MANAGING MISCARRIAGES OF JUSTICE FROM VICTIMIZATION TO REINTEGRATION

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I. INTRODUCTION

Few aphorisms of criminal law are as exquisitely enigmatic as Blackstone's rule: "it is better that ten guilty persons escape than that one innocent suffer."[1] The number "ten" conveys an air of deliberation and precision, as well as justifiable concern about the need to honor the presumption of innocence principle, but the rule is vague on the essentials. It is silent about whether the rule should apply equally to all criminal offenders and offenses—serial rapists and shoplifters alike, for example—and mute about the policy implications of the rule for police, prosecutors, judges, and correctional officials. It is silent also about whether a number much larger than ten is acceptable.[2] This essay attempts to make these matters explicit, to identify each of the primary sources of miscarriages of justice and ask how they might be managed more effectively and to raise questions about the validity of the number *ten* along the way.

The scholarly literature on miscarriages of justice has focused primarily on wrongful convictions, and with good reason: the presumption of innocence is a bedrock principle in our system of

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[1] 4 WILLIAM BLACKSTONE, 4 COMMENTARIES *358. A more recent saying on errors is similarly enigmatic, if ethically more dubious: "Mistakes were made"—a non-apology commonly made to acknowledge errors without taking responsibility for them.

[2] Blackstone's ten appears to have given up more security than Voltaire cared to: "'[T]is much more Prudence to acquit two Persons, tho' actually guilty, than to pass Sentence of Condemnation in one that is virtuous and innocent." VOLTAIRE, ZADIG; OR, THE BOOK OF FATE: AN ORIENTAL HISTORY 53 (John Brindley 1749) (1747) (emphasis omitted), *available at* http://www.gutenberg.org/files/18972/18972-h/18972-h.htm. Or, stated more plainly: "It is better to risk saving a guilty person than to condemn an innocent one." *Id.*

criminal justice. But miscarriages occur on both plates of the justice goddess's balance scale. They begin at the point of community failures to report serious crimes and police failures to respond to the ones that are reported. They include wrongful arrests and convictions, as well as wrongful dismissals and acquittals. Miscarriages of justice often continue beyond conviction, through sentencing, correctional treatment, and eventually, to failures to support the successful reintegration of offenders back to the community.

In fact, many more than ten culpable offenders escape for every innocent person wrongfully convicted in the United States. Consider first the left-hand side of the 10-to-1 ratio: well over 10 million felony offenses that do not end in conviction are committed annually by adults.[3] As for the right-hand side, wrongful convictions have been estimated at between 0.5 and 1 percent of all felony convictions,[4] which amounts to between 5000 and 10,000 wrongful convictions per year.[5] Hence, we have a number in the neighborhood of 1500 to 3000 culpable adult offenders not convicted in reality for every innocent person convicted.[6] One can only speculate what Blackstone would have thought about a number more than two orders of magnitude larger than ten.

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[3] In 2007, 12.7 million felony crimes were committed against individuals in the U.S., including almost 5.2 million violent incidents, 3.2 million household burglaries, almost 1 million motor vehicle thefts, and 3.4 million larcenies involving thefts of amounts exceeding $250. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES 96 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf. Several million more felonies were committed against commercial establishments.

[4] The Bureau of Justice Statistics reports that about one million adults are convicted each year. Patrick A. Langan & Helen A. Graziadei, *Felony Sentences in State Courts, 1992*, BUREAU OF JUST. STAT. BULL., Jan. 1995, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Felsent.pdf; Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, BUREAU OF JUST. STAT. BULL., Dec. 2004, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf; Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, BUREAU OF JUST. STAT. BULL., July 2007, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf; Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006—Statistical Tables*, BUREAU OF JUST. STAT. STATISTICAL TABLES, Dec. 2009, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf. For 2006, the most recent year for which data were available at the time of this writing, there were 1,132,290 felony convictions, of which 377,860 were for drug offenses.

[5] C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 62 (1996); BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 5 (2004).

[6] It would be informative and extremely useful to know how the public, the police, prosecutors, courts, and correctional authorities contribute, respectively, to this aggregate ratio. Available evidence is suggestive, but not definitive, on this important line of inquiry. We consider much of this evidence below.

Some of the sources of miscarriages of justice, on both sides, are outside the direct authority of criminal justice officials. The police can encourage members of the community to report crimes and provide the police with information needed to solve them, but citizens have no legal responsibility to do so. Many groups of individuals have good reasons not to contact the police: fugitives of justice, illegal immigrants, and people whose prior experiences with police have been negative. On the other side, innocent people occasionally find themselves on the wrong end of a perfect storm of circumstances, just due to bad fortune, that induce a jury to conclude erroneously that the defendant is guilty beyond a reasonable doubt. Perfect storms cannot be prohibited and are often unmanageable, but the prospects for finding ways to reduce miscarriages of justice caused by officials who are responsible for the pursuit of justice—the police, prosecutors, defense counsel, judges, and correctional officers—may be substantial.

Rules of criminal procedure provide a crude system for managing errors of justice. The standard of evidentiary proof escalates as an individual advances from a "person of interest" to suspect, arrestee, and criminal defendant under prosecution. These rules encourage the police to protect the public by using a lower, less restrictive standard of evidentiary proof to investigate and arrest than is used in the courtroom. As cases move forward, the legal standard of evidence elevates from "reasonable suspicion" at the interrogation and investigation stage, to "probable cause" at the stage of arrest, and "beyond a reasonable doubt" at the stage of trial.[7] Thus the emphasis shifts from protection of the community to protection of

[7] Here is an official definition of "proof beyond a reasonable doubt" according to federal Pattern Criminal Jury Instructions:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime [or crimes] charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS § 21 (1988). The rule is binding only on the relatively few cases that go to trial; 85%–90% of all felony convictions are by resolved plea. Brian Forst, *Prosecution*, *in* CRIME AND PUBLIC POLICY 437, 441 (James Q. Wilson & Joan Petersilia eds., 2011). Variation in the interpretation of the rule by juries and judges—precisely where, for example, the line is drawn between "firmly convinced" and "less than firmly convinced" is itself less than firm—complicates the task of finding a proper balance between the error of convicting an innocent person and that of failing to convict a true offender.

the innocent, as cases advance from the front end of the system to the courtroom.

This system of escalating evidentiary standards is useful, but it is neither sufficient for preventing miscarriages of justice nor a particularly efficient way to manage them. We can build a more coherent framework for managing miscarriages of justice by distinguishing between the two fundamentally different types of justice errors and assessing their respective social harms. We can refer to failures to do what is needed to protect the innocent (e.g., collect available evidence needed to exonerate them and ensure that the charges and sanctions imposed on real offenders are not excessive) as *errors of due process*, and failures to do what is needed to sanction culpable offenders (e.g., collect and use available evidence needed to secure their convictions and impose sufficient sanctions on them) as *errors of impunity*.[8] Under a conventional social welfare calculus, a criminal sanction is excessive when a decrease in the sanction would reduce the associated social costs and is insufficient when an increase in the sanction would reduce the total social costs of crime and punishment.[9] Sanctions include not only those imposed after conviction, but at any time between the suspect's first contact with the police and his or her conviction. The social cost of a miscarriage of justice is the difference between the total cost borne by society under the sanction given and the smaller social cost associated with an optimal sanction.[10]

Miscarriages on both sides may be either systematic, a product of misguided policies and rules of criminal justice intervention and sanctioning, or a product of the collective biases of criminal justice officials, or random, associated with quirks in the circumstances of the case and the evidence available or a result of disparity in the exercise of discretion. That disparity may also be random or systematic. Both systematic and random errors impose costs on

[8] Rigorous assessments of criminal justice policies and decisions explicitly weigh the relative costs of these errors, often referred to as false positives (arrests and convictions of the innocent, incarcerations of harmless people) and false negatives (failures to convict culpable offenders or to incarcerate dangerous convicts). In any given system, these two types of errors are often hydraulically linked, so that reducing one produces an increase in the other. In other cases, new technology and methods arise that allow for decreases in both errors simultaneously (DNA testing, more effective methods of interrogation). *See generally* FORST, *supra* note 5.

[9] *Id.* at 53–54.

[10] It must be noted that miscarriages of justice are often defined as departures from proper process rather than from just outcomes. We take the position that unless a departure from proper process creates harm to victims, defendants, or others, they are benign.

society that can be profound, and both appear to be manageable.[11]

In developing an analytic framework along these lines, we consider not only the nature and sources of miscarriages of justice and the prevalence of each type, but the associated costs on individuals directly and indirectly affected. Attempts to manage miscarriages of justice should account not only for how alternative interventions influence the rate of occurrence of miscarriages, but also for the harms those attempts impose on victims, offenders and their families, the costs of the resources consumed in the process, and the costs imposed on witnesses and the community at large. All miscarriages of justice are not equal.

Our failures to bring culpable offenders to justice as an essential component of miscarriages of justice departs from much of the literature on the subject, but is consistent with the notion of social costs and optimal sanctions, with the bifurcated error structure of scientific inference, and with basic notions of justice when seen as a matter of balancing the interests of security with those of protecting the innocent. While the social costs associated with lapses of justice are elusive empirically—they call for estimates of all the costs, tangible and intangible, associated with the stream of future crimes prevented by a sanction—we include them in the larger conceptual framework because they are important in the real world. We do not attempt to measure them here, yet they cannot be ignored. Mark Cohen and others have estimated the major elements of these costs.[12]

It is fashionable to take a less nuanced approach: all miscarriages of justice are unacceptable. One need not dig deep to see the folly of such a position. Many miscarriages are the product of random errors that cannot be prevented. Some level of such errors is socially optimal, since the costs of managing miscarriages can exceed the social cost of the errors themselves, as when the cost of bringing culpable offenders to justice substantially exceeds the social benefit of doing so. For those unpreventable errors, randomized enforcement to provide a degree of deterrence may be the preferred strategy. Miscarriages of justice associated with the exercise of the discretion of criminal justice practitioners may be

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[11] A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 307, 307–29 (Boudewijn Bouckaert & Gerrit De Geest eds., Edward Elgar Publishing 2000); FORST, *supra* note 5, at 46–52.

[12] Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, 4 CRIM. JUST. 263 (2000), *available at* http://www.ncjrs.gov/criminal_justice2000/vol_4/04f.pdf.

reduced through systems that structure the exercise of that discretion.[13] When improperly calibrated, such systems will inevitably produce systematic errors of justice, as in the case of mandatory sentences that are set above socially optimal levels. These may be revealed as non-optimal through rigorous policy analysis. To be valid and comprehensive, such analyses should focus both on policies designed to reduce the risk of convicting innocent persons (or reduce sentences that impose costs on society that exceed the crime control benefits) and on policies that aim to bring culpable offenders to justice.

We could start with the most egregious miscarriages on both sides of the scale of justice and work our way to the less serious ones; at some margin the cost of acting to reduce the errors further would exceed the social benefit of doing so. Given our complex world, we are not likely soon to be able to eliminate either type of error entirely. In the meantime, we would be remiss not to work diligently to find ways of reducing both types, and to find coherent frameworks for resolving the tensions between the two.

One final point warrants acknowledgment before we examine the specifics. We can convert the two-plates scale of justice metaphor to a continuum that arrays all miscarriages of justice on a spectrum from very socially costly wrongful arrests and convictions to very socially costly failures to bring culpable offenders to justice. The miscarriages on the extremes will be more likely to include cases involving malfeasance of criminal justice agents; the other cases vary in their departure from optimality as the natural result of benign imperfections, resource constraints, and a system of justice that relies on probabilistic rules of conviction. Between the extremes we have a vast array of cases with small to moderate miscarriages of justice, such as cases where the victims of crime fail to report because of poor relations with the police. For those that are reported, few cases are resolved in the courts in such a way as to regard the outcomes as perfect carriages of justice. Indeed, for many cases, the criminal justice system imposes excesses of both due process and impunity, leaving both the defendant and victims justifiably dissatisfied. For others the system may produce a rough form of justice in which the defendant is treated with excessive

[13] Brian Forst & Shawn Bushway, *Discretion, Rule of Law, and Rationality*, 11 CRIMINOLOGY & PUB. POL'Y (forthcoming 2011), *available at* http://www.albany.edu/scj/documents/Forst-Bushway_Discretion_000.pdf.

leniency in one case and excessive harshness in an earlier or later case. Miscarriages of justice thus vary not only in nature and degree, but in complexity as well.

In the sections that follow, we consider the nature of miscarriages of justice, the role of each major category of criminal justice official, the means available to each to manage miscarriages of justice, and the social costs associated with each major type of miscarriage. The article concludes with a statement about where the needs appear greatest for identifying miscarriages of justice and opportunities for managing them.

II. THE NATURE AND SOURCES OF MISCARRIAGES OF JUSTICE

A. Miscarriages Associated with Due Process

Miscarriages of justice associated with due process range from honest mistakes to venal acts of criminal justice officials. On the honest end of the spectrum, the mistakes may be inadvertent and random, due to erroneous eyewitness identification even after the police take reasonable precautions to prevent such error,[14] or cases in which strong circumstantial evidence conspires to point to an ill-fated bystander, sometimes one with a criminal record, who happened to be at or near the crime scene at the wrong time. Or such errors may be due to the inability of the police to take adequate precautions against such errors in the face of inadequate resources. Although most of these errors appear avoidable, some are bound to occur even in a criminal justice system scrupulous about the need to protect rights to due process, given over ten million felony crimes annually.[15]

Less honest errors are not uncommon. These include systematic errors associated with excessive pressure to solve cases or reduce

[14] HUFF ET AL., *supra* note 5, at 66–70; JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 53–58 (2001). Mistaken identifications by eyewitnesses or victims have been cited as "the single most important cause of wrongful imprisonment." DWYER ET AL., *supra*, at xxi. Such identifications were cited in 24 of the 28 convictions overturned by DNA evidence in a 1996 study sponsored by the Department of Justice. EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 16–17 (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf [hereinafter CONVICTED BY JURIES]. A similar rate (82%) was reported in exonerations attributed to the pro bono Innocence Project of the Cardozo School of Law in New York. DWYER ET AL., *supra*, at 95.

[15] *See supra* note 3 and accompanying text.

crime, and by a lack of professionalism among criminal justice officials. The Innocence Project reported false confessions in nearly a quarter of all DNA exonerations they studied.[16] Flawed systems of police accountability have been found to lead to extreme pressures on police officers, investigators, and supervisors to solve crimes, make arrests, and reduce the crime rate in their jurisdictions.[17] Legislators may feel similar pressure to secure reelection by promoting dubious laws with get-tough slogans (e.g., "three-strikes-and-you're-out" laws and "drug kingpin" laws) and draconian mandatory sentences that put political self-interest above the public interest. The sentences may be legal and technically in accordance with Eighth Amendment protections against cruel and unusual punishments,[18] but they may nonetheless be excessive under both utilitarian and pure justice frameworks of sentencing.

Miscarriages of justice associated with the absence of professionalism are exemplified by police placed in positions of significant authority without adequate training or experience, reliance on information provided by informants of questionable credibility,[19] incompetent or unenthusiastic defense lawyers, and discrimination based on race or class, conscious or otherwise. These are more than innocuous problems, since they are often spawned by deeper frustrations and social divisions. They are more dangerous as well, as they can polarize the community and aggravate the underlying problems. In city after city, police overreactions to minor disturbances have been known to ignite major urban riots, with substantial losses of life and property.[20]

At the dishonest end of the spectrum, we see occasional miscarriages of justice associated with clearly sinister motives, as in episodes of police brutality and "curbside justice". The incidents sometimes involve the police killing of suspects, a practice which amounts to capital punishment without due process. Police killings are justifiable as defensive acts only when all other attempts to

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[16] DWYER ET AL., *supra* note 14, at 120.

[17] Kevin Flynn, *Police Feel Scorn on Beat and Pressure from Above*, N.Y. TIMES, Dec. 26, 2000, at A1, B6.

[18] U.S. CONST. amend. VIII.

[19] DWYER ET AL., *supra* note 14, at 163–203. The informant may be either a collaborator in the offense in question or a prison or jail "snitch" who claims to have incriminating information. In both instances, the informant generally receives a reduced sanction in return for the information. *Id.* at 167–68, 203.

[20] JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 76–78 (1993).

perform a legitimate policing duty failed. Many, however, if not most such killings, appear to be preventable.[21] Some, such as the sensational 1999 killing of Amadou Diallo by the New York Police Department, turn out to involve police shootings of unarmed, innocent people identified erroneously as suspects.[22] The prospect of assembling data to permit a valid assessment of police behaviors in the cases in which these errors occur is daunting. Such an assessment would require estimates of the relevant social costs of the errors of various actions (including inaction), as well as the identification of all episodes in which the potential for such errors is present.[23] Other examples of miscarriages associated with dishonesty include the police or lab technician tampering with or fabricating evidence;[24] the overzealous prosecutor who withholds exculpatory evidence from the defense;[25] and conscious discrimination by police, prosecutors, judges, juries, and correctional officials.

Wrongful arrests and convictions are problematic largely because they generally create two miscarriages of justice: on innocents, and on victims and the community at large. When the wrong person is arrested and convicted, justice is not done *and* the real offender remains free to commit further crimes. Wrongful arrests divert police attention from culpable offenders; wrongful convictions generally produce errors of impunity as well. The reverse is not true. Wrongful failures to convict do not automatically create wrongful convictions.

Wrongful convictions are especially problematic in capital punishment cases, where an erroneous conviction can result in the execution of an innocent person.[26] The alternative of convictions

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[21] James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, *in* VIOLENT TRANSACTIONS: THE LIMITS OF PERSONALITY 207, 210 (Anne Campbell & John J. Gibbs eds., Basil Blackwell 1986); William A. Geller, *Deadly Force: What We Know*, 10 J. POLICE SCI. & ADMIN. 151, 154 (1982).

[22] Editorial, *Learning from the Diallo Case*, N.Y. TIMES, May 5, 2001, at A12.

[23] James J. Fyfe, *When Cops Kill, Someone Should Count*, WASH. POST, July 8, 2001, at B1, B2.

[24] DWYER ET AL., *supra* note 14, at 138–62; CONVICTED BY JURIES, *supra* note 14, at 15–18.

[25] Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57, 59–60 (1987); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5.9 (2d ed. 2010); HUFF ET AL., *supra* note 5, at 71–72; DWYER ET AL., *supra* note 14, at 222–36. A prosecutor's suppression of exculpatory evidence violates the due process rights of the defendant. Brady v. Maryland, 373 U.S. 83 (1963).

[26] Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, *in* DEFENDING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 117, 127, 131–32 (Hugo Adam Bedau & Paul G. Cassell eds.,

that put innocent people in prison for life are little better, and are arguably worse for some wrongfully convicted people, but they are reversible.

There are simple solutions to the problem of reducing wrongful convictions, such as raising the standards of proof at every stage in the process. Simple solutions, however, are not always prudent. Under a large variety of assumptions, it has been found that "raising evidentiary standards to an extent that produces a ten percentage point reduction in the conviction rate [from current margins] approximately doubles the number of true offenders set free per innocent person convicted and increases the total error rate by about ten percentage points."[27]

B. Miscarriages Associated with Errors of Impunity

"Impunity" is defined generally as the avoidance of or exemption from punishment.[28] We incorporate this idea as an essential component of miscarriages of justice in the form of errors of impunity, as defined earlier:[29] miscarriages that allow culpable offenders to remain at large or false negative errors. This definition has fuzzy edges; many offenders are on the margin of culpability. Juveniles, emotionally disturbed offenders, and people who injure others while in states of diminished capacity due to circumstances beyond their control are all examples of acts that often go unpunished despite the fact that the other elements of a crime have been met. These examples cannot be regarded as miscarriages of justice; they are more akin to car accidents or tornadoes than to crimes in which culpable offenders go free. The community may be able to do more to prevent them, but it is generally beyond the reach of the adult criminal justice system to do so.

In other cases, errors of impunity are palpable, unambiguous, and often significant in terms of the harms imposed on victims and the community. When culpable offenders evade arrest and conviction, or are released prematurely, public safety and quality of life are compromised, the credibility of deterrent effectiveness is lost, and citizens may tend to perceive injustice to victims, becoming

Oxford Univ. Press 2004); ROBERT M. BOHM, DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 155–56, 193 (2d ed. 2003).

[27] FORST, *supra* note 5, at 64.

[28] THE AMERICAN HERITAGE DICTIONARY 883 (4th ed. 2000).

[29] *See supra* note 8 and accompanying text.

alienated from the police and courts, if not from government generally. The integrity of the justice system can thus be threatened by both the reality and perception of ineffectualness. These lapses can run through the entire justice system, from ineffective policing and prosecution to weak sentencing and corrections (e.g., when inmates escape).

There are several sources of errors of impunity: skillful offenders, ineffective police, laws that allow culpable offenders to be freed following police or prosecutor violations of due process, lapses in prosecution and adjudication, weak sanctions, and flawed correctional practices. It may distort standard nomenclature to regard the failure to deter or prevent a crime by an offender as a miscarriage of justice, but it is not unreasonable to regard as a miscarriage of justice the meting out of a lenient sentence that permits an active offender to reoffend, particularly when the harms imposed on the victims of the subsequent crimes are substantial. Similarly, while it stretches conventional notions of justice to regard police policies that permit offenses to occur more frequently as miscarriages of justice, it does not stretch conventional notions of justice to consider the failure of an individual officer to act prudently in a particular case as a miscarriage of justice when such failure allows subsequent identifiable crimes to occur.

One final point: reducing errors of one type need not come at the expense of increases in errors of the other type. Vast improvements in forensic technology—DNA testing is but one obvious example—have surely reduced both types of miscarriages of justice. Improvements in policing and associated increases in conviction rates, other factors constant, reduce both the number of offenders freed per innocent person convicted and the total percentage of cases erroneously decided.[30]

III. THE EFFECTS OF MISCARRIAGES OF JUSTICE: SOCIAL COSTS

We noted above that the social cost of a miscarriage of justice is the difference between the total cost borne by society under the sanction given and the smaller social cost associated with an optimal sanction. This is consistent with the standard vernacular of welfare economics: the social cost of any act—a crime, a public or private intervention, an erroneous conviction, a misallocation of

[30] FORST, *supra* note 5, at 57–65.

police resources and the crimes that result, and so on—is the net reduction in aggregate wealth associated with the act.[31] Some prefer to use external costs rather than social costs as the primary metric, ignoring the offender's gains in a crime, on grounds that the theft of money involves a transfer from victim to thief, with no immediate aggregate loss of wealth.[32] The theft of property other than money is more complicated, since the value of the property to the victim is usually higher than to the thief, who must either bear transaction costs to convert the property to cash or live with a good that is likely the product of opportunity rather than thoughtful selection.[33] For current purposes, the use of either social costs or external costs will be suitable.[34]

Social costs have two primary components: costs associated with crimes and costs associated with public and private actions to prevent and respond to crime. The crime costs include the costs associated with property stolen or damaged, injury or death (medical costs, costs of pain and suffering), and lost income. Most of these costs are borne by the victim, often over a lifetime, but some costs—including insurance claims paid for medical costs and property losses, productivity losses covered by employers, victim service agency costs, and psychic costs to the community associated with increased fear of crime—are borne by society at large. The costs of prevention and response include expenditures for the criminal justice system (police, prosecutors, courts, and corrections), expenditures for private security personnel, security and surveillance systems (locks, target hardening, protected parking facilities, cameras, security lighting, movement sensors, and alarms, etc.) purchased by private citizens and commercial

[31] *See generally* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 60–115 (1981) (explaining the wealth maximization theory applied to social costs).

[32] Cohen, *supra* note 12, at 271–73; William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis?*, 9 J. POL'Y ANALYSIS & MGMT. 201, 210–12 (1990); *see also* Philip J. Cook, *Costs of Crime*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 373 (Sanford H. Kadish ed., 1983) (summarizing the direct and indirect social costs of crime); Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225, 227–28 (1993) (explaining Gordon Tullock's approach to calculating the costs of crime).

[33] Value to the victim often includes unrecoverable sentimental value that exceeds the replacement cost of the property. Insurance effects further complicate the calculus.

[34] The question of whether to include the offender's gain from crime is a moral one, outside the development of a general framework for assessing errors. Our interest is in developing a framework that will accommodate either treatment of the offender's gains. Accordingly, we will use the term "social cost" loosely as though it either includes or excludes the offender's gains, as the reader prefers. The question of whether to consider the offender's utility is another such concern in sanctioning policy.

establishments, costs incurred by dependents of incarcerated offenders[35] and by witnesses whose time is taken up with police and prosecutor interviews and trial obligations, and costs associated with community crime prevention activities.[36] These costs are summarized in Table 1.

TABLE 1. PUBLIC AND PRIVATE COSTS OF CRIME AND CRIME INTERVENTIONS

	Incurred Privately	**Incurred Publicly**
Costs of Crime	Property stolen or damaged, not covered by insurance	Insurance costs for theft
	Pain, suffering (physical, emotional)	Victim service agency costs
	Medical expenses, uninsured	Insurance costs for medical claims
	Lost income	Lost productivity of victims
	Loss of life	Lost commerce in high-crime areas
	Missed school	Increased fear of crime in the community

[35] Most inmates are parents, with about 65% of inmates helping to support at least one dependent at the time of arrest. ANNE MORRISON PIEHL ET AL., CENTER FOR CIVIC INNOVATION AT THE MANHATTAN INSTITUTE, RIGHT-SIZING JUSTICE: A COST-BENEFIT ANALYSIS OF IMPRISONMENT IN THREE STATES 15 (1999), *available at* http://www.manhattan-institute.org/pdf/cr_08.pdf.

[36] I do not address here whether expenditures on crime prevention activities are optimal, that is, whether they are allocated in a manner that minimizes the expected present value of the stream of future crimes against the persons and properties of interest.

	Incurred Privately	Incurred Publicly
Costs of Prevention and Intervention	Private security personnel	Criminal justice system personnel
	Locks, hardened targets, surveillance and alarm systems	Capital equipment, buildings for police, prosecutors, courts, jails, and corrections
	Community crime prevention participation (labor, outlays)	Public support of crime prevention programs
	Dependents deprived of incomes, services of incarcerated people	Lost productivity of incarcerated offenders, witnesses while interviewed, in court
	Lost income, freedom for innocent suspects detained by CJS	
	Victim and witness time lost in interviews, testimony	

A. Difficulties in Assessing the Social Costs of Crime and Justice

Assessing property losses and medical costs associated with injury is fairly straightforward, but most of the other relevant costs associated with errors of impunity are extremely elusive. Even reported accounts of property losses may be suspect.[37] Recollections of the amounts of cash stolen may be overstated (for the sake of recovery of damages) or understated (out of embarrassment). It is not clear whether property stolen should be assessed at original cost, depreciated cost, or replacement cost. Especially vexing are assessments of the social costs of a victim's pain and suffering, especially with crimes such as rape or child abuse, and the social costs associated with failures to convict crimes in which the victims are difficult to identify, such as drug use and trafficking offenses, and white collar crime.[38] Other costs are equally elusive, such as

[37] *See* Cohen, *supra* note 12, at 282.

[38] Estimating the social costs of individual crimes is difficult enough for crimes such as

the sentimental value to the victim of stolen family items or personal keepsakes.

Thoughtful people are bound to disagree about how to make these assessments, and the range of prospects are worth considering, in order to converge on a least objectionable methodology and set of estimates of the pertinent social costs of miscarriages of justice. Some criminal justice policies and decisions may turn out to be superior or inferior under any reasonable approach to assessing an elusive social cost, and it would be useful to know which policies and decisions are thus dominant or inferior.

B. Intangible Crime Costs

Pain and suffering, sentimental values, and other intangible costs of crime can be assessed collectively in a variety of ways. One method is to survey victims and prospective victims, asking what they would be willing to pay to avoid the discomforts of various types of crime.[39] Another is to impute such values from preferences demonstrated in revealed behaviors, such as amounts spent on crime prevention resources and the higher cost of homes in low

burglary, and more difficult still for crimes involving large intangible costs, such as rape. It may be even more problematic for crimes without immediate victims, like drugs, prostitution, and many white collar offenses. Since drug crimes account for a larger percentage of correctional populations than any other crime, it will be especially useful to examine the difficulties in assessing the social costs associated with drug crimes. Our drug laws are justified largely on the grounds that drugs harm society by producing higher levels of street crime, due partly to drug users committing crimes to support drug habits, partly to pharmacological effects of drugs, and partly to complex drug-crime culture effects. The nature and magnitude of these effects vary substantially by drug type. David A. Boyum et al., *Drugs, Crime, and Public Policy*, *in* CRIME AND PUBLIC POLICY 368, 370–80 (James Q. Wilson & Joan Petersilia eds., 2011). The laws have been justified also because they impose costly health problems on society, they hinder productivity and wellbeing, and they would be in more homes and more accessible to children if legalized. *See* Cohen, *supra* note 12, at 283 (addressing the difficulties associated with valuing economic crimes).

[39] Asking people what they would be willing to pay to avoid being victimized by crime is direct, but hypothetical. It typically involves a battery of questions designed to elicit responses to various aspects of crime, including the type and amount of property stolen or destroyed, physical harm, emotional harm, diminished capacity, and harm to loved ones. The responses may be exaggerated or understated. Actual victims may assign different values from those offered by prospective victims, and it is not clear that victims of highly charged crimes like rape or child abuse can assign meaningful values to prospects of avoiding victimization. Nor is it clear whether adjustments should be made for wealth and the ability to pay. Frank and Sunstein argue that estimates of willingness to pay tend to be understated because of reluctance to make voluntary payments when those payments lower one's standard of living. Individuals are bound to differ in the respective values they assign to collective increases in safety and increases that they purchase privately. Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 326–27 (2001).

crime areas.[40] Still another is to use awarded damage values arrived at by juries that have deliberated on the worth of such elusive harms.[41] A thorough assessment system might draw from the strengths of all three approaches.

C. Optimal Levels of Interventions Against Crime

As noted earlier, miscarriages of justice become substantial as the social costs of outcomes substantially exceed optimal levels. Even without precise assessments of the total costs of crime and interventions, it is useful to have a conceptual framework for making these assessments for each major type of crime. Such a framework can provide a basis as well for approximating, at least conceptually, optimal levels of each major component of the criminal justice system—policing, prosecution and courts, and corrections—and for the system as a whole.

The notion of optimal sanction levels presumes that as a sanction becomes more severe, at least over some range, it will reduce crime and its associated costs. A large body of theoretical and empirical information on the deterrent and incapacitative effects of sanctions offers some support for this presumption.[42] At some point, however,

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[40] Cohen, *supra* note 12, at 284. Imputing the intangible cost of crime from revealed preferences such as actual amounts spent on crime prevention devices and services overcomes the dubious nature of responses to hypothetical questions, but brings another set of difficulties. Actual expenditures are likely to reflect flawed assessments of the likelihood of being victimized by various types of crimes. They are likely to reflect flawed estimates of the deterrent effect of each type of expenditure on crime. For example, homeowners may have no idea whether an additional amount paid for a more substantial front door will actually reduce the likelihood of break-in and, in turn, on the likely amount of property or violence thus prevented, more than an alternative expenditure. Moreover, some portion of a particular expenditure may be made for reasons other than security, such as design or improved performance. Higher expenditures to prevent crime, moreover, will not distinguish between the tangible and intangible costs of crime. They will also reflect ability to pay, with poor people spending less, in spite of the fact that the inner-city poor are subject to the highest rates of victimization. They will reflect different degrees of risk aversion. The estimates will be confounded as well by externalities (e.g., I may benefit from, or feel harmed by, my neighbor's having guns and dogs). *See* Cohen, *supra* note 12, at 297–98 (articulating private methods of crime prevention).

[41] The amounts that juries assigned to intangibles in arriving at awards to victims and their dependents for harms caused by crime have the obvious advantages of explicitness, deliberation, and consensus, but they bring their own set of problems. They may include punitive assessments, even in the face of a judge's instructions to ignore such considerations. They are subject to extreme variation by jurisdiction and the unique mix of jurors making the assessment. They are typically designed to "make the person whole" rather than to assess the cost of pain and suffering; the two may be quite different. Cohen, *supra* note 12, at 285–86.

[42] NAT'L RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 4 (1978); Steven D. Levitt, *Deterrence*, *in*

the marginal increase in the social cost of the sanction will not be offset by the marginal decrease in the social cost of crime prevented by the sanction. At that point—the optimal sanction level—the social cost of the sanction will equal the social cost of the amount of crime associated with that sanction.

This basic framework can be used, at least in principle, to assess a particular sanction, a component of the criminal justice system, or the level of spending for the criminal justice system as a whole.[43] Departures in either direction from the optimal level will produce systematic errors of justice. For a given sanction or intervention, say random traffic stops by the police or a mandatory sentencing law for a particular type of offense, the intervention will be biased toward errors of impunity if its usage falls below the optimal level, and will be biased increasingly toward errors of due process as its usage level rises above optimality. For interventions that are ineffective for any positive level of use, such as draconian sentences for offenders who have aged out of their careers in crime, the cost of sanctions and total social costs will increase as the use of the intervention increases, and in some cases the intervention might well aggravate matters and cause the costs of both crime and sanctions to increase. The framework can be used also to assess the value of various types of criminal justice data,[44] as well as the value of data accuracy, using logic provided by statistical decision theory.[45]

Imbedding estimates of social costs in coherent frameworks for identifying and assessing miscarriages of justice will not eliminate prospects for ideology to trump objectivity in the development of error-sensitive justice policies. The development of such frameworks has not eliminated prospects for research mischief in other settings. The court of scientific opinion can help to minimize

CRIME: PUBLIC POLICIES FOR CRIME CONTROL 435, 444–45 (James Q. Wilson & Joan Petersilia eds., 2002).

[43] An important corollary set of problems has to do with complementarities and substitutabilities among criminal justice inputs. An increase or decrease in a particular sanction cannot validly be assessed independently of the effect of the change on other inputs. Drug treatment programs, for example, are likely to be both a substitute for and complement of prosecution and conviction. David A. Boyum et al., *supra* note 38, at 380–88.

[44] I thank Joan Petersilia for pointing this out.

[45] *See generally* Ronald A. Howard, *Information Value Theory*, 2 IEEE TRANSACTIONS ON SYS. OF SCI. & CYBERNETICS 22 (1966) (illustrating the value of data accuracy when considering the uncertainty of both probability and economic factors); HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY (2d prtg. 1970) (discussing methods and approaches used to analyze decisions in the face of uncertainty and incomplete information).

such risks. Valid assessments of social costs could, in any case, move us ahead in understanding miscarriages of justice.[46] Surely, it cannot hurt to try. In the process, we may be able to examine more consciously the barriers that block the path to criminal justice policies that are mindful of miscarriages of justice and their social costs. That examination alone could be a significant step forward.

The full range of miscarriages of justice can be more clearly understood by considering their sources in the worlds of policing, prosecution, adjudication, and corrections. We begin with the police.

IV. THE POLICE

A. Policing in an Imperfect World

The police are the first formal line of defense against crime. In a perfect world, they prevent crimes from occurring, and when crimes do occur, the police work effectively to solve them without intruding on the rights of the accused and others. They do this by maintaining effective ties to the community, responding promptly to calls for service, proceeding purposefully to obtain pertinent crime scene evidence, establishing effective procedures for identifying key witnesses and suspects and conducting interviews, determining

[46] The difficulties discussed above have not thwarted attempts to estimate the social costs of crimes, and to do so by crime category. For many offense categories, the range of estimated costs per crime is not, in fact, as broad as one might expect. Cohen documents three estimates of the average cost of an index (felony) crime, ranging from approximately $1200 to $2300. Cohen, *supra* note 12, at 290–91. These estimates provide the basis for estimating the total social cost of crime in the United States—the sum of all four quadrants of Table 1—with similar variation in the assessments. Miller, Cohen, and Wiersema estimated the total cost at $450 billion annually in 1993 dollars for all victimizations from 1987 to 1990, with tangible costs (value of property stolen, medical costs, lost income) accounting for 25% of the total. TED R. MILLER ET AL., NAT'L INST. OF JUST., U.S. DEP'T OF JUST., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 17 (1996), *available at* http://www.ncjrs.gov/pdffiles/victcost.pdf; *see also* Cohen, *supra* note 12, at 291, 293. Laband and Sophocleus estimated $455 billion in 1985 for the cost of crime and insurance against crime and another $1.8 trillion for public and private expenditures for crime prevention and intervention resources. David N. Laband & John P. Sophocleus, *An Estimate of Resource Expenditures on Transfer Activity in the United States*, 107 Q.J. ECON. 959, 962, 967 (1992). Anderson has estimated that the total burden of crime in the United States exceeds one trillion dollars annually. David A. Anderson, Abstract, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 611 (1999). While the estimates for individual crime categories offered by Miller, Cohen, and Wiersema suggest a degree of precision that belies the difficulties in making such estimates—sexual abuse of children ($99,000), physical abuse of children ($67,000), emotional abuse of children ($27,000), rape ($87,000), arson ($37,500), and so on—such estimates nonetheless provide a starting point for assessing the social costs of crime by major category. TED R. MILLER ET AL., *supra*, at 9.

whether and how to initiate an investigation, whether and when to make arrests and how much force to apply in doing so, whether to detain arrestees, when to use lineups, what charges to cite in official reports, and how much follow-up investigation to engage in after arrest. Ideally, they do all this mindful of their other responsibilities, determining properly how much time to put into each of several problems, calls for service, and other matters for which they are responsible.

We do not live in a perfect world; opportunities for police-induced miscarriages of justice abound at each step along the way. The ability of the police to prevent crime is limited by the vast human desire to commit crime, an abundance of attractive targets, and constraints on police resources. For our purposes, it stretches conventional notions of justice beyond reasonable limits to regard police failures to prevent crimes as miscarriages of justice. Wrongful searches, interrogations and arrests are a different matter, however; they are squarely within the domain of police responsibility and they are miscarriages of justice. Improper searches typically involve violations of the Fourth Amendment,[47] and improper interrogations are typically associated with violations of the Fifth Amendment.[48] Miscarriages can arise as well as a result of failures to collect available physical or testimonial evidence needed to exonerate innocent suspects. In the real world of scarce resources, police contribute often faultlessly to errors of impunity by failing to collect available evidence needed to secure convictions of culpable offenders.

Most police-induced miscarriages of justice go unreported. At the same time, however, they may be less frequent than is often suggested by critics of the police. In jurisdictions throughout the country, arrests rejected for prosecution because of due process violations have been found to represent less than one percent of all felony arrests, and the vast majority of these rejections involve drug offenses.[49]

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[47] *See* Boyd v. United States, 116 U.S. 616, 622 (1886).

[48] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[49] Forst, *supra* note 7, at 442 (citations omitted). The small proportion of arrests rejected by prosecutors because of due process problems overlooks the much larger number of episodes in which the police do not bother to arrest the offender and bring the case to the prosecutor because they know that search or confession problems would cause the prosecutor to reject the case. *Id.* Cassell and Fowles report that "crime clearance rates fell precipitously immediately after *Miranda* and have remained at lower levels ever since." Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful*

Miscarriages of justice occur even in the best police departments. They tend to increase in any department, good or bad, with the passage of misguided legislation by a governing authority, when the department implements ill-conceived policies, or in periods of declining budgets. As programs of recruitment, screening and training decline in effectiveness, individual officers in any department tend to become less capable of exercising discretion prudently. The ability to manage such lapses is reduced also when the quality of leadership and supervision decline, or when the systems for holding the police accountable for their performance are weakened.[50]

Miscarriages of justice associated with the police are likely to be more common in large urban departments than in more affluent suburbs with higher budgets per resident or per officer and typically much smaller crime loads. It is no coincidence that the rates of clearance by arrest are consistently higher in suburban and rural areas than in urban places for both violent and property crimes.[51] As resources are spread over a greater array of demands, the amount of time and effort that can be allocated to each criminal event diminishes, with corresponding increases in bad outcomes and miscarriages of justice.

Regardless of the scarcity of resources, the police have learned to leverage them by building stronger ties to the community, starting with its most influential members—church groups, school administrators and teachers, community organizers, and so on—so

Effects on Law Enforcement, 50 STAN. L. REV. 1055, 1059 (1998). They conclude that *Miranda* did "handcuff" the police, and that alternative approaches to regulating police interrogations should be explored. *Id.* at 1126, 1132. Their conclusion is based on a multiple regression time-series analysis that controlled for crime rates, expenditures on police, percent of the population in crime-prone ages, and other factors. *Id.* at 1071, 1076–81. They found effects for violent crime in the aggregate and property crime in the aggregate, as well as for the individual crime categories of robbery, vehicle theft, and larceny, and a marginal effect for burglary. *Id.* at 1060, 1082–89. They found no effects for three of the four categories of violent crime—murder, rape, or assault—which raises questions about how one should interpret their finding an effect for violent crime generally. *Id.* Feeney questions the validity of the Cassell and Fowles analysis, observing that the sharp decline in clearance rates may have been due primarily to factors other than those controlled by Cassell and Fowles, such as the epidemic of urban riots that occurred in the mid-1960s. Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of* Miranda *on the Police*, 32 RUTGERS L.J. 1, 6 (2000). *See also generally* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (1998) (providing a more comprehensive assessment of *Miranda*).

[50] FORST, *supra* note 5, at 103–04.

[51] BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, TABLE 4.19: OFFENSES KNOWN TO POLICE AND PERCENT CLEARED BY ARREST (2009), *available at* http://www.albany.edu/sourcebook/pdf/t4192009.pdf.

that members of the community will be more inclined to regard the police as public servants than as hostile aliens, resulting in higher rates of crime reporting and witness participation. Such programs have been implemented in police departments throughout the country, starting in the 1980s, under the rubric of "community policing." It may be no coincidence that felonies are reported to the police today at significantly higher rates than before these programs were implemented.[52]

B. Initiating Contacts: Calls for Service and Proactive Patrols

Criminal justice errors frequently begin with a call for service, such as a 911 call, an alarm signal, or an in-person summons to the police. The police can err either by over-responding and imposing costs needlessly on innocent people, or by under-responding and imposing avoidable crime costs on victims.[53] Over-response occurs when the police dispatch a patrol unit away from an important activity to respond to a less urgent call for service that could have been handled telephonically or in a follow-up contact, perhaps by a parapolice officer or civilian. It occurs also when the police on patrol proactively identify individuals and activities as suspicious, stopping to question or search people who have no intent to commit crime. Such misallocations of resources can interfere with crime prevention, crime-solving, and other important goals of the police, including the building of goodwill in the community. Under-response, or failure to respond, may result in errors of impunity and missed opportunities for crime control, and thus undermine police legitimacy in a different way.[54]

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[52] The Bureau of Justice Statistics initiated its National Crime Survey (today known as the National Crime Victimization Survey) in response to inadequate measures of crime statistics nationally. MICHAEL R. RAND, U.S. BUREAU OF JUSTICE STATISTICS, THE NATIONAL CRIME VICTIMIZATION SURVEY; 32 YEARS OF MEASURING CRIME IN THE UNITED STATES 3 (2005), *available at* http://www.stat.fi/sienagroup2005/sienarand.pdf. Today about half of all violent crimes committed are reported. Jennifer L. Truman & Michael R. Rand, *National Crime Victimization Survey: Criminal Victimization, 2009*, BUREAU OF JUST. STAT. BULL., Oct. 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf.

[53] The police may, of course, commit other types of errors, such as those that undermine trust through rude behavior or ambiguous communications with the public. These may tend to interfere with the ability of the police to manage errors of justice, but these indirect effects take us beyond the immediate task at hand: to understand how police practices and policies contribute directly to miscarriages of justice.

[54] FORST, *supra* note 5, at 69–70.

C. Identifying Suspects

After responding to a call for service, the police may misidentify suspects, sometimes soon after arriving at a destination. Whether and when to designate a person as a suspect varies from jurisdiction to jurisdiction; there is no uniform standard under the law. The officer who responds to a call for service typically files a patrol report that specifies the names of all suspects. Even when operating effectively, some people identified as suspects will turn out to be innocent. For high visibility unsolved cases, the police often feel pressure to find suspects, sometimes starting with vague offender descriptions, and to deal aggressively with them. Suspects thus identified are often unlikely to have committed the crime in question. Captain Louis Renault's (played by Claude Rains) immortal "round up the usual suspects" line from the 1942 movie classic *Casablanca* comes to mind. Among a pool of initial suspects, one person may emerge as the leading suspect, but a leading suspect is not automatically a likely suspect.[55]

Widening the net of suspects may satisfy the public that the police are on the case, but it tends also to impose avoidable costs on innocent people and waste scarce resources. When all leads are weak, any particular leading suspect is likely not to be the offender. The FBI's erroneous identification of Richard Jewell as the prime suspect in the fatal 1996 bombing at the Olympic Games in Atlanta had a chilling effect on the police practice of naming individuals as official suspects in major cases, for better or worse. The FBI had been under intense pressure to report progress in that and following the anthrax murders of 2001, resulting in the misguided pursuit of Steven Hatfill. In both of these cases the FBI's eagerness to name suspects proved costly to their reputation at a time when they were trying to restore it.[56] Mistakes may be a natural and common

[55] *Id.* at 70–71.

[56] The United States Supreme Court has found that the police do occasionally designate persons as suspects prematurely based on calls for service. In the case of *Florida v. J.L.*, the United States Supreme Court refused to allow a stop-and-frisk, or "Terry stop," of a person based on nothing more than an anonymous tip. Florida v. J.L., 529 U.S. 266, 268 (2000). The tip in that case was that a fifteen-year-old Miami boy wearing a plaid shirt and standing at a particular bus stop was carrying a gun. *Id.* at 268–69. The police frisked the boy and seized a gun from his pocket. *Id.* The Court held that the tip provided "no predictive information" and created no reasonable suspicion because it was reliable only in terms of identification and not in terms of illegality. *Id.* at 271, 272. The Supreme Court refused to create a "firearm exception" to the reasonable suspicion requirements of a Terry stop. *Id.* at 272. While the Court does not base such decisions explicitly on the framework used here, such rulings

consequence of decision-making under uncertainty, but the media make it their business to exploit them in high-profile cases. Law enforcement agencies thus have learned to temper their enthusiasm to report progress and to solve cases with caution in identifying suspects and persons of interest to the media.[57]

D. Initial Contacts: Police Busts and Profiling

Miscarriages of justice often occur as the police make contacts with potential suspects. Two common sources of such errors are police busts (or "crackdowns") and various profiling tactics, typically in high-crime areas. The contacts are made in the absence of an attempt to clear any particular crime or in response to a call for service. Rather, they are made to deter criminal activity and "fish" for offenders in neighborhoods plagued with crime, either by special police units or as part of proactive patrol strategy. Busts may be directed at drug traffickers, prostitutes, gangs, or in campaigns to remove vagrants or other "undesirables" from an area. They frequently succeed in bringing offenders to justice, but innocent people often get caught in these police sweeps too.[58]

Profiling is more troublesome, because it more often inconveniences innocent people and thus produces false positives at a higher rate than do police busts. Profiling aims to organize scarce law enforcement resources in a manner that is more purposeful and efficient than random or arbitrary, although its ability to do so has been strongly contested. Profiling is typically based either on time and place (including "geographic profiling"[59] and "hot-spot

nonetheless reflect concern for pertinent social costs and the need to balance errors of due process and crime control. *See also* FORST, *supra* note 5, at 71–72.

[57] FORST, *supra* note 5, at 71.

[58] *Id.* at 72.

[59] Geographic profiling aims principally to use mapping information and sophisticated computer systems to identify, track, and apprehend specific serial predators, both to deal with prior crimes and prevent future ones. D. Kim Rossmo, *Geographic Profiling*, *in* OFFENDER PROFILING: THEORY, RESEARCH AND PRACTICE 159 (Janet L. Jackson & Debra A. Bekerian eds., 1997); D. KIM ROSSMO, GEOGRAPHIC PROFILING (2000). Rossmo's approach combines crime analysis methods to link unsolved cases to individuals, and mapping and crime analysis to predict the location of an offender's residence, given the characteristics of a series of related offenses, based on data from previously solved cases. Rossmo, *Geographic Profiling*, at 161–62, 174; ROSSMO, GEOGRAPHIC PROFILING, at 1–2. Inferences based only on solved cases are likely to be biased, different from the most difficult-to-solve cases, which do not make up the geographical profiles. The number of offenses committed matters too: other factors constant, each offense committed increases an offender's exposure to apprehension. One might be able to get a sense of this aspect of the bias from a population of solved cases by examining the extent to which the geographical profiles for offenders with high rates of

policing"[60]), situation (e.g., interrogating people behaving suspiciously outside of a bar that is frequented by assaults),[61] or knowledge about an offender or class of offenders ("suspect profiling").

Suspect profiling is the most controversial of these three approaches to profiling, especially when it targets individuals without reasonable suspicion. Suspect profiling is controversial largely because the vast majority of people who happen to have characteristics that fit a profile based on general characteristics like ethnicity, gender, and age, rather than specific ones (e.g., about six feet tall, 200 pounds, and with a large mole on the left earlobe), are usually innocent of the crime under suspicion. Police who engage in suspect profiling generally develop a set of socio-psychological characteristics designed to provide focus to the detection of offenders. Suspect profiling is often done in response to a rash of crimes in an area and sometimes in response to a specific crime. Proponents of profiling see it as a "multidisciplinary forensic practice"[62] that has revolutionized the ability of investigators to solve serious crimes by restricting the suspect pool to manageable proportions[63] so that offenders can be identified more quickly and interrogated more effectively.[64] Scientists are more inclined to see

offending differ from those with low rates. Information that emerges from such analysis has been used to manage resources assigned to solving high-profile crimes such as serial homicide, rape, and arson, and to inform decisions involving neighborhood canvasses aimed at catching major offenders. While designed to apprehend specific individuals, information about the distribution of distances traveled by offenders to their targets, for various crime categories, has wide applicability for informing policing strategy in crime prevention. *Id.* Geographic profiling systems appear generally capable of reducing errors in solving crimes. They may, however, introduce due process errors in the short term, especially if the data on which the systems are based are flawed or if police use the systems injudiciously. PETER B. AINSWORTH, OFFENDER PROFILING AND CRIME ANALYSIS 92–94 (2001); FORST, *supra* note 5, at 73–74, 73 n.5.

[60] Hot-spot policing is a proactive approach to police patrolling in which the patrol units are allocated disproportionately to places that experience high concentrations of crimes and calls for service, rather than randomly throughout an area. Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 37–49 (1989).

[61] Situational profiling calls more for skill in reading situations and knowing how to respond, the prudent exercise of discretion, than do other types of profiling. FORST, *supra* note 5, at 74–76.

[62] *Id.* at 76; BRENT E. TURVEY, CRIMINAL PROFILING: AN INTRODUCTION TO BEHAVIORAL EVIDENCE ANALYSIS xvii (3d ed. 2008).

[63] Ronald M. Holmes, *Psychological Profiling: Uses in Serial Murder Cases*, *in* CONTEMPORARY PERSPECTIVES ON SERIAL MURDER 173, 182 (Ronald M. Holmes & Stephen T. Holmes eds., 1998).

[64] *See* JOHN DOUGLAS & MARK OLSHAKER, MINDHUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT 31 (1995) (detailing an account from an FBI profiler); *see generally* TERANCE D.

profiling as charlatanism when based purely on intuition or unconfirmed speculation, devoid of systematic empirical validation.[65]

At the extremes, profiling is either a highly effective crime-solving approach or a sure-fire way to multiply due process errors, institutionalize racism, and reduce police legitimacy, thus limiting the ability of the police to get support from the community in solving crimes. As with most criminal justice debates, the truth is more complicated. Confusion about profiling has been exacerbated by the fact that the term "profiling" has several different connotations. It can be used to prevent crimes or apprehend a particular offender; to develop a psychological picture of a particular offender, usually an intuitive process; or to fit a particular pattern of offending with a more general criminal archetype, a process conducive to empirical analysis.[66]

E. Racial and Ethnic Profiling

To civil libertarians, profiling is especially toxic when police action is based on ethnicity rather than behavior, particularly when it results in the arrest and harassment of disproportionate numbers of persons from disadvantaged minority groups, a practice now widely known as racial or ethnic profiling.[67] Racial or ethnic profiling occurs when the police target someone for investigation on the basis of that person's race, national origin, or ethnicity. For years, African Americans had been the dominant targets of racial

MIETHE & RICHARD C. MCCORKLE, CRIME PROFILES: THE ANATOMY OF DANGEROUS PERSONS, PLACES, AND SITUATIONS (2d ed. 2001) (analyzing situational elements and circumstances in various specific crimes, such as homicide, sexual assault, robbery, motor vehicle theft, etc.).

[65] David Canter, *Offender Profiling and Criminal Differentiation*, 5 LEGAL AND CRIMINOLOGICAL PSYCHOL. 23, 25–26 (2000); Damon A. Muller, *Criminal Profiling: Real Science or Just Wishful Thinking?*, 4 HOMICIDE STUD. 234, 248–51, 260–61 (2000).

[66] FORST, *supra* note 5, at 77. Profiling originated with the work of Howard D. Teten, often referred to as the "grandfather" of profiling, although essentials of contemporary profiling were applied in the 19th century murders committed by Jack the Ripper. *Id.*; TURVEY, *supra* note 62, at 89. Many of the non-psychological essentials of profiling can be traced to Cesare Lombroso's development of criminal archetypes, based on physical characteristics. Teten came to the FBI in 1962 and developed profiling soon afterward as an investigative tool for homicide cases, in collaboration with colleague Pat Mullany. Teten regarded profiling as "applied criminology." FORST, *supra* note 5, at 77.

[67] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 147, 157 (1997); *see also* DEBORAH RAMIREZ ET AL., U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (2000), *available at* http://www.ncjrs.org/pdffiles1/bja/184768.pdf (defining racial profiling as "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual").

profiling, giving rise to the expression "driving while black" or "DWB" (a play on the official police designation "DWI": a stop for driving while intoxicated).[68] Since September 11, 2001, however, Arab-Muslims have become prime targets of profiling at airports, other U.S. entry points, and many other locations as well, a practice that has come to be known as "flying while Muslim."[69]

Profiling that includes race or ethnicity as a factor is controversial because it is discriminatory, even when it improves predictions of crime. The practice violates the rights of targeted racial or ethnic groups, especially those innocent of the crimes for which they are suspected. Profiling may serve to reduce crime when ethnicity contributes to more accurate prediction of certain classes of criminal activity. Racial or ethnic profiling becomes more palatable when used to solve or prevent extremely serious crimes and when combined with suspicious activity of the person or persons profiled. But even under such circumstances, the practice intrudes on the liberties and privacy of those profiled. This issue has been and will continue to be tested in the courts. The Supreme Court has not strongly opposed profiling systems that use race as a factor, even when the stops that result are used as pretexts for searches.[70]

But even when race and ethnicity are statistically valid predictors, many object to their use in determining whom the authorities should stop, search, or interrogate. Randall Kennedy, among others, has argued persuasively that race should not be part of a profiling system even when it increases the accuracy of prediction: "Don't draw racial distinctions, except under extraordinary circumstances."[71] Kennedy's argument is based largely on a deep and troubling legacy of discrimination,[72] but his position is justifiable on social-scientific grounds as well. Race is a socially constructed variable in the eyes of the beholder, unlike age

[68] FORST, *supra* note 5, at 79.

[69] Joyce Purnick, *Last Week, Profiling was Wrong*, N.Y. TIMES, Sept. 15, 2001, at A8.

[70] In the 1996 case *Whren v. United States*, the United States Supreme Court held a police officer's subjective intent in making a traffic stop is irrelevant when the officer has probable cause for the stop. Whren v. United States, 517 U.S. 806, 812–13 (1996). The *Whren* decision involved police stopping a car for a traffic violation and, after observing a bag of drugs in the car, arresting the occupants on narcotics charges. *Id.* at 808–09. The Court held that even if the traffic stop was a pretext for the search, the officers' intent was irrelevant. *Id.* at 812–13, 819. *See also* FORST, *supra* note 5, at 80.

[71] Randall Kennedy, *Race, the Police, and "Reasonable Suspicion*," 2 PERSPECTIVES ON CRIME AND JUSTICE: 1997–1998 LECTURE SERIES 29, 49 (1998).

[72] *Id.* at 41; KENNEDY, *supra* note 67, at 29–75 (discussing the history of unequal treatment of African Americans under the law in the United States).

and gender. It is measured less precisely than variables that are more crime-relevant theoretically and ethically, such as the number of prior felony convictions. Two profilers may not agree about the ethnicity of a particular person, and both may disagree with the ethnic self-designation preferred by the person in question. Moreover, individuals often re-think their own racial and ethnic identities over time; they may change their self-designations from one census to the next, sometimes in the spirit of assimilation, sometimes in the spirit of group identity.[73] Basing profiling policies on statistical associations between race or ethnicity and crime is, in short, both morally and methodologically dubious.[74]

Racial and ethnic profiling can lead, moreover, to wasteful delays in the solving of serious crimes. Hundreds of white males driving white vans were stopped and searched by the police in major dragnets following the seriously flawed profiling of the Washington, DC area "sniper" of 2002, who turned out to be a black man and a black juvenile working in tandem out of a blue sedan. One cannot ignore the crime opportunities that police profiling opens up for people who do not fit a particular ethnic profile.[75]

Using ethnicity as a factor in profiling is, in short, unjustifiable when its relationship to a crime is unfounded or when it is used in lieu of factors that are related to a crime. It is especially unjustifiable when invoked as a ruse, as when a trivial traffic violation is cited arbitrarily as a lever to allow the police to search the member of a minority group for weapons or drugs. Such

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[73] PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS 200–01 (2000) (discussing the effects of assimilation and group identity on the census); Amitai Etzioni, *A New American Race?*, 10 THE RESPONSIVE COMMUNITY 10, 11 (2000), *available at* http://www.gwu.edu/~ccps/etzioni/M37.pdf (arguing "the U.S. Census [should] allow Americans to classify themselves as 'multiracial'" in order to account for Americans of mixed racial backgrounds who do not self-identify with a specific racial category). The U.S. Census Bureau offered five categories for race/ethnicity on the 1990 census form and 20 in 2000, allowing respondents to check as many boxes as they like. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, YOUR GUIDE FOR THE 1990 U.S. CENSUS FORM 2, 10, *available at* http://www.census.gov/prod/1/90dec/cph4/appdxe.pdf; U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, UNITED STATES CENSUS 2000 3, *available at* http://www.census.gov/dmd/www/pdf/d02p.pdf. The White House Office of Management and Budget, which supervises the census, issued Directive 15 to accompany the release of the 2000 census, outlining the racial/ethnic categories for the Census. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,781, 58,782 (Oct. 30, 1997). The directive includes this: "The categories in this classification are social-political constructs and should not be interpreted as being scientific or anthropological in nature." *Id.* at 58,788.

[74] FORST, *supra* note 5, at 80–81.

[75] *Id.* at 81.

practice violates fundamental notions of justice. It may serve a security goal in the short term, but may cause greater harm over a longer horizon. Police departments that permit such practices risk losing legitimacy in the community and exposure to elevated risks to the safety of its officers; the elimination of such practices may be justifiable on utilitarian grounds as well. Ending racial and ethnic profiling could have a profound impact on the willingness of minority communities to work with the police to make the community more secure.[76]

These issues have risen to a new level in the era of terrorism. The tension between the basic crime control and due process goals that has been raised by racial profiling in less perilous times tests the limits of any analytical framework. What can be said about social costs when an error made to avoid a cost associated with due process contributes to what Yale law professor Peter Schuck has called a "social calamity of incalculable proportions"?[77] Today we confront a new set of difficult questions: should airport security officers not subject young Arab men to greater scrutiny in airports than, say, elderly Scandinavian women? If profiling based on race or ethnicity is unjustifiable in enforcing drug laws, is it equally unjustifiable in preventing acts of terrorism? How do we resolve the tension between ethical and utilitarian considerations raised by ethnic profiling when the social costs of errors are vastly greater than under more ordinary circumstances? Does that increased social cost of error qualify as a bona fide extraordinary circumstance under Randall Kennedy's rule of not drawing racial distinctions except under extraordinary circumstances?[78]

These are not hypothetical questions. Soon after the airlines tightened their security procedures in response to the attacks of September 2001, Arab-American groups filed lawsuits in federal courts protesting the discriminatory nature of the new procedures. In each of the lawsuits, incidents were cited in which the

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[76] *Id.* at 83–84.

[77] Peter Schuck, *A Case for Profiling*, YALE LAW SCHOOL: NEWS & EVENTS (Jan. 27, 2002), http://www.law.yale.edu/news/3341.htm.

[78] Kennedy, *supra* note 71, at 33–34; Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13, 20, 1999, at 34. A related question deals with the respective responsibilities for public and private agencies in setting policies to prevent acts of terrorism. Commercial air carriers are responsible for air security, as are airports and the Federal Aviation Administration. Government intervention is warranted to the extent that air security is a public good. Public interventions may be warranted, but can impose burdensome costs on society: intrusions into privacy, time costs, other inconveniences, and monopolistic inefficiency. *See also*, FORST, *supra* note 5, at 84, 84 n.19.

passengers had cleared security and were later pulled from their flights or denied the right to board after other passengers or crew members expressed discomfort with their presence. All were given seats on later flights, but the lawsuits claimed damages associated with humiliation, time lost, and other discomforts.[79]

Common sense should tell us at least this: many of the restrictions to liberty imposed in the name of preventing terrorism do nothing at all to reduce the risk of terrorism. Some may even increase it by displacing security resources from more productive activities and alienating marginalized individuals. Commentator Fareed Zakaria has noted: "the greatest obstacle to fighting terror is not our freedom but government inefficiency."[80] He goes on to call the "crazy-quilt" assortment of federal, state, and local authorities involved in protection "the single greatest threat to America's safety."[81] Former Senator George McGovern has also written compellingly of the wasteful "grip of bureaucratic devotion" that too often causes people to miss flights needlessly, cripples operations at airports, and frustrates most everyone involved.[82]

The problem has been compounded by the arbitrary nature of many of the new restrictions and by sheer incompetence. The public is not likely to feel more secure learning of numerous screening failures in tests conducted by the Transport Security Administration ("TSA").[83] Even people of extreme tolerance cannot

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[79] FORST, *supra* note 5, at 84–85. These matters are likely to be resolved through a mix of the court's interpretation of the law and common sense. One commentator has suggested that minorities singled out and seriously delayed for security checks should be compensated with frequent flier miles. Michael Kinsley, *Racial Profiling at the Airport: Discrimination We're Afraid to be Against*, SLATE (Sept. 28, 2001), http://www.slate.com/id/116347. The decisions made under any framework are not likely to satisfy everyone.

[80] Fareed Zakaria, *Freedom vs. Security—Delicate Balance: The Case for "Smart Profiling" as a Weapon in the War on Terror*, NEWSWEEK, July 8, 2002, at 28–29.

[81] *Id.* Zakaria adds:

> The FBI is finding out all it can about the 1200 people rounded up since September 11—except whether they have ever bought firearms. It's not that the government doesn't have that information, but the Justice Department will not share it because of an NRA-sponsored law that says that information about people buying guns—even illegal immigrants!—can never be shared with anyone.

Id. at 29.

[82] FORST, *supra* note 5, at 85.

[83] The TSA conducted tests in which the testing agents were instructed not to artfully conceal simulated bombs and other weapons as terrorists might, but rather to pack their bags in ways that would test whether screeners could spot basic items they had been trained to recognize. In spite of this lower and clearly less relevant standard, 58% of the screeners failed to pass such a test at the international airport in Cincinnati, 50% failed in Las Vegas, 50% in Jacksonville, and 41% in Los Angeles. Overall, approximately 25% of the screening tests conducted at 32 airports failed. Blake Morrison, *Airport Security Failures Persist*, USA

be comforted to learn of the Immigration and Naturalization Service sending student visa approvals to a flight school in Florida for two men responsible for the 9/11 attacks six months after the attack. Incompetent screening procedures were all too evident as well in the case of failed suicide airplane "shoe bomber" Richard Reid.[84]

Even when inspectors are competent, however, ethnic profiling is a limited predictor of terrorism because terrorists adapt their behaviors to profiling rules. Profiling can, and has, caused women, for example, to be used in the place of men as suicide bombers in the Middle East and Europe, Jamaicans to be used in place of Middle Easterners on airplanes and trains in Europe, and people with white skin and baptized as Christians to become radicalized as Muslims and engage in terrorist plots in Europe and elsewhere.[85] Such adaptations are countered by replacing rigid profiling rules with random screening that gives greater weight to factors statistically associated with terrorism. This is both more just and more effective.

Ethnicity may thus be used as a factor in screening, but only when combined with other factors that lend greater predictive power, factors that often call for mature, trained screeners to exercise good judgment and common sense. The airline screeners, for example, profile passengers based on whether the passenger purchased a one-way or round-trip ticket, whether cash was used, how recently the ticket was purchased, and whether the passenger displays behavior suggesting any of three categories of hijacking candidates: crazies, crusaders, or criminals.[86]

To subject a person to closer scrutiny solely because of his or her ethnicity violates fundamental notions of justice. As such errors accumulate they tend to alienate the people selected. The vast

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TODAY, July 1, 2002, at A1, *available at* http://www.usatoday.com/travel/news/2002/2002-07-01-airport-security.htm; *see also* FORST, *supra* note 5, at 85–86.

[84] Reid's name and ethnicity (his parents were British and Jamaican) did not suggest an obvious link to terrorism, but his behavior, appearance, and prior record certainly did. The profile Reid presented at the airport in Paris should have warranted a careful search of the sort that would have uncovered the lethal explosives in his shoes. His suspicious behavior and a record of ten prior convictions were conspicuous, yet he was given a seat on the airplane, and the jet took off for Miami. Only the prompt action of a perceptive flight attendant thwarted Reid's intention to blow up the airplane. Her quick response appears to have saved over 300 lives. FORST, *supra* note 5, at 85–86.

[85] Craig Whitlock, *Terrorists Proving Harder to Profile: European Officials Say Traits of Suspected Islamic Extremists Are Constantly Shifting*, WASH. POST, Mar. 12, 2007, at A1, A10.

[86] Malcolm Gladwell, *Checking Out the Checkpoints: The Curious Irrationality of Airport Security*, SLATE (Apr. 11, 2002), http://www.slate.com/id/2064257/.

majority of any particular ethnic group, after all, are not terrorists. People of Middle Eastern descent, or with Arabic names, or dressed in modest clothing common to Muslim cultures, have suffered indignities in public places and have been picked out for thorough screening at points of entry in a manner that resembles decades of racial profiling of blacks by the police. Many of those detained have been tolerant and understanding of the grave threat of terrorism committed by people of similar ethnicity, but, especially as the false positive errors accumulate, the practice of ethnic profiling tends to work against the goal of building goodwill with mainstream Muslims in the struggle to win over the hearts and minds of moderates, those best positioned to discourage extremism in their populations.

In the interests of transparency and common courtesy, the officials who profile should be able to explain clearly to the people affected why it is needed, so that everyone inconvenienced by the practice can be helped to understand the policy. When the factors used to profile suspects are employed arbitrarily or impolitely, profiling may have the unintended effects of undermining the legitimacy of the screening authorities and contributing to the negative feelings that tend to breed terrorism in the first place.

Clearly, some varieties of profiling are more acceptable than others. Profiling to thwart acts of terrorism and other very serious crimes, when based on valid factors, is likely to reduce social costs, win broad public support, and could reduce due process errors as well over the long haul. Arbitrary profiling that targets minorities and harasses them in the process, by contrast, is likely to increase both due process errors and errors of impunity. Evidence of such harassment by a police or security officer should be grounds for dismissal. Profiling systems should be assessed based on their capacity to reduce miscarriages of justice and the costs they impose on the community.

F. Mistaken Witness Identifications

The most common source of police-related wrongful convictions is the erroneous witness identification.[87] Two factors have turned up

[87] ROBERT L. DONIGAN ET AL., THE EVIDENCE HANDBOOK 203–19 (Robert H. Reeder ed., 4th ed. 1980); HUFF ET AL., *supra* note 5, at 66. This has been confirmed in the exoneration, based on reliable DNA evidence, of over 100 people sent to death row over a twenty-five year period starting in 1977. DWYER ET AL., *supra* note 14, at xxii; *see generally* CONVICTED BY

as especially common in cases involving mistaken witness identification. First, victims and witnesses often do not get a good look at the offender or offenders at the time of the crime. Second, witnesses often identify the wrong person when the police have a strong interest in solving the crime, especially serious crimes or ones involving offenders the police have targeted for arrest and conviction.[88]

Miscarriages of justice associated with mistaken witness identifications occur on the other side as well, especially when witnesses feel intimidated by the offender, fearing reprisal if they testify. Even when the police are aware of the incriminating evidence known to such a victim or witness, they often fail to persuade the person that they will be able to protect him or her from reprisal.[89]

Other factors have been found to contribute to both types of error. The accuracy of a witness's memory of events tends to decay over time.[90] Witnesses have more difficulty recalling specifics accurately when the event at issue was violent.[91] Even in nonviolent crimes, the presence of stress, fear, and anxiety may disrupt normal perception processes and cloud subsequent memory.[92] Research into the inhibitors of accurate memory recall gives us reason not to accept without question the common witness claim of having been so frightened that the offender's face is forever etched in the witness's memory.

Police lineups can be useful for confirming a witness's identity of an offender, but they too can produce both false positives (when the witness identifies the wrong person, a due process error) or false negatives (when the witness fails to identify the actual offender, an

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JURIES, *supra* note 14, at 16–17; *see also* FORST, *supra* note 5, at 87.

[88] According to Elizabeth Loftus, a leading authority on the accuracy of eyewitness testimony, "pressure . . . comes from the police [who] want to see the crime solved, but there is also a psychological pressure that is understandable on the part of the victim who wants to see the bad guy caught and wants to feel that justice is done." *DNA Testing Turns a Corner as Forensic Tool*, LAW ENFORCEMENT NEWS, Oct. 15, 1995, at 10.

[89] It is not difficult to imagine cases in which the witness may intentionally identify the wrong person in a lineup in order to avoid subsequent confrontation with the actual offender.

[90] *See* Alan D. Baddeley et al., *Word Length and the Structure of Short-Term Memory*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 575, 587 (1975) (demonstrating that the ability to recall complex word sequences diminishes over time).

[91] Brian R. Clifford & Jane Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. OF APPLIED PSYCHOL. 352, 356 (1978); Elizabeth F. Loftus & Terrence E. Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 MEMORY & COGNITION 318, 321–22 (1982).

[92] HUFF ET AL., *supra* note 5, at 87.

error of impunity). The witness may identify the wrong person either by chance or because the police led the victim to the selection of a particular suspect, a clear due process violation. Police-induced identifications can occur when the police ask a witness to find the person in a file of mug shots and then put the person selected by the witness in the lineup. The person selected may only resemble the actual offender and then be selected by the witness in a subsequent lineup from a recollection of the picture rather than the criminal event. Or the police may give facial or other cues suggesting to the witness that a particular picture is the "right guy."[93] Or it can be the result of a "suggestive one-person show-up," in which a witness is shown a single suspect and asked, "Is this the guy?"[94] Systematic errors can occur also when the lineup consists largely of people who do not fit the physical description of the offender, increasing the risk of selecting a particular person in the lineup who is in fact innocent of the crime in question and who fits the description more closely. And once a witness has identified the suspect in a lineup, she may convince herself that that person was indeed the offender.[95] Defense counsel, especially those appointed by the court, cannot always be counted on to know about and reveal these various improper procedures in trial.

G. Excessive Use of Force

The gravest of all due process errors occurs when the police kill an innocent person, as in the notorious 1999 killing of Amadou Diallo by a team of New York Police Department officers.[96] The

[93] HANS EYSENCK & MICHAEL EYSENCK, MINDWATCHING: WHY WE BEHAVE THE WAY WE DO 252, 254 (1995).

[94] "[S]howing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought." Williams v. State, 546 So. 2d 705, 706 (Ala. Crim. App. 1989) (quoting Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (Douglas, J., dissenting)).

[95] United States v. Wade, 388 U.S. 218, 228–29 (1967).

[96] In February 1999 four members of a New York Police Department special crime unit, assigned to a predominantly minority neighborhood of the Bronx, shot and killed Amadou Diallo, a twenty-two-year-old immigrant from West Africa. Diallo was unarmed and unconnected to the criminality that prompted the officers' assignment to the area. He happened to be where the officers were looking and appeared noncompliant; when commanded to freeze, he reached in his pocket for his wallet. Thinking he was reaching for a gun, the four officers fired a hail of 41 bullets in his direction, 19 of which hit Diallo. Mayor Rudolph Giuliani and Police Commissioner Howard Safir called the incident a tragic error, and in February 2000 the four officers were found innocent in court of any criminal act. Four months later, the United States Commission on Civil Rights, a body appointed by the President and Congress, issued a report finding that racial profiling contributed to Diallo's

Bureau of Justice Statistics reports that police in the United States killed some 370 people per year from 1976 to 1998.[97] Killings are but the tip of the iceberg of a much larger number of cases in which the police use excessive force in dealing with suspects and other members of the public.

Some police departments are much better than others in avoiding killings by officers. A 2001 survey of the fifty-one largest police departments, conducted by *Washington Post* reporters Craig Whitlock and David Fallis, found that during the period of 1990 to 2000, some police departments were much more trigger happy than others.[98] Overall, more killings occurred in larger jurisdictions, jurisdictions with more homicides, and jurisdictions with relatively few sworn officers.[99] The police departments that most exceeded the predicted number of killings based on the norms for the fifty-one jurisdictions and the size of the jurisdiction and department and homicide level for each, were Los Angeles County, Washington, DC, San Diego, Phoenix, Denver, and Prince Georges County, Maryland.[100] At the low end were Dallas, Chicago, San Antonio, New Orleans, Suffolk, New York, and Fairfax, Virginia. This is a limited sample, covering just 20 percent of the U.S. population. But it suggests possibilities for the routine and much more extensive collection and analysis of pertinent data elements on the use of deadly force in police departments throughout the country. This could help to substantially reduce what may be the most serious

death. *See* FORST, *supra* note 5, at 67; Editorial *supra* n.22 & accompanying text.

97 JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, POLICING AND HOMICIDE 1976–98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS 1 (2001).

98 Craig Whitlock & David S. Fallis, *County Officers Kill More Often Than Any in U.S.: Officials Ruled Shootings Justified in Every Case—Even of Unarmed Citizens*, WASH. POST, July 1, 2001, at A1.

99 The regression result is Killings = 0.5021 + .00000394 Population - .00075 Cops + .0161 Homicides, with all three independent variables significant at .01 (t = 4.87, -3.84, and 7.30, respectively), and with $R^2 = .893$ (adjusted $R^2 = .886$; F = 131, significant at a level arbitrarily close to zero). FORST, *supra* note 5, at 106, 106 n.38.

100 Whitlock and Fallis reported Prince Georges County as worst, based on the number of killings per officer, under the headline, "County Officers Kill More Often Than Any in U.S." However, the county has a higher than average homicide rate and lower than average number of officers per resident population, so the number of killings per officer will be artificially high both because the number of killings in the jurisdiction are spread over a smaller base and because of the inverse regression relationship between officers and killings generally. Prince Georges County ranked high, nonetheless, under any reasonable accounting. Craig Whitlock & David S. Fallis, *County Officers Kill More Often Than Any in U.S.: Officials Ruled Shootings Justified in Every Case—Even of Unarmed Citizens*, WASH. POST, July 1, 2001, A1.

justice error of all.[101]

Several proposals have been offered to reduce the problem of excessive use of force: guidelines that inform officers on the appropriate level of force for a variety of common real-world situations;[102] more rigorous screening of officers; training that includes extensive situational role-playing and violence avoidance exercises;[103] better supervision; clearer and more thoughtfully crafted policies; internal and external systems of accountability (e.g., civil suits, civilian review boards, and the media) to ensure that the policies are followed and objectives achieved, and the use of nonlethal weapons (batons, chemical sprays, electronic devices, capture nets, and so on) instead of guns in a variety of situations calling for the use of force. These proposals are complementary; each appears to be potentially useful for reducing the use of deadly force, and collectively they are more likely to be effective than if the department is deficient in any one of them. Of particular significance here, these proposals appear capable also of strengthening the ability of the police to solve and prevent crimes.[104]

One factor appears to be senior to all the others: leadership. Jerome Skolnick and James Fyfe have observed that nothing was as effective in fixing decades of recurring waves of brutality and corruption in the 40,000-officer New York Police Department as the strong leadership of Patrick V. Murphy in the early to mid-1970s.[105] Some twenty years later, the NYPD was led by an equally transformative figure, William J. Bratton, who invoked a disciplined program of accountability that proved capable of reducing police misbehavior and crime at the same time.[106] Murphy

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[101] *Id.* at 106.

[102] *See* SKOLNICK & FYFE, *supra* note 20, at 38–40.

[103] Fyfe has observed that an unknowable but substantial number of deadly encounters involving the police each year are preventable without an increase in crime if the police were trained in violence avoidance techniques. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, *supra* note 21, at 219–20.

[104] FORST, *supra* note 5, at 103–04.

[105] *See* SKOLNICK & FYFE, *supra* note 20, at 184–85. Murphy made police misbehavior unacceptable. He had several qualities that helped make this possible: he was raised in a family of cops, worked his way up through the ranks in the NYPD, and he developed executive skills there and refined them elsewhere, as chief in Syracuse, Washington, DC, and Detroit. Skolnick and Fyfe regard the most important factor, however, to be his "genius . . . to put in place fundamental structural reforms and redundant checks on integrity and abuse in every part of the department." *Id.* at 185; *see also* FORST, *supra* note 5, at 104.

[106] Bratton was appointed by Mayor Rudolph Giuliani to serve as NYPD commissioner from 1994 until Giuliani fired him two years later. He is widely credited for reducing the

and Bratton, each in his own way, changed the culture of the department so that police misbehavior became unacceptable, a remarkable accomplishment.

Unfortunately, such transformative leaders are rare. Departments can nonetheless realize benefits of transformation through a stronger set of policies for reducing excessive force. In 1985, the International Association of Chiefs of Police ("IACP") developed a set of best policies and practices that could be imbedded in a police department's system of internal accountability and used to shape specific training programs.[107] Some of the central features of the IACP's model policy include the clarification of fundamental distinctions among such terms as deadly force, excessive force, reasonable force, and unlawful force; an elaboration of the limited sets of conditions under which use of deadly force may be permissible; and an outline of the essential elements of training programs designed to implant the policies firmly in the minds of the officers who will be governed by them.[108] These developments, together with community policing programs that have become popular throughout the country since the 1980s, may have helped to reduce excesses in the police use of force.[109]

City's homicide level from 1997 in 1993 to fewer than 1000 by the end of his term. Some of this reduction would surely have occurred without him, however, and the rest may have come at a cost to civil liberties. Under his "zero tolerance" policing philosophy, the number of citizen complaints jumped by about 60%, from 3500 citywide in 1993 to 5500 in 1996. ROBERT C. DAVIS & PEDRO MATEU-GELABERT, RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX 1, 3, 5 (1999), *available at* http://207.5.76.189/publication_pdf/respectful_policing.pdf. By contrast, Barrett reports a 12% drop in the number of shots fired by police, from 1193 in 1993 to 1040 in 1997. Wayne Barrett, *Ducking Diallo: White Pols and Press Tread Lightly on Rudy Role in Cop Brutality*, VILLAGE VOICE, Mar. 2, 1999, *available at* http://www.villagevoice.com/1999-03-02/news/ducking-diallo/. The decline in serious crime in New York during Bratton's tenure, his innovative use of a strong accountability system, his contribution to a lifting of the morale of the NYPD, and the effects of crime reduction on the vibrancy of the city, in any case, have assured him a prominent place in the police leadership hall of fame, should such an institution be built. *See generally*, WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); *see also* FORST, *supra* note 5, at 104 n.36.

[107] KENNETH J. MATULIA, A BALANCE OF FORCES: MODEL DEADLY FORCE POLICY AND PROCEDURE 63, 76–85 (2d ed. 1985). The IACP model was published in the year of the landmark *Tennessee v. Garner* decision, in which the Supreme Court ruled that police departments could not allow officers to shoot at fleeing felons except when the person in flight poses an immediate danger of serious injury to another. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[108] MATULIA, *supra* note 107, at 68–85.

[109] WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 15–18, 89–93 (1990); NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 232–35 (Wesley Skogan & Kathleen Frydl eds., 2004).

Much more could be done. No federal agency currently tracks fatal and nonfatal shootings by officers on a department-by-department basis. If this were done systematically, we could then inquire into the sources of variation to determine why some departments are better than average and others worse and thus provide a basis to reduce avoidable shootings by police.[110] We stand to further reduce police killings by learning more about the problem, to provide an informed basis for taking corrective action.

H. Managing Police-Induced Miscarriages of Justice

Cities have done much to manage errors associated with these policing functions and tactics, perhaps most significantly through the use of accountability systems such as COMPSTAT, which uses geographically based data to map crimes and identify problems in a precinct or other area. These systems are often accompanied by weekly meetings in which the problems are discussed and strategies devised to solve them and reduce crime. COMPSTAT was first used and developed in New York City and New Orleans in the 1990s, and soon spread to several other cities, including Philadelphia, Los Angeles, Washington, San Francisco, Baltimore, and Austin.[111] These systems typically track the prevalence of crimes solved and unsolved, citizen complaints, and other factors related to miscarriages of justice.[112]

With or without the benefit of COMPSTAT, in big cities and elsewhere, police-related lapses associated with high crime rates and insufficient resources are likely to show up in a variety of ways. Police investigations will be hampered by officers who are ill-equipped to gather evidence needed to reduce errors of justice not only because of insufficient resources, but due to insufficient training in proper techniques for securing crime scenes; identifying, collecting, and processing physical evidence; interviewing witnesses; and interrogating suspects. The first investigator at a crime scene is typically a patrol officer, and some police departments prepare

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[110] The research should attempt to adjust for factors beyond the department's control. It might be reasonable, for example, to expect jurisdictions with higher homicide rates to have more virtually unavoidable shootings.

[111] BRATTON & KNOBLER, *supra* note 106, at 233; DAVID WEISBURD ET AL., THE GROWTH OF COMPSTAT IN AMERICAN POLICING 1, 3, 5–7 (2004). COMPSTAT refers to computer-statistics meetings. BRATTON & KNOBLER, *supra* note 106, at 233.

[112] Geoffrey P. Alpert & Mark H. Moore, *Measuring Police Performance in the New Paradigm of Policing*, *in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 109, 110 (1993).

both patrol officers and detectives much better than others in the essentials of investigation. The ability of the police to solve crimes and minimize errors of due process depends also on the cooperation of the public, and some police departments are more successful in getting such support than others, often the product of effective community policing programs.

I. Balancing Error Management with Other Policing Goals

Error management is rarely offered as a fundamental aspect of good policing. The stated goals of policing typically include elaborations on the mission, "to serve and protect." Questions usually arise over the respective emphasis that should be placed on security and due process, whether the police should aim high and wide, working to improve quality of life in the community, or focus on more traditional goals of crime control and the maintenance or order. Incorporating the management of miscarriages of justice with such questions is important; it brings to policing an essential element of excellence and professionalism that is missing from conventional systems of accountability, both department-wide and to assess performance at the unit and individual levels.

In the extreme, the police could eliminate errors of overreaction by doing nothing, but that would ignore social costs and misread the errors of impunity side of the balance scale of justice. Minimizing the social cost of failures to control crime means doing something and doing it well. Nor should accountability for miscarriages of justice necessarily conflict with goals of policing that have become associated with community policing, such as improving perceptions of the quality of community life, fear of crime, and citizen satisfaction. Focusing on error management could in fact contribute to these goals of policing.[113]

How, then, should the police embed the idea of error management into preexisting goal structures? There are two distinct parts to the answer to this question, the first having to do with social costs and the second with the time dimension. Regarding the first, in any given period the goal of minimizing the total social cost of crime and interventions will yield a result that is likely to differ from the conventional goal of minimizing crime subject to constraints on the protection of civil liberties, as the latter does not account for social

[113] FORST, *supra* note 5, at 106–07.

costs. Ignoring social costs simplifies the problem. Mayors and police chiefs have shown little zest for estimating the value of a statistical life and other pertinent social costs, and many have shown too little interest in attempting to understand more precisely the effects of police policies and practices on liberty and safety.[114]

With regard to the time dimension, the goal of crime prevention raises another concern. It extends the assessment beyond the current period. An optimal allocation of police resources toward either the prevention of future crimes or the reduction of the associated stream of social costs calls for a multi-period calculus. Policy analysts address this problem by assigning a discount rate to reflect the relative value of a good or outcome now and the same good or outcome a year from now.[115] Following this approach, the optimal allocation of resources in the current period would be the allocation that minimizes the present value of a stream of total social costs of crime and justice over an extended time horizon, using a standard discount rate, such as 4 percent, or a range of discount rates that reflect alternative time preferences.[116]

Law enforcement is the engine of miscarriages of justice. The greater the pressure to solve crimes, the more aggressive the police in attempting to do so, and the more likely that errors of due process will follow. Effective use of community and problem-oriented policing concepts and programs developed in the late 20th century may have helped to reduce some of these errors. The police can further reduce miscarriages of justice by rethinking their systems of accountability, from the aggregate department and division level to the unit and individual officer level. In this way police can become more conscious of miscarriages of justice, track them, and reduce the costs they impose on the community. Police can improve their capability to solve and prevent crimes by collecting and analyzing data on investigative activities and how those activities relate to successes and failures, and by making

[114] *Id.* at 107–08.

[115] Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 355–58 (2002) (observing that this standard approach can be simplistic, overlooking distinctions between time preference and uncertainty, effects of changes in taste, and other factors that might influence intertemporal decision-making). *See also* FORST, *supra* note 5, at 108.

[116] Police chiefs who may embrace such a long time horizon must report to mayors who tend to care much more about the next election. While not always feasible, the tension between these conflicting time perspectives can be resolved by removing long-term department strategies and budgets from the shorter-term political process.

greater use of effective decision-support technologies and civilian experts with more reliable modus operandi files and more effective analysis and use of them. Police can reduce miscarriages associated with rules for profiling and screening suspects by rigorously assessing the procedures for making stops and collecting and analyzing data on the yields associated with current and past practices. Sound principles of error management will be especially useful for dealing with federal and local efforts to reduce miscarriages of justice in the new terrorist era of law enforcement. Police could reveal a genuine sense of concern about these matters by collecting and analyzing data on all people detained and the outcomes that follow those intrusions to develop an accounting of the costs imposed on innocent people.[117]

Perhaps the single most effective way for the police to manage miscarriages of justice would be to strengthen the independence of the investigative function and transform the role of the investigator from in-house advocate for crime control to impartial scientist with professional standing and autonomy. Current arrangements do not provide sufficient incentives for detectives, especially those assigned to divisions, to weigh exculpatory evidence objectively against incriminating evidence. Police departments can stimulate such a transformation by first reconciling the role of the police as the public's first line of defense against crime with their larger responsibility for building and maintaining public support and legitimacy. Criminal investigators create problems for the police and undermine criminal justice legitimacy when they operate principally as anti-crime warriors, much as in-house accountants have undermined the firms that pay their salaries by compromising their professional standards. Doctors who work for hospitals operate under a higher professional code of medical ethics, and professional investigators could operate similarly under a formal code of justice ethics.[118] Even patrol officers who focus first on crime prevention and control, when they act as investigators should work to minimize the costs to society associated not only with errors of failure to bring offenders to justice, but with due process errors as well. Until such transformation occurs, we can expect police-

[117] FORST, *supra* note 5, at 109–10.

[118] Of course, codes of professional responsibility and ethics do not guarantee socially responsible behavior. Auditors, doctors, and other professionals are occasionally convicted of violating such codes. They do, however, provide a basis for holding professionals accountable—legally and administratively—for their decisions, policies, and practices.

induced miscarriages of justice to continue at higher rates than necessary.[119]

V. THE PROSECUTOR

Prosecutors have substantial control over miscarriages of justice, in terms of the extent to which innocent people are convicted and to the extent to which culpable offenders are not. They can uncover police errors by screening arrests more carefully, directing post-arrest investigations to resolve conflicting sources of evidence, working more effectively with victims and witnesses to establish, precisely and accurately, pertinent events that preceded and followed the episode in question, and directing the forensic processing of key items of physical evidence to resolve ambiguities involving both incriminating and exculpatory evidence. While much of this work is initiated and managed by the police, prosecution resources are also allocated to these activities in different amounts at various stages of prosecution: intake and filing, indictment, plea negotiation, and trial preparation and performance.[120] More than ample opportunity arises along the way for prosecutors to err by over-allocating resources to cases involving innocent people or minor offenders and under-allocating resources to serious cases involving more culpable offenders. These errors sometimes occur simultaneously, as when they give excessive concessions to offenders who testify against low-level, less culpable collaborators.

It is by no means clear that this arrangement operates in close accordance with the overarching goals of prosecution: justice, crime control, evenhandedness, efficiency, timeliness, quality of life in the community, and legitimacy. Prosecutors rarely make public details about their priorities. It is even more unusual to hear prosecutors speak of managing their operations with consideration to miscarriages of justice.[121]

Traditional measures of prosecution performance—conviction rates, case processing time, reelection success, and so on—shed little light on how these matters should be resolved, and indicators of miscarriages of justice (e.g., the ratio of appellate reversals of convictions to confirmations) are not among the traditional measures. Conventional goals of prosecution, especially that of

[119] FORST, *supra* note 5, at 110–11.
[120] *Id.* at 112.
[121] *Id.*

maximizing conviction rates, are consistent with the over-incarceration of people who pose little threat to the community, some of whom are in fact innocent. Research on prosecution has tended similarly to ignore miscarriages of justice.[122]

Even in capital cases, which one might expect are subject to greater due process protections than other felony cases, an astonishingly large number of persons sentenced to death have been subsequently exonerated of all charges, based largely on DNA evidence.[123] Liebman et al., in *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, reports prosecutor misconduct in 16% of appellate reversals of capital sentences.[124] And in many noncapital cases, the costs of incarceration appear clearly to exceed the alternative costs of intermediate sanctions that would permit those offenders to contribute to the productivity of the community and well-being of their families.

A. Prosecutorial Discretion and Miscarriages of Justice

Prosecutors are known to exercise considerable discretion in deciding whether to prosecute individual cases and in determining how much attention to assign to each case accepted. Former U.S.

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[122] William Landes, among the first to study prosecutors using a classical theoretical and empirical research design, theorized that prosecutors aim to maximize the weighted number of convictions, where the weights are based on offense seriousness. William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63–64 (1971). Landes's model made no distinction between cases in which the defendant was factually guilty or innocent, tacitly assuming that all were culpable offenders of the crime for which they had been charged. Landes was not the only researcher to ignore prosecution error. His model had been criticized by Forst and Brosi for failing to consider future crimes and the crime prevention goal of prosecution, not for failing to distinguish culpable offenders from innocent defendants. Forst and Brosi's model, like Landes's, assumes tacitly and uncritically that the prosecutor always prefers a conviction to a nonconviction. Brian Forst & Kathleen B. Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177, 177–79 (1977). *See also* FORST, *supra* note 5, at 113–14.

[123] Some of the eighty exonerations studied were based on procedural errors that do not necessarily imply factual innocence, and many of these may be connected to jurisdictions with serious lapses in due process controls not typical of prosecution in most jurisdictions. Still, in most of the cases forensic evidence implicated others, and in many capital cases DNA evidence is not available to exonerate the death row inmate; other death row inmates sentenced during the period may be factually innocent too. FORST, *supra* note 5, at 114.

[124] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (calculating "serious errors" and finding up to 19% error for misconduct by all forms of law enforcement). Latzer and Cauthen point out that "most appellate reversals [of capital sentences] leave undisturbed the guilt of the murderer." Barry Latzer & James N.G. Cauthen, *The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West*, 84 JUDICATURE 142, 142 (2000). Prosecutor misconduct is documented in a variety of other sources. Bedau & Radelet, *supra* note 25, at 56–60; GERSHMAN, *supra* note 25; HUFF ET AL., *supra* note 5, at 70–73; DWYER ET AL., *supra* note 14, at 222–36.

Attorney General and Supreme Court Justice Robert H. Jackson and others have called attention repeatedly to the dangers associated with this power.[125] Independent prosecutor Kenneth Starr's 1994–97 impeachment investigation of President Bill Clinton and Mike Nifong's 2006 prosecution of three members of the Duke University lacrosse team are but two notable examples of prosecutors exercising discretion in such a way as to damage the lives and reputations of the accused.[126]

Prosecutors are only occasionally overruled for engaging in such excesses. In the case of *Berger v. United States*,[127] involving a federal prosecutor who grossly overstepped the bounds of proper behavior in order to win a conviction against a defendant, Supreme Court Justice George Sutherland wrote, "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[128] This observation has gone unheeded by many a prosecutor in the decades since. Bedau and Radelet report 35 cases of prosecutors suppressing exculpatory evidence in a sample of 350 potentially capital cases involving "wrong-person" conviction errors, and 15 other such errors attributable to "overzealous prosecution."[129] Other commentators have documented convictions of the innocent as a consequence of misconduct associated specifically with the prosecutor's withholding of

[125] Jackson put it this way: "The prosecutor has more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940). Criminologist Albert Reiss saw it similarly, asserting that the U.S. prosecutor exercises "the greatest discretion in the formally organized criminal justice network." Albert J. Reiss, *Discretionary Justice in the United States*, 2 INT'L J. CRIMOLOGY & PENOLOGY 183, 195 (1974). In an analysis of an unprecedented 61% increase in the prison population from 1992 to 2002, a period of sharply declining crime rates, Bushway and Forst identified prosecutorial discretion as a primary source of the problem. Bushway & Forst, *supra* note 13, at 15–17. *See also* FORST, *supra* note 5, at 114–15.

[126] Benjamin Wittes has offered a charitable assessment of Starr's abuse of prosecutorial discretion, attributing it to his mistaken but good-faith belief that his mission was wide-ranging, to seek the truth of any and all Presidential misconduct, rather than the conventional narrow one of investigating specific charges, in this case, the President's role in the Whitewater scandal. Starr's civil law perspective would substantially broaden the meaning of an error of justice. One might, in any case, question the ethics of the Starr team's threatening to jail Monica Lewinsky's mother for withholding information even under this more charitable view of Starr's role. *See* BENJAMIN WITTES, STARR: A REASSESSMENT (2002); FORST, *supra* note 5, at 115, 115 n.5.

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

[128] *Id.* at 88.

[129] Bedau & Radelet, *supra* note 25, at 23, 57.

exculpatory evidence from the defense.[130]

One source of miscarriages of justice associated with the exercise of prosecutorial discretion is the negotiated plea, in which the prosecutor induces the defendant to plead guilty to one or more charges in exchange for the dismissal of more serious charges, typically ones that would lengthen the sentence term. Miscarriages associated with negotiated pleas are often the product of mistakes, but sometimes the product of draconian mandatory sentencing legislation and prosecutorial misconduct. Exceedingly high mandatory sentence laws give prosecutors leverage that may cause too many innocents to plead guilty.[131] And prosecutorial misconduct has been documented even in high-profile offices with reputations for professionalism. Brad Heath and Kevin McCoy report that Assistant U.S. Attorneys agreed to shorter prison sentences for convicted murderers from 2000 to 2010 after judges and defense attorneys discovered that prosecutors had improperly concealed evidence that could have helped the defendants and their attorneys contest the charges.[132] Pleas are also often negotiated in exchange for information from the defendant against co-offenders. Such pleas can bring offenders to justice, but raise the risk of wrongful convictions and, perhaps more commonly, produce a fundamental unfairness when the person offering the information is a greater menace to the community than the person or persons about whom the information is given.

A basic and seemingly benign aspect of prosecutorial discretion appears to be a far more profound source of errors of justice than overt acts of prosecutorial misbehavior: the power of the prosecutor to determine the extent to which the courtroom standard of evidence, proof beyond a reasonable doubt, will be relaxed at any stage of prosecution, starting with the screening of arrests. In prosecutors' offices of all sizes, the exercise of discretion in screening arrests is not severely constrained by the Constitution or

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[130] GERSHMAN, *supra* note 25; HUFF ET AL., *supra* note 5, at 70–72; DWYER ET AL., *supra* note 14, at 222–36.

[131] David Bjerk, *Guilt Shall Not Escape or Innocence Suffer?: The Limits of Plea Bargaining When Defendant Guilt is Uncertain*, 9 AM. L. & ECON. REV. 305, 306 (2007).

[132] Brad Heath & Kevin McCoy, *Prosecutor Misconduct Lets Convicts Off Easy*, USA TODAY, Dec. 28, 2010. Heath and McCoy found 201 cases since 1997 in which federal courts ruled that prosecutors had violated laws or ethics rules. Some of the violations put innocent people in prison; in forty-seven cases defendants were later convicted, then had their sentences reduced or were set free. Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY, Sept. 23, 2010.

by case law. The decision to file an arrest in court depends on the threshold of evidence used by the prosecutor, which is largely a matter of office policy. When deciding whether to file a case in the court, the prosecutor is free to use any standard between "probable cause" and "beyond a reasonable doubt." By lowering evidentiary standards at the pretrial stages of prosecution, the prosecutor raises the likelihood of winning convictions in cases involving innocent suspects, mostly by way of plea bargaining, and imposes potentially harmful costs on those defendants (and others) in the process. Others have noted that the controversy over plea bargaining has been misplaced: it is ostensibly a matter of choosing between pleas and trials, but more fundamentally a matter between whether to place more emphasis on rigorous case screening or on the negotiation of pleas.[133]

This policy choice owes its existence to a tradition of loosely governed escalation in the legal standard of proof as felony cases proceed from arrest to indictment and adjudication in court, noted earlier. The height at which the chief prosecutor places the bar in the pretrial stages involves a tradeoff between the certainty and severity of applicable sanctions. Lowering screening standards and getting more convictions by way of plea negotiations and fewer by guilty verdicts in trial is likely to be associated with higher conviction rates and shorter sentences. And as sentences of probation increase, such practices can be expected to lead to reduced incapacitation effects, but with a higher risk of convicting more innocent people, along with some compensation in convicting a larger share of culpable offenders.[134]

Prosecutors in fact vary considerably as to the standard of evidentiary proof used in the screening room, and this variation has been found to be related to the ratio of pleas to trials from one jurisdiction to the next.[135] Some prosecutors are inclined to accept only trial-worthy cases and obtain fewer convictions by plea; others are inclined to accept marginal cases and put greater effort into the task of negotiating pleas and winning convictions in cases that

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[133] FORST, *supra* note 5, at 115–16; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 116–17 (2002).

[134] FORST, *supra* note 5, at 116.

[135] Barbara Boland & Brian Forst, *Prosecutors Don't Always Aim to Pleas*, 49 FED. PROBATION 10, 11 (1985). Wright and Miller report evidence of the tradeoff between case screening and plea bargaining decisions in New Orleans. Wright & Miller, *supra* note 133, at 68–70.

would be rejected elsewhere.[136]

The choice between placing emphasis on case screening and trials rather than on plea negotiations turns out to have strong implications for rates of miscarriages of justice. I have found that the former policy tends to increase both the number of offenders set free per innocent person convicted and the total error rate.[137] Moreover, as the percentage of felony arrestees who are innocent increases, both the number of offenders set free per innocent convicted and the total error rate tend to decrease under both strategies, making a more selective felony case screening strategy increasingly attractive as the quality of police arrests declines, and arguably essential at some arbitrary threshold.[138] That is, as the police become more accurate in identifying true offenders, the prosecutor need not spend as much time screening cases.[139] When the quality of arrests declines—for example, the product of a crime wave or diversion of police resources to the press of other demands such as terrorism or crackdowns on illegal immigrants—more selective screening will be needed, not only to deal with the immediate need to correct the problem by checking the work of the police more carefully, but also to manage the miscarriages of justice. Similarly, when crime and associated concerns for public safety subside, tougher screening standards and more focus on trials might be warranted to produce corresponding reductions in errors of due process.[140]

Miscarriages can result from other aspects of prosecutorial

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[136] Examples of jurisdictions in the former camp, with higher screening standards and fewer pleas per trial in the early 1980s, included New Orleans (LA), Portland (OR), and Washington (DC). Examples in the latter camp included Manhattan (NY), Geneva (IL), and Cobb County (GA). Boland & Forst, *supra* note 135, at 11. Unfortunately, the data series on which this analysis was based was discontinued a few years after the study was conducted. Were data available to replicate the research reported here, the lists could well be different, although there is no compelling reason to expect that the essential findings on differences across district attorneys' offices would have changed.

[137] FORST, *supra* note 5, at 131.

[138] *Id.* at 124–126.

[139] These findings were based on extensive simulations under a wide range of assumptions about the rate of true offenders brought to prosecution, the rates of wrongful convictions in pleas and trials, and officewide conviction rates in trial. Reductions in the case acceptance rate produce increases in the number of offenders set free at the screening stage and thus reduce the rate at which arrests end in conviction. The increase in the number of trials associated with an emphasis on quality of convictions tends also to produce an increase in the number of true offenders acquitted, but for most scenarios these increases are offset by declines in the number of innocent persons convicted by way of plea or trial. The increases in the number of offenders set free under a more selective prosecution strategy are also accompanied by longer terms of incarceration for convicted offenders. *Id.*

[140] *Id.* at 127.

discretion as well, especially in assessing criminal liability, a central element of culpability. Questions about whether juveniles or adults with serious mental impairments or emotional illness are criminally liable are questions of law rather than of fact. So are questions about whether a defendant acted in self-defense in a case in which he or she is charged with a crime of assault. Similarly, violations of federal RICO statutes and insider trading laws are often technically complicated and difficult to establish as criminal rather than civil matters. In all such cases, the question is not whether a defendant committed a particular act, but whether the act qualifies as criminal. Specific rulings may produce inconsistencies in the interpretation of the law or violations of ethical norms rather than errors about whether a particular person committed the act at issue.[141]

Even among the large class of cases that qualify unambiguously as criminal rather than juvenile or civil, degrees of culpability are important to the prosecutor's decision to accept a case and determine the level of resources to allocate to it if accepted. To the extent that the degree of harm imposed on victims and the community at large is a measure of culpability, the prosecutor should allocate more resources to cases involving greater culpability, among any pool of cases in which the strength of the evidence and dangerousness of the offender to the community are about equal. Prosecutors routinely exercise discretion when making such decisions, and occasionally use decision support tools to help guide this exercise, using such metrics as the maximum sentence associated with the charges as a measure of offense seriousness.[142]

Prosecutors also may miscalculate in their tactical decision-making, with the result that culpable offenders go free. The notorious error of Los Angeles Assistant District Attorney Christopher Darden's having defendant O. J. Simpson try on a pair of bloody, shrunken gloves in trial may be a case in point. Such miscalculations are beyond the scope of the present inquiry, but the prospects of empirical analysis helping to establish prosecution approaches that are more or less effective in dealing with various

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[141] *Id.* at 119.

[142] FORST, *supra* note 5, at 119, 119 n.8. In the early and mid-1970s, the U.S. Attorney for the District of Columbia (Earl Silbert) incorporated an offense seriousness scale developed by criminologists Marvin Wolfgang and Thorsten Sellin as the metric to assess cases at the screening stage. As a practical matter, most assistant attorneys paid little attention to the score given to each case. *See* MARVIN E. WOLFGANG ET AL., U.S. DEP'T OF JUSTICE, THE NATIONAL SURVEY OF CRIME SEVERITY 2 (1985).

classes of cases should not be ignored.[143]

B. Improved Coordination with Police

In deciding what standard of evidence to use in screening arrests, the prosecutor makes a statement to the police. If the prosecutor uses the probable cause standard, case acceptance amounts to validating the police assessment that the evidence in the case was sufficient to make an arrest. In rejecting a case under this standard, the prosecutor ordinarily explains to the police officer either that the case was rejected "in the interest of justice," that the evidence met the probable cause standard, but the nature of the case did not warrant prosecution (e.g., the arrest was needed only to prevent further harm or the offense was trivial), or because the probable cause standard was not met, along with an explanation as to specific deficiencies in the case. If the prosecutor rejects the case using a higher standard than probable cause in screening cases, he or she can tell the police officer what evidence would have merited case acceptance under the higher standard. Regardless of the evidence standard used by the prosecutor at the screening stage, this explanation provides useful feedback for the police, generally given informally and recorded routinely for the prosecutor's records, although not generally a matter of open public record.[144]

Such information is routinely given to the police as a matter of record only in a minority of jurisdictions, making it virtually impossible for most police departments to hold their officers systematically accountable for the quality of the arrests they make. The opportunity for improved coordination and reduced errors rests generally with systems of feedback that provide routine, non-accusatory information as to how the police can strengthen cases legitimately with stronger tangible and testimonial evidence. Such systems are the exception, not the rule.[145]

The quality of coordination in individual cases depends largely on the quality of the underlying relationship between police and prosecutor. There is some strain in this relationship in most jurisdictions, if only because the cultures of policing and prosecution differ so substantially.[146] From the perspective of the police officer,

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[143] FORST, *supra* note 5, at 120.

[144] *Id.* at 116–17.

[145] *Id.* at 117.

[146] WILLIAM F. MCDONALD, U.S. DEP'T OF JUSTICE, POLICE-PROSECUTOR RELATIONS IN THE

the prosecutor's position often seems pristine and formal, removed from the workaday world of the cop on the street trying to fight crime against enormous odds. From the perspective of the prosecutor, the police often appear excessively zealous and insensitive to the prosecutor's case backlogs and the rigorous evidentiary standards of the court. The underlying tension occasionally escalates when the prosecutor goes public with criticism of police work in a particular case or series of cases, sometimes fueled by media inquiry. In many, if not most, jurisdictions, police and prosecutors enjoy a generally healthy, mutually supportive working relationship.[147]

The quality of the police-prosecutor relationship in any jurisdiction is critical to the ability of the prosecutor to effectively monitor the problems discussed in the previous section: flawed lineups and other improper witness identification procedures, illicitly obtained confessions, improper use of informants, legally invalid searches, and faulty processing of physical and forensic evidence. The prosecutor cannot escape responsibility for failing to catch persistent policing problems, such as the fraudulent evidence technician. In some instances, prosecutors have been charged with conspiring with the police to make weak cases against innocent defendants appear stronger by withholding exculpatory evidence or overlooking flaws in police investigations.[148] Police-prosecutor cooperation is not always in the interest of justice.[149]

VI. ADJUDICATION AND SENTENCING: JUDGES, JURIES, AND LEGISLATORS

A. Adjudication

Miscarriages of justice sometimes originate in the courtroom, associated with decisions made by judges and juries. Judges have the power to dismiss cases, and they can free culpable offenders in the process. Judges manage trials: sustaining or overruling

UNITED STATES 6–7 (1982); Malcolm M. Feeley & Mark H. Lazerson, *Police-Prosecutor Relationships: An Interorganizational Perspective*, *in* EMPIRICAL THEORIES ABOUT COURTS 216 (Keith O. Boyum & Lynn Mather eds., 1983); CATHERINE M. COLES ET AL., U.S. DEP'T OF JUSTICE, PROSECUTION IN THE COMMUNITY: A STUDY OF EMERGENT STRATEGIES: A CROSS SITE ANALYSIS 102 (1998).

147 FORST, *supra* note 5, at 117–18.

148 DWYER ET AL., *supra* note 14, at 232–33.

149 FORST, *supra* note 5, at 118.

objections raised by prosecutors and defense counsel, meeting with principals at the bench as needed, and governing the flow of events. They also give instructions to juries and can inadvertently (or otherwise) signal to the jury a message that induces jurors to either convict an innocent person or acquit a culpable offender. Appellate judges rule on appeals, sometimes overturning convictions rendered in lower courts.

Juries also play an important role in the adjudication of guilt or innocence. Former Supreme Court Justice Sandra Day O'Connor has expressed strong reservations about whether this arrangement renders informed decisions:

> Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in any way, [and] finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began.[150]

Juries can contribute to miscarriages of justice in a number of well-documented ways. They often do not understand legal and scientific complexities, as Justice O'Connor observes, even when the facts and the law are presented and explained as plainly as possible.[151] When the information is presented too simply, relevant technical essentials can get lost. Jurors often forget what was presented in trial, and in many jurisdictions are prevented from taking notes that could help reduce such memory lapses. Justice O'Connor is not alone in raising questions about whether rules

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[150] Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, 44 THE FED. LAW. 20, 22 (1997).

[151] Legal scholar Jerome Frank, after observing numerous jury trials, wrote:

> The truth is that for much of the time there are twelve wandering minds in that silent group, bodily present but mentally far away. . . . It is plainly said by those whose opinions command the utmost respect that the administration of the law in this land is on a lower plane than other phases of government and is unworthy of the civilization it poorly serves.

JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 124–25 (1963) (quoting Osborn's reflections after observing numerous jury trials). Rita James Simon, by contrast, takes exception to the popular view of the jury "as a group of indignant, angry citizens seeking vengeance even at the cost of justice. We saw the jurors' urge to punish tempered by a sense of responsibility and socialized by the expectations which they believed were placed upon them by the judicial system." RITA JAMES SIMON, THE JURY & THE DEFENSE OF INSANITY 178–79 (Transaction Publishers 1999) (1967). Simon's observation followed an extensive, albeit "informal, non-quantified content analysis" of actual jury deliberations. *Id.* at 132.

against note taking increase jury errors.[152] One side finds that note taking reduces error by reinforcing juror memories about what happened in trial.[153] The other side argues that notes may be in error, may divert the juror's attention away from more critical information presented in trial, may be used to bully other jurors, and are unnecessary in any case because jurors can ask for transcripts of the trial.[154]

Other critics have expressed concerns about juror competency, renegade jurors, and juror nullifications of the law as prospective sources of error. Several characterize jurors as fallible and often unreliable arbiters,[155] easily seduced, especially in matters involving brutal crimes with unattractive defendants and victims who evoke juror sympathy.[156] In his landmark collection of case studies of wrongful convictions, Edwin Borchard commented, "Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence."[157] The jury in the O. J. Simpson murder trial, the last of several claimants to the title of Trial of the Century for the twentieth century, did little to bolster support for the notion that our jury system can be trusted to produce deliberative bodies that weigh the evidence objectively and render reliable verdicts.[158]

Miscarriages of justice may result also from a jury's failure to understand instructions from the judge.[159] One study reports that

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[152] Several states have issued guidelines to govern note-taking by jurors, stipulating that the taking of notes should not be a distraction, should be used only by the individual juror to aid the memory, and should not be used to influence other jurors or used outside the jury room. FORST, *supra* note 5, at 137; *see e.g.*, Vermont Rules of Civil Procedure, VT. STAT. ANN. tit. 6, § 39(e) (Supp. 2010); Criminal Procedure, WASH. REV. CODE ANN. § 6.8 (West 2002).

[153] Lynne Forster Lee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567, 576 (1994); Judyth W. Pendell, *Enhancing Juror Effectiveness: An Insurer's Perspective*, 52 LAW & CONTEMP. PROBS. 311, 314 (1989) (noting that research does not support the argument against note taking).

[154] Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effect*, 18 LAW & HUM. BEHAV. 29, 49–50 (1994).

[155] Kersch describes jurors as "wild cards . . . the enemy of rational, systematic thinking." Ken. I. Kersch, *Juries on Trial*, 150 THE PUB. INT. 121, 121 (2003).

[156] Steven D. Penrod & Brian L. Cutler, *Assessing the Competence of Juries*, *in* HANDBOOK OF FORENSIC PSYCHOLOGY 293, 300 (Irving B. Weiner & Allen K. Hess eds., 1987); DWYER ET AL., *supra* note 14, at 261–271, 324 (where convictions of rape were intertwined with juror racial prejudice).

[157] EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE xiii (Da Capo Press 1970) (1932).

[158] FORST, *supra* note 5, at 137–38.

[159] In commuting the death sentences of all 156 death row inmates in 2003, Former Illinois Governor Ryan included this justification: "What are we to make of the studies that showed that more than 50% of Illinois jurors could not understand the confusing and obscure

just 5 percent of jurors understand and remember the judge's instructions on the legal standards applicable to their task.[160] Jurors interviewed after the judge repeated instructions have been found to be significantly less likely to understand the instructions than when the judge offered meaningful clarifications.[161] In the 2000 case of *Weeks v. Angelone*, a defendant who killed a Virginia State trooper was executed following the jury's apparent failure to understand that they were permitted to exercise an option not to vote for execution, a misunderstanding that the judge presiding in the case took no action to clarify.[162]

Public concern about jury errors emerges from time to time despite the relative rarity that an offender, even if arrested, will be held accountable for his criminal act before a jury.[163] Just 4 percent of all felony arrests end up in the judgment of a jury.[164] Public concern over jury errors derives largely from the handful of high-stakes jury trials that become public spectacles. These cases

sentencing instructions that were being used?" George Ryan, Governor of Illinois, Speech at Northwestern University College of Law (Jan. 11, 2003), *available at* http://www.deathpenaltyinfo.org/ryans-words-I-must-act; *see also* FORST, *supra* note 5, at 138 n.8.

[160] Reid Hastie et al., *Judging Corporate Recklessness*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 77, 90–92 (Cass R. Sunstein et al., 2002).

[161] Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (discussing the impact and confusion of juror instructions); Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000) (performing a mock jury study using the juror instructions from the controversial case *Weeks v. Angelone*).

[162] Weeks v. Angelone, 528 U.S. 225, 227–29 (2000); *see also* Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 66 (providing a variety of examples of wrongful convictions).

[163] Many criticisms of the jury system have little to do with miscarriages of justice. Abramson, Gobert, and others have expressed concern about rules and procedures that interfere with the representativeness of juries and concern over whether the matter will truly be decided by his or her peers. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY (1997). Other concerns focus on jury representativeness and the rules governing eligibility, with such alternatives as selection from lists of voters or registered drivers, tax rolls, welfare recipient files, and exemptions for occupation or hardship. Still others focus on the selection of jurors by defense and prosecution from lists of eligibles, often raising questions about the ethics of peremptory challenges—the rejection of a set number of jurors by either side without the need to give reasons for rejection—and the goal of widening the eligibility of minorities and increasing their participation as jurors.

[164] The numbers vary substantially across crime categories. A person arrested for murder is almost three times as likely to go to trial as one arrested for rape, robbery, assault or burglary. TIMOTHY C. HART & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1996 26 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc96.pdf; BUREAU OF JUST. STAT., U.S. DEP'T OF STATE, PUB. NO. 173939, FELONY SENTENCES IN STATE COURTS, 1996 8 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc96.pdf.

typically involve serious crimes. They serve as civics lessons, shaping what prospective offenders and criminal justice officials come to expect can happen, good or bad, should they find themselves involved in a jury trial. Regardless of the accuracy of these perceptions, the legitimacy of our criminal justice system is undermined when it is widely believed that juries are unreliable arbiters of guilt and innocence.

Much work remains to be done by way of empirical examination of this array of issues, through the analysis of data both from actual jury decisions and from mock trials and surveys. Such research may shed more light on the effect of jury rules on conviction rates and errors. It may ultimately help to bolster from the inside what Tocqueville saw so clearly from the outside, that a sound jury system can serve to strengthen democracy.

B. Sentencing

Miscarriages of justice can occur after a defendant is convicted, even when the offender committed the crime as charged. Bentham identifies these errors, first by observing where sanctions are "profitable,"[165] then by describing circumstances under which they are excessive.[166] As Bentham suggests, we may be able to identify miscarriages by assessing sanctions in terms of the extent to which

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[165] Bentham identified most of the ends that are characterized in the contemporary literature on the goals of sentencing: incapacitation, general deterrence, reformation (individual deterrence and rehabilitation), and retribution:

> The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power, in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*. A kind of collateral end, which it has a natural tendency to answer, is that of affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to parties whose ill-will, whether on a self-regarding account, or on the account of sympathy or antipathy, has been excited by the offence.

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158–59 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789).

[166] Bentham observed:

> It is plain, therefore, that in the following cases punishment ought not to be inflicted.
> 1. Where it is *groundless*; where there is no mischief for it to prevent; the act not being mischievous upon the whole.
> 2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief.
> 3. Where it is *unprofitable*, or too *expensive*; where the mischief it would produce would be greater than what it prevented.
> 4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.

Id. at 159.

they fall within reasonable boundaries between insufficient (in terms of the goal of controlling the actions of offenders) and excessive. Contemporary writings on sentencing policy echo Bentham's justifications for sanctions, elaborating on them frequently in terms of general and individual deterrence, incapacitation, retribution, and rehabilitation, and often adding victim and community restoration as legitimate purposes of sentencing.

A review of sentencing policy over the past fifty years reveals strong ebbs and flows in the mix of rules and discretion in sentencing. This history can be recast in terms of systematic and random errors of justice. Mounting evidence of unwarranted disparity in sentencing, through a mix of random and systematic departures from sentencing norms, contributed to a marked shift away from indeterminate sentencing systems toward systems of sentencing guidelines and mandatory sentences throughout the 1980s and 1990s. Indeterminate sentencing has produced a broad range of prison time imposed by judges after guilty pleas and verdicts, followed by parole boards using the theory of rehabilitation to establish when offenders had been "corrected" and were ready for return to the community. Judges' sentences were found to relate to their embrace of different sentencing goals: retribution (or more kindly, "just deserts"), general deterrence, special deterrence, or incapacitation.[167] These differences have been found to contribute to unwarranted variation in the exercise of sentencing discretion, along with tendencies for some judges to be more predictable in their sentencing practices than others, regardless of their preference for one goal or another.[168] Others have found the exercise of judicial discretion to lean toward harsher sentences for federal judges appointed by Republican presidents and toward more lenient sentences for federal judges appointed by Democratic presidents.[169]

A pioneer in the movement to reduce unwarranted variation in sentencing was the guideline system implemented by the state of

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[167] Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment*, 33 RUTGERS L. REV. 799, 801–02, 804–06 (1981) (listing "rehabilitation" as another articulated goal of sentencing); PANEL ON SENTENCING RESEARCH, NAT'L RESEARCH COUNCIL, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 70–71 (1983) (identifying variables in sentencing decision-making).

[168] Forst & Wellford, *supra* note 167, at 813–14.

[169] Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 723 (2008).

Minnesota in 1980. This system aimed to reduce miscarriages of justice perceived as systematic by reducing the average sentence for each offense-offender category, and to reduce miscarriages of justice associated with the exercise of judicial discretion. It did so by narrowing the range of sentences in each category and ending the parole system, which had, in the name of determining whether the offender had been rehabilitated, produced unwarranted variation in terms served.[170]

The Minnesota sentencing guidelines became the dominant model for the creation of guidelines in other states and for the federal system as well. In 1984, Congress passed the Sentencing Reform Act, which created a federal commission to design a system of mandatory guidelines and end indeterminate sentences and federal parole boards.[171] The federal sentencing guidelines became effective in 1987 and continued without fundamental change for nearly twenty years.[172] The guidelines went from mandatory to advisory under the Supreme Court's landmark 2005 ruling in *United States v. Booker*, which held that sentences imposed under the guidelines were based on data that did not pass the evidentiary test needed to convict in trial, thus violating the Sixth Amendment right to trial by jury.[173] One can only speculate on the frequency and gravity of

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[170] Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 389–91, 406–07 (1997); Kay A. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237 (1982).

[171] 18 U.S.C. §§ 3551–86 (2006).

[172] Unlike the Minnesota system, which initially reduced average sentences for most categories of offense and offender, the federal guidelines increased both the rate of incarceration and the term of sentence for most categories. (The Minnesota guidelines became tougher in time too, thanks largely to legislation fueled by the politicization of crime and punishment in the 1980s and '90s.) The federal guidelines may thus have reduced the social costs of errors associated with unwarranted disparity in the exercise of discretion, but may have produced more than offsetting increases in the social costs associated with overly severe punishments, especially for drug cases and nonviolent offenders.

[173] United States v. Booker, 543 U.S. 220 (2005). Booker was the last of three major Supreme Court decisions that returned sentencing discretion to judges: *Apprendi v. New Jersey*, *Blakely v. Washington*, and *United States v. Booker*. Those cases did so largely by eliminating the practice of basing sentences on information about the offense and offender that had not been subjected to courtroom scrutiny. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004). In *Apprendi*, the Court ruled, five to four, that the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476, 490. In *Blakely*, the Court ruled, five to four, that the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences based on facts other than those decided by the jury or confessed to by the defendant. *Blakely*, 542 U.S. at 303–04. In *Booker*, the Court ruled that the federal sentencing guidelines violate the Sixth Amendment right to a jury trial by requiring judges to determine facts for criminal sentencing, and so should be made advisory rather than

miscarriages of justice associated with eighteen years of fallible information contained in presentence investigation reports prepared by federal probation agents on which the federal guideline sentences were based.

The extraordinary quadrupling of prison and jail populations in the United States over less than three decades, from 501,886 in 1980 to 2,300,686 in 2008,[174] a period that also witnessed an unprecedented decline in crime (the number of homicides declined from approximately 23,000 to 16,000 during this period, despite a 34% increase in the resident population[175]), suggests a substantial shift toward systematic errors of over-incarceration, well beyond the boundaries of reasonableness articulated by Bentham: groundless, inefficacious, unprofitable, and needless.[176]

Sentences are bound by the law and decided usually by judges and sometimes by juries. The latitude for judges and juries to exercise discretion varies considerably from state to state and from case to case. Legislators have responded to the public's concern about crime by setting high mandatory minimum terms of incarceration, as in the case of drug offenses, in which "drug kingpin" laws often require long terms for offenders convicted of selling given amounts of illegal drugs.[177] These sanctions appear to be well in excess of optimal: many are clear miscarriages of justice.

Attempts have been made to induce judges to rein in unwarranted disparities from one another and from norms in the exercise of discretion in sentencing. This is not the same as reining

mandatory. *Booker*, 543 U.S. at 245, 265–67. Prior to these decisions, defendants could be sentenced under guidelines to crimes for which they had been acquitted in court.

[174] *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm (last revised Jun. 5, 2011).

[175] *Homicide Trends in the U.S.—Long Term Trends*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/content/homicide/tables/totalstab.cfm (last revised Jun. 5, 2011) (data available up until 2005). U.S. population has increased from approximately 226 million in 1980 to 304 million in 2008. *Freight Facts and Figures 2010: Table 1-1. Economic and Social Characteristics of the United States: 1980–2008*, FED. HIGHWAY ADMIN., http://ops.fhwa.dot.gov/freight/freight_analysis/nat_freight_stats/docs/10factsfigures/table1_1.htm (last modified Jan. 24, 2011).

[176] *See* BENTHAM, *supra* note 165, at 159. Some see these numbers as prima facie evidence of over-incarceration, whereas conservatives may be more inclined to see them as evidence of the effectiveness of the deterrent and incapacitative effectiveness of incarceration. A third position is that regardless of how far the current incarceration rate departs from the socially optimal rate, current sentencing policies and practices guarantee that many persons currently in prison or jail do not belong there while other persons currently on probation belong behind bars.

[177] Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 940–42 (2001).

in miscarriages of justice in sentencing, which involves a departure from an optimal sentence, which may differ from existing norms. In their exercise of discretion in sentencing prior to guidelines, judges have been found to introduce unwarranted disparity because they disagree with one another about the fundamental goals of sentencing or about the relative social harm associated with particular offenses, because they are internally inconsistent in their decisions, or from a combination of these sources of disparity.[178] Sentencing guideline systems have been devised that attempt to account for the details that matter, but more detail has brought with it complexity and confusion, especially at the federal level.[179] Guidelines are clearly capable of simultaneously reducing unwarranted disparity in sentencing (a problem of injustice) and helping to minimize systematic errors of justice (a problem of lost social welfare). But, to ensure against guidelines that serve to institutionalize systematic sentencing errors, those guidelines must be instituted and administered in a manner that deals more effectively with the politics of sentencing than many of the systems have to date.[180] In jurisdictions that permit a broader exercise of sentencing discretion by judges, the appellate review process can be made more mindful of errors of justice, and judges can be persuaded to work more diligently to ensure that such errors are in fact effectively managed.

Further gains might accrue from movement away from the practice of electing judges, common in Texas and elsewhere, to the more conventional system of appointment by the executive branch, subject to approval by the legislature and tenure following a

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[178] *See* JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS 6 (1971); Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 110 (1975); Forst & Wellford, *supra* note 167, at 801–02. The National Research Council Panel on Sentencing Research offered this summary assessment: "Despite the number and diversity of factors investigated as determinants of sentences, two-thirds or more of the variance in sentence outcomes remains unexplained." PANEL ON SENTENCING RESEARCH, NAT'L RESEARCH COUNCIL, SUMMARY REPORT—RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 10 (Alfred Blumstein et al. eds., 1983).

[179] MICHAEL TONRY, SENTENCING MATTERS 46 (1996); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 96–98 (1998).

[180] This suggests the need to assess the relative costs of systematic and random errors of justice, an overlooked and important empirical question. It calls as well for the development of a theory of the optimal control of discretion. We should always aim to identify systematic errors and move them toward zero. When the average social costs of random justice errors are greater than the average social costs of systematic justice errors, there will be more to gain in dealing with the problem of abuse of discretion than in adjusting sentences uniformly downward or upward.

probationary period. Judges might thus be shielded from the political pressures that interfere with balanced sentencing policy. One might reasonably expect the political pressures under a regime of elected judges to raise the costs of punishment through more imprisonments and longer sentences without compensating reductions in crime.

Sentencing legislation has become especially draconian since approximately 1990, when mandatory minimum sentences rose significantly.[181] Most states have enacted laws that increase terms of imprisonment for persons with prior convictions, such as "Three Strikes and You're Out," without regard to a large body of evidence validating "life course" theory, showing that offenders tend to commit fewer crimes as they age.[182] As a result, U.S. prisons are overloaded with now-harmless people who were given long sentences just as they were about to desist from committing crimes. Until these laws are removed or adjusted to correct for this error, it remains for prosecutors, judges, and sentencing commissions to develop more forward-looking policies and guidelines to ensure that conviction charges and terms of incarceration are adjusted appropriately to account for age. Failure to do so will continue to unduly penalize older offenders, who tend to have long criminal records relative to their likelihood of reoffending, than younger offenders. Taxpayers have been more willing to tax themselves to reduce crime than to realize other social benefits, but they might want to know that billions of their tax dollars are being wasted on the warehousing of middle-aged and older harmless people.

Analyses might provide a justification for overhauling sentencing laws and reducing the social costs associated with our punitive sentences. One option is to consider more extensive use of alternatives to incarceration.[183] Of course, the development of

[181] This turn in political thinking appears to have been profoundly influenced by the presidential election of 1988, in which candidate Michael Dukakis's prospects plummeted after responding feebly to accusations by the Bush campaign that Dukakis was responsible for Willie Horton's rape while on furlough from prison and, when asked in a presidential debate what penalty would be in order for a hypothetical man who raped and murdered Dukakis's wife, responded blandly about his opposition to the death penalty. FORST, *supra* note 5, at 174.

[182] ROBERT J. SAMPSON & JOHN N. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 6 (1993).

[183] Awareness of the need for intermediate sanctions to fill the void in the in-out dichotomy was stimulated largely by an influential 1990 book by Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. Morris and Tonry argued that both prison and probation were used excessively: "Our plea is for neither increased leniency nor increased severity; our program, if implemented, would

alternative sanctions does not lead automatically to socially optimal sentences. Just as incarceration may be overused or underused, so too might fines, intensive supervision, community service, and even victim restoration (e.g., it could create an open-ended type of enslavement or an incentive to be victimized). For any particular type of case, the bottom-line question is this: what mix of sanctions minimizes the total social costs of crime and justice?[184] Some sanctions will be substitutes for one another and others complements. One can imagine that one case involving a dangerous offender might call for incarceration to achieve incapacitation, while another calls for alternatives to incarceration to reduce costs in service of the goals of general and individual deterrence and deserved punishment. A restorative sanction might be a more efficient way of achieving the goals of reducing recidivism (through individual deterrence, rehabilitation, or both) and achieving justice for certain classes of offenses and offenders; a fine might be more efficient in cases without identifiable victims; community service for similar cases in which the offender cannot pay the fine; and so on. Questions of equity emerge when different offenders have different abilities to pay fines and restitution.

The emergence of restorative justice has been the other major

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tend toward increased reliance on punishments more severe than probation and less severe than protracted imprisonment." NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 3 (1990). They proposed a spectrum of alternative sanctions to smooth the discontinuity in sanctions: fines; community service; house arrest; intensive probation (involving more attention and more frequent visits and calls by probation officers with fewer cases); closely supervised treatment programs for drugs, alcohol, and mental illness; and electronic monitoring of movement. *Id.* at 6–7. Other options have been proposed and tried, including boot camps, drug courts, and day reporting centers. Evidence on the effectiveness of these alternatives has been mixed, with drug courts faring somewhat better than boot camps, and few empirical evaluations of day reporting centers. Boyum et al., *supra* note 38, at 385–86; Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, *in* CRIME AND PUBLIC POLICY 293, 295–300 (James Q. Wilson & Joan Petersilia eds., 2011). Morris and Tonry's call for a "humane, well-run, fairly administered" program of such an array of alternatives appears to have contributed to serious reform in some jurisdictions, but the funding for such programs has not followed calls for their expansion. MORRIS & TONRY, *supra*, at 241. Joan Petersilia estimated that some ten years after the initiation of intermediate sanction programs, only about 10% of all adult probationers and parolees were participating in them. Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, 1 JUST. RES. & POL'Y 9, 13 (1999). She concludes elsewhere that cost reduction, rather than humanistic or re-integrative appeal, is the prime political motivator for the adoption of such programs. Joan Petersilia, *Community Corrections*, *in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 483, 507–08 (James Q. Wilson & Joan Petersilia eds., 2002).

[184] A more complex version of this question incorporates the socially desirable tradeoff between costs incurred in the present and future: what mix of sanctions minimizes the discounted present value of the total social costs of crime and justice?

stimulus to the creation of an alternative to the prison-or-probation dichotomy. Restorative justice is an old idea, with origins in the civil justice system and the idea of restitution.[185] It has been renovated as a program that can simultaneously compensate victims for their crime losses and reform offenders by connecting their criminal acts to flesh-and-blood victims, thus enhancing reintegration into the community.[186] The popularity of restorative justice programs has been stimulated largely by victim rights advocates who have complained that under our common law system of criminal justice the victim often gets harmed twice, first by the offender and then by a callous criminal justice system that regards the victim officially as no more than a witness who can help the state to bring justice to an amorphous abstraction: the "people."[187] Restorative justice programs assume a variety of forms, most having particular features in common: the offender is held accountable for bringing the victim as close as possible back to the pre-crime state; the victim or family of the victim has a say in the crafting of the terms of restoration; retribution and rehabilitation of the offender may serve as residual benefits, often by moving from a formal justice model to one in which the offender is induced to see victims as people with whom they share a permanent personal relationship.[188]

It does not seem unreasonable, in any case, to regard either terms of imprisonment for persons who deserve less, or terms of ordinary probation for offenders who warrant sanctions that make the community more secure, as miscarriages of justice. Intermediate sanctions and programs of restorative justice could well fill this bill.

C. Holding Lawmakers More Accountable

Lawmakers hold the keys to many of these sentencing reforms. Legislators who enact sentencing statutes that impose overly long sentences might be dissuaded from doing so if the sort of attention that has been given to scary stories about crime were given as well

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[185] DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 27 (2d ed. 2002).

[186] *Id.* at 37–50.

[187] *Id.* at 20–21.

[188] JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); Albert Eglash, *Beyond Restitution—Creative Restitution*, *in* RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS 91, 91–96 (Joe Hudson & Burt Galaway eds., 1975); VAN NESS & STRONG, *supra* note 185, at 37–50.

to the extraordinary waste borne by taxpayers associated with prison and jail costs and the burdens on families of the incarcerated, especially for offenders who pose little or no danger to the public. The public deserves to know roughly how much it pays, per citizen, for these excesses. We might prefer civil discourse and neutral presentation of facts, but if this information must be couched in the sort of blunt, sensational terms that are used to get the attention of voters regarding the blight and dread of crime, so be it.

VII. CORRECTIONAL OFFICIALS

Even when sentences are neither excessively lenient nor harsh, errors can occur afterward. Overly harsh correctional officials can inflict needless harm on convicted defendants, as can overly lax officials on the public at large. Prison parole authorities may keep the person in prison for either too long or too short a term, imposing higher than optimal costs on society either way. Parole officials operate under incentive systems akin to those that shape the probation officer's recommendations about sentences, and they too are likely to be more concerned about the prospect of a parolee committing a crime after release from prison than about the prospect of keeping the same person in prison a while longer, thus tending to err on the side of overly long terms of incarceration.[189]

In the United States, over seven million people are under correctional authority, with over two million in prison or jail (about two-thirds in prison) and the rest on probation (over four million) or parole (nearly one million).[190] Miscarriages of justice can occur in dealing with both the incarcerated and non-incarcerated populations. Probation officers routinely decide on whether terms of probation or parole have been violated and whether probation or parole revocation hearings should be held. Parole authorities similarly decide routinely whether an inmate is ready for release from prison. Prisons and jails with inadequate security arrangements that allow inmates to escape to the community produce systematic errors that compromise the public's safety.

As with prediction errors in sentencing, prediction errors can

[189] FORST, *supra* note 5, at 174–75.

[190] Data are for 2008, from the Bureau of Justice Statistics Correctional Surveys: The National Prisoner Statistics Program, Annual Survey of Jails, Annual Probation Survey, and Annual Parole Survey. BUREAU OF JUST. STAT., U.S. DEP'T OF STATE, PUB. NO. 231681, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf.

occur either in determining whether to incarcerate a probationer or to re-incarcerate a parolee following violations of the terms of nonconfinement, or whether to release an inmate eligible for parole. Empirically derived parole guidelines often help to reduce the latter type of errors. The decision to incarcerate a probationer or parolee can be more difficult, both because it is more often based on subjective assessments and because the decision to incarcerate may conflict with the reintegration and treatment objectives of probation and parole departments.

Charles Logan has observed that prison authorities are capable of committing other errors as well:

> We ask an awful lot of our prisons. We ask them to correct the incorrigible, rehabilitate the wretched, deter the determined, restrain the dangerous, and punish the wicked. We ask them to take over where other institutions of society have failed and to reinforce norms that have been violated and rejected. We ask them to pursue so many different and often incompatible goals that they seem virtually doomed to fail. Moreover, when we lay upon prisons the utilitarian goals of rehabilitation, deterrence, and incapacitation, we ask them to achieve results primarily outside of prison, rather than inside. By focusing on external measures, we set prisons up to be judged on matters well beyond their direct sphere of influence.[191]

Logan's solution to these multiple dilemmas is a "confinement model," under which "[t]he mission of a prison is to keep prisoners—to keep them in, keep them safe, keep them in line, keep them healthy, and keep them busy—and to do it with fairness, without undue suffering, and as efficiently as possible."[192] Logan goes on to offer a set of specific prison performance measures in each of eight corresponding areas: security, safety, order, care, activity, justice, conditions, and management.[193] I am aware of no attempts to assess the social costs associated with errors in each of these domains; doing so could serve to prioritize them. In the meantime, Logan's system provides a useful basis for identifying and managing errors in corrections.

Elements of Logan's system are relevant to the management of

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[191] Charles H. Logan, *Criminal Justice Performance Measures for Prisons*, *in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 19, 23–24 (1993).

[192] *Id.* at 25.

[193] *Id.* at 26–32.

non-incarcerated populations as well, especially when augmented with a focus on mentoring to facilitate community reintegration.[194] Adapting such a program to probationers and parolees could provide a basis for assessing alternative approaches to supervision and thus help to reduce miscarriages of justice in the supervision of probationers and parolees in the community. This would be a particularly worthy undertaking given the enormity of this population, nearly two percent of the U.S. resident population.

VIII. MANAGING MISCARRIAGES OF JUSTICE

The twentieth century was marked by extraordinary productivity growth, much of it fueled by revolutionary technological advances in production processes in the first two-thirds of the century and by unprecedented advances in information technology in the last third. These technologies have been put to effective use to manage quality and reduce irregularities in the production of goods and delivery of services throughout the private sector and much of the public sector;[195] to manage misdiagnosis and mistreatment errors in medical settings through the use of signal detection technology;[196] to balance increased yields against the risk of losses in investment portfolios;[197] and in the management of discretion in setting and administering monetary policy.[198]

Errors are managed differently in the criminal justice system—using rules of criminal procedure, a protocol of escalating standards of evidence from early stages of investigation to the courtroom, and

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[194] Joan Petersilia has offered a parallel system of performance measurement for the much larger pool of non-incarcerated persons under correctional authority. She identifies the following as the primary goals of community corrections: (1) assess offender's suitability for placement; (2) enforce court-ordered sanctions; (3) protect the community; (4) assist offenders to change; and (5) restore crime victims. Joan Petersilia, *Measuring the Performance of Community Corrections*, *in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 61, 72 (1993).

[195] JAMES R. EVANS & WILLIAM M. LINDSAY, THE MANAGEMENT AND CONTROL OF QUALITY 6–10 (6th ed. 2005).

[196] *See generally* METIN AKAY, DETECTION AND ESTIMATION METHODS FOR BIOMEDICAL SIGNALS (1996) (examining the signal processing techniques and its application to the biomedical setting).

[197] PAMELA PETERSON DRAKE & FRANK J. FABOZZI, THE BASICS OF FINANCE: AN INTRODUCTION TO FINANCIAL MARKETS, BUSINESS FINANCE, AND PORTFOLIO MANAGEMENT 437 (2010).

[198] Bennett T. McCallum, *Misconceptions Regarding Rules vs. Discretion for Monetary Policy*, 23 CATO J. 365 (2004). One must acknowledge that the tools for reducing errors in the management of discretion in these domains are not always used. Improvements traceable to these tools are nonetheless unmistakable. In any case, before leading our horse of justice to water it helps first to have potable water.

heuristics such as Blackstone's rule—as noted in the introductory section. While threats to the accuracy of the conclusions of statistical inference are dealt with through research designs and quality control analyses that aim to ensure that the results are valid, reliable, and replicable,[199] threats to due process and crime control are more likely to be countered by attempts to ensure the victory of one disputant over the other, often at the expense of accuracy, perceived legitimacy, and justice. The problem may not be great when the power between the state and defendant is in balance, but imbalances of power may be systematic and substantial in the vast ocean of cases involving indigent defendants. Objectivity is a virtue in research, less so in the courts. Prosecutors and defense counsel, indeed, are not lauded so much for their objectivity as for their reputation for pursuing their respective sides as vigorously as possible—for achieving victory over the other side.[200] Principles designed to ensure dispassionate, accurate inference may be more at home in most Continental European courts of the inquisitorial system than in the adversarial common law setting that characterizes criminal courts in the United States.[201]

It is surely worth asking where to chip away at the barriers that allow for the persistence of miscarriages of justice. Vast improvements in the management of errors in other domains, beginning with assessments of the associated costs, may provide a precedent for such an inquiry. One standard approach in both production processes and service delivery settings is to document and organize information on errors through the use of check sheets. The Japanese auto industry led in the development and uses of such tools in the 1980s, following the earlier work of Frederick W. Taylor

[199] Researchers have been known to operate as advocates, selecting research design options guaranteed to produce a desired set of results. Such practices are usually discovered when other researchers fail to either replicate the results or produce similar results under sound alternative research designs.

[200] Old courtroom joke: when the law is against you, argue the facts; when the facts are against you, argue the law; when both are against you, pound on the table.

[201] These systems of justice differ from that of the United States in several respects that are bound to influence both wrongful convictions and wrongful failures to convict: incentives for the suppression of exculpatory evidence and other unethical conduct by government officials; funding levels for defense counsel; appellate review (more common in the U.S.); freeing the guilty following procedural errors (only in the U.S.); and revised verdicts following new evidence (not in the U.S.), among others. Marvin Zalman, *The Adversary System and Wrongful Conviction*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 71, 83–87 (C. Ronald Huff & Martin Killias eds., 2008).

and W. Edwards Deming.[202]

One can imagine using parallel tools in the criminal justice system. This could begin by specifying the dimensions of the check sheets, following the consideration of such questions as these:

- What miscarriages of justice occur in a police department, prosecution office, court, or correctional setting, and what are their primary sources?
- How do these vary by crime category, neighborhood setting, time (of year, week, day), and type of personnel (e.g., patrol officer or investigator, experience level of prosecutor)?
- How can we obtain information more systematically to document errors in each of these categories?

An analysis of these check sheets could help to establish how resources might be redeployed and rules changed to reduce the most frequent and costly types of errors. Such approaches might be applicable as well to the assessment of alternative investigative profiling strategies, parole release guideline systems, and other complex decision processes involving various types of miscarriages of justice.

Criminologists and scholars of the criminal justice system have come to embrace the scientific method, partly out of their appreciation for the coherence and rigor of science and the power it brings to predictive accuracy and explanatory validity, but no less out of a desire to elevate their status in the academy. James Q. Wilson, in his landmark essay, *Crime and the Criminologists*, reported that criminologists had avoided scientific analysis during the crime explosion of the late 1960s and early 1970s, when it was dearly needed.[203] He wrote, "when social scientists were asked for advice by national policy-making bodies, they could not respond with suggestions derived from and supported by their scholarly work."[204] He went on to say that they "were speaking out of ideology, not scholarship"[205] and that the focal concerns of their tradition were largely "beyond the reach of science."[206] In the years

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[202] KAORU ISHIKAWA, WHAT IS TOTAL QUALITY CONTROL?: THE JAPANESE WAY 16–17 (David J. Lu trans., 1985); GENICHI TAGUCHI & RAJESH JUGULUM, THE MAHALANOBIS-TAGUCHI STRATEGY 8–9 (2002).

[203] James Q. Wilson, *Crime and the Criminologists*, 58 COMMENT. 47, 51–52 (1974). Wilson's essay was later expanded into one of the most widely read books ever written in the field. *See* JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

[204] WILSON, THINKING ABOUT CRIME , *supra* note 203, at 44–45.

[205] *Id.* at 62.

[206] *Id.* at 63.

since, long strides have been made to bring the rigor and respectability of science to the work of criminology and criminal justice scholarship. It may be a pipe dream to imagine a similar revolution in the criminal justice system, but if the costs of miscarriages of justice can be exposed, perhaps this pipe dream might become a reality.

IX. CONCLUSION

News of miscarriages of justice is always unwelcome, especially in an era of deep public cynicism of government and long-standing concerns about its monopoly of power to use non-negotiably coercive force.[207] It is unwelcome largely because of its tendency to create incentives for people to seek private remedies for protection and justice. Informal mechanisms have always been the dominant form of social control in the United States and elsewhere, but for serious crimes private alternatives to our formal system of justice can be ineffective at best, and more likely counterproductive and highly unjust.

Miscarriages of justice cannot be dealt with simply. As Blackstone recognized centuries ago, they involve vexing tradeoffs. We might wish to eliminate wrongful arrests and convictions, but we should instead aim to minimize the social costs of these errors with full awareness of other legitimate social interests—not a trivial pursuit. None of the great legal thinkers has yet discovered a way to eliminate wrongful convictions without incurring unacceptably high crime and resource costs. The challenge is to find ways to reduce both crime and wrongful arrests and convictions under a system of management that accounts for the social costs of both.

Miscarriages of justice are matters of policy. The assessment of criminal justice policy has traditionally focused on other concerns. It is long past due to attempt more systematically to learn the likely effects of basic policy changes on both the ability of those policies to bring offenders to justice and their ability to protect the rights of citizens and minimize costs on innocent people. Such inquiry is likely not only to complement conventional frameworks for

[207] *See generally* EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS (Oelgeschlager, Gunn & Hain 1980) (1970) (noting the long-standing hostile attitude toward police in American society); Max Weber, Politics as a Vocation, Lecture at Munich University (Jan. 1919), *available at* http://www.ne.jp/asahi/moriyuki/abukuma/weber/lecture/politics_vocation.html.

assessing the criminal justice system, such as crime, recidivism rates, and cost, but also to contribute more reliable and balanced knowledge to our understanding of the criminal justice system and criminal justice policy. Surely we can do better to manage miscarriages of justice than to rely on sensational media accounts of innocent people released from death row following the discovery of exculpatory DNA evidence, and on equally sensational accounts of dangerous people committing heinous crimes following breakdowns in mechanisms for bringing them to justice in prior cases. These "breaking news" stories are typically followed by political grandstanding that has produced draconian laws and contributed immeasurably to injustices and, more measurably, to billions of dollars of wasted resources that could have been applied more productively elsewhere.

Miscarriages of justice are a matter of legitimacy. Criminal justice legitimacy is largely a product of the ability of policies and procedures to reduce wrongful arrests and convictions, and avoid wrongful failures to convict as well. If criminal justice policies are to meet this basic test, the assessment of those policies requires a coherent framework for relating the policies to miscarriages of justice and their social costs.

Miscarriages of justice harm those wrongfully arrested and convicted. They harm victims. They harm us all. They drain our resources, create inequities, restrict our freedom, and undermine the legitimacy of our system of justice. They reduce our quality of life. They warrant more thoughtful consideration than we have given them.