearable situation.<sup>153</sup> Finally, the third category—coerced-internalized confessions—includes cases where investigators subject suspects to repeated accusations to the point that the suspects actually come to believe that they committed the alleged offense.<sup>154</sup>

While the concept of coerced-internalized confessions is particularly puzzling, it is nonetheless a scientifically proven phenomenon.<sup>155</sup> A decade after developing the three categories of false confessions, Kassin and his colleagues conducted a study testing the

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149. *See id.*

150. *See, e.g., id.* (citing Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 76–78 (1985) [hereinafter *Confession Evidence*]).

151. *See Confession Evidence*, *supra* note 150, at 76.

152. *See id.* at 76–77. Kassin and Wrightsman describe this category as “the most enigmatic of the three types.” *Id.* at 76.

153. *See id.* at 77; *see also* Ofshe, *supra* note 23, at 986 (noting that, in these cases, investigators secure confessions “by leading [the suspect] to believe that their situation, though unjust, is hopeless and will only be improved by confessing”).

154. *See Confession Evidence*, *supra* note 150, at 78; *see also* Ofshe, *supra* note 23, at 986 (noting that, in these cases, investigators secure confessions “by persuading [the suspect] that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action”).

155. *See generally* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 *PSYCHOL. SCI.* 125 (1996) [hereinafter *Confessions: Internalization*] (summarizing the leading study supporting the theory of coerced-internalized confessions).

theory of coerced-internalized confessions.<sup>156</sup> They discovered that it is not uncommon for individuals facing accusations of misconduct to begin to believe that they are in fact responsible for the alleged acts, especially when corroborative evidence seems to support the allegations.<sup>157</sup> What makes this type of false confession particularly troublesome is that once a suspect internalizes his or her confession, it may be difficult, if not impossible, to undo the damage and retrieve the suspect's original understanding of the situation.<sup>158</sup> Still, Kassin and other false confession experts maintain that these scenarios occur with surprising regularity and have landed many innocent people behind bars for crimes they did not commit.<sup>159</sup>

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156. See *id.* For the experiment, undergraduate students who believed they were participating in a keyboard typing test were specifically told to avoid hitting the “ALT” key, as doing so would cause the program to crash. See *id.* at 126. During each student's test, the program would randomly terminate and the proctor would accuse the student of hitting the “ALT” key. See *id.* In some instances, a fellow student serving as a “witness” would echo the proctor's allegation that the typing student pressed “ALT.” *Id.* At the conclusion of testing, each student was questioned about the accusation the he or she hit the “ALT” key while typing. See *id.* at 126–27. Although none of the students had actually hit the “ALT” key, 69% of them signed a document acknowledging they hit the “ALT” key, 28% made additional verbal statements confirming their guilt, and 9% contrived specific details about how they accidentally pressed “ALT.” *Id.*; see also Brent Snook et al., *The Next Stage in the Evolution of Interrogations: The PEACE Model*, 18 CANADIAN CRIM. L. REV. 219, 227–28 (2014) [hereinafter *Next Stage*] (describing further research that supports Kassin's findings in the “ATL” key experiment).

157. See, e.g., *Vindictive Decision*, *supra* note 64 (detailing the case of Shirley Smith, a grandmother who, when confronted with accusations that she had shaken her grandson to death, reacted with shock saying, “Oh my God. Did I do it? Did I do it? Oh my God.”); *People v. Thomas*, 8 N.E.3d 308, 311–13 (N.Y. 2014) (detailing Adrian Thomas's interrogation during which investigators convinced him that he had killed his infant son Matthew); see also *Confessions: Internalization*, *supra* note 155, at 127 (“[T]he presentation of false incriminating evidence—an interrogation ploy that is common among the police and sanctioned by many courts—can induce people to internalize blame for outcomes they did not produce. These results provide an initial basis for challenging the evidentiary validity of confessions produced by this technique. These findings also demonstrate, possibly for the first time, that memory can be altered not only for observed events and remote past experiences, but also for one's own recent actions.”).

158. See *Confession Evidence*, *supra* note 150, at 78 (describing the content of the suspect's original memory as “potentially irretrievable”).

159. See generally *Confession Evidence*, *supra* note 150 (discussing false confessions with examples); *Interviewing Suspects*, *supra* note 31 (discussing false confessions with examples); *Confessions Trump Innocence*, *supra* note 141 (discussing false confessions with examples).

### C. PEACE: An Alternative Interview Method

In response to concerns over false confessions, the United Kingdom developed the PEACE model of investigative interviewing in 1993.<sup>160</sup> PEACE is an acronym for the method's five steps.<sup>161</sup> Like the steps of the Reid Technique, the steps of the PEACE model follow a distinct progression.<sup>162</sup> In step one—planning and preparation—the interviewer reviews all existing evidence, considers the unique characteristics of the interviewee, makes decisions about the logistics of the interview, and develops a written interview plan summarizing the goals of questioning, all in advance of the meeting.<sup>163</sup> In step two—engage and explain—the interviewer begins speaking with the interviewee by explaining the reason for the interview, the objectives of the interview, and the routines and expectations of the investigative interviewing process.<sup>164</sup> In step three—account, clarification, and challenge—the interviewer actively listens to the interviewee's account of the situation and then asks straightforward questions aimed at getting the interviewee to clarify or expand upon certain parts of his or her story.<sup>165</sup> Importantly, investigators are not allowed to lie or fabricate evidence during this step or at any time throughout the

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160. See *Suspect Interviews*, *supra* note 25, at 34 (detailing the United Kingdom's efforts to decrease false confessions).

161. See *Investigative Interviewing*, C. POLICING: AUTHORISED PROF. PRAC., <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/> [<https://perma.cc/Y77V-5K5H>] (last modified Nov. 28, 2018) [hereinafter *Investigative Interviewing*]; see also MARY SCHOLLUM, *INVESTIGATIVE INTERVIEWING: THE LITERATURE* 43–47 (2005).

162. Compare INBAU ET AL., *supra* note 6 (outlining the steps of the Reid Technique), with *Investigative Interviewing*, *supra* note 161 (outlining the steps of the PEACE model).

163. See *Investigative Interviewing*, *supra* note 161 (describing how the literature directs the interviewer to complete this step “even where it is essential that an early interview takes place” as it is “one of the most important phases in effective interviewing”).

164. See *id.*; see also Snook et al., *supra* note 30, at 220 (“An interviewer engages the interviewee by personalizing the interview and continuously acting in a professional and considerate manner. These actions are meant to foster an atmosphere in which the interviewee will want to talk.”).

165. See *Investigative Interviewing*, *supra* note 161 (suggesting that interviewers use “open-ended prompt[s], such as, ‘tell me what happened’” when eliciting a suspect's account, and that the interviewer first provide the suspect with an opportunity to give “a full, unrestricted account” and give “answers which are less likely to have been influenced by the interviewer”); see also Snook et al., *supra* note 30, at 221 (describing how interviewers can identify “points of interest (e.g., persons, locations, actions, and times) that can be pursued later in the interview”).

interview process, which is a major diversion from Reid-style interrogations.<sup>166</sup> In step four—closure—the interviewer recounts the interviewee’s story, answers any of the interviewee’s questions, and explains to the interviewee the next steps in the investigation process.<sup>167</sup> In step five—evaluation—the primary interviewer and any other interviewers who participated in the process debrief their findings, reflect on their own performance, and determine the next steps in the investigation.<sup>168</sup> This emerging style of questioning is not aimed solely at eliciting confessions but rather is designed to gather useful information as objectively and cooperatively as possible.<sup>169</sup>

Thus far, data has shown that both methods—the Reid Technique and the PEACE model—share comparable success at attaining confessions.<sup>170</sup> However, despite their similar outcomes, the two methods have developed from starkly different origins.<sup>171</sup> While the Reid Technique was founded by a private corporation and has thrived as a commercial enterprise for decades,<sup>172</sup> the PEACE model emerged as part of a deliberate effort by the British government to

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166. See *Next Stage*, *supra* note 156, at 230 (summarizing the key features of the PEACE).

167. See *Investigative Interviewing*, *supra* note 161 (detailing proper procedure for the closing stage of PEACE).

168. See *id.*; see also Snook et al., *supra* note 30, at 222 (“Interviewers are encouraged to conduct self-evaluations of their performances, and supervisors are taught to provide constructive feedback as part of routine or interviewer-requested performance evaluations.”).

169. See Andrea Sawyer et al., *Investigative Interviewing in the UK*, in *INTERNATIONAL DEVELOPMENTS IN INVESTIGATIVE INTERVIEWING* 24, 24 (Tom Williamson et al. eds., 2009) (“The aim of the [investigative] interview has evolved from a confession-seeking exercise to a process that seeks to gather high-quality information to aid the investigation in a fair and ethical manner.”).

170. See Snook et al., *supra* note 30, at 222 (citations omitted) (“Both before and after the implementation of PEACE in England and Wales, roughly 50% of suspects confessed to their crimes; furthermore, the confession rate seems to hover around 50% in countries that continue to use Reid. Assuming that obtaining a confession is the desired outcome, these findings suggest that interviewers are just as effective using PEACE as they are using Reid.”).

171. Compare Orlando, *supra* note 116, at 1 (describing the founders of the Reid Technique as “John E. Reid and Associates, Inc.”), with *Interviewing Suspects*, *supra* note 31, at 47 (indicating that “[i]n 1993, the Royal Commission on Criminal Justice . . . reformed the practice of interrogation by proposing the PEACE model”).

172. See generally *Success With Reid*, JOHN E. REID & ASSOCIATES, INC., [http://www.reid.com/success\\_reid/](http://www.reid.com/success_reid/) [<https://perma.cc/897Z-67XK>] (last visited Mar. 11, 2019) (providing links to information about the Reid Technique, testimonials from past customers, and various options for individuals and agencies to purchase training sessions and merchandise).

abandon psychologically manipulative interrogation tactics.<sup>173</sup> As such, the PEACE method is backed by substantial empirical research and has been tailored to meet legislative standards outlined in the Police and Criminal Evidence Act of 1984.<sup>174</sup> Likely to the satisfaction of the British government, studies of the PEACE method's inaugural twenty years show that the information-gathering technique is more diagnostic of truth than its accusatory counterpart—that is, it effectively secures a greater proportion of true confessions while reducing the incidence of false confessions.<sup>175</sup> Additionally, investigative interviewing models like PEACE have yielded more detailed accounts from more talkative suspects, even in high-stakes contexts like interviews with terrorism suspects for intelligence-gathering purposes.<sup>176</sup> Though the PEACE model is still relatively young, it has already begun to exhibit significant benefits in contrast to the accusatory interrogation framework.<sup>177</sup> Since PEACE was introduced in the United Kingdom in the mid-1990s, several other countries including Canada, Germany, Sweden, Australia, New Zealand, and Mauritius have followed suit by adopting some version of the investigative interview model.<sup>178</sup> Though such a systemic shift has not yet occurred in the United States, leading false confession

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173. See *Interviewing Suspects*, *supra* note 31, at 46 (noting that the British legislature passed the Police and Criminal Evidence Act of 1984 as part of an effort “to reduce the use of psychologically manipulative tactics” and make the interrogation process “less ‘confrontational’ and more ‘investigative’”).

174. See David Dixon, *Questioning Suspects: A Comparative Perspective*, 26 J. CONTEMP. CRIM. JUST. 426, 429 (2010) (“Unlike Inbau and Reid, exponents of investigative interviewing can point to its origin in extensive empirical research on the questioning of suspects as justification of this approach. Such research was particularly influential because it was sponsored by official inquiries into criminal justice or as part of the evaluation of legislation prompted by such inquiries.”); see also Robert Kolker, *Nothing But the Truth: A Radical New Interrogation Technique is Transforming the Art of Detective Work: Shut Up and Let the Suspect Do the Talking*, MARSHALL PROJECT (May 24, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth> [<https://perma.cc/6M3T-Q5PE>] (describing the Reid Technique as “ha[ving] almost no science to back it up . . . despite its scientific pose”).

175. See Christian A. Meissner et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions*, 13 CAMPBELL SYSTEMATIC REV. 1, 31 (2012); see also *Interviewing Suspects*, *supra* note 31, at 47.

176. See *Next Stage*, *supra* note 156, at 233.

177. See *id.* at 235–38 (dispelling Reid Technique supporters’ counterarguments against PEACE); see also Kolker, *supra* note 174 (noting the relative success of PEACE when compared with an accusatory approach).

178. See, e.g., Heydon, *supra* note 111, at 105–06; see also *Suspect Interviews*, *supra* note 25, at 34 (adding Norway to the list of countries).

scholars are calling for change,<sup>179</sup> and some police training agencies have begun to listen.<sup>180</sup> Replacing a generations-old interrogation system with a new investigative interviewing model may seem like a daunting challenge, but Britain's tiered rollout approach serves as a helpful guide.<sup>181</sup> Moreover, an increasing number of police training agencies now offer instruction on the PEACE model, so resources are available to facilitate the transition.<sup>182</sup> Ultimately, the causal link between Reid-style interrogation practices and false confessions, when paired with the availability of a viable alternative in the PEACE method, may leave proponents of Reid-style questioning hard pressed to find justification for maintaining the status quo—especially in SBS investigations, where evidence of criminal activity is sparse and controversial.<sup>183</sup>

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179. See, e.g., *Interviewing Suspects*, *supra* note 31, at 50 (arguing that investigative interviewing should replace accusatory interrogations); see also *Suspect Interviews*, *supra* note 25, at 33 (“Several authors have recently expressed concerns about the guilt-presumptive and confrontational aspects of the Reid technique and its association with false confessions and recommend that it be replaced by the PEACE model.”).

180. See Eli Hager, *A Major Player in Law Enforcement Says It Will Stop Using a Method That's Been Linked to False Confessions*, BUS. INSIDER (Mar. 9, 2017, 7:44 PM), <http://www.businessinsider.com/reid-technique-false-confessions-law-enforcement-2017-3> [<https://perma.cc/LP2M-PQTC>] (indicating that one major police consulting firm, Wicklander-Zulawski & Associates, plans to stop teaching accusatory interrogation methods and will “use the Reid technique only to educate police on the risk and reality of false confessions”).

181. See Tracey Green, *The Future of Investigative Interviewing: Lessons for Australia*, 44 AUSTRALIAN J. FORENSIC SCI. 31, 35–36 (2012) (describing the levels in Britain's tiered roll-out approach); see also Heydon, *supra* note 111, at 104 (“A tiered approach was used to roll out the ‘PEACE model’ across British police forces whereby senior police investigators are trained to provide support to recruits and more junior officers in using the new approach to investigative interviewing. This tiered design of the PEACE model was intended to address the difficulty of challenging police practices established over generations of peer-to-peer communication.”).

182. See, e.g., *P.E.A.C.E. Investigative Interviewing Course*, FORENSIC INTERVIEW SOLUTIONS, <https://www.fis-international.com/services/public-sector/police-courses/investigative-interviewing-courses/p-e-a-c-e-investigative-interviewing-course/> [<https://perma.cc/5QQ4-8QD4>] (last visited Mar. 11, 2019); *P.E.A.C.E. Investigative Interviewing Course*, N. VA. CRIM. JUST. TRAINING ACAD., <http://www.nvcja.org/training-calendars/6269/> [<https://perma.cc/YR3F-3V94>] (last visited Mar. 11, 2019); *The PEACE Model: Evidence-Based Interviewing Strategies for the Workplace*, GLOBAL INST. FORENSIC RES., <https://www.gifrinc.com/peace/> [<https://perma.cc/9KZ8-ZTVG>] (last visited Mar. 11, 2019).

183. See *Next Stage*, *supra* note 156, at 239 (“It is only a matter of time before the psychologically manipulative practices that dominate current interrogations become extinct. The persuasive link between accusatorial methods and false confessions, and the fact that police officers around the world . . . are conducting

#### IV. REFORMING BY INFORMING: A NEW APPROACH TO SBS INVESTIGATIONS

When controversial medical evidence, accusatory interrogation practices, and vulnerable parties converge in SBS-based prosecutions, it creates the proverbial “perfect storm” for erroneous convictions.<sup>184</sup> Indeed, the ever-increasing number of documented exonerations for SBS-based convictions indicates that the system fails with sufficient regularity to raise concerns.<sup>185</sup> As such, it is incumbent upon those tasked with facilitating justice to respond to this criminal law crisis.<sup>186</sup> Because the legal community cannot control the pace of developments in SBS science, meaningful reform from the legal end should begin at

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effective criminal investigations with the use of a humane interviewing approach, suggests that arguments . . . in favour of ‘get tough’ tactics are less likely to continue to convince a contemporary and progressive judiciary.”).

184. See *FLAWED CONVICTIONS*, *supra* note 27, at 97–126 (discussing the impact of confessions on the prosecution of SBS cases).

185. See, e.g., *Shaken Baby Syndrome Cases*, *supra* note 14 (follow hyperlink; then type “SBS” in search field; then click “Filter”) (listing cases in which parents or caregivers convicted of abusing infants were exonerated). Of course, these data are just a few examples and discount hundreds of cases in which the defendant plead guilty and thus waived direct appellate review, and hundreds of cases still pending on appeal. See *Next Innocence Project*, *supra* note 26, at 9–10 (“[T]here are a number of ways to estimate the magnitude of defendants potentially impacted by recent scientific developments. One might conservatively assume that the approximately 800 appeals reported since 1990 reflect about 1500 convictions after trial. To focus on more recent figures only, it seems fair to conclude that around 200 defendants a year are being convicted of SBS. Without additional data, we cannot reasonably speculate about the number of defendants who plead guilty to this type of crime . . . . When placed against the backdrop of recent scientific developments, these numbers reflect a crisis in the criminal justice system.”).

186. See Jenecke, *supra* note 33, at 147 (“If actors in the American criminal justice system fail to enact systemic reforms that adequately address the collapse of [SBS] as a definitive medical diagnosis of criminal child abuse, then they will continue to contribute to the substantial, if not certain, risk that innocent caregivers and parents will be wrongfully convicted and imprisoned for child abuse related crimes where no crime may have been committed.”); see also Sangero & Halpert, *supra* note 143, at 1303 (“In the case of false convictions . . . it is in fact the state itself that creates the risk: by setting the offenses in law; by focusing on one specific suspect; by bringing people to trial; by using problematic evidence and inaccurate equipment to prove guilt; and by convicting and imposing harsh penalties. An accepted principle in both torts and criminal law is that the creator of a dangerous situation is duty-bound to eliminate or reduce the risk of harm deriving from that situation. . . . Thus, not only does the state have a moral duty to incorporate safety [measures] into the criminal justice system, even if this would entail resources, but it also bears a legal obligation to do so.”).

the investigation stage—when police officers working the front lines make initial determinations of criminal culpability.<sup>187</sup>

#### A. Implications of the SBS Controversy on the Preliminary Stages of Investigations

Though many reputable critics contest the credibility of SBS science, the majority of practicing medical professionals still consider it valid and continue to issue death-by-abuse diagnoses whenever infants present with the triad of symptoms.<sup>188</sup> These doctors, acting on genuine beliefs that children have been abused, alert the police and thereby set criminal investigations in motion.<sup>189</sup> In turn, the police heed to the expertise of medical professionals and build their investigations around what they genuinely believe to be legitimate diagnoses of child abuse.<sup>190</sup> The result is an ongoing cycle of SBS-based prosecutions and convictions that effectively stifle the underlying controversy and reinforce the validity of SBS.<sup>191</sup>

Law enforcement can begin to break this cycle by acknowledging both sides of the medical controversy at the outset of all SBS investigations.<sup>192</sup> Historically, when a physician diagnoses a child with SBS, that diagnosis triggers a criminal investigation involving medical professionals, law enforcement, social workers, and

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187. See Jenecke, *supra* note 33, at 183 (“Once doctors make an SBS diagnosis, police officers or social workers are alerted and then charged with investigating the circumstances surrounding the child’s injuries. After completing their investigation, officers are able to recommend pursuit of a prosecution. It is at this stage that the snowball of wrongful convictions truly gains momentum.”).

188. See Haberman, *supra* note 33 (stating that, as recently as 2015, “many doctors, maybe most, still swear by the diagnosis”).

189. See Jenecke, *supra* text accompanying note 187.

190. See *Next Innocence Project*, *supra* note 26, at 26 (“SBS cases are going forward because law enforcement officers genuinely believe in the validity of the diagnostic triad . . .”).

191. See *FLAWED CONVICTIONS*, *supra* note 27, at 37–38 (“SBS has been fortified by decades of triad-only convictions. Over and over again, people have been sent to prison based on the triad, lending credibility to its status as a maker of guilt. Through this process of reification, whereby an abstraction is elevated to the status of concrete reality, the criminal justice system has in essence validated the idea that the triad proves violent shaking.”).

192. See Jenecke, *supra* note 33, at 183 (“In order to combat their confirmation bias, police officers . . . should be educated about the possible alternatives to abuse in alleged in SBS cases. This type of re-education would be the first step towards eliminating the investigatory inclination to seek confirmatory evidence of a foregone conclusion and would encourage them rather to seek the truth.”).

prosecutors.<sup>193</sup> The employment of such robust legal machinery in response to a medical diagnosis minimizes the chances of classifying the situation as anything other than abuse and significantly increases the likelihood that formal charges will follow.<sup>194</sup> Further, because classic SBS theory predetermines that the last adult to be with the child is the most likely suspect, investigators following the Reid Technique are essentially free to forego the factual analysis phase of investigation and proceed directly to interrogating that individual.<sup>195</sup> As a result, the legal system automatically and often prematurely places a cloud of suspicion over a potentially innocent or merely negligent parent or caregiver.<sup>196</sup>

In order to avoid this scenario, investigators analyzing the direct and circumstantial evidence of an SBS case must give meaningful consideration to all possible alternatives—perhaps a different adult abused the child days or weeks prior, or perhaps the child was not abused at all but instead succumbed to a preexisting infirmity.<sup>197</sup> Notably, there will still be occasions when a child presents with SBS symptoms and the last adult to be with the child truly did inflict some sort of abuse.<sup>198</sup> The point is not to extinguish this narrative entirely

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193. See Holmgren, *supra* note 92, at 276 (suggesting that a “multi-disciplinary coordinated response” is best practice when a case of SBS has been reported).

194. See Le Fanu, *supra* note 61, at 252 (“For parents [accused in SBS cases] there was no escaping their fate. From the moment of the initial allegation against them, the alliance of medical experts, police, social workers and an unsympathetic judiciary—well organized, experienced and well financed—meant that their eventual conviction was almost a foregone conclusion.”); see also Findley et al., *supra* note 43, at 242 (“In general, prosecutors and child abuse pediatricians continue to strongly endorse the SBS/AHT hypothesis, resulting in hundreds of successful prosecutions every year.”).

195. See generally INBAU ET AL., *supra* note 6. Recall that the factual analysis phase is used “to locate possible suspects and to help identify which one probably committed the crime.” *Id.* at 11–12. However, in SBS cases, the foregone conclusion is that the child’s injuries had to have been inflicted very recently, so the pool of adult suspects is likely to be very small, or perhaps just one individual. See Findley et al., *supra* text accompanying note 43.

196. See FLAWED CONVICTIONS, *supra* note 27, at 102 (“The dominant feature of most SBS interrogations is that the suspect’s guilt is already accepted as a given. This message is conveyed with emphasis and repetition. Since the science is portrayed as both unassailable and inescapable, all that remains is for the suspect to acknowledge what doctors have already gleaned from the medical evidence. SBS proves the crime and identifies the criminal; there is no room for doubt or denial.”).

197. See Findley et al., *supra* note 43, at 244.

198. See *Next Innocence Project*, *supra* note 26, at 8 (indicating that some cases of SBS do include corroborating physical evidence of abuse).

but rather to consider it in its proper context among other scientifically recognized alternatives.<sup>199</sup> Such a shift in procedure will likely result in the early dismissal of some cases as genuine accidents and will prime the remaining suspicious cases for further investigation and suspect interviews.<sup>200</sup>

## B. Replacing Accusatory Interrogations with Investigative Interviews

As investigators embrace a more complete understanding of both sides of the SBS debate, it should be abundantly clear that this subset of cases is unique and often involves a very different breed of criminal suspect.<sup>201</sup> Because SBS suspects are generally not hardened criminals but rather vulnerable parents and caregivers in traumatic situations, replacing old habits of accusatory interrogation with new methods of cooperative interviewing is a far more feasible task.<sup>202</sup> In effect, discussion in these cases will evolve from “get this baby killer to confess” to “find out what information this individual has that might help explain how this child was injured.”<sup>203</sup> Such a change in approach is more imperative now than ever, as the shifting science behind SBS has skeptics calling for more corroborative evidence before prosecutors bring SBS-based criminal cases to court.<sup>204</sup>

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199. *See id.* at 23 (acknowledging that sometimes adults do violently shake infants, inflicting fatal injuries); *see also* Gabaeff, *supra* note 96, at 91 (“To be clear, real child abuse and false accusations of child abuse are completely separate medically and have little to do with each other from any legitimate forensic perspective. Those working in the field or in emergency departments see real child abuse and its tragic consequences. . . . Focusing on the increasing number of false accusations of abuse and decreasing and eliminating them is [the issue.] . . .”).

200. *See Jenecke, supra* note 33, at 185–86 (“[P]rosecutors should protect the integrity of the court and the case by . . . dismissing cases that lack corroborating evidence instead of taking advantage of the now-debunked definitive nature of SBS diagnoses and prosecutions.”).

201. *See* FLAWED CONVICTIONS, *supra* note 27, at 101 (explaining that most SBS suspects are “new to the criminal justice system” and are willing to fully cooperate with police, without the assistance of a lawyer, in hopes of resolving the issue expediently).

202. *See Jenecke, supra* note 33, at 184 (suggesting that police training in the areas of SBS and false confessions be reformed).

203. *See id.* at 170 (describing the investigation of SBS cases as historically being confession-based rather than “truth-seeking” endeavors).

204. *See, e.g.,* Gena, *supra* note 46, at 711 (suggesting that “prosecutors should not charge crimes based on SBS without corroborating evidence”); *see also* Findley et al., *supra* note 43, at 256 (“As the differential diagnosis for the triad has expanded, the ‘case for shaking’ as a mechanism of injury now rests largely on confessions.”).

Investigators and prosecutors alike find great value in suspects' confessions and inconsistent statements because SBS cases typically lack physical evidence beyond the triad of symptoms.<sup>205</sup> Conveniently, the Reid Technique and similar methods that many police agencies currently use provide ample opportunity and tools for extracting incriminating statements from parents and caregivers under scrutiny.<sup>206</sup> From an investigative standpoint, these SBS suspects are treated no differently than other criminal suspects in that they may be subject to accusatory and deceptive interrogations.<sup>207</sup> However, from a legal standpoint, confronting these suspects with seemingly conclusive scientific evidence of guilt in a Reid-style interrogation is a troubling scenario that significantly increases the likelihood of false confessions and wrongful convictions.<sup>208</sup> Indeed, it is incongruous that police question these individuals with the same vigor and deceit as

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205. See Holmgren, *supra* text accompanying note 104; see also Findley et al., *supra* note 43, at 256–61 (discussing the importance of inconsistent statements and confessions in SBS cases and the methods interrogators used to elicit them); FLAWED CONVICTIONS, *supra* note 27, at 102 (“[I]n recent years, as the diagnosis has weakened, police incentives to exact a confession have strengthened. Greater ambiguity surrounding the triad means that the medical testimony is less sure to yield a conviction. As we have seen, this loosening of diagnostic definitiveness does not necessarily diminish the certainty of the state’s doctors, which then becomes the certainty of police investigators.”).

206. See *supra* text accompanying notes 112–131 (outlining the nine steps of the Reid Technique). For example, in Adrian Thomas’s case, investigators following a Reid-style interrogation procedure began their encounter by accusing Thomas incessantly, proceeded to fabricate incriminating statements by Thomas’s wife, and ultimately told Thomas that his confession could be the key to saving his son’s life. See *People v. Thomas*, 8 N.E.3d 308, 311 (N.Y. 2014). Notably, investigators told Thomas 21 times that his confession could help save his son’s life, despite the fact that his son had officially been declared brain-dead mid-interrogation. See *id.* at 314–15.

207. See Leestma, *supra* note 37, at 14 (“One scenario in alleged SBS cases is that an interrogator . . . may employ subterfuge to secure an admission of shaking. Deceit is not uncommon, as when the interrogator may communicate to the accused that ‘if you could tell us exactly what happened and if you shook the baby, we could do something for the baby and maybe save its life.’ There are, of course, no specific treatments in such cases other than those already being given to the baby, and this type of suggestion is disingenuous at best.”).

208. See, e.g., Findley et al., *supra* note 43, at 259 (quoting *Aleman v. Village of Hanover Park*, 662 F.3d 897, 907 (7th Cir. 2011) (“[Investigators] told the [suspect] the only possible cause of [the victim’s] injuries was that he’d been shaken right before he collapsed; not being an expert in shaken-baby syndrome, [the suspect] could not deny the officers’ false representation of medical opinion. And since he was the only person to have shaken [the victim] immediately before [the victim’s] collapse, it was a logical necessity that he had been responsible for the child’s death. Q.E.D. A confession so induced is worthless as evidence, and as a premise for an arrest.”)).

they would gang members and rapists, despite their own concession that most alleged SBS perpetrators are over-stressed parents and caregivers, not cold-hearted career criminals.<sup>209</sup>

If police agencies replace the status quo Reid-style interrogation with the more cooperative PEACE investigative interview method when investigating SBS cases, the trustworthiness of prosecutors' cases will substantially increase.<sup>210</sup> First, rather than beginning interviews with scathing accusations of guilt, investigators will begin each interview with an explanation of the process and a transparent set of objectives for the interaction.<sup>211</sup> This change will better equip these suspects, many of whom have little-to-no experience with the criminal justice system, to confront the formidable legal machinery that stands pitted against them.<sup>212</sup> Second, rather than suppressing and condemning every statement of innocence that a suspect gives, investigators will encourage the suspect to provide a complete explanation of the situation from his or her perspective.<sup>213</sup> This step is absolutely critical in SBS investigations because it gives the parent or caregiver an opportunity to offer potential alternative causes for the child's symptoms, like a preexisting illness or a recent fall, that might ultimately prove his or her innocence.<sup>214</sup> To be clear, this change in procedure does not foreclose the opportunity for investigators to challenge the narrative; it simply neutralizes a formerly hostile

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209. See *Next Stage*, *supra* note 156, at 238 (noting that police officers have said that they owe SBS victims to “get tough” on suspected perpetrators “by using the full arsenal of psychologically manipulative tactics” (emphasis added)).

210. See *Suspect Interviews*, *supra* note 25, at 35–36 (citations omitted) (“Since, unlike the Reid technique, the PEACE model is neither guilt presumptive nor overtly confrontational, it is widely assumed that it is less likely to elicit false confessions.”); see also *FLAWED CONVICTIONS*, *supra* note 27, at 197 (arguing that, in the context of SBS investigations, reforms need to be made to “soften[] the adversarial model” because it “is a poor fit for a prosecution paradigm that depends entirely on medical science”).

211. Compare *supra* text accompanying note 123 (detailing the “direct, positive confrontation” step of the Reid Technique), with *supra* text accompanying note 164 (detailing the “engage and explain” step of the PEACE method).

212. See *supra* text accompanying note 194 (listing all of the parties that typically get involved in SBS-based criminal investigations).

213. Compare *supra* text accompanying notes 125–126 (detailing the “handling denials” and “overcoming objections” steps of the Reid Technique), with *supra* text accompanying note 165 (detailing the “account, clarification, and challenge” step of the PEACE method).

214. See *supra* text accompanying notes 50–53 (listing scientifically recognized causes of the triad other than shaking).

interaction.<sup>215</sup> Next, rather than fabricating evidence and employing deceptive techniques, investigators will be bound by existing evidence and held to a standard of honesty.<sup>216</sup> Importantly, in the SBS context, existing medical evidence that is not fabricated or manipulated could come in the form of a differential diagnosis that describes alternative possibilities for the cause of the child's symptoms and does not simply conclude abuse.<sup>217</sup> Finally, rather than spending endless hours trying to secure a confession, investigators will be free to conclude interviews cordially at any time, leaving the prospect of future interviews open and the suspect much more inclined to cooperate.<sup>218</sup> In sum, replacing Reid-style interrogation with PEACE investigative interviewing in the context of SBS investigations will provide this unique class of suspects with a fighting chance against the arguably antiquated SBS construct that has falsely convicted many of their predecessors.<sup>219</sup>

### C. Scrutinizing Confessions

If PEACE-style investigative interviews replace Reid-style accusatory interrogations in SBS investigations, statistics indicate that the prevalence of confessions may actually remain the same.<sup>220</sup> Therefore, the key distinction between the two methods lies in the reliability of those confessions.<sup>221</sup> The Reid Technique is largely investigator-driven.<sup>222</sup> As a result, it can be hard to distinguish in retrospect whether substantive details in a confession originated from

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215. See Green, *supra* note 181, at 40 (indicating that the PEACE model “primarily provides for an ethical, fair and admissible account to be obtained and challenged where appropriate”).

216. See *supra* notes 205–208 (discussing current interrogation practices of deceit and false evidence ploys).

217. See *supra* text accompanying note 53.

218. Compare *supra* text accompanying notes 129–131 (detailing the steps of the Reid Technique that are most heavily geared toward securing a detailed confession), with *supra* text accompanying note 167 (detailing the closure step of the PEACE method).

219. See generally *FLAWED CONVICTIONS*, *supra* note 27 (discussing the problems with the current approach to SBS prosecutions).

220. See Snook, *supra* note 30, at 222 (indicating “that interviewers are just as effective using PEACE as they are using Reid” to elicit confessions of wrongdoing); see also *supra* text accompanying note 170.

221. Compare *supra* Section III.A, with *supra* Section III.C.

222. See generally *INBAU ET AL.*, *supra* note 6 (instructing investigators on how to conduct interrogations using the Reid Technique).

the suspect or the interrogating officer.<sup>223</sup> Conversely, the PEACE method is largely suspect-driven.<sup>224</sup> Thus, when a suspect confesses, it is far more likely that he or she was the first party to offer the substantive information linking him or her to the crime.<sup>225</sup> Certainly, if investigators have successfully procured detailed statements from suspected terrorists using PEACE, they should be able to elicit the same level of detail, if not more, from parents and caregivers.<sup>226</sup> By taking a suspect-driven approach instead of a police-dominated approach, the PEACE method categorically results in confessions that are more reliable and substantively thorough.<sup>227</sup>

Though studies indicate that the PEACE method produces more reliable confessions, the risks associated with false confessions are so great that the legal system should nevertheless scrutinize all admissions of guilt in the context of SBS investigations.<sup>228</sup> Indeed, a hallmark of the PEACE method is that the suspect supplies the narrative, but for the crime of infant abuse by SBS, there are only so many narratives available.<sup>229</sup> Therefore, it is reasonably possible that a suspected parent or caregiver could contrive a credible story based solely on his or her general knowledge of SBS.<sup>230</sup>

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223. See Heydon, *supra* note 111, at 118 (noting that investigators following the Reid Technique “can find themselves reliant on information or evidence that they believe formed a core part of the suspect’s confession only to find later that the suspect never volunteered this information freely and only agreed to a statement made by the investigator”); see also *Confessions Trump Innocence*, *supra* note 141, at 435–36 (describing a study in which thirty-six out of thirty-eight proven false confessions included accurate details of the crime, all of which had first been provided “inadvertently or purposefully” by officers conducting the interrogations).

224. See *Next Stage*, *supra* note 156, at 231 (stating that one of the primary goals of PEACE is to “obtain an uninterrupted account of [the suspect’s] version of the event(s)”).

225. See SCHOLLUM, *supra* note 161, at 40 (discussing the relative roles of suspects and investigators in PEACE interviews).

226. See Snook, Eastwood & Barron, *supra* note 156, at 233.

227. See *id.* (“[A] meta-analysis of studies that compared the information-gathering approaches to accusatorial approaches on their diagnostic ability found that both produced a large percentage of true confessions but that an information-gathering approach produced far fewer false confessions.”).

228. See generally Leestma, *supra* note 37 (discussing unreliable confessions in SBS cases).

229. See *Never Shake*, *supra* note 97 (informing the public that SBS can be caused by either “shaking alone or from shaking with impact”).

230. See Leestma, *supra* note 37, at 14 (suggesting that SBS “is embedded in the collective minds of the public”); *Anatomy of a Misdiagnosis*, *supra* note 46 (“The diagnosis is so rooted in the public consciousness that, [in 2010], the Senate unanimously declared the third week of April ‘National Shaken Baby Syndrome Awareness Week.’”).

In addition, the parents and caregivers who become suspects in SBS cases are at an increased risk for giving coerced-internalized confessions.<sup>231</sup> Investigators often approach these parents and caregivers during a particularly stressful time<sup>232</sup>—when they are distraught over the injury or loss of a child and are likely still processing the situation—and compound the damage by presenting scientific “proof” of that parent’s or caregiver’s guilt.<sup>233</sup> Even if the PEACE method softens this encounter, suspects may still conflate their innocent or negligent conduct as evidence of criminal culpability under the extreme circumstances of a child abuse or homicide investigation.<sup>234</sup> Therefore, investigators, prosecutors, and courts should closely scrutinize all SBS confessions before accepting them as credible.<sup>235</sup> Ultimately, when the legal system is operating in reliance on a medical diagnosis of abuse, it should only accept those confessions that are obtained using a cooperative PEACE-style interview method and adequately screened for any signs of contrivance or false internalization.<sup>236</sup>

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231. See *supra* text accompanying note 154; see also *FLAWED CONVICTIONS*, *supra* note 27, at 102 (“[W]e now know that particular risk factors contribute [to] . . . internalized false confessions, where ‘innocent but malleable’ suspects come to believe that they have committed the alleged crime. When these known risk factors are present, as in SBS cases they so often are, statements that result are of questionable reliability.”).

232. See *supra* text accompanying note 28. Literature produced by the founders of the Reid Technique instructs interrogators to take advantage of this stress to develop a theme: “Because emotional offenders often experience shame and guilt, themes centered around excusing their criminal behavior are effective because such themes permit the suspect to accept physical responsibility for committing the crime while relieving his [or her] emotional guilt.” See *INBAU ET AL.*, *supra* note 6, at 116.

233. See *supra* text accompanying note 166 (recalling that officers following the PEACE method may not lie or misrepresent evidence). However, in SBS investigations, “there is no such misrepresentation—the doctors really do feel certain of the suspect’s guilt” and informing the suspect of the doctors’ opinion is not considered lying or misrepresentation. See *FLAWED CONVICTIONS*, *supra* note 27, at 101.

234. See Findley et al., *supra* note 43, at 259–60 (“When confronted with ‘proof’ of shaking or impact, parents [or caregivers] may search their memories for what they might have done, ultimately recalling minor incidents that are then viewed as confessions . . .”).

235. See Jenecke, *supra* note 33, at 183–87 (discussing the roles of police, social workers, prosecutors, defense attorneys, and judges in causing or preventing erroneous convictions in SBS cases).

236. See *FLAWED CONVICTIONS*, *supra* note 27, at 99 (arguing that “there is good reason for caution when evaluating the truth-value of confessions” in SBS cases).

#### D. “If It Ain’t Broke, Don’t Fix It”—Overcoming Systemic Resistance

Opposition to the idea that police should use the PEACE model instead of the Reid Technique when investigating parents and caregivers accused in infant abuse and death cases comes primarily from two groups: those who believe in the validity of the SBS diagnosis<sup>237</sup> and those who defend the efficacy of accusatory interrogation practices.<sup>238</sup> To this day, the legal system continues to successfully churn out cases that are both premised on controversial SBS science and built using Reid-style interrogations.<sup>239</sup> As such, the proposition for change may be met with great resistance from the current regime.<sup>240</sup> However, evidence indicates that the system is certainly broken, and those tasked with facilitating justice have an obligation to fix it.<sup>241</sup>

##### 1. *Disputed Science Cannot Ensure Just Convictions*

The mere fact that a legitimate medical controversy exists with reputable professionals on both sides should be enough to convince legal minds to modify existing protocol in SBS prosecutions.<sup>242</sup> Many countries have already responded to the controversy by drastically reforming the function of the SBS diagnosis within their respective

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237. See, e.g., NATIONAL CENTER ON SHAKEN BABY SYNDROME, <https://dontshake.org> (last visited Mar. 11, 2019).

238. See generally INBAU ET AL., *supra* note 6.

239. See, e.g., Salisbury, *supra* note 124 (detailing the November 2017 felony murder trial of a Michigan man accused of shaking his girlfriend’s son to death).

240. See FLAWED CONVICTIONS, *supra* note 27, at 37–40 (discussing prosecutors’ roles in perpetuating SBS under the current regime); see also *Suspect Interviews*, *supra* note 25, at 36 (“No doubt, [replacing Reid with PEACE] will be strongly resisted by American police authorities. The Reid technique has a long history, and its prescriptive nature and apparent effectiveness undoubtedly make it attractive.”).

241. See Findley et al., *supra* note 43, at 259 (“[M]any of the confessions in child abuse cases involve interrogation techniques that are known to produce false confessions or plea bargains. Some interrogations include assertions that the medical evidence proves that a child was shaken and that only the accused could have done it.”).

242. See *supra* Sections I.A & I.B (discussing both sides of the SBS controversy); see also Findley et al., *supra* note 43, at 305 (“[I]f doctors cannot agree on these complex and unresolved issues, it is unlikely that jurors or judges can do any better.”).

legal systems, leaving the United States a clear outlier in this regard.<sup>243</sup> To be sure, the SBS skeptics are not just a group of quack doctors and mad scientists looking to cause a rift in the criminal justice system or make extra cash testifying as defense experts.<sup>244</sup> The most remarkable among them perhaps is A.N. Guthkelch, one of the neurosurgeons credited with establishing the SBS diagnosis,<sup>245</sup> who is now actively condemning its use in criminal prosecutions.<sup>246</sup> Regardless of which side turns out to be more “correct” in the long run, the mere existence of such a disagreement in the scientific and medical communities should be enough to deter those in the legal community from using SBS as a vehicle for securing criminal convictions.<sup>247</sup>

## 2. *Accusatory Interrogations Produce Faulty Confessions*

Though proponents of the Reid Technique and its progeny maintain that accusatory interrogations are effective at uncovering the truth, a staggering number of proven false confessions severely undermine that claim.<sup>248</sup> Indeed, the international community and even some police training agencies in the United States have found key features of the Reid Technique—such as the presumption of guilt and the largely unfettered license to fabricate evidence—to be antiquated, if not unscrupulous, and have changed practices accordingly.<sup>249</sup> However, even for those who continue to find utility in the Reid Technique, abolishing the practice in the context SBS investigations

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243. See, e.g., Jenecke, *supra* note 33, at 159–65 (detailing reforms in Australia, the United Kingdom, and Canada).

244. See Cenziper, *supra* note 33 (indicating that supporters of the SBS diagnosis “say the doctors and scientists who frequently testify for the defense are on the fringes of mainstream medicine and are often paid to provide testimony” so are thus not credible). *But see* Bazelon, *supra* note 45 (mentioning multiple SBS skeptics who qualify as experts in the field and testify in court for defendants).

245. See *supra* text accompanying note 32.

246. See Cenziper, *supra* note 33 (quoting Guthkelch as saying, “I am doing what I can so long as I have a breath to correct a grossly unjust situation”).

247. See *FLAWED CONVICTIONS*, *supra* note 27, at 197 (asserting that the legal system “should be wary of resting criminal convictions on highly contested scientific claims”).

248. See generally *Facts and Figures*, *supra* note 142 (discussing the connection between accusatory interrogations and false confessions).

249. See *supra* text accompanying notes 178–180 (listing countries and police training agencies that have abandoned the Reid Technique); see also *Next Stage*, *supra* note 156, at 236 (“Whether or not a confession has been elicited is a crude measure of success [in investigations].”).

is a feasible compromise.<sup>250</sup> The “get a confession at all costs” mentality is misplaced where the conduct confessed may in fact be non-criminal.<sup>251</sup> Therefore, while eliminating the Reid Technique altogether would be best practice, reserving it for the malicious—not the potentially innocent or merely negligent parent or caregiver implicated by controversial medical science—will suffice for now.<sup>252</sup>

### E. Moving Forward

As the number of vindicated, erroneous convictions multiply in the SBS context and beyond, experts continue to call for change to the Reid-style interrogation practices that have played a major role in these miscarriages of justice.<sup>253</sup> The United Kingdom has successfully replaced its old system of accusatory interrogations with the new PEACE model, so its process provides a framework for police agencies in the United States to follow.<sup>254</sup> However, because the United Kingdom has also dramatically reduced its SBS-based prosecutions in the decades since it rolled out the PEACE model of investigative interviewing, there is little data on the intersection of the

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250. See generally Leestma, *supra* note 37 (discussing false confessions in SBS cases).

251. See Ofshe, *supra* note 23, at 1023 (“In the investigation of infant deaths, [Reid-style tactics] can be so devastating that they can lead a grieving parent to misclassify a child’s natural or accidental death as a murder, and result in a false confession. If an investigator prematurely accuses a parent of a recently deceased infant by claiming supposedly conclusive medical evidence, the result can be disastrous.”).

252. See *Next Stage*, *supra* note 156, at 239 (“It is only a matter of time before the psychologically manipulative practices that dominate current interrogations become extinct. The persuasive link between accusatorial methods and false confessions, and the fact that police officers around the world (The United Kingdom, New Zealand, Norway, and parts of Canada) are conducting effective criminal investigations with the use of humane interviewing approach, suggests that arguments (e.g., ‘they are a necessary evil in the fight against crime’) in favour of ‘get tough’ tactics are less likely to continue to convince a contemporary and progressive judiciary. The relatively minor costs associated with changing interrogation policies and practices pales in comparison to the financial, political, and legal costs associated with inadequate investigations and miscarriages of justice.”).

253. See, e.g., *Suspect Interviews*, *supra* note 25, at 34 (noting the push to replace the Reid Technique with the PEACE model); *Interviewing Suspects*, *supra* note 31, at 42, 47 (calling for a change to status quo Reid-style interrogation procedures).

254. See generally *Confessions Trump Innocence*, *supra* note 141 (suggesting that police agencies in the United States replace accusatory interrogations with the PEACE method).

two.<sup>255</sup> Therefore, implementing PEACE in the specific context of SBS investigations in the United States will be somewhat of a pioneer effort.<sup>256</sup> Nevertheless, if the shift away from Reid-style interrogation toward investigative interviewing in the United States is inevitable, as many believe it is,<sup>257</sup> investigations of parents and caregivers for potentially non-criminal conduct provide an ideal forum to pilot PEACE.<sup>258</sup>

## CONCLUSION

Investigators are currently allowed to use deceit, aggression, and manipulation to secure confessions from criminal suspects, even when those suspects are otherwise law-abiding parents and caregivers accused of severely abusing infant children.<sup>259</sup> To elicit these confessions, investigators rely heavily on a medical diagnosis that is clouded with controversy.<sup>260</sup> The result is the problematic scenario of officers confronting emotionally vulnerable parents and caregivers with seemingly definitive scientific evidence of their alleged misconduct.<sup>261</sup> Under such circumstances, these suspects, who are likely unaware of the medical debate surrounding SBS, are highly susceptible to internalizing the allegations and ultimately shouldering significant blame.<sup>262</sup> This process can quickly culminate in criminal prosecutions for offenses as serious as intentional murder.<sup>263</sup>

To combat this troubling cycle, it is imperative that police agencies acknowledge the SBS controversy and adopt the PEACE model when interviewing suspects in these cases.<sup>264</sup> The employment of this cooperative approach will enable officers to conduct well-rounded information-gathering investigations into infant deaths and

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255. See Enright, *supra* note 45 (discussing SBS reform in the United Kingdom).

256. See *id.*

257. See *supra* text accompanying note 252.

258. See *supra* text accompanying note 210.

259. See INBAU ET AL., *supra* note 6, at 121–22 (detailing the Reid Technique of accusatory interrogation).

260. See generally *Next Innocence Project*, *supra* note 26; *FLAWED CONVICTIONS*, *supra* note 27.

261. See *supra* text accompanying note 208.

262. See Findley et al., *supra* note 43, at 259–60 (discussing the potential for internalized false confessions in SBS cases).

263. See, e.g., *supra* notes 1–9, 14–15 (detailing the homicide prosecutions of Adrian Thomas and Audrey Edmonds, respectively).

264. See generally *Interviewing Suspects*, *supra* note 31.

spare unwitting parents and caregivers from falsely incriminating themselves in these tragedies.<sup>265</sup> While the system cannot and should not extinguish the shaken baby narrative entirely, investigators and prosecutors owe it to exonerees like Adrian Thomas, Audrey Edmunds, Shirley Smith, Krystal (Voss) O'Connell, Jasmine Eskew, Drayton Witt, Jennifer Del Prete, and Zavion Johnson—who collectively spent decades wrongfully incarcerated—to conduct SBS-based abuse and death investigations in an objective, honest, and thorough manner the first time around.<sup>266</sup>

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265. See generally Jenecke, *supra* note 33 (discussing the need for change in SBS-based criminal cases).

266. See *supra* text accompanying notes 64–79.