FOREWORD

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The criminal law would be enforced reliably, equitably, and proportionately against offenders, and only offenders, in a perfectly just and error-free world. Unfortunately, we do not live in such a world. Gaps are inevitable, and slippage foreordained between abstractions and their manifestations in all human endeavors. Innocent people are wrongly accused, convicted, and imprisoned in American systems of criminal justice. Guilty parties escape detection, verdicts fail to speak the truth, and punishments do not match the crimes. Justice sometimes miscarries.

The *Albany Law Review* and the University at Albany School of Criminal Justice have entered into a unique partnership devoted to analyzing, in an annual special issue of the *Albany Law Review*, the legal, empirical, systemic, and human dimensions of miscarriages of criminal justice. This distinctive collaboration involves separate institutions with different academic strengths and missions. Albany Law School, the oldest independent law school in North America and home to the *Albany Law Review*, prepares students for entry into the legal profession. It promotes and relies on scholarship grounded primarily in legal doctrine and policy analysis. The University at Albany, a research center within the State University of New York ("SUNY") system, houses a School of Criminal Justice with the oldest and one of the leading Ph.D. programs of its kind. Its focus is on studying the causes of crime, and the operation of the law enforcement and judicial and correctional institutions that comprise criminal justice systems. Its methods are primarily social scientific and empirical.

The seeds of this venture lay in the joint recognition that miscarriages of justice neither originate nor reside exclusively within law or criminal justice, but rather implicate both disciplines as well as others. Discussions began,[1] planning ensued, and the

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[1] Matthew J. Laroche, the 2009–2010 *Albany Law Review* Editor-in-Chief, and prior

inter-institutional initiative took root with a symposium hosted in March 2010 by the *Albany Law Review*: *Wrongful Convictions: Understanding and Addressing Criminal Injustice*. The symposium, moderated by Chief Judge Jonathan Lippman of the New York Court of Appeals, involved the participation of legal scholars, empirical researchers, policy activists, and practitioners, whose contributions subsequently were published by the *Albany Law Review*.[2] The partnership blossomed with the awareness that many additional issues remained unexplored and would benefit from the perspectives and methodologies of multiple disciplines and diverse professional experiences.

This collection represents the inaugural *Miscarriages of Justice* issue stemming from the partnership between the *Albany Law Review* and the University at Albany's School of Criminal Justice.[3] The focus on "miscarriages of justice" is deliberately expansive. It encompasses wrongful convictions and their antecedents and consequences, erroneous acquittals and corresponding lapses in law enforcement and prosecution, disservices to the victims of crime, inequitable punishments, and related matters. The Memorandum of Understanding solemnizing this inter-institutional partnership makes the broad, interdisciplinary scope of the miscarriages of justice theme explicit.

The annual *Miscarriages of Justice* issue will be dedicated to exploring injustice in the criminal justice system. It will focus broadly on legal, social science, and policy perspectives on topics including wrongful convictions, actions and policies that impede the apprehension, prosecution, and punishment of the guilty, and other subjects that explore how and why the criminal justice system falls short in achieving its objectives, or can enhance its truth-seeking and other functions.[4]

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recipient of B.A. and M.A. degrees in criminal justice from the University at Albany, was especially instrumental in initiating and contributing to discussions involving the *Law Review* and the School of Criminal Justice that resulted in the *Miscarriages of Justice* collaboration. Professor Vincent M. Bonventre, the *Albany Law Review* Faculty Advisor, was indispensable as well to the partnership's origins and development.

[2] *Symposium: Wrongful Convictions: Understanding and Addressing Criminal Injustice*, 73 ALB. L. REV. 1195–378 (2010).

[3] Caitlain Devereaux Lewis, the 2010–2011 *Albany Law Review* Editor-in-Chief, was tireless and supremely effective in working with Article Editors Krystle Chalich and Kristopher Ostrander to shepherd the inaugural *Miscarriages of Justice* issue into existence.

[4] Memorandum of Understanding—"Miscarriages of Justice" Partnership: University at Albany School of Criminal Justice & Albany Law Review (Sept. 24, 2010) (on file with *Albany Law Review*).

It is fitting that a law school and an academic unit devoted to the social scientific study of crime and criminal justice administration have joined to establish a forum to promote regular scrutiny of issues related to miscarriages of justice. The law—whether legislative, judicial, or administrative in origin—creates and represents the superstructure of rules and policies in which justice operates or malfunctions. Those laws are not self-executing—their application by the police, prosecutors, and courts; how crime victims, defense lawyers, juries, and criminal justice officials operate within them; the mechanisms behind their formation and implementation—are all issues that invite empirical examination. Gaining further insights about the incidence and types of miscarriages of justice, the factors that contribute to them, and how they can be detected, corrected, and averted, will demand the continuing attention of scholars and practitioners in law, criminal justice, and cognate disciplines.

There is little controversy about the desirability of correcting and avoiding miscarriages of justice. Reasonable people will certainly disagree, at some level, about the meaning of "justice," and about whether and precisely how justice may have miscarried in individual cases. Yet, as ideologically charged as many issues relating to crime and punishment may be, and as divergent as the extremes are on the spectrum of "crime control" and "due process" value orientations, there can be no disagreement about the injustice of convicting and punishing the innocent. Similarly, few will rejoice on seeing perpetrators of criminal violence and other serious offenses elude detection and prosecution, or otherwise flout the law. Yet surprisingly, perhaps, although much is known about policies that are effective in helping to prevent and redress miscarriages of justice, and although many jurisdictions have enacted salutary changes, reform efforts remain dormant or have met with resistance elsewhere.

At least in part, such inaction and resistance may owe to a tendency to conceptualize potential reforms as a zero-sum game, involving initiatives that demand a trade-off between sparing the innocent from wrongful conviction, but only at the expense of allowing the guilty to avoid apprehension and punishment. While it is unlikely that such trade-offs are inherent in all reform measures, important policy implications hinge on the validity of this premise, and it consequently merits careful scrutiny. How frequently and under what circumstances legal and criminal justice policies require

choosing between disadvantaging the innocent and providing a windfall to the guilty remain open questions in a variety of contexts.

Diverse aspects of these essential questions are explored in the writings that follow. The unifying theme of this inaugural *Miscarriages of Justice* issue is: "'[B]etter that ten guilty persons escape, than that one innocent suffer': Appraising the Blackstone Ratio in 2011." Blackstone ventured this famous and venerable assessment in his *Commentaries on the Laws of England*, where he admonished that "all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[5] Implicit in this proposition is that enhanced protections for the innocent must somehow thwart bringing the guilty to justice. Yet the foundations of the "Blackstone ratio" are conspicuous for their lack of supporting authority. No explanation accompanies the normative judgment that a 10-to-1-error rate embodies an acceptable exchange between freeing the guilty and condemning the innocent.[6] Nor is empirical evidence offered to substantiate the magnitude, or even the existence, of the envisioned trade-off.

These and related subjects are explored in the ensuing articles, nearly 250 years after Blackstone penned his thoughts. In one respect, these contemporary writings are a testament to the intractability, timeliness, and consequential nature of issues bearing on miscarriages of justice. In another respect, they suggest that careful legal and empirical analysis of issues subsuming the prevalence and different types of errors of justice, and their presumed interrelationships, may bring us closer to informed policy solutions. This initial *Miscarriages of Justice* issue of the *Albany Law Review* marks the beginning of a venture that we anticipate over time will mature into a rich, interdisciplinary scholarly tradition; one devoted to understanding the causes of diverse miscarriages of justice, and to developing and critically evaluating policies that are designed to identify, correct, and minimize those failures of justice.

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[5] 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[6] That disagreement exists about this value judgment is revealed in the lively analysis offered by Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).