

Reducing Error in the Criminal Justice System

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I. INTRODUCTION

Larry Laudan's recent work, including his most recent book,¹ previous articles,² and now his article and presentation for this Symposium,³ give us cause to reflect on the fundamental goals of the criminal justice system, and on whether our institutions, and the research surrounding them, are raising the right questions and resolving them in the most accurate and effective ways.⁴ For Professor Laudan, the primary purpose of the criminal justice system is to minimize harm—whether harm committed by the state against innocent individuals (conviction of the innocent—the problem of false positives), or harm caused by individuals engaging in crime (which is exacerbated by what he calls false acquittals, or the false negative problem).⁵ For too long, he argues, commentators and the system itself have focused too much on the former, to the neglect of the latter.

¹ See generally LARRY LAUDAN, *THE LAW'S FLAWS: RETHINKING TRIAL AND ERRORS?* (2016).

² E.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295 (2003).

³ Larry Laudan, *Different Strokes for Different Folks: Fixing the Error Patterns in Criminal Prosecutions by "Empiricizing" the Rules of Criminal Law and Taking False Acquittals Seriously*, 48 SETON HALL L. REV. 1243 (2018).

⁴ A theme that runs through much of Professor Laudan's work on these issues is that the criminal justice system, like any form of empirical inquiry, should be concerned about gathering and assessing data on the system's failure rates—the rates at which it produces both false positive (false convictions) and false negatives (what he calls false acquittals). No doubt such data would be valuable. But as I discuss in greater detail *infra*, Part III, Professor Laudan overlooks that assessing those rates requires access to ground truth, or a gold standard test of reliability or accuracy—something that simply is not available in the vast majority of criminal cases. Unfortunately, in place of real data—which is realistically unattainable—Professor Laudan builds mathematical formulas for assessing the system and its structures upon error rates that are little more than guesses and assumptions—and quite debatable ones at that, as we shall see.

⁵ It is debatable whether the notion of a "false acquittal" even makes sense, as either an epistemological or a legal matter. That is because we never can know why a jury acquits any individual. Sometimes, it might be because the defendant is in some absolute sense guilty, but the jury cannot discern it, at least not beyond a reasonable doubt (itself a proper judgment, but one Professor Laudan would consider factually erroneous). Note, however, that we have no way of gauging or assessing that (unlike in exonerations cases, where new evidence is used to establish innocence). In other instances, however, the jury might acquit because, although convinced beyond any real doubt of guilt, the jury is expressing some other value or purpose—to punish the prosecutor, to act as a check on what jurors may see as a runaway government, and/or to reflect a community's sense that the law at issue is unjust. While Professor Laudan might count those as false acquittals, in our constitutional system, the jury exists precisely to exercise that sort of community control over the government, which cannot truly be considered an error or a false acquittal. As Harry Kalven and Hans Zeisel observed in their 1966 study of the American jury, "The jury, it is said, is a remarkable device for insuring that we are governed by the spirit of the law and not by its letter; for insuring that rigidity of any general rule of law can be shaped to justice in the particular case." HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 8–9 (1971). I return to this point *infra*, at text accompanying footnotes 65–67.

Throughout much of Professor Laudan's work on these topics, his arguments follow a similar pattern and reach a similar conclusion. That argument, presented here in very simplified form, is as follows. First, to assess the appropriate procedural rules and burdens of proof in criminal cases, he contends, we need to understand empirically the costs of both false negatives and false positives. He then extrapolates from admittedly meager data what he believes are the false positive and false negative error rates in the criminal justice system, and concludes that false acquittals are a much bigger problem than false convictions. His prescription is a rather startling call to incarcerate many more people, and for much longer than we currently do, at least for violent crimes.⁶

Professor Laudan's method for increasing our incarceration levels is equally unsettling: he urges us to rejigger the system to increase convictions in ways that he acknowledges will also cause an increase in convictions of the innocent. His most prominent call is to abandon the reasonable doubt standard, at least for repeat violent offenders. To support this claim, Professor Laudan argues that each false acquittal for a violent crime⁷ causes 1.2 harms because on average, individuals who have committed a violent crime will commit 1.2 more violent crimes.⁸ On the other side of the ledger, Professor Laudan argues that false convictions (false positives) cause approximately 2.2 harms each—1 harm to the wrongly convicted individual plus the 1.2 crimes that the true perpetrator who is not apprehended will commit.⁹ From this, Professor Laudan argues, the true comparative cost of false convictions to false acquittals is 2.2 to 1.2, or roughly 2 to 1.¹⁰ Professor Laudan then contends that the rules of evidence and criminal procedure overwhelmingly and inappropriately favor defendants and, in particular, that the proof "beyond a reasonable doubt" standard (which he refers to by the acronym "BARD")¹¹ is out of alignment with these comparative costs. He contends that we currently acquit far more guilty people than we convict innocents, so that we need to recalibrate the equation in ways that make the ratio of false acquittals to false convictions closer to what he contends is his empirically derived 2 to 1 ratio.

⁶ See *infra* text accompanying notes 207–08.

⁷ Professor Laudan generally limits his argument to violent crimes. LAUDAN, *supra* note 1, at 1245.

⁸ LAUDAN, *supra* note 1, at 1253.

⁹ LAUDAN, *supra* note 1, at 1253.

¹⁰ LAUDAN, *supra* note 1, at 1253.

¹¹ I do not find the BARD acronym helpful, so I generally refer to the standard as the "beyond a reasonable doubt" or simply the "reasonable doubt" standard, except when quoting for Professor Laudan, where I quote the acronym "BARD" as he uses it.

Professor Laudan's primary complaint is with the "beyond a reasonable doubt" standard. He argues that, given the true value of comparative harms, the burden should be a much lower one, more consistent with the "clear and convincing" standard. In his current article, he refines this claim a bit, arguing for a sliding scale burden of proof that is dependent on the accused's prior record. He contends that, because individuals with prior records are much more likely to recidivate than are first-time offenders, the clear-and-convincing standard should be applicable to repeat offenders, while first-timers can still be tried under the reasonable doubt standard.¹²

In this response, I address some of Professor Laudan's claims, and the assumptions and data underlying them. In Part II, I take on some of Professor Laudan's claims about the nature, purpose, and effects of the reasonable doubt standard. I contend that neither is the standard the culprit he thinks it is in creating injustice, nor does it create the type of formal mathematical, probabilistic assessment of evidence that he assumes it does. In Part III, I point out the difficulty—indeed the impossibility—of accurately assessing the real rate of either false negatives or false positives in the criminal justice system, and hence the futility of Professor Laudan's enterprise. In Part IV, I add to that conclusion by challenging his attempts to meaningfully quantify the harms from both false convictions and false acquittals, and his conclusions about the comparative harms from each. Part V then examines Professor Laudan's claims about the various ways that the system currently is skewed to (overly) protect criminal defendants, including guilty ones. I show that, in many respects, Professor Laudan has the analysis exactly backwards—and in the ways that count most for determining the disputed facts. I also challenge his prescription for reforms that would ratchet up mass incarceration rates, disproportionately harm low-income and minority people, and sweep even more innocent people into prison, all in his quest to convict and imprison more of the guilty. Finally, in Part VI, I contend that because the mathematized weighing and apportioning of harms that Professor Laudan undertakes is a doomed enterprise with enormous unacceptable costs, the reform agenda—whether one cares more about crime prevention or innocence protection—ought to be to look first for ways to reform the system to improve its overall diagnosticity, and to simultaneously reduce both false negatives and false positives, without the flawed assumption that the two are always and inevitably in tension. I show how this, indeed, is the primary thrust of the Innocence Movement.

¹² Laudan, *supra* note 3, at 1251.

II. PROOF BEYOND A REASONABLE DOUBT

Professor Laudan's work, at its core, repeatedly challenges our adherence to the reasonable doubt standard. He argues that we should seriously doubt "[t]he belief that the two-century old standard of proof ('proof beyond a reasonable doubt') must not be changed because it is required by the Constitution and because it alone protects the innocent. Both claims are patently false."¹³ I have neither the space nor the inclination to debate here the constitutional roots of the reasonable doubt standard, especially because it is so thoroughly entrenched in constitutional doctrine that it is inconceivable the courts will abandon it any time soon.¹⁴ But I will briefly address some of Professor Laudan's related contentions.

A. *Definitional Challenges*

Professor Laudan's first attack on the "beyond a reasonable doubt" standard is that it defies definition.¹⁵ It is not quite accurate, however, to say that "beyond a reasonable doubt" lacks definition. As Jules Epstein points out, courts routinely define "beyond a reasonable doubt" through standard jury instructions.¹⁶ To be sure, various courts have used different wording to define the standard, and courts and critics alike have bemoaned the difficulty in providing a clear definition. But these indictments provide a weak basis for abandoning the standard—which in its essence expresses the fundamental value that we need to be very sure about guilt before we permit the state to impose draconian sanctions depriving individuals of life, liberty, or property as punishment for perceived misdeeds.

On its merits, Professor Laudan's ambiguity argument tells us little about how to apportion error in criminal cases, in part because it says little about how any other standard would work better. With the reasonable doubt standard there should be little confusion about what is meant by "doubt," so Professor Laudan's (and other critics') concern must be with the modifier "reasonable." But "reasonable" or "reasonableness" is a term that is ubiquitous in the law; from the Fourth Amendment's protection against "unreasonable" searches and seizures to the standard of care that defines negligence in tort law, to all of the various tests that rely upon some form of

¹³ LAUDAN, *supra* note 1, at ix.

¹⁴ In this regard, I am in complete agreement with Paul Cassell's analysis of the unconstitutionality of Professor Laudan's proposal. Paul G. Cassell, *Risking Wrongful Convictions: Quantifying the Risk, Addressing the Risk, and Escaping the Risk*, 48 SETON HALL L. REV. 1435 (2018).

¹⁵ LAUDAN, *supra* note 1, at ix, 4.

¹⁶ See Jules Epstein, *The National Commission on Forensic Science: Impactful or Ineffectual?*, 48 SETON HALL L. REV. 743, 770 (2018) (quoting U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS 3.06 (2011), <http://www.ca3.uscourts.gov/sites/ca3/files/Chapter%203%20Rev%20April%202015.pdf>).

the “reasonable person” test. If the “beyond a reasonable doubt” standard is unsustainable because it depends on the inherently intuitive notion of “reasonableness,” then the law as a whole is in serious trouble. In the end, Professor Laudan’s own solution exposes the emptiness of this criticism of the “beyond a reasonable doubt” standard. Professor Laudan ultimately advocates for a “clear and convincing” standard in some criminal cases, but never explains how that solves his clarity problem. There is indeed nothing intrinsically clearer about “clear and convincing” than there is about “reasonable doubt,” and Professor Laudan points to nothing providing the clarity he asserts we need.

B. *Overclaiming About Reasonable Doubt*

To his credit, Professor Laudan does not really hang his argument on concerns about the difficulty in defining “beyond a reasonable doubt.” Rather, he argues that what is more important is that “we should . . . look at [BARD’s] *results*; that is, how often do erroneous verdicts occur at trial and in pleas and how often can those errors be attributed to BARD? And, we need to ask, what is the optimal error ratio—that ratio that will produce the fewest harms to innocent victims.”¹⁷

But even with that focus on producing the least harm to innocent victims, Professor Laudan’s near single-minded focus on the reasonable doubt standard is puzzling. He alleges that supporters of the “beyond a reasonable doubt” standard claim that “it alone protects the innocent”¹⁸ and that it is “the most important rule governing the conduct of criminal trials.”¹⁹ Certainly the standard is important—even fundamental—but to single it out as *the* key or sole feature of the system for determining the prevalence and distribution of errors reveals an odd, unjustified fixation. The system is far more complex than that and, in the end, the “beyond a reasonable doubt” standard, as important as it is, is implemented through a jury instruction, which jurors may or may not follow with fidelity. It does nothing to affect the production, access to, and presentation of evidence, which likely represent much more significant variables in determining both the prevalence and distribution of error.

Professor Laudan nonetheless asserts that “the overwhelming reason for most false negatives is not a flawed case made by the prosecutor nor a lack of strong inculpatory evidence but the fact that, to convict someone of a crime, our system generally requires that the jury must be unanimously persuaded of his guilt to a degree of near certainty (proof beyond a

¹⁷ Laudan, *supra* note 3 (emphasis in original).

¹⁸ LAUDAN, *supra* note 1, at ix.

¹⁹ LAUDAN, *supra* note 1.

reasonable doubt).”²⁰ Yet, despite his plea for empirical evidence and data to assess the workings of the criminal justice system, Professor Laudan provides no data or evidence to support this claim—he just asserts it as true.

C. *Mathematizing Proof or Expressing Values?*

Much of Professor Laudan’s claim about the power of the “beyond a reasonable doubt” standard appears to rest on his penchant for treating fact-finding as a mathematical process of apportioning discernible probabilities. He assumes, for example, that the “beyond a reasonable doubt” standard translates in jurors’ minds as something akin to 90% certainty or more. From this, Professor Laudan makes the remarkable assertion that “all arrestees with a likelihood of guilt of 80% or 70% are almost certain to win an acquittal, even though the numbers tell us that it quite likely that they committed the crime.”²¹ While that might be true if adjudication were a mathematical proposition working with known likelihoods, that it is of course not at all how it actually works.²² Nor should it be.²³ The process is far too nuanced, value-laden, and emotion-driven to be reduced to such neat formulaic expressions. Professor Laudan tells us nothing about how jurors in the real world come up with, as Michael Risinger puts it, “credible numbers to mathematize what is meant by standards of proof.”²⁴

²⁰ LAUDAN, *supra* note 1, at 13.

²¹ Laudan, *supra* note 3, at 1245.

²² Susan Haack, for example, has explained that “probabilistic conceptions of degrees of proof . . . are fatally flawed,” because “degrees of epistemic warrant simply don’t conform to the axioms of standard mathematical calculus of probabilities; from which it follows that degrees of proof cannot plausibly be constructed probabilistically.” SUSAN HAACK, EVIDENCE MATTERS: SCIENCE, PROOF, AND TRUTH IN THE LAW xvii–xviii (2014). *See also id.* at 18–19, 61–62. She elaborates: “[W]e can’t look to probability theory for an understanding of degrees and standards of proof in the law, but must look, instead, to an older and less formal branch of inquiry: epistemology.” *Id.* at 47. Lawrence Tribe has likewise observed that “the lay trier will surely find it difficult at best, and sometimes impossible, to attach to P(X) a number that correctly represents his real prior assessment. Few laymen have had experience with the assignment of probabilities, and it might end up being a matter of pure chance whether a particular juror converts his mental state of partial certainty to a figure like .33, .43, or somewhere in between.” Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1358 (1971).

²³ Tribe, for example, has pointed out that, if we were to mathematize evidential probabilities at trials, one effect would be “the dwarfing of soft variables”—facts that are easily quantifiable will be counted, and those that cannot will be disregarded or minimized, leading to outcomes in which, “despite what turns out to be a spurious appearance of accuracy and completeness, is likely to be significantly warped and hence highly suspect.” Tribe, *supra* note 22, at 1361–62. Accordingly, as Haack concludes, “it isn’t feasible to put precise numbers on degrees of proof; nor would it necessarily be desirable to do so even if we could.” HAACK, *supra* note 22, at 59.

²⁴ D. Michael Risinger, *Leveraging Surprise: What Standards of Proof Imply That We Want from Jurors, and What We Should Say to Them to Get It*, 48 SETON HALL L. REV. 965 (2018) [hereinafter Risinger, *Leveraging Surprise*].

Professor Risinger and others have, on several occasions, offered more compelling accounts of how the reasonable doubt standard works—not as a mathematical or formal probabilistic assessment,²⁵ but more as a value statement about the importance of the decision the jurors are being called upon to make.

The term “beyond a reasonable doubt” . . . forces the individual juror to ponder the question of how the law wants him to decide, and to examine his own soul, so to speak, to answer the question of whether or not he is as sure as the law requires him to be. It is intended to make even the juror who thinks that the defendant “did it,” in everyday terms, think twice.²⁶

In this Symposium, Professor Risinger develops this thought further in a far-more sophisticated argument than I can approximate here. He argues that standards of proof “are not properly seen as statements entailing or implying any formal version of modern mathematized probability theory or statistical theory,” but rather as “degrees of belief” measured by “the intensity of the surprise that would be experienced if it were established that the proposition believed to be true is in fact false. Professor Risinger’s “central claim is that people believe something to be true to the extent that they would be surprised to find out it was false.”²⁷

Indeed, prominent schools of thought about the trial process today, such as the narrative theory of the trial, the story model, or the relative plausibility theory, all posit that the side that wins—even in a criminal case—is the side that tells the story that best fits with the evidence presented. It is a process driven not so much by mathematical likelihoods of guilt as it is by comparative strength of competing narratives.²⁸ Contrary to Professor

²⁵ *Id.* at 973 (“I am of the school that thinks that attempts at formalizing the meaning of burdens through the use of numerical expressions of probability is probably a bad idea in theory and definitely a bad idea in practice. Formal mathematization can have all sorts of unintended consequences.”).

²⁶ Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 199 (1969).

²⁷ Risinger, *Leveraging Surprise*, *supra* note 24, at 973. Risinger elaborates: “But how do we measure these levels of surprise, or at any rate induce jurors to measure them in themselves? Not by artificially generated cardinal numbers to put into a full probability calculus, but by a well-ordered system of categories designated by words like what are now called (rather unfortunately, I now believe) “words of estimative probability.” In fact, the traditional three standards of proof of our litigation system are a rank-ordered, three-category system defined by various formulas, which can be thought of as words (or word formulas) of estimative probability. But what I propose is a system which uses what I would prefer to call “words of estimative surprise,” such as mildly surprised, surprised, quite surprised, greatly surprised, astonished, shocked, etc. *Id.* at 981 (footnotes omitted).

²⁸ See Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in

Laudan's artificially mathematized world, under the narrative theory of the trial, the defendant whom Professor Laudan somehow assesses to be 70%-80% likely to be guilty might indeed be convicted, under the narrative theory of the trial because the guilt narrative is the one that might appear far more compelling. Or in Professor Risinger's terms, the jury that considers the competing evidence in such a case might be quite surprised, even shocked, to learn that the accused was in fact innocent.²⁹

In the end, the requirement of proof beyond a reasonable doubt is based on something more fundamental, but less quantifiable, than Professor Laudan's algorithm assumes. Even if we could somehow assign a mathematical weight to the harms that individuals suffer from the effects of wrongful conviction and the effects of being victimized by a recidivist who was mistakenly acquitted of a prior offense, that still would not justify modeling a burden of proof based on those weights. That is because the burden of proof—the requirement that the state prove guilt beyond a reasonable doubt—and indeed, Blackstone's ratio (the well-known maxim that it is "better that ten guilty persons escape than that one innocent suffer"³⁰)—are not premised not on some illusion of mathematical precision, or on some notion that the harms caused to victims of all sorts can be meaningfully assessed and weighed.³¹ They are instead based, at least in significant part, on the notion that, whatever suffering the victimization may cause, it is far worse as a structural matter in a free society for the *government* to actively and deliberately deprive its citizens of life, liberty, or the ability to lead the life they choose, than it is for a private individual, through criminal misdeeds, to harm another and to escape punishment. Several years ago, Professor Risinger also made this point, in response to a similar proposal made by Professors Laudan and Ronald Allen:

INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192 (Reid Hastie ed., 1993); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992)..

²⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (1765).

²⁹ Risinger, *Leveraging Surprise*, *supra* note 24, at 973.

³⁰ *Id.*

³¹ Relatedly, Professor Laudan has a curious penchant for treating the Blackstone ratio as if it were meant to express a precise mathematical weighing of the costs of false convictions and false acquittals. Others have persuasively explained that the Blackstone ratio was never meant to express a precise mathematical formula, but rather a more general sense of values, so I will not repeat those arguments here. See, e.g., Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1068 (2015); D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 1002 (2010) [hereinafter Risinger, *Tragic Consequences*]; Marvin Zalman, *The Anti-Blackstonians*, 48 SETON HALL L. REV. 1319 (2018).

Viewing the state as having more responsibility for harm done directly to the immediate subjects of its acts than for the harm done indirectly by its failures to act, or by its choices to act one way rather than another, has a long tradition, especially in situations where the latter harm is done by the subsequent choice of an independent human agent.³²

The reasonable doubt standard, therefore, reflects the notion that, when the state acts directly to inflict massive punitive harm on an individual, it must be constrained to act in only the clearest and most compelling of cases.³³ As Michael Corrado has written recently in comparing the civil burden of a preponderance of the evidence to the criminal burden of beyond a reasonable doubt:

When all that is at issue is the allocation of a loss that can be measured in financial terms, the accuser needs only to prove the defendant's fault by a preponderance of the evidence, but where the defendant's very life or freedom is at stake the burden is considerably higher: the prosecutor must prove guilt beyond a reasonable doubt. In the criminal case the community has placed the high burden upon the state because the imposition of punishment by the state is such a terrifying act.³⁴

³² Risinger, *Tragic Consequences*, *supra* note 31, at 1020 (footnote omitted). For this point, Professor Risinger draws, in part, on writings of the nineteenth-century reformist Sir Samuel Romilly, who famously observed, "When, therefore, the guilty escape, the Law has merely failed. . . . But when the innocent become the victims of the Law . . . it creates the very evil it was to cure, and destroys the security it was made to preserve." *Id.* at 998 n.24 (quoting SIR SAMUEL ROMILLY, *Observations on the Criminal Law as It Relates to Capital Punishments, and on the Mode in Which It Is Administered*, in 1 THE SPEECHES OF SIR SAMUEL ROMILLY IN THE HOUSE OF COMMONS 106, 165–66 (1820)). Professor Risinger wrote in response to arguments propounded in Allen & Laudan's article, *Deadly Dilemmas*, *supra* note 2.

³³ Professor Cassell, in his contribution to this Symposium, acknowledges this argument but ultimately rejects it as unpersuasive because, he contends, in modern society providing security against crime has become a "special responsibility" of the government, just as is its obligation to protect the innocent from wrongful conviction. See Cassell, *supra* note 14, at 1444. It is no doubt true that the government has responsibility for providing security against crime and also restraining itself to avoid directly inflicting criminal punishments on the innocent. Professor Cassell's argument, however, tells us nothing about how to weigh failure to meet either of those responsibilities. Cassell, *supra* note 14, at 1444. I suggest that, even acknowledging Professor Cassell's point, the government's first obligation is to avoid directly inflicting harm on its people, just like a physician, who has a special responsibility for providing care to her patients, bears a primary and overriding obligation to "do no harm."

³⁴ Michael Louis Corrado, *Punishment and the Burden of Proof* 1 (U.N.C. Legal Studies Research Paper 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997654.

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Professor Laudan's quantification simply fails to capture the real essence of the reasonable doubt standard.

III. MAKING ERRORS COUNTING ERRORS

A. *Verdict Errors*

To justify his assault on the reasonable doubt standard, Professor Laudan attempts to measure what he believes are the harms produced by that standard. To start, Professor Laudan takes legal actors and scholars to task for failing to figure out how often criminal justice processes produce inaccurate results—both false positives and false negatives. “Such ignorance,” he says, “speaks not only to an intellectual and moral laxness but also to the abandonment of the cardinal rule of any self-respecting system of empirical inquiry, to wit, devising and then utilizing methods to figure out how often its results are reliable.”³⁵ But it is not quite that simple because the reality is that there is no good method for counting criminal justice system errors. After all, the processes are themselves the best we have been able to come up with for figuring out what happened in a contested historical event. The trial (or short of that, the plea) is itself the closest we have to a gold standard for determining truth. Unlike most scientific methods of empirical inquiry, which have true gold standard diagnostic tools (e.g., blood tests as a check on the reliability of clinical judgment for many illnesses) or the ability to set up randomized controlled studies, the law usually has nothing more than the outcomes of the individual cases themselves.³⁶ Only in the exoneration context do we *sometimes* have the ability to discover error, through the production of new evidence of innocence (especially DNA evidence). This tells us that error does occur, and does so at above a trivial level, which can help us understand the conditions and contributing factors that can lead to false positives. It cannot, however, tell us a rate. For false negatives (false acquittals), as discussed below, we do not even have that.

1. Problems with Counting False Positives

Despite Professor Laudan's criticism, scholars *have* attempted to estimate wrongful conviction rates, relying primarily on examining discrete cohorts of wrongful convictions. But even those scholars have noted that their estimates are rough, or reflective of only discrete subcategories of convictions, which cannot easily be extrapolated across the criminal justice system more broadly. Professor Laudan himself relies upon—and accepts

³⁵ LAUDAN, *supra* note 1, at xiii.

³⁶ Indeed, examples that Professor Laudan explicitly relies upon include error rates for medical tests and public opinion polls, both of which usually can be measured ultimately against ground truth. LAUDAN, *supra* note 1, at xiv.

as a true value—an average of several of those estimates (although he rounds the estimated error rate downward to 3%),³⁷ including one based upon an analysis of wrongful convictions in capital rape murder cases by Michael Risinger, which estimated an error rate of 3.3%-5%.³⁸ But Professor Laudan ignores Professor Risinger's own caution against attempting to generalize from the rate of wrongful convictions applicable to all crimes and all jurisdictions. Professor Risinger cautions that such extrapolation cannot be done because "the universe of criminal convictions is almost certainly heavily substructured in regard to factual innocence rates."³⁹ This substructuring, Professor Risinger notes, combined with limited access to reliable information about wrongful conviction rates for most types of cases, "renders virtually useless any notion of a system-wide 'wrongful conviction rate.'"⁴⁰ Professor Risinger adds, "[t]here are two reasons why we should resist the temptation to expend much effort in pondering such a general average factual wrongful conviction rate: first, we are unlikely to ever be able to derive it very specifically, and, second, it would not tell us anything very important if we knew it."⁴¹

2. Problems with Counting False Negatives

The foundation for Professor Laudan's mathematized analysis is further undermined because, as Professor Laudan's indictment of the scholarship notes, far less is known about false acquittals, or more broadly, false negatives. Given constitutional constraints, there are virtually no cases in which an acquitted individual has been later proven guilty based on new and better evidence, so there is almost no data. Professor Laudan laments this as a moral failing of criminal justice actors and observers, rather than as a reality of the inaccessibility of ground truth: "An erroneous acquittal will almost always escape detection, not because it would be especially difficult to identify false acquittals if we earnestly looked for them but because almost no one gives a damn about their occurrence."⁴²

³⁷ See LAUDAN, *supra* note 1, at 54 (citing Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 n.21 (2005); KALVEN & ZEISEL, *supra* note 5; Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, 111 PNAS 7230 (2014), <http://www.pnas.org/content/111/20/7230.full.pdf>; D. Michael Risinger, *Innocents Convicted: An Empirical Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) [hereinafter Risinger, *Innocents Convicted*].

³⁸ Risinger, *Innocents Convicted*, *supra* note 37, at 761.

³⁹ Risinger, *Innocents Convicted*, *supra* note 37, at 783.

⁴⁰ Risinger, *Tragic Consequences*, *supra* note 31, at 991, 993–97.

⁴¹ Risinger, *Innocents Convicted*, *supra* note 37, at 782.

⁴² LAUDAN, *supra* note 1, at 10.

Professor Laudan is correct that the data are not there, but it is not because of disinterest. Rather, data about false negatives that is reliable and meaningful is nearly impossible to obtain—a reality that Professor Laudan cannot accept because it dooms his enterprise. On the other side of the equation, discovering a single false conviction case requires enormous resources, access to evidence, dogged resolve, skilled lawyers, enormous luck, and a long time (an average of nine to fourteen years).⁴³ Professor Laudan never tells us how anything approximating that could be undertaken in acquittal cases, especially given that the double jeopardy clause bars retrials based on new evidence.⁴⁴ While scholars could theoretically examine acquittals and render opinions—based on little more (and often less) than the information already available to the legal system—the undertaking would be enormous and those opinions would not be worth much and would prove little. Thus, even the very limited tools that exist for trying to estimate a false conviction rate simply do not exist for trying to estimate a false acquittal rate. Hence, Sam Gross and Barbara O’Brien’s observation about the challenges in assessing a false conviction rate applies with even more force to false negatives: “The fundamental problem with false convictions is also one of their defining features: they are hidden from view. In most cases false convictions are not merely invisible but hard if not impossible to identify when we try.”⁴⁵ While Professor Laudan recognizes this dearth of data, and laments it, he does not let that stop him, he simply makes a guess (a quite debatable guess), and advocates wholesale constitutional revision on the basis of the assumptions underlying that guess.

At the outset, one has to wonder why Professor Laudan focuses so much effort on claiming that false acquittals are the central problem facing our criminal justice system today. Professor Laudan begins his piece with an

⁴³ The average time from conviction to exoneration among the DNA cases is 14 years. 2017 Innocence Project, *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Apr. 20, 2018). For the exonerations listed in the broader National Registry of Exonerations, the average time spent in prison before exoneration is 8.7. The National Registry of Exonerations, *Exonerations by State*, (Apr. 9, 2018), <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

⁴⁴ Professor Laudan instead objects that we cling to the double jeopardy bar that prevents the state from appealing not guilty verdicts or ever retrying an acquitted individual. *See, e.g.*, LAUDAN, *supra* note 1, at 10–11. But this robust version of the Constitution’s double jeopardy clause is long-settled in this country. Debating the wisdom of that constitutional provision or the Supreme Court’s interpretation of it is more than I can take on in this relatively short response to Professor Laudan. For my purposes here, it is enough to note that the double jeopardy clause poses a virtually insurmountable obstacle to the type of assessment of mistaken acquittals upon which Professor Laudan’s argument depends.

⁴⁵ Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL. LEGAL STUD. 927, 928 (2008).

epigrammatic quote from Daniel Givelber to the effect that “[a]cquittals are the mystery disposition of the criminal justice system.”⁴⁶ But, building off of that to argue that the system acquits too many guilty people, Professor Laudan overlooks that one significant reason Professor Givelber says that acquittals are such a mystery is because they are *so rare*.⁴⁷ Indeed, as Professor Givelber notes, the data show that the ratio of convictions to acquittals in federal court is somewhere between fifty to seventy convictions for every acquittal.⁴⁸ Given the rarity of acquittals (and the necessarily much smaller category of “false” acquittals), it is difficult to discern why one would focus on false acquittals as a significant criminal justice problem. That is especially so given that a certain minimal level of acquittals is essential to any legitimate system of criminal justice. Without some small yet significant rate of acquittals—which appears to be right where we are—the system would appear (and likely would be) rigged, and would lose its integrity as a check on governmental power. Moving the acquittal rate much, if any, below what we already have, therefore runs a significant risk of that delegitimizing effect.

Undaunted, Professor Laudan builds his argument for fundamental realignment of the criminal justice system on extrapolation and assumptions from thin reeds of evidence about false acquittals. For his estimates, he relies primarily on Harry Kalven, Jr. & Hans Zeisel’s classic study of judge and jury agreement and disagreement,⁴⁹ and data on jury verdicts in Scotland, where juries have the option of rendering two types of acquittal verdicts: “guilt not proven” and “not guilty.”⁵⁰ For example, turning to Kalven and Zeisel’s study, Professor Laudan notes the rate at which judges would have convicted when juries acquitted, which Kalven & Zeisel found to be about 17% of the cases.⁵¹ Professor Laudan further notes that, among the cases included in Kalven & Zeisel’s study, the judges reported that they believed that only about 15% of the acquittals were clear acquittals, and 85% were close cases.⁵² Professor Laudan then takes at face value that this means that the close cases—85% of the acquittals—“are close enough to warrant an assumption that these are probably factually guilty defendants.”⁵³ From data

⁴⁶ LAUDAN, *supra* note 1, at 1 (quoting Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1167 (2005)).

⁴⁷ Givelber, *supra* note 46, at 1167.

⁴⁸ Givelber, *supra* note 46, at 1167, n.3 (citing U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, 419, 460 (Ann L. Pastore & Kathleen Maguire eds., 2000)).

⁴⁹ KALVEN & ZEISEL, *supra* note 5.

⁵⁰ LAUDAN, *supra* note 1, at 58.

⁵¹ KALVEN & ZEISEL *supra* note 5, at 56.

⁵² LAUDAN, *supra* note 1, at 59.

⁵³ LAUDAN, *supra* note 1, at 59.

and reasoning of this type, Professor Laudan ultimately concludes that he can make a good guess at a rate of false acquittals, while in the process ignoring Kalven & Zeisel's own caution that "[i]t is not easy to know what to make of these figures."⁵⁴

Professor Laudan's willingness to accept the judges' perceptions of the closeness of the evidence as proof of guilt also ignores the lessons from the wrongful conviction cases: that virtually every one of the exoneration cases involved evidence that convinced prosecutor, judge, jury, and often even defense counsel, that the defendant was clearly guilty.⁵⁵ The exoneration cases tell us we cannot just assume that even judges' assessments of the evidence can reliably tell us what portion of jury verdicts are factually erroneous.

Kalven & Zeisel's study is widely acknowledged as path breaking largely because of its data identifying a cluster of cases in which the judge and jury disagreed about the outcome of the case—most often cases in which the judge would have convicted but the jury acquitted (a total of about 17% of all cases). Any assumption that those disagreements provide further support for a claim of widespread false negatives in jury verdicts, however, must be reconciled with the reasons Kalven & Zeisel identified as factors that they thought accounted for the disagreements between judge and jury: evidence factors (i.e., differential weighting of the evidence); facts only the judge knew; disparity of counsel; jury sentiments about the individual defendant; and jury sentiments about the law.⁵⁶

The claim that the cases in Kalven & Zeisel's study in which the jury acquitted but the judge would have convicted represent factually erroneous verdicts would have the strongest claim in those cases in which the judge had access to inculpatory evidence that the jury did not. But that accounts for only 2% of the cases in which the judges would have convicted but the jury acquitted; excluded evidence is virtually inconsequential as an explanation for acquittals in Kalven & Zeisel's study.⁵⁷ Moreover, even in that category of cases, we cannot be confident that the judge was right and the jury was wrong—that is, that the jury's verdict was a "false acquittal" as a factual matter—because in some of those cases the additional evidence that the judge would have considered would have included evidence that the

⁵⁴ LAUDAN, *supra* note 1, at 58; KALVEN & ZEISEL, *supra* note 49, at 57.

⁵⁵ Brandon Garrett's analysis of the first 200 DNA exonerations, for example, revealed that courts denied relief to almost all of these actually innocent people, granted innocence-based relief to none, found most errors to be harmless because of their assessment that the evidence was strong, and even opined in many cases that the evidence against these innocent people was "overwhelming." Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61 (2008).

⁵⁶ KALVEN & ZEISEL, *supra* note 5, at 106–07.

⁵⁷ KALVEN & ZEISEL, *supra* note 5, at 121 n.1.

Rules of Evidence exclude because the evidence has a tendency to *impede* rational fact-finding.⁵⁸ This includes evidence like character and propensity evidence,⁵⁹ unreliable forensic evidence or expert opinions,⁶⁰ coerced confessions,⁶¹ the judge's personal knowledge of the parties or other extrajudicial facts⁶² (which can be unreliable, and hence, legally cannot be considered because they are either highly prejudicial, or not subject to adversarial testing for veracity and accuracy), or a wide range of evidence the judge herself deemed to be far more prejudicial than probative.⁶³

Moreover, it is not safe to assume that every acquittal of even an arguably guilty individual is truly a "false acquittal." Juries acquit for a wide variety of reasons, some based on conclusions about guilt, and others, equally legitimate in our constitutional system, on conclusions about mercy or constraint of government overreaching. Indeed, Kalven & Zeisel hypothesized that jury acquittals in cases where judges would convict might reflect precisely that type of communitarian expression of restraint. From their analysis of the judge-jury disagreement cases, Kalven & Zeisel developed a "liberation hypothesis"—the theory that, when the evidence was close, the jury felt "liberated" to acquit for non-fact reasons, such as sympathy for the accused or sentiment about the law.⁶⁴ Daniel Givelber explains it this way:

[Kalven & Zeisel] identified juries as more likely to acquit than judges, and developed a liberation hypothesis to explain the disparity. If the case is close on the evidence, the jury is liberated to permit sentiment to guide its decision. In their words, the jury "yields to sentiment in the apparent process of resolving doubts as

⁵⁸ Of course, *some* excluded evidence is highly probative and excluding it serves other criminal justice system values, while impeding the search for the truth. That is especially true of exclusion of evidence for violation of the Fourth Amendment, for example. But that is not true of *all* excluded evidence. See text accompanying notes 58-64.

⁵⁹ See FED. R. EVID. 404.

⁶⁰ See FED. R. EVID. 703.

⁶¹ Historically it was recognized, and empirically it is now being confirmed, that one risk of coerced confessions is that they can often be actually false—yet still very persuasive to factfinders. See *e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

⁶² KALVEN & ZEISEL, *supra* note 5, at 123.

⁶³ See FED. R. EVID. 403. Lest one think that judges, unlike juries, are not likely to be influenced by evidence that they themselves recognize to be inadmissible, the empirical evidence shows the contrary. See, *e.g.*, D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, 36 LAW & HUM. BEHAV. 151, 154 (2012) (finding that experienced judges who recognized that a confession was coerced and hence inadmissible were nonetheless significantly influenced by the confession when assessing the defendant's guilt or innocence).

⁶⁴ KALVEN & ZEISEL, *supra* note 5, at 106, 165-66.

to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.” Apparently unlike judges, juries permitted extra-legal concerns to temper strict justice when they acquitted the guilty.⁶⁵

Professor Givelber, however, questions this hypothesis, arguing that the empirical evidence supports the conclusion that juries usually acquit because, based on the evidence, the defendant is probably innocent. Contrary to the lesson that Professor Laudan draws from Kalven & Zeisel’s work, the evidence suggests that juries do not regularly acquit irrationally, or based on too-much fidelity to the “beyond a reasonable doubt” standard (if that is not an oxymoron). Although Professor Laudan begins his piece with a quote from Professor Givelber about the mystery of acquittals, Professor Givelber has repeatedly written about the rationality, and indeed reliability, of jury acquittals. Professor Givelber asserts, indeed, that “[d]espite the enormous publicity generated by apparently irrational acquittals, there appears to be no basis for believing that these are anything but aberrational events.”⁶⁶ And his book, *Not Guilty: Are the Acquitted Innocent?*, persuasively and extensively makes the case, based on *analysis of the empirical evidence*, that acquittals are best read as factually supportable conclusions of actual innocence.⁶⁷

B. Charging and Dismissal Errors

Professor Laudan makes clear, it should be noted, that when he discusses “false acquittals” he means “false negatives” more broadly, including not just erroneous jury verdicts, but also *dismissals* by prosecutors in cases where the accused was actually guilty.⁶⁸ Combining his assessment of erroneous jury verdicts and prosecutor dismissals of charges against guilty suspects, he settles on a false negative rate of about 38%–40%.⁶⁹

With regard to dismissals, Professor Laudan’s claim is that the reasonable doubt standard is producing false negatives by imposing such a high burden on prosecutors that they are likely to dismiss cases, even when convinced of guilt, because they fear they will be unable to prove guilt beyond a reasonable doubt. To support this conclusion, Professor Laudan relies primarily on survey data of prosecutors. He notes that in several

⁶⁵ Givelber, *supra* note 47, at 1168 (footnotes omitted) (citing KALVEN & ZEISEL, *supra* note 5, at 165).

⁶⁶ Givelber, *supra* note 47, at 1169.

⁶⁷ DANIEL GIVELBER & AMY FARRELL, *NOT GUILTY: ARE THE ACQUITTED INNOCENT?* (2012).

⁶⁸ Laudan, *supra* note 3, at 1244.

⁶⁹ LAUDAN, *supra* note 1, at 64–65.

surveys, prosecutors have identified a range of reasons for dismissing cases, many of which have nothing to do with doubts about guilt.⁷⁰ But that too is a very shaky foundation upon which to determine a factual rate of false negatives, both because survey data is among the least reliable for assessing what people actually do and why they do it, and because prosecutors' judgments about guilt or innocence are far from a gold standard for assessing factual truth, even if they are accurately reporting their motivations for dismissing cases. As has been reported elsewhere, a host of cognitive biases and institutional pressures makes it difficult, if not impossible, for prosecutors (like everyone else) to assess evidence objectively and reliably.⁷¹ And the record of prosecutorial resistance to claims of innocence, even in the face of overwhelming evidence of innocence (including DNA) in exoneration cases, undermines any suggestion that prosecutorial judgments can be relied upon as any sort of litmus test of actual innocence.⁷²

While it surely is true that prosecutors in some cases dismiss charges despite a firm belief in guilt, it is difficult to know how much that explains, because the reality is there is little empirical evidence on the matter.⁷³ One certainly cannot conclude, as does Professor Laudan, that it must mean the "beyond a reasonable doubt" standard, virtually alone, is forcing prosecutors to dismiss cases against a large number of actually guilty people. Experience, legal standards, and empirical evidence suggest that the "beyond a reasonable doubt" standard might not be the culprit in this process that Professor Laudan thinks it is, or that the dismissals are therefore factually wrong. Professor Laudan largely dismisses the significance of all of the many reasons that prosecutors dismiss cases that have little or nothing to do with proof beyond a reasonable doubt—political judgments and office policies (for example, policies not to prosecute certain types of crimes);

⁷⁰ *Id.* at 60–62.

⁷¹ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

⁷² See Amy Bach, *Extraordinary Wrongful Convictions, Ordinary Measures—Why Measurement Matters*, 73 ALB. L. REV. 1219, 1221 (2010); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1179–84 (2010); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140–44 (2004); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 765 (2007).

⁷³ According to John Pfaff, who studied justice system data for fifteen years, "Perhaps most problematically, we have almost no information whatsoever on what prosecutors do or how (or why) they do it." JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 17 (2017).

caseload pressures; and simple lack of evidence (regardless of the standard of proof). Professor Laudan ignores that, in our system, prosecutors have virtually unfettered and unreviewable discretion in charging,⁷⁴ and that concomitant with that authority comes the responsibility to screen cases that are brought to them by police. In the caselaw and literature on prosecutors, effective screening—dismissal of cases—by prosecutors is seen as a strength of the system, not a flaw.⁷⁵

Ethics rules and legal standards further make clear that prosecutorial decisions are not necessarily driven exclusively or perhaps even predominantly by the “beyond a reasonable doubt” standard. ABA standards on the prosecution function require only probable cause to initiate and pursue a prosecution.⁷⁶ Likewise, under the Fourth Amendment, police need only probable cause to make an arrest, and prosecutors need only probable cause to indict or obtain a bindover at a preliminary hearing to permit the case to proceed to trial. Professor Laudan misunderstands this to mean that, “[t]o make an arrest official, the police must persuade either a judge or a grand jury (or both) that a rational person, confronted with the available evidence, would conclude that the defendant probably committed the crime.”⁷⁷ Professor Laudan elaborates, still incorrectly, that by the time a case enters the prosecution process the accused “is considered by the police, a grand jury and/or the arraiging judge to be more likely than not to be guilty on the available evidence.”⁷⁸ But probable cause does not require any showing that the accused “probably” or “more-likely-than-not” committed the crime. The probable cause standard—whether for arrest, indictment, or other charging—is explicitly a lower standard than that. Probable cause means nothing more than that there is a reasonable basis for believing that a crime may have been committed, and that the accused may have committed it; that basis may be well below 50-50.⁷⁹ Professor Laudan’s misunderstanding of

⁷⁴ *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978).

⁷⁵ *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. (forthcoming 2018); *State v. Farrell*, 293 A.2d 176, 179 (N.J. 1972) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”).

⁷⁶ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 3-3.9(a) (AM. BAR ASS’N 1993) (“A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.”).

⁷⁷ LAUDAN, *supra* note 1, at 62.

⁷⁸ *Id.*

⁷⁹ *See Illinois v. Gates*, 462 U.S. at 235 (“[T]he term ‘probable cause,’ according to its usual acceptance, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion. . . .” (quoting *Locke*, 11 U.S. at 348)); *see also id.* at 235 (“Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate’s decision. While an effort to fix some general, numerically precise degree of certainty

this may help explain in part why he appears so willing to accept police and prosecutor judgments of guilt as approximations of ground truth.

Moreover, while the law ostensibly creates a presumption of innocence, it is widely recognized, both as a matter of theory and empirics, that prosecutors are actually aided by a presumption of guilt, at least once the first bits of evidence are introduced,⁸⁰ which makes proof beyond a reasonable doubt far less daunting.⁸¹ Nearly fifty years ago, in his classic work modeling the criminal justice system, Herbert Packer observed, “[t]he presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands.”⁸² Surveys of prosecutors confirm that more than half do not presume that a person is innocent until proven guilty, and that “[m]any believe that once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor.”⁸³ Michael Saks and Michael Risinger note that “[s]ome evidence exists to suggest that jurors set their probabilities lower than they think they do,” and that jurors might actually start with “assumptions close to zero (innocence), but to which they attach[] very little weight, so that the presumption of innocence [is] abandoned as soon as the first piece of inculpatory evidence [is] presented.”⁸⁴ Daniel Givelber explains: “Jurors apparently do not listen, evaluate and deliberate on the assumption that the defendant is innocent unless the government proves otherwise. Rather, jurors take the logical position that they are in equipoise concerning the defendant’s guilt and will await the presentation of evidence before reaching a verdict.”⁸⁵ Still others have argued that the reasonable doubt instruction, as currently formulated in most jurisdictions, is significantly weaker than as first developed at common law⁸⁶ and is

corresponding to ‘probable cause’ may not be helpful, it is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.’” (quoting *Spinelli*, 393 U.S. at 419)).

⁸⁰ Michael J. Saks & D. Michael Risinger, *Baserates, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1062 (2003) (citing Thomas M. Ostrom, Carol Werner & Michael J. Saks, *An Integration Theory Analysis of Jurors’ Presumptions of Guilt or Innocence*, 36 J. PERSONALITY & SOC. PSYCHOL. 436 (1978)).

⁸¹ See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997); BOAZ SANGERO, SAFETY FROM FALSE CONVICTIONS 68, 72–73 (2016); John Baldwin, *Police Interrogation: What Are the Rules of the Game?*, in SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 67 (David Morgan & Geoffrey M. Stephenson eds., 1994).

⁸² HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160 (1968).

⁸³ George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975).

⁸⁴ Saks & Risinger, *supra* note 80, at 1056.

⁸⁵ Givelber, *supra* note 81, at 1372.

⁸⁶ See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the*

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sometimes misunderstood by juries as weaker than the law requires.⁸⁷ The “beyond a reasonable doubt” standard is not likely to have the overwhelming effects Professor Laudan attributes to it.

Other reasons exist as well for doubting that the reasonable doubt standard is forcing prosecutors to dismiss charges against actually guilty people on a massive scale. Law and economics scholars contend that, when a prosecutor believes in an individual’s guilt but has proof problems, her response is likely not to dismiss the case outright, but rather to engage in bargaining by reducing the charges or the sentence, discounting either or both by the perceived likelihood of an acquittal.⁸⁸ Or worse, the prosecutor with a weak hand but a firm belief in guilt might be inclined to bend the rules, deliberately or unwittingly, in ways designed to ensure a conviction, such as by failing to recognize *Brady* material, permitting use of a suggestive eyewitness identification procedure, or overzealously coaching witnesses.⁸⁹ To a prosecutor who believes in the accused’s guilt, the only outcome that will be seen as serving justice is a conviction, and so she will be highly motivated to find some way to achieve that outcome, despite proof problems.⁹⁰

Evidence for this hypothesis can be found in Gould et al.’s empirical study of the causes of wrongful convictions. Professor Gould and his colleagues found that, among the factors that are significantly correlated with false convictions is a prosecutor’s *weak* case.⁹¹ In at least some cases where prosecutors might have doubts about their ability to meet the “beyond a reasonable doubt” standard, therefore, the weak evidence and high standard did not combine to produce dismissals, but wrongful convictions. Gould et al. hypothesized that this could be because:

Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1170 (2003) (arguing that the proof required to convict has shifted from a “certainty” standard to a much weaker one, in which juries are instructed to acquit only if they can identify reasonable doubts, defined as specific and articulable doubts).

⁸⁷ Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999) (finding inconsistency and confusion among jurors, including that some jurors understand the reasonable doubt standard to be less rigorous than civil standards, depending on the wording of the instruction); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 PSYCHOL. PUB. POL’Y & L. 769, 774–78 (2000) (discussing empirical studies on the effect of the “beyond a reasonable doubt” standard).

⁸⁸ See *infra* notes 98–100 and accompanying text.

⁸⁹ See Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 559–62 (1987).

⁹⁰ *Id.* at 554.

⁹¹ Jon B. Gould, Julia Carrano, Richard Leo & Joseph Young, *Predicting Erroneous Convictions: A Social Science Approach to Miscarriage of Justice*, 99 IOWA L. REV. 471, 491, 494, 501–02.

Weak facts may also encourage prosecutors to engage in certain behaviors designed to bolster the case, which our statistics show help predict an erroneous conviction. In several of our erroneous convictions, a prosecutor, convinced of the defendant's guilt despite a lack of conclusive proof, failed to recognize and turn over exculpatory evidence or enlisted a snitch or other non-eyewitness to provide dubious corroborating testimony. These types of actions compound, rather than rectify, previous errors or misconduct in the case.⁹²

The high rate of plea bargaining in this country (more than 95% of all convictions are obtained by pleas⁹³), along with considerable empirical and anecdotal evidence, further suggests that prosecutors confronted with the "beyond a reasonable doubt" standard and weak evidence are making hard-to-refuse plea offers rather than just dismissing cases.⁹⁴ Albert Alschuler describes it this way:

Convicting defendants who would be acquitted at trial is one of the principal goals of plea bargaining. "Half a loaf is better than none," prosecutors say. "When we have a weak case for any reason, we'll reduce to almost anything rather than lose." If the correlation between "weak cases" and actual innocence is better than random, plea bargaining surely "convict[s] defendants who are in fact innocent (*and* would be acquitted [at trial])."⁹⁵

This is what Professor Alschuler calls "odds bargaining": bargaining "to ensure conviction in doubtful cases."⁹⁶ And if it occurs with any frequency—which it surely does—it undermines Professor Laudan's thesis that the reasonable doubt standard is forcing prosecutors to dismiss cases against factually guilty defendants in alarming numbers.

⁹² *Id.* at 501.

⁹³ In 2012, out of 87,908 cases in federal district court that resulted in a conviction, 85,774 (97.757%) were the result of a plea (85,640 guilty pleas and 134 nolo contendere pleas). MARK MOTIVANS, U.S. DEPT. OF JUST. BUREAU OF JUST. STATISTICS, FEDERAL JUSTICE STATISTICS, 2012-STATISTICAL TABLES 17 tbl. 4.2 (2015), <https://www.bjs.gov/content/pub/pdf/fjs12st.pdf>.

⁹⁴ New empirical research, involving analysis of actual case files from two New York prosecutors' offices, reveals, among other things, that among all defendants, those who denied guilt but ultimately took a plea deal received "the largest-sized plea discounts when they did plea." Allison D. Redlich, Shi Yan, Robert J. Norris & Shawn D. Bushway, *The Influence of Confessions on Guilty Pleas and Plea Discounts*, PSYCHOL., PUB. POL'Y & LAW 10 (2017), available online first, <http://dx.doi.org/10.1037/law0000144>.

⁹⁵ Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 940, 940 (2015) (emphasis in original).

⁹⁶ *Id.*

As a stark illustration of this, consider cases in which innocence advocacy organizations have marshaled strong new evidence of innocence (strong enough, at least, to meet the very high hurdles for overturning a conviction⁹⁷). Prosecutors often respond not by dismissing the cases, but by offering plea bargains too good to turn down—often, remarkably, “time served” even on serious homicide charges.⁹⁸ Viewing this through an “odds bargaining” or law-and-economics lens suggests that prosecutors in these cases must recognize that the evidence is extraordinarily weak—and that indeed the accused might be (or even likely is) innocent. Law and economics theory contends that rational prosecutors and defendants engaged in plea-bargaining will start with an expected sentencing outcome in a case and discount it by the likelihood of acquittal.⁹⁹ That is to say, the literature predicts that parties strike plea bargains in the shadow of expected trial outcomes. The parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount. Hence, a prosecutor will offer a deal that is greater than or equal to his or her expected value of the trial, and the defendant will accept it if it is less than or equal to his or her expected value of the trial. So, for example, in simple terms, if the expected sentence after trial is 20 years, and the probability of conviction at trial is .8, both parties will see a plea bargain of 16 years as a

⁹⁷ See Garrett, *supra* note 55, at 128-30 (describing the obstacles to overturning convictions, even in cases where the defendant was actually innocent); Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005).

⁹⁸ See, e.g., Megan Rose, *The Deal Prosecutors Offer When They Have No Cards Left to Play*, ATLANTIC (Sept. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/> (noting that “in Baltimore City and County alone—two separate jurisdictions with their own state’s attorneys—*ProPublica* identified at least 10 cases in the last 19 years in which defendants with viable innocence claims ended up signing *Alford* pleas or time-served deals. In each case, exculpatory evidence was uncovered, persuasive enough to garner new trials, evidentiary hearings, or writs of actual innocence”); *Facing Life: The Retrial of Evan Zimmerman*, (A&E Television Networks 2006) (chronicling how, after Evan Zimmerman, a Wisconsin man who had served just three years of a life sentence for murder, was offered a plea bargain to time served after his conviction was vacated based on new evidence of innocence—evidence that ultimately forced the prosecutor to dismiss all charges with prejudice when Zimmerman refused to take the plea deal).

⁹⁹ See, e.g., Russell D. Covey, *Plea Bargaining and Price*, 84 GEO. WASH. L. REV. 920 (2016); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 295–96 (1983); Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 753–55 (1983); Williams M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Louis M. Natali, Jr., *Plea Bargaining in the Free Enterprise System*, 14 J. L. & ECON. 61, 61 (1971); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713–14 (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 775–79 (8th ed. 2011).

rational choice. While this is obviously a grossly simplified and incomplete description of what happens in plea bargaining,¹⁰⁰ there is at least enough truth to it¹⁰¹ to suggest that in many of these “innocence” cases, prosecutors recognize that the chances of conviction are virtually zero. Yet they are not dismissing these cases. Instead, they offer deals that are as close to no-cost to the defendants as possible (time served), thereby making it difficult for even the most risk-tolerant defendant to turn it down. Professor Laudan’s assumption that prosecutors handling cases in which they believe in guilt to some degree, but cannot meet the “beyond a reasonable doubt” standard, will uniformly dismiss those cases cannot be reconciled with this reality.

Given these possibilities—indeed realities—it is odd that Professor Laudan would hang his argument on assumptions that, of all the features in the criminal justice system, it is the “beyond a reasonable doubt” standard that is most responsible for creating error and victimization. Not only is there no reason to believe that the reasonable doubt standard is working considerable mischief, one cannot conclude, as does Professor Laudan, that prosecutorial dismissals must reflect some significant rate of false negatives, especially anything as large and specific as the 40% rate Professor Laudan derives from it.

In the end, while it would be useful to know rates of error, we simply cannot know those rates across crime categories and jurisdictions in any meaningful way, because we do not have anything close to perfect access to information; all we have is human judgment. Hence, to focus on error *rates* is to ask the wrong question, and indeed begs error in the analysis by reliance on what can be little more than guesswork. The focus instead must be on how to improve the efficacy of investigations and the diagnosticity of trials, regardless of what the error rate might be. This is a point to which I will return later in this piece.

IV. ERRORS IN WEIGHING HARMS

Note that the Laudan Algorithm, entirely apart from any questions about methodology for estimating victimization rates, counts all victimizations as of equal value. To Professor Laudan, the harm victimization by a wrongful conviction is exactly the same as the harm caused by every recidivist’s violent crime. That is how he comes up with his

¹⁰⁰ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

¹⁰¹ Indeed, there is empirical evidence to support the theory. See Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the “Shadow of the Trial” a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437 (2012); Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* 52 CRIMINOLOGY 723 (2014).

ratio of 2.2 to 1.2—he says every false conviction creates 2.2 victimizations, and every false acquittal creates 1.2, with each type of victimization worth exactly the same. But is that really true? Simply counting repeat offenses, even repeat violent offenses, masks wide variations in conduct and harm. A violent crime might be anything from premeditated murder to a barroom tussle, or an unwanted shove or slap. Indeed, there is good reason to believe that the vast majority of violent offenses that Professor Laudan counts as of full value—a “1” in his formula—are of the lesser types—often more annoyances and insults than real threats to community well-being. That is likely a fairer assessment of what the large number of probation dispositions or comparatively short sentences that Professor Laudan references mean, rather than Professor Laudan’s assessment that, even in our uniquely punitive society with unparalleled levels of incarceration, the sentences that judges impose are soft.

A. *The Harms from False Negatives*

Professor Laudan’s equation also falters because he assumes that every conviction of a guilty person is an unqualified good, because it reduces the risk other victimization. For some offenses—murder and violent sexual offenses, for example—few would disagree that every conviction is desirable. But there is a wide array of crimes, even violent crimes, for which conviction and imprisonment might sometimes cause more victimization than they would prevent. Murder and rape convictions make up only a very small proportion of all criminal convictions—even of all convictions for violent crimes—together only about 2% of all felony convictions, and a much smaller percentage of all crimes.¹⁰² For many crimes, imprisonment in some circumstances likely *increases* the risk of recidivating, which may in turn generate other crimes. As Cecelia Klingele notes, “[g]iven the social disruption, isolation, and substandard conditions that define the experience of imprisonment in America today, it is no surprise that people who are incarcerated are at a higher risk of being re-incarcerated in the future.”¹⁰³ Marvin Zalman puts it this way: “All the anti-Blackstonians, especially Allen/Laudan and Cassell, emphasize the costs of crime. But any analysis of system effectiveness and system errors needs to consider . . . the effects or costs of crime control as well.”¹⁰⁴

¹⁰² Gross & O’Brien, *supra* note 45, at 938 (citing Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2000*, U.S. DEPT. OF JUST. BUREAU OF JUST. STATISTICS 2 tbl. 1 (2003)).

¹⁰³ Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 548 (2015).

¹⁰⁴ Marvin Zalman, *The Anti-Blackstonians: Thinking About Different Strokes*, 48 SETON HALL L. REV. 1319 (2017).

Indeed, while Professor Laudan and the other anti-Blackstonians employ simple calculations of the crime-suppressing effects of imprisonment (and conversely, the crime-inducing effects of every failure to convict the guilty), their analysis is remarkably one-dimensional and blind to the myriad factors that contribute to crime. More nuanced, deeper analyses, such as the comprehensive review recently completed by the National Research Council of the National Academy of Sciences, make clear that the numbers are neither as clear nor as dramatic as Professor Laudan would have it. Indeed, the NRC report concludes, contrary to the grand claims made by Professor Laudan, that “[m]ost studies estimate the crime-reducing effect of incarceration to be small.”¹⁰⁵

Additionally, Professor Laudan’s calculation depends on offender uniformity—the notion that every guilty individual accused of a crime is just as likely as the next to commit future crimes. But that assumption too is unwarranted, and skews the crime-prevention value of each additional conviction in ways designed to support Professor Laudan’s thesis. As the NRC observed, recidivism rates for accused individuals are not uniform, but subject to “stochastic selectivity:” High-rate offenders are more likely to be apprehended and convicted than less frequent offenders, simply because their behavior exposes them to jeopardy more frequently. Accordingly, “they will be represented in prison disproportionately relative to their representation in the population of nonincarcerated offenders.”¹⁰⁶ As Professor Zalman observes, therefore, “beyond a certain point, incarcerating more offenders is likely to capture low-rate offenders resulting in diminishing crime-reduction returns for every person incarcerated and for every year of incarceration.”¹⁰⁷ Professor Laudan’s simple equation ignores this reality, and thereby overstates the value of incrementally convicting and imprisoning more people.

Moreover, the social dislocation and disruption occasioned by high levels of incarceration represents another cost of conviction of the guilty that Professor Laudan’s equation entirely overlooks. Imprisonment deprives children and spouses of their parents and partners,¹⁰⁸ and at high-enough

¹⁰⁵ NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 155 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

¹⁰⁶ *Id.* at 142–43.

¹⁰⁷ Zalman, *supra* note 104, at 1340.

¹⁰⁸ A robust body of literature in sociology and criminology empirically shows a large negative effect of parental incarceration on life course outcomes for children. See Holly Foster & John Hagan, *Maternal and Paternal Imprisonment and Children’s Social Exclusion in Young Adulthood*, 105 J. CRIM. L. & CRIMINOLOGY 387 (2016); Christopher Wildeman, Signe Hald Andersen, Hedwig Lee, & Kristian Bernt Karlson, *Parental Incarceration and Child Mortality in Denmark*, 104 AM. J. PUB. HEALTH 428 (2014); Holly Foster & John Hagan, *Incarceration and Intergenerational Social Exclusion*, 54 SOC. PROBLEMS 399 (2007);

levels (as it is in many, especially urban, neighborhoods), imperils entire communities. Professor Klingele explains:

Communities are also negatively affected by mass imprisonment. A host of formal and informal collateral consequences—including disenfranchisement, deportation, exclusion from public housing, and limitations on employment licensing—await those who have been incarcerated, making them less productive parents and citizens when they return home. In places with disproportionately high rates of incarceration, traditional family structures are weakened, democratic power is diluted, and neighborhoods are destabilized.¹⁰⁹

For many crimes, some such disruption is unavoidable and most would agree it is worth the cost, but that simply is not so for all offenders and all crimes, even all violent crimes. To treat all offending, even all violent offending, as equally well-served by conviction and imprisonment—as a “1” in Professor Laudan’s calculus—therefore also defies reason and undermines the utility of Professor Laudan’s project.

Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 *FUTURE OF CHILDREN* 157 (2010), https://www.princeton.edu/futureofchildren/publications/docs/20_02_08.pdf; Sytske Besemer et al., *The Relationship Between Parental Imprisonment and Offspring Offending in England and the Netherlands*, 51 *BRITISH J. CRIMINOLOGY* 413 (2011). This includes negative academic outcomes. See Rosa Minhyo Cho, *Impact of Maternal Imprisonment on Children’s Probability of Grade Retention*, 20 *J. URBAN ECON.* 11 (2009); Rosa Minhyo Cho, *Maternal Incarceration and Children’s Adolescent Outcomes: Timing and Dosage*, 84 *SOC. SERV. REV.* 257 (2010); Foster & Hagan, *supra*; Wildeman et al., *supra*; Joseph Murray & David P. Farrington, *Parental Imprisonment: Effects on Boys’ Antisocial Behaviour and Delinquency Through the Life-Course*, 46 *J. CHILD PSYCHOL. & PSYCHIATRY* 1269 (2005); Joseph Murray, David P. Farrington & Ivana Sekol, *Children’s Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 *PSYCHOL. BULL.* 175 (2012); Christopher Wildeman, *Parental Incarceration and Children’s Physically Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study*, 889 *SOC. FORCES* 285 (2010). *But see* Stephen B. Billings, *Parental Arrest, Incarceration and the Outcomes of Their Children* (Mar. 14, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3034539> (finding that parental arrest coincides with negative outcomes for children, but that incarceration of a parent may have short-term benefits for children as a result of removing negative role models from the child’s home environment).

¹⁰⁹ Klingele, *supra* note 103, at 549 (citing TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007)); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 157–63 (2006); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 *STAN. L. REV.* 1147, 1148–49 (2004); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 58 (Marc Mauer & Meda Chesney-Lind eds., 2002)).

Finally, this discussion would be incomplete without at least noting the financial cost of mass incarceration. Professor Laudan's proposal—to lock up more people, and for longer—is oblivious to the fiscal crises facing most jurisdictions today caused in part by our very high rates of incarceration. Across this country, in the last decade or so, state after state has begun to search for ways to reduce incarceration rates because they simply cannot afford to continue to fund mass incarceration at current levels, let alone the enormously increased levels Professor Laudan proposes.¹¹⁰ The reality is, we cannot imprison our way out of crime. What we need are other solutions. For reasons that are not clear, Professor Laudan focuses single-mindedly on imprisonment as the only solution to crime, without any consideration of alternative approaches that might be more effective and less costly in both human and financial terms.

B. *The Harms from False Convictions*

On the other side of the equation, false convictions also come in all degrees, from convictions for petty misdemeanors to capital murder. The vast majority of the exonerations we know about are of the more serious type—indeed, 99% of the DNA exonerations involve murder, rape, or rape-murder.¹¹¹ There is good reason to believe, however, that even far more false convictions arise in petty crimes and various misdemeanor cases¹¹² and lower-level felonies or offenses that result in short or no prison sentences. But the reality is that such injustices are rarely discovered, because no resources are spent on trying to find and correct them. As Professors Gross and O'Brien have observed, these small-case wrongful convictions are almost surely far more numerous than the serious-crime wrongful convictions that we know about, yet we know almost nothing about them.¹¹³

¹¹⁰ See, e.g., Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 TOLEDO L. REV. 859, 859 (2011) ("After two decades of escalating prison populations, jurisdictions throughout the country are beginning to experience the significant ramifications of globally-unparalleled rates of confinement. The high cost of incarceration, coupled with the disproportionate burden on minority communities, has led many jurisdictions to question whether prison terms should be so frequently and indiscriminately imposed, and whether they should be so long."); Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415 (2012).

¹¹¹ Garrett, *Judging Innocence*, *supra* note 55, at 73.

¹¹² See, e.g., ALEXANDRA NATAPOFF, *Misdemeanors*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 1 (Erik Luna ed., 2018) ("Enormous, fast, and highly informal, the [misdemeanor] system sweeps up and processes millions of people in ways that diverge wildly from traditional criminal justice ideals. People often do not get a lawyer; evidence is rarely scrutinized; proceedings can take mere minutes. Most people plead guilty, typically very quickly. Many convictions are inaccurate; many violate the Constitution.")

¹¹³ Gross & O'Brien, *supra* note 45, at 938.

Nonetheless, it is almost certainly true that most, if not all, false convictions—even in the misdemeanor cases—are costly and profoundly damaging, to a degree that cannot be said of all victimization of crimes, even violent crimes. Professor Laudan’s 1-1 ratio of the cost of a false conviction to the wrongly convicted individual and the cost of every crime victimization ignores that, regardless of the sentence imposed, *every* prosecution and every conviction is a devastating experience. The stress of accusation alone is overwhelming. The expense of defense can be enormous. The loss of one’s good name, of friendships and family relationships, of employment, of savings, of the ability to find future employment and housing, and the corrosive effects of being marginalized and disbelieved by one’s own government—all are regular features of false convictions, regardless of the sentence imposed.¹¹⁴ And then consider the enormous losses occasioned by imprisonment. Beyond those direct punishments, the collateral consequences of convictions tally literally in the thousands.¹¹⁵ For those wrongly convicted who have prior (or subsequent) valid convictions, those consequences might be marginally less significant, but the sense of injustice attendant to being falsely accused and convicted still works unmeasurable harm. A criminal conviction, especially a felony conviction, marks a person for life, making it enormously difficult to obtain employment, housing, and education.

One way to assess this is to note that, given all these harms, most of us, no doubt, if given the choice between being victimized by all but the most serious crimes, or being wrongfully convicted and imprisoned for any length of time, would elect the former rather than the latter.¹¹⁶ Either possibility is of course horrible, but for many if not most crime victims, recovery in a supportive community is largely possible, even likely. The same simply

¹¹⁴ For some of the literature on the crushing emotional harms caused by wrongful convictions of the innocent, see Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 139 (2004); Rashaan A. DeShay, “A Lot of People Go Insane Behind That”: *Coping with the Trauma of Being Wrongfully Convicted*, 29 CRIM. JUST. STUD.: A CRITICAL J. OF CRIME, L. & SOC’Y 189 (2004); Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165 (2004).

¹¹⁵ See generally MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY & PRACTICE* (2016).

¹¹⁶ On this point, it is worth noting that Professor Laudan builds his argument, equating every wrongful conviction with every violent crime victimization, on data suggesting that in 2008 1.7 million violent crimes were committed in the United States. But his own data shows that, of those 1.7 million violent crimes, just over 105,000—or just 6% of the total—involved murder or rape. The remaining 94% (1.6 million of the 1.7 million) of the violent crimes comprised armed robbery, aggravated assault, and “other” crimes (this latter category alone accounting for 330,000 crimes, more than 3 times as many as the rapes and murders)—the types that might be serious, but also can be and often are much less threatening. LAUDAN, *supra* note 1, at 48 tbl. 4.

cannot be said of wrongful convictions.

Professor Laudan predicts a different preference for most people, asking rhetorically, “After all, how many of us would say that they would prefer to have been murdered rather than having been sentenced to 12 years in prison for a murder we didn’t commit? Who would rather have been raped with violence than have been falsely convicted of rape and receiving the average 6-year sentence for that crime?”¹¹⁷ But Professor Laudan can only make that argument by focusing on the most violent types of crimes—particularly murders and “violent rapes.” For many of those crimes, Professor Laudan is likely correct. For less serious violent crimes, including armed robbery and aggravated assault, Professor Laudan then suggests the picture is not much different because he says that 38% of armed robberies and 30% of aggravated assaults resulted in serious injuries.¹¹⁸ Yet, as noted, murders compose only a miniscule proportion of all crime in America, and rapes not much more¹¹⁹—even less if limited to the more physically injurious types of assaults that Professor Laudan apparently means by “violent rapes.” And even the “serious injuries” he references among the armed robbery and aggravated assault cases will often, if not usually, be the type of injury from which one can recover. Indeed, Professor Laudan’s data show that, by far, the most significant reason that most violent crimes do not produce convictions is because the victims don’t even bother to report them. Of the 1.7 million violent crimes he counts in 2008, about half of the crimes were never reported to police.¹²⁰ Apparently, for a huge proportion of violent crime victims, the experience, for whatever reason, didn’t warrant a call to the police. The costs between all of these crimes and wrongful convictions cannot be simplistically counted as equal.

Professor Laudan suggests that the costs of false convictions are further diminished because “a non-trivial number of those false positives will be exonerated by the activities of Innocence Projects and by exoneration hearings.”¹²¹ Because he estimates a false conviction rate of about 3%, he contends that “approximately 2-3% of convictions for violent crimes lead to exonerations for false positives, meaning release from prison”¹²² But even if Professor Laudan’s false conviction rate is correct, that is a *theoretical* or *estimated* rate, not a rate at which innocent people are actually exonerated.

¹¹⁷ LAUDAN, *supra* note 1, at 74.

¹¹⁸ LAUDAN, *supra* note 1, at 75.

¹¹⁹ According to the FBI, in 2013, of more than 9 million total arrests in the United States, 8,383, or 0.0009%, were for murder, and 13,515, or 0.001%, were for sexual assaults of all types. FBI Crim. Just. Info. Servs. Div., *Crime in the United States 2013*, FBI (2013), <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43>.

¹²⁰ LAUDAN, *supra* note 1, at 49, 67.

¹²¹ LAUDAN, *supra* note 1, at 75.

¹²² LAUDAN, *supra* note 1, at 75.

Only a small fraction of the pool of individuals hypothesized to be innocent are actually exonerated each year; most of the innocents continue to languish in prison, unable to muster the combination of new evidence, legal assistance, access to a court, and simple good luck required for vindication. Professor Laudan's argument, equating the theoretical false conviction rate with the exoneration rate, reinforces both the weakness of his claims and Professor Risinger's observation that Professors Laudan's (and Allen's) data "seem to have been selected to make their readership . . . feel more threatened, so those readers will be more open to their message."¹²³

It seems quite likely, therefore, that the *harm* caused by the average false conviction is much more significant than the harm caused by the average false acquittal. Of course, the opposite could also be true, at least for some offenses, although I doubt for most. But even if one is unconvinced about the greater harms from wrongful conviction, the point remains, at bottom we just don't know with any certainty—and how could we, since the harms involved defy quantification? Hence, it is overly simplistic, and indeed futile, to try to create a mathematical formula for quantifying harms that are as widespread, divergent, individualized, and unknowable as the harms from false convictions and false acquittals. But what we can be pretty sure of is that there is no reason to assume the harms fit a neat ratio of 1 to 1.¹²⁴ That alone dooms Professor Laudan's enterprise.

C. *Balancing Harms Against Individual Justice*

Professor Laudan's approach flounders for another, related reason as well. He attempts a mathematical balancing of harms *in the aggregate*, and then from there hopes to settle on a burden of proof that will apply in *individual* cases. But justice as dispensed in the courts, especially in criminal courts, is about fairness to the individual litigants. In this sense, Professor Laudan's mathematical approach proves far too much, for, if pushed to its logical extreme, it would generate scenarios in which aggregate risks for certain categories of individuals might be deemed so serious (in terms of risks of false acquittals) as to warrant putting the burden of proof on the accused, and even making it a high burden.¹²⁵ But, despite the risk that the

¹²³ Risinger, *Tragic Consequences*, *supra* note 32, at 1016.

¹²⁴ Professor Cassell, in his contribution to this Symposium, suggests that, because of these uncertainties, I just "throw up" my hands. Cassell, *infra* note 207, at 1478. But my response is not to despair in the way Professor Cassell suggests. Instead, as discussed *infra* Part VI, my response is to focus on what we *can* know, and how that can lead us to improve the overall functioning of the system, to simultaneously reduce failures to convict the guilty and false conviction of the innocent. My response, I believe, is one that is simultaneously reality-based and more attentive to reform possibilities that can actually make the system better.

¹²⁵ Professor Risinger has also previously recognized this problem: "[B]y the[] logic [of

community may perceive from some unpopular individuals, justice requires considering individual guilt, not some form of group liability (even if based on individual characteristics, like prior offenses). Professor Corrado makes this point this way:

[Settling on a burden of proof] is a matter of costs, but the standard (at least in the courtroom) does not involve comparing costs. It does not involve comparing the cost of a guilty verdict with the cost of a not guilty verdict, for example. In the case of punishment, there is a prior determination, namely that the individual is not to be sacrificed merely for the good of the community, and that something more is required. That is, the state is not being asked to show that in general the costs of a mistaken verdict of not guilty vastly outweigh the costs of a mistaken guilty verdict. Instead, given the immense cost for the defendant of a guilty verdict, mistaken or not, and the moral presumption that human beings are not to be used by the state without justification, the only comparison is between the evidence for guilt and the evidence against guilt. Were it otherwise, we would run into the most extreme form of the problem that punishing the innocent raises for the justification of punishment: if the costs of a verdict of not guilty were in general too high, the burden would be on the—possibly innocent—defendant to prove his innocence, and the burden might be set quite high, ensuring that innocent defendants could be sacrificed to the good of the community.¹²⁶

In a related way, when comparing harms at the individual case level—the level at which justice is dispensed—there is still another reason why false convictions are far worse than false acquittals. Every false conviction is guaranteed to inflict substantial harm on an individual; the harm to the innocent individual is by its very nature a certainty, a given. But the harms—as measured by Professor Laudan (by which he means future victimization of innocent people) from false acquittals in individual cases are speculative at best. While Professor Laudan claims that on average a factually guilty person who is acquitted will commit 1.2 additional crimes, even if accurate and meaningful, that is an *average*. It is far from certain that any given factually-guilty-but-acquitted individual will commit any additional crimes at all (while, of course, he or she *might* commit many). To reiterate, then, when dispensing justice to individuals, the harm from wrongly convicting an

Allen and Laudan's] position, there would seem to be no limit to the drop in the standard of proof that could be justified, all the way to the preponderance, and even beyond" Risinger, *Tragic Consequences*, *supra* note 32, at 1018.

¹²⁶ Corrado, *supra* note 34, at 4.

innocent person is certain, but the harm to other potential crime victims from acquitting a factually guilty person is speculative and contingent.¹²⁷ From a justice perspective, the two harms simply cannot be equated.

V. TILTING AN ALREADY TILTED PLAYING FIELD

A. Targeting Recidivists, Exacerbating Mass Incarceration

As noted, ultimately Professor Laudan's argument boils down to this: We don't incarcerate enough people, or for long enough, at least when it comes to violent crimes. At numerous points he makes this claim directly.¹²⁸ It is difficult, however, to reconcile that diagnosis and its ensuing prescription for more and longer imprisonment with the well-known facts. To begin, the United States already has the highest incarceration rate in the world—and it's not even close. The incarceration rate in the United States is *seven times* the rate of its Western European counterparts.¹²⁹ And incarceration in the United States over the past few decades has exploded, leading to what is widely now recognized as a crisis of mass incarceration¹³⁰ in a system already "internationally infamous for its size and harshness."¹³¹ From 1977 to 2010, the number of individuals in state and federal prisons mushroomed from approximately 300,000 to more than 1.5 million.¹³² Yet we are not appreciably safer for it, especially in an international comparative sense.

¹²⁷ I recognize that there are other harms one might attribute to a false acquittal, such as the failure to deliver a sense of justice to the victim of the given crime. I do not mean to diminish those concerns, but do not count them in my analysis simply because Professor Laudan does not attempt to quantify such harms in his equation (how could he?), and it is his equation to which I am responding.

¹²⁸ LAUDAN, *supra* note 1, at ix (arguing that it is wrong to believe "[t]he near-universal belief that we are incarcerating far too many criminals—a familiar cliché of modern American life" or "[t]he widely-held convention that we are locking serious criminals away in prison for unreasonably long stays"); LAUDAN, *supra* note 1, at 25 (arguing that "there are effective methods for lowering the rate of serious crimes. Basically, these hinge on *convicting and incarcerating a higher proportion of the guilty than we now convict.*") (emphasis in original); LAUDAN, *supra* note 1, at 31 ("Where violent crimes are concerned, we should be incarcerating more of the guilty and locking them away in prison for longer venues.").

¹²⁹ Bruce Western & Christopher Wildeman, *Punishment, Inequality and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 857 (2009); Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 348–50 (2005).

¹³⁰ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* (2005).

¹³¹ NATAPOFF, *supra* note 112, at 1.

¹³² Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1016–17 (2013) (first citing LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES 2010* 3 tbl. 1 (2011); then citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *STATE AND FEDERAL PRISONERS, 1925–85* 3 tbl. 2 (1986)).

While it can be hazardous to draw causal conclusions from comparative data, especially given the vast array of cultural, economic, political, and other differences that can contribute to crime rates, comparisons between demographically, culturally, and politically very similar states within the United States can be somewhat illuminating. Wisconsin and Minnesota, for example, are often compared because of their many similarities. That comparison suggests, at least to some extent, that more and longer imprisonment does not produce greater public safety, as promised by Professor Laudan. Although the two states have nearly identical populations (approximately 5 million), and very similar demographics, geography, and cultures, Wisconsin imprisons two to 2.5 times as many people as does Minnesota: in 2008, Wisconsin had 23,000 people in its prisons, while Minnesota imprisoned only 9,000.¹³³ Yet crime rates in the two states are nearly identical.¹³⁴ Somehow, the reduction in crime that Professor Laudan promises from increased imprisonment has not materialized in Wisconsin¹³⁵—despite the considerable human and financial cost to the state from that increased imprisonment.

Lowering the burden of proof for repeat offenders is also not even necessary to achieve Professor Laudan's goal of making it easier to imprison recidivists. Common investigative heuristics, adjudicative practices, institutional imbalances, and the rules of evidence already take care of that. For the same reason that Professor Laudan wants to target repeat offenders, police and prosecutors are already predisposed to suspect the usual suspects—whether as a matter of convenience or motivation. Repeat offenders are the people on police radar screens. Police and prosecutors naturally target repeat players because they are the people whose fingerprints, DNA profiles, and mug photos are already available to link them—accurately or not—to crimes.¹³⁶ Indeed, Professor Laudan and his frequent co-author Ronald Allen have previously recognized that prior

¹³³ MICHAEL O'HEAR, WISCONSIN SENTENCING IN THE TOUGH-ON CRIME ERA: HOW JUDGES RETAINED POWER AND WHY MASS INCARCERATION HAPPENED ANYWAY 62, 89, 160–61 (2017); *Comparison of Wisconsin, Minnesota Prison Data Prompts Questions*, TWIN CITIES PIONEER PRESS (Apr. 28, 2010), <http://www.twincities.com/2010/04/28/comparison-of-wisconsin-minnesota-prison-data-prompts-questions/> (updated Nov. 12, 2015).

¹³⁴ *Id.*

¹³⁵ See O'HEAR, *supra* note 133, at 160 (concluding Wisconsin and Minnesota data “suggest[] that Wisconsin’s dramatic divergence from Minnesota on the imprisonment front after the 1970s may have yielded few public safety benefits”).

¹³⁶ For eyewitness identification procedures, for example, Gary Wells has explained how simply being included in a photo array or lineup puts innocent people at risk of misidentification. See Gary L. Wells, *Eyewitness Identification: Systemic Reform*, 2006 WIS. L. REV. 615, 635 (2006). Individuals with prior records are, of course, much more likely to have mug photos that are available for inclusion in photo arrays, or to be selected for inclusion in an identification procedure, simply because of the prior record.

record is already one of the strongest predictors of conviction that is available, regardless of whether the jury hears about the prior conviction or not; those without a prior conviction are about twice as likely to be acquitted as those with a prior record.¹³⁷

Beyond convenience, Professors Laudan and Allen have also previously hypothesized that one reason people with prior records are convicted at higher rates than those without “can be explained by the fact that police and prosecutors are keener on locking up serial felons”—and hence work harder to develop evidence against them.¹³⁸ Empirical data supports this intuition. The research on false confessions, for example, reveals that when police approach a suspect with a belief in guilt—a scenario that is more likely when the suspect has a prior record—they are more likely to engage in aggressive psychological interrogation tactics that make it much more likely that the suspect—whether guilty or innocent—will confess, will do so in convincing detail, and will appear guilty to observers.¹³⁹

Similar heuristics influence jury decision-making as well, predisposing juries to find guilt if the defendant has a prior record, even when they are ostensibly applying the “beyond a reasonable doubt” standard. Although the rules of evidence preclude the jury from hearing about prior records for some accused individuals—precisely because the rules recognize that the biasing heuristics can lead juries to convict not on the evidence but on assumptions that the accused is a bad person and hence for that reason is either likely guilty or is deserving of punishment whether he committed the particular crime at issue¹⁴⁰—the rules also permit evidence of prior records to be admitted at trial under many circumstances.¹⁴¹ Despite rules ostensibly barring evidence of prior conduct to prove character or propensity, the rules permit evidence of other acts if offered to prove virtually anything other than

¹³⁷ Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Mythos of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 498 (2011) (citing Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1190 (2005)).

¹³⁸ *Id.* at 517.

¹³⁹ See, e.g., Deborah Davis & Richard A. Leo, *The Problem of Interrogation-Induced False Confession: Sources of Failure in Prevention and Detection*, HANDBOOK OF FORENSIC SOCIOLOGY AND PSYCHOLOGY 47 (2013); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215 (2005), <https://www.iiirg.org/assets/Kassin-2005-Does-Innocence-Put-Innocents-at-Risk.pdf>.

¹⁴⁰ The Advisory Committee notes to FED. R. EVID. 404 explain the rationale for excluding character evidence: “Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.” FED. R. EVID. 404 advisory committee’s note to 2000 amendment (quoting Cal. Law Revision Comm’n, Rep., Rec. & Studies, 615 (1964)).

¹⁴¹ See, e.g., FED. R. EVID. 404(b); FED. R. EVID. 609.

character—such as “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident,” and the like.¹⁴² Courts have read those exceptions so expansively in criminal cases that they have nearly swallowed the rule.¹⁴³ If the defendant testifies, the rules then generally permit impeachment with prior convictions. The result is either the defendant suffers the prejudice attendant to spreading her bad character before the jury,¹⁴⁴ or she refrains from exercising her right to testify and explain her innocence in order to prevent such impeachment.¹⁴⁵ Either way, the defendant’s opportunities for vindication are diminished.¹⁴⁶

Other systemic factors also conspire against repeat players. Those with a prior record are less likely to be granted bail, for example, or if granted bail, are likely to have it set too high for them to be able to post it. Yet we know that inability to make bail impedes one’s ability to work with counsel to prepare a defense, make reparations to victims, or address treatment needs, thereby increasing the odds of conviction and/or the severity of

¹⁴² FED. R. EVID. 404(b).

¹⁴³ See, e.g., *State v. Sullivan*, 576 N.W.2d 30, 33–34 (Wis. 1998) (noting that the court of appeals in that case had “expressed concern that the supreme court and the court of appeals over the years have chipped away” at the rule against admitting other acts evidence); Ronald J. Allen, *The Nature of Juridical Proof: Probability as a Tool in Plausible Reasoning*, 21 INT’L J. EVID. & PROOF 133, 140 (2017) (noting that, despite rules that purport to exclude other acts evidence, most such character evidence is admitted at trial, as in practice “virtually all relevant evidence comes in”).

¹⁴⁴ Considerable empirical research confirms that use of prior record to impeach a testifying defendant imposes a penalty on criminal defendants, and has a tendency to lead jurors to convict for legally impermissible character reasons. For an excellent summary of this research, see Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395 (2018). Interestingly, in the literature on this point, the lone noteworthy article that makes the contrary claim—that the empirical evidence on this point is “all over the map,” and that the prior-record penalty is overstated—is authored by Professors Laudan and Allen. See Allen & Laudan, *supra* note 2. Professor Bellin, however, convincingly shows that the data Laudan and Allen rely upon to reach their startling conclusion is inapposite or distinguishable and that, accordingly, despite Laudan and Allen’s contrary claim, “[t]he empirical evidence from mock juror experiments is one-sided and clear. The studies suggest that the introduction of prior conviction evidence substantially damages defendants’ chances for acquittal, primarily through a legally prohibited ‘criminal propensity’ inference.” Bellin, *supra* note 144, at 406 (footnote omitted).

¹⁴⁵ See Bellin, *supra* note 144, at 146 (summarizing the social science literature showing that jurors punish defendants for declining to testify). Professors Laudan & Allen also hypothesize that jurors likely infer a prior record whenever the defendant fails to introduce evidence of no prior convictions, and that this helps explain why jurors convict repeat offenders at a higher rate than those with clean records. Allen & Laudan, *supra* note 2, at 511–15. If correct, this adds even more reason why a prior record *already* works as a handicap to the repeat players, without officially lowering the burden of proof.

¹⁴⁶ In an interesting simulation study, Professor Bellin found that, not only do jurors punish defendants for either having a prior record (the “prior offender penalty”) or for choosing not to testify (the “silence penalty”), but that the penalties are approximately equal. Bellin, *supra* note 144, at 415.

punishment.¹⁴⁷ (Inability to make bail also has other negative consequences, even for those who are ultimately acquitted, including loss of jobs, housing, benefits, and placement of children and even *increased recidivism*.)¹⁴⁸

A prior record, therefore, inherently serves as a handicap in our criminal justice system, without any help from Professor Laudan's proposal to tilt the scales even further. Professor Laudan's proposal—to deliberately stack the deck against those with prior convictions—thus promises to further imbalance the process and make it significantly more likely that innocent defendants with prior records are wrongly convicted.

Data from the exoneration cases seems to bear out this reasoning. Of the more-than 2,000 exonerees listed in the National Registry of exonerations, approximately 44% have some sort of prior record.¹⁴⁹ Yet among the general population, a smaller proportion, approximately one-third, have a prior record¹⁵⁰—itself a staggeringly high figure on an international scale, but significantly lower than the rate among those who are wrongly convicted in the United States. Thus, the data reveal that, while wrongful conviction can happen to anyone, those with a prior record are at a significantly higher risk of suffering such an injustice; the rate of exoneration is almost 50% higher for those with a criminal record than for those

¹⁴⁷ See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 517 (1986); Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK. L. REV. 881, 900 (2017) (“Being [denied bail] increases the likelihood that individuals will commit future crimes, substantially impacts defendants’ ability to assist attorneys in mounting competent defenses, and encourages plea bargains, all of which increase the likelihood that the accused will be convicted, imprisoned, and subjected to an extended deprivation of liberty and justice as a sentenced inmate.”) (citing MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* 115 (2012) (“[A] decade of criminal cases were analyzed, revealing that in New York City, 50% of bailed nonfelony defendants were convicted, compared with 92% of those jailed pending trial. Among those convicted, only 10% of the bailed defendants received prison sentences, compared with 84% of defendants who spent the entire pretrial period behind bars.”)); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005) (citing 3 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 12.2(c) (2d ed. 1999) (“There is little reason to doubt the proposition that pretrial detention has a significant adverse impact upon the ability of a defendant to vindicate himself at trial.”)); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 527–28 (4th ed. 2000) (stating that bail “facilitates preparation of a defense and prevents incarceration of a possibly innocent person”).

¹⁴⁸ Jeffrey A. Kremers, *Milwaukee Moves Away From Money Bail System*, WIS. LAWYER, (June 2017), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=6&ArticleID=25667>.

¹⁴⁹ Email from Maurice Possley to author (on file with author).

¹⁵⁰ Half in Ten & The Sentencing Project, *Americans with Criminal Records* (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>.

without.¹⁵¹

And, of course, all of this is especially true with regard to the poor, the mentally ill, and racial minorities. It is well-known that “[c]ommunities of color; lesbian, gay, bisexual, and transgender individuals; and people with histories of abuse or mental illness are disproportionately affected” by the criminal justice system.¹⁵² Because these groups—already ensnared in the criminal justice system at disproportionate rates—will therefore also be even more over-represented among those who are wrongly convicted,¹⁵³ Professor Laudan’s proposal has the additional consequence of exacerbating these very problematic disparities in the criminal justice system.¹⁵⁴ I need not recount the myriad ways that those disparities undermine respect for the law, create tensions between the system (including most visibly the police) and communities of color, and destabilize whole communities. This adds yet another reason why Professor Laudan’s simple equation overlooks many of the intangible and uncountable harms attributable to wrongful convictions. It also underscores Professor Zalman’s observation that “[a] startling omission in the anti-Blackstonians’ analyses is race. In their highly abstract world not only are human actors like unchanging monads but they are colorless.”¹⁵⁵

B. *Tilting the Procedural Rules at Trial*

When cases go to trial, the rules of the game can further make exoneration of the innocent difficult. In this regard, Professor Laudan has it exactly backwards when he contends that “[l]egislators and appellate courts over the years have made it increasingly difficult to identify guilty defendants” by essentially stacking the deck at trial in the defendant’s favor.¹⁵⁶ Among the rules that Professor Laudan argues give the defendant an advantage (and obscure the truth) are rules that exclude: the fruits of Fourth Amendment violations;¹⁵⁷ the defendant’s prior record;¹⁵⁸ “unfairly

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Again, the data from the wrongful conviction cases bear this out. Among the first 200 DNA exonerations, 62% were black, and a combined 71% were black or Hispanic (compared to 29% for whites)—well beyond their proportion of either the general population or even the prison population. Garrett, *supra* note 55, at 66.

¹⁵⁴ New empirical research shows that indeed the massive increase in imprisonment rates from 1978 through 1999 produced a huge and disproportionate increase in the incarceration rate for black people. Walter Enders, Paul Pecorino & Anne-Charlotte Souto, *Racial Disparity in U.S. Imprisonment Across States and Over Time* (Oct. 13, 2017), <https://ssrn.com/abstract=3053020>.

¹⁵⁵ Zalman, *supra* note 104.

¹⁵⁶ LAUDAN, *supra* note 1.

¹⁵⁷ LAUDAN, *supra* note 1, at 113.

¹⁵⁸ LAUDAN, *supra* note 1, at 114.

prejudicial, relevant evidence;¹⁵⁹ “relevant, hearsay evidence;”¹⁶⁰ evidence about the character of the defendant;¹⁶¹ non-*Mirandized* confessions;¹⁶² evidence that the defendant refused to talk with the police after they had advised him that he had the right to remain silent;¹⁶³ and privileged evidence (statements from “doctors, clergy, psychiatrists, lawyers, social workers, counselors”).¹⁶⁴ Among the procedural asymmetries that Professor Laudan says favor the defendant are the bar against the prosecution’s appeal of acquittals;¹⁶⁵ the sequence at trial, which permits the defendant “to present his case and his testimony *after* the prosecution rests its case . . . thereby being able to shape his testimony to his advantage;”¹⁶⁶ rules that permit the defendant to “present character evidence to impeach prosecution witnesses while still blocking the admissibility of evidence of his own character (if he does not testify);”¹⁶⁷ the statute of limitations that bars initiation of a case after a certain period of time;¹⁶⁸ asymmetry in the parties’ discovery obligations and rights;¹⁶⁹ rules that permit the exclusion of eyewitness identification evidence that in some jurisdictions have become more amenable to excluding evidence than in the past;¹⁷⁰ and others. Professor Laudan also notes that there are some features of the criminal process that favor the prosecution—including the prosecution’s far greater resources, discretion in shaping the charges, ability to make deals with accomplices or grant immunity for testimony, and the defendant’s inability to compel victims (or any witness for that matter) to agree to a pretrial interview.¹⁷¹ But he gives these advantages little ink, and concludes, curiously, that they pale in comparison to defense advantages.

¹⁵⁹ LAUDAN, *supra* note 1, at 114 (citing FED. R. EVID. 403).

¹⁶⁰ LAUDAN, *supra* note 1, at 114.

¹⁶¹ LAUDAN, *supra* note 1, at 114.

¹⁶² LAUDAN, *supra* note 1, at 115. Professor Laudan also curiously argues, without citing authority, “A voluntary admission of guilt by the defendant to the police (even after being *Mirandized*) can be retracted by the defendant, thereby becoming inadmissible at trial, unless there is independent evidence corroborating the confession.” LAUDAN, *supra* note 1, at 115. Why Professor Laudan says this is a mystery. Certainly a defendant may retract a confession, but that hardly makes the confession inadmissible. Such confessions are routinely admitted at trial, both as substantive evidence of guilt and as impeachment of the defendant’s testimony should he or she take the stand and proclaim innocence.

¹⁶³ LAUDAN, *supra* note 1, at 115 (citing *Doyle v. Ohio*, 426 U.S. 610 (1976)).

¹⁶⁴ LAUDAN, *supra* note 1, at 115.

¹⁶⁵ LAUDAN, *supra* note 1, at 116.

¹⁶⁶ LAUDAN, *supra* note 1, at 116.

¹⁶⁷ LAUDAN, *supra* note 1, at 117 (citing FED. R. EVID. 608).

¹⁶⁸ LAUDAN, *supra* note 1, at 117.

¹⁶⁹ LAUDAN, *supra* note 1, at 117.

¹⁷⁰ LAUDAN, *supra* note 1, at 117.

¹⁷¹ LAUDAN, *supra* note 1, at 119–20.

So much is wrong here it's hard to know where to start, and I only have space to address some of the problems. Professor Laudan is certainly correct that exclusionary rules, although only rarely invoked successfully, favor the defense and have a truth-suppressing effect. Professor Laudan ignores, however, that the system has adopted those rules fully aware that they have those effects, but has created them nonetheless because they serve values entirely independent of the truth-seeking functions of the trial, such as protecting the privacy rights of all citizens, guilty or innocent. One can debate the wisdom, and effect, of those rules, but it is not a part of the trade-off between protecting the innocent from wrongful convictions and the potential future victims of guilty-but-acquitted individuals. It is a different debate altogether. A similar analysis applies to exclusion of statements obtained in violation of *Miranda* (although some such exclusions might actually enhance reliability because unwarned confessions—especially coerced ones—might be more likely to be untrue than others).

Most of the other rules or procedures Professor Laudan cites either are neutral (not defense-favoring), or exist precisely because the rules-makers have concluded that they will *enhance*, not diminish, access to the truth—and therefore they are designed to serve both conviction of the guilty and acquittal of the innocent. Some that Professor Laudan cites even actually favor the prosecutor, not the defense. Rules against character evidence and prior acts evidence, hearsay, unfairly prejudicial evidence (Rule 403), and privileges, for the most part apply equally to both parties and all witnesses. Professor Laudan's claim that the fact that the prosecutor presents her case first advantages the defense is puzzling, at best. And the hearsay rules, the rules against character and other acts evidence, and against unfairly prejudicial evidence, are designed to keep out evidence that impedes access to the truth—that is, precisely in order to enhance reliability of the proceedings for all parties, and thereby to reduce both false positives and false negatives.

Some of the features that Professor Laudan criticizes as too defense friendly actually operate in the opposite way. Allowing the prosecution to go first is among those. The principle of primacy and recency teaches that the most influential and memorable evidence is usually that which is heard first and last.¹⁷² By going first, the prosecutor gets to take advantage of that principle, and moreover gets to shape the narrative for the rest of the trial.¹⁷³

¹⁷² See, e.g., James L. Farr, *Response Requirements and Primacy-Recency Effects in a Simulated Selection Interview*, 57 J. APP. PSYCH. 228 (1973); James L. Farr & C. Michael York, *Amount of Information and Primacy-Recency Effects in Recruitment Decisions*, 28 PERSONNEL PSYCH. 233 (1975); Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL PSYCH. 1 (1959).

¹⁷³ Much of Professor Laudan's concern with the sequence at trial is that the defendant

Moreover, although Professor Laudan wholly overlooks it, the prosecutor also gets to go last—the prosecutor is permitted to present a rebuttal case whenever the defense presents anything unanticipated. In closing arguments, as in the evidentiary portions of the trial, the prosecutor also gets to present both first and last, while the defense gets to argue only once with no opportunity to respond to what the prosecutor says in rebuttal. Most knowledgeable litigators would vastly prefer the opportunity to go both first and last in presenting evidence and arguing; this is no advantage to the defense, but a distinct advantage to the prosecution.

In other ways, the rules Professor Laudan cites distinctly disadvantage the accused. Professor Laudan claims, for example, that, “in trials where the defendant chooses not to testify, the trial judge will exclude the admission of prior crimes evidence in about 90% of the cases involving serial felons.”¹⁷⁴ Most scholars, however, note that the rule against admission of prior crimes evidence—which only prohibits use of alleged prior misconduct to prove an individual’s bad character or propensity to commit like crimes—is so riddled with exceptions and loose judicial interpretation that it rarely poses much of an obstacle to admission.¹⁷⁵ Indeed, Professor Laudan’s sometimes-co-author Ronald Allen has acknowledged, specifically with regard to such character evidence, that, “[a]lthough the American rules of evidence are often characterised in other countries as having many exclusionary rules, the

gets to listen to all the other witnesses’ testimonies before testifying, while all other witnesses are typically sequestered. Professor Laudan overlooks, however, that the prosecution too gets to exempt one of its key witnesses from sequestration orders; the lead case investigator is often permitted to remain at the prosecutor’s side throughout the trial, exempted from sequestration, able to listen to the other testimony in the trial before testifying—and even able to listen to the defendant’s testimony (if he testifies)—before testifying in rebuttal.

¹⁷⁴ LAUDAN, *supra*, note 1, at 17 (citing Professors Allen and Laudan on prior convictions).

¹⁷⁵ See, e.g., Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 3 (2016) (“court decisions resolving Rule 404(b) issues have been quite liberal in sustaining theories of admissibility advanced by prosecutors, despite the fact that such admission often violates the prohibition on the use of character evidence to prove conforming conduct.”); Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV. 271, 271 (1995) (“Rule 404(b) is probably the most frequently litigated rule of evidence. Yet, the evidence that it excludes actually falls within a very narrow range.”); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (“Contrary to . . . [the] conventional view, courts routinely admit bad acts evidence precisely for its relevance to defendant’s propensity.”); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 219 (2011) (“In the last fifteen to twenty years . . . many federal courts have reversed their views and now generally take a welcoming or inclusionary approach to admission of prior similar acts for the purpose of showing intent.”); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 579 (1985) (observing that prosecutors “will almost always succeed” in attempts to admit uncharged acts against criminal defendants).

truth is the exact opposite: virtually all relevant evidence comes in”¹⁷⁶ Recently, both the Federal Rules of Evidence and many state evidence codes have taken this trend a step further and have explicitly abolished the rule against using evidence of prior sexual assaults or child molestations (whether the defendant was convicted or not) to prove guilt in a new sexual assault¹⁷⁷ or child molestation¹⁷⁸ case. In this regard, these particular types of criminal defendants are singled out for a disadvantage that applies to no other litigant in any type of case, plaintiff or defendant, government or accused, civil or criminal. And of course, as noted, the Rules of Evidence permit evidence of prior convictions to be admitted to impeach a defendant if she exercises her constitutional right to testify in her own defense.¹⁷⁹ It blinks at reality to suggest that most evidence of prior alleged bad acts (let alone prior convictions) is hidden from juries.

Moreover, Professor Laudan wholly overlooks other trial and evidentiary rules that distinctly favor the prosecution. The direct connection doctrine, or its variants, for example, directly impedes the defendant’s ability to introduce relevant evidence of innocence in the form of evidence that some other party committed the crime.¹⁸⁰ As I have explained it previously,

Third-party perpetrator evidence is not admissible in most jurisdictions merely if it is relevant. Rather, under the direct connection doctrine, the evidence must be both relevant in the traditional sense (i.e., it must have a “tendency” to make the defendant’s guilt “less probable”), and it must have a “direct connection” to the crime. The rule frequently excludes evidence of strong motive or opportunity because courts often require “direct evidence placing the third party at the scene.” Because this rule imposes a super-relevancy requirement on the defendant’s ability to tell her story of innocence, it is hard to reconcile the rule with a professed overriding concern for protecting the innocent.¹⁸¹

¹⁷⁶ Allen, *supra* note 143, at 140.

¹⁷⁷ See FED. R. EVID. 413(a) (“In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.”).

¹⁷⁸ See FED. R. EVID. 414(a) (“In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.”).

¹⁷⁹ FED. R. EVID. 609.

¹⁸⁰ Different jurisdictions use various terminology to describe the direct connection requirement, including “clearly link,” “point directly,” “point unerringly,” “inherent tendency,” or “legitimate tendency,” but all essentially have the same effect. See Findley & Scott, *supra* note 71, at 343 n.337.

¹⁸¹ Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 925–26 (2008) (footnotes omitted). See also David S. Schwartz & Chelsea B. Metcalf, *Disfavored Third-Party Guilt Evidence*, 2016 WIS.

Similarly, several of the exceptions to the rule against hearsay explicitly or in practice uniquely restrict defense-proffered evidence. The rules, for example, create a hearsay exception for statements against penal interest if the declarant was unavailable at the time of trial.¹⁸² But one type of statement-against-interest testimony is uniquely disfavored: evidence proffered by a criminal defendant to show that someone else might have committed the crime. Rule 804 provides: “A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”¹⁸³ The rule does not similarly burden such evidence when offered by the prosecution in a criminal case, or when offered by any party in a civil action. Again, such skewing of admissibility standards is hard to reconcile with an overriding commitment to protecting the innocent, or with Professor Laudan’s claim that the hearsay rule somehow favors the defense.

The hearsay rules are also applied in other ways that favor the prosecution. Eleanor Swift has shown that courts apply disparate standards of admissibility for “contextual” evidence offered to complete the narratives presented by the parties to exclude defendants’ statements about their then-existing state of mind (another hearsay exception), even though such evidence should be admissible under Rule 803(3), and even though it may be critical context information needed to make a defendant’s narrative complete and plausible.¹⁸⁴

And it is by now well known that when it comes to admitting forensic science evidence, the courts perform their gate-keeping role under Rule 702¹⁸⁵ and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁸⁶ in uneven ways that disadvantage the defense and fail to ensure reliability of the evidence used to convict. Empirical data on judicial decisions on such expert testimony reveal that non-validated, unscientific forensic “science”

L. REV. 337, 337 (2016) (arguing that the direct connection doctrines’ disfavored treatment of third-party guilt evidence “stems from discredited and abandoned concepts of evidence law and is out of step with the Federal Rules of Evidence and modern evidence codes. The direct connection doctrines wrongly transfer credibility questions from the jury to the judge and raise only minimal FRE 403-type dangers to justify their systematic exclusion. Moreover, the direct connection doctrines unconstitutionally interfere with the defendant’s right to present a complete defense. They lack any non-arbitrary justification.”).

¹⁸² See FED. R. EVID. 804(a), 804(b)(3).

¹⁸³ FED. R. EVID. 804(b)(3).

¹⁸⁴ Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975 (2008).

¹⁸⁵ FED. R. EVID. 702.

¹⁸⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

evidence¹⁸⁷ proffered by the prosecution is routinely admitted, while defense expert evidence, even well researched and validated evidence (such as expert testimony on eyewitness identifications¹⁸⁸), is routinely excluded.¹⁸⁹

C. *The Pretrial Case-Building Stage*

Professor Laudan's contention that the rules of the game favor criminal defendants—flawed as it is—focuses almost exclusively on the rules that govern trials. Yet trials are the rare exception; almost all criminal law is adjudicated without a trial. As noted, more than 95% of all convictions are obtained not after a trial, but by plea.¹⁹⁰ We have essentially an administrative system of criminal justice, in which state administrators—police and prosecutors working together—develop the evidence and determine the outcomes, which are usually formally processed in guilty or no contest plea proceedings.¹⁹¹ Hence, in most cases, the defendant's fate is sealed long before trial (or the guilty plea hearing)—when the evidence is created, collected and packaged.

To overlook that stage of the process, then, is to overlook the real machinery of the criminal justice system. When one does examine that part of the process, the picture that emerges is entirely inconsistent with Professor Laudan's thesis that the system is hopelessly tilted in favor of the accused. While Professor Laudan acknowledges that the state typically has superior resources and greater access to the evidence, he underestimates the significance of these advantages. At these pretrial, case-development stages, the state has a virtual monopoly on the process. Police typically have sole access to the crime scene and the crime scene evidence, which the defense can only later access through the notoriously limited and weak discovery provisions in criminal cases. Pretrial detention adds to the defendant's limited ability to conduct an independent investigation. Police can threaten

¹⁸⁷ See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NRC REPORT].

¹⁸⁸ See Findley, *supra* note 181, at 922–24.

¹⁸⁹ See Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions Daubert Does Not Answer*, 33 SETON HALL L. REV. 1125, 1125 (2003); Findley, *supra* note 181, at 939–43; Garrett, *supra* note 55, at 76, 81; Paul C. Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 SETON HALL L. REV. 1071, 1076 (2003); Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 342 (2002), <https://pdfs.semanticscholar.org/b386/f5131178d3e5f916698f62e83837c2587043.pdf>; Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107 (2005); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 143–49 (2000).

¹⁹⁰ See MOTIVANS, *supra* note 94, at STATISTICAL TABLES 17 tbl. 4.2.

¹⁹¹ See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

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and lie to suspects and witnesses to induce cooperation and statements, and prosecutors can compel testimony in grand juries, while the defendant can do neither. Prosecutors can offer benefits (lenient treatment, immunity, even cash) in return for testimony—conduct that would be a crime for any other litigant¹⁹² And police and prosecutors have their own crime laboratories.¹⁹³ As Ion Meyn has observed, “[t]he irony is apparent. A criminal defendant has more constitutional protections than any litigant during trial, but all other litigants have far greater access to information and have a greater ability to test evidence during the pretrial period, where over 90% of all disputes are actually resolved.”¹⁹⁴

VI. TOWARD HARM REDUCTION WITHOUT INCREASING WRONGS

Professor Laudan contends:

We have to remind ourselves of two features of the data collection system that guarantees that we miss many recidivist acts. I refer, of course, to the fact that, where violent crimes are concerned, a). only about 45% of crimes are reported to the police, b). the police arrest and charge only about 30% of the violent offenders. That all means that c). there are some 1.2m violent crimes committed every year in which the police never identify the culprit. It is inconceivable that most of those unsolved crimes were not perpetrated by serial felons who escaped arrest or conviction. If that is so (and I cannot imagine otherwise), we have to recognize that the recidivist harms caused by serial felons are much greater

¹⁹² See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc) (holding that the government alone has the legal right to “give[], offer[], or promise[] anything of value to any person, for or because of testimony,” even though such conduct by any other litigant would constitute the crime of bribery).

¹⁹³ For a discussion of these and other advantages that the government enjoys in developing and investigating the evidence that determines case outcomes, see Findley, *supra* note 181, at 898–907.

¹⁹⁴ Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 46–47 (2014). And that power—to develop the facts that become the reality of the case—is awesome. Meyn puts it this way: “The executive wields impressive pre-complaint investigatory powers. Free from judicial review, this inquiry will remain largely shielded from defendant’s eyes. State agents are authorized to search, seize, arrest, and interrogate both willing and unwilling witnesses. The investigative method of an officer summarizing his findings in a police report lacks any transparency. This lack of transparency permits the opportunity to dissimulate information. Any later attempt to correct the record will involve a police officer’s word against the account of the witness. State agents thus exercise “formal” (the power to compel) investigatory powers that produce a non-transparent factual record largely insulated from later review. This opportunity is not afforded to any other litigant in the common law system.” *Id.* at 49 (footnotes omitted); see also Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091 (2014) (arguing that structural deficits in the criminal justice system impede the defense from conducting adequate investigations).

still than I have described them.¹⁹⁵

These data are indeed significant—but primarily for a different reason than Professor Laudan posits. What these data show is that most crimes go unpunished not because of failure to prove guilt under the reasonable doubt standard. Most crimes go unpunished because they are never reported to police or police never apprehend a suspect. “Beyond a reasonable doubt” has nothing to do with that. If the concern is to prevent future harms from recidivist behavior, our efforts would be much better spent addressing the conditions that produce crime and the reasons police fail to solve such a high proportion of crimes. More investigative resources would do far more for public safety than tinkering with the burden of proof and thereby running the risk of exacerbating what is already emerging as a serious problem of wrongful conviction of the innocent.

Professor Laudan, however, does not seriously consider other ways of dealing with crime than to ratchet up conviction rates and sentence lengths, along with false convictions. Professor Laudan thinks almost exclusively in terms of trade-offs between public safety and protection of the innocent, and he comes down on the side of public safety. Professors Laudan and Allen, for example, write that “the remedies usually proposed for the ‘excessive’ levels of false conviction involve measures that further increase the already grave risk of criminal victimization.”¹⁹⁶ That, however, does not reflect the real thrusts of the innocence movement, as we shall see.

But first I must acknowledge that some scholars and advocates, to be sure, have urged dramatic reforms of the criminal justice system to provide greater protections against conviction of the innocent, some of which would reduce accurate convictions. Recently, for example, in *SAFETY FROM FALSE CONFESSIONS* Boaz Sangero systematically analyzed known wrongful convictions and advocated a series of reforms.¹⁹⁷ In addition to the standard reforms innocence organizations typically endorse to respond to the “canonical list”¹⁹⁸ of factors that contribute to wrongful convictions (e.g., improving eyewitness identification procedures, electronically recording interrogations, improving the scientific foundations of the forensic “sciences,” etc.), Professor Sangero advocates broad structural reforms, such as prohibiting convictions based on a single piece of evidence,¹⁹⁹ making the

¹⁹⁵ Laudan, *supra* note 1252 (footnote omitted).

¹⁹⁶ Allen & Laudan, *supra* note 2, at 80.

¹⁹⁷ SANGERO, *supra* note 81.

¹⁹⁸ See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008).

¹⁹⁹ SANGERO, *supra* note 81, at 57–64.

“beyond a reasonable doubt” standard even more demanding,²⁰⁰ prohibiting conviction based on a confession absent strong corroboration and evidence that the interrogee knew unrevealed details about the crime,²⁰¹ and the like. Some of those reforms would involve trade-offs (hence I will call them “trade-off reforms”)—reducing the rate of false positives through reforms that increase the rate of false negatives. Critics have argued, therefore, that their viability and justifiability are dependent on showing both a high rate of false convictions and that the high rate of false convictions is disproportionately caused by the systemic features he proposes to alter. And, those critics contend, such data are just not there to make those claims.

Doron Menashe and Sivan Biber, for example, criticize Professor Sangero’s trade-off reforms, contending “it seems hard to substantiate a whole safety theory on such meager empirical data, no matter how good the extrapolation methods are [for estimating that data].”²⁰² And, they add, the reform theories that Professor Sangero relies upon “cannot be tested for refutability because the relevant data is ‘hidden,’ and so it does not adhere to Karl Popper’s principle of falsifiability.”²⁰³ Accordingly, they contend, “[e]ven from a moral point of view it’s questionable if we should take safety measures to prevent hypothetical ‘accidents,’ while those measures will certainly and very tangibly harm other important moral values, like the right to personal security.”²⁰⁴

If that is true for reforms designed to prevent false convictions, like Professor Sangero’s, then it is certainly true—indeed even more so, given the relative dearth of data on false acquittals—for reforms designed to prevent false acquittals, like those offered by Professor Laudan and his fellow anti-Blackstonians. All of Professor Laudan’s reforms—most prominently the recommendation to lower the burden of proof in some cases—are explicitly trade-off reforms. Indeed, they are intended to be such. Professor Laudan’s whole goal is to imprison more people, and to do so by reducing the number or proportion of people who are acquitted (defined broadly to include dismissals), including of necessity a percentage that are actually innocent. While Professor Laudan works hard to extrapolate both a false conviction and a false conviction rate in order to justify this change, the reality is those rates are mere guesses—quite debatable guesses at that—and hence no basis for making fundamental alterations of our structures affecting

²⁰⁰ SANGERO, *supra* note 81, at 65–66.

²⁰¹ SANGERO, *supra* note 81, at 95.

²⁰² Doron Menashe & Sivan Biber, *Safety from False Convictions by Boaz Sangero—Book Review*, J. JURIS. 147, 154 (2017).

²⁰³ *Id.* (citing KARL POPPER CONJUNCTURES AND REFUTATIONS—THE GROWN OF SCIENTIFIC KNOWLEDGE 33–58 (5th ed. 1989)).

²⁰⁴ Menashe & Biber, *supra* note 202, at 154.

fundamental rights, like the burden of proof, that were deliberately created to reflect the value preferences of our system. The consequences would surely be unknown, likely to some extent at least unintended, and perhaps disastrous.

To Professor Laudan, the interests in protecting the innocent and convicting the guilty, like the trade-off reforms that Professors Menashe and Biber criticize, are always in tension; pursue one, and you suffer losses to the other. In Professor Laudan's binary world:

If we say to ourselves (as many jurists and legal scholars do) that we must take new and additional measures to minimize the likelihood of a false positive, then we are apt to try to modify the legal system by a variety of additional rules that make it even harder than it now is for the prosecutor to establish the guilt of a defendant. (Indeed, that is a quick thumbnail summary of the history of Supreme Court jurisprudence about criminal law in the last half century.)²⁰⁵

Professor Laudan reiterates: "We know full well that the greater the pains a state takes to protect its innocent citizens from false conviction, the more difficult it is for the state to control crime, since measures adopted to achieve the former end will typically make it more difficult to convict the guilty, which in turn . . . make controlling crime much more difficult."²⁰⁶

To the contrary, however, most of the reforms that innocence organizations advocate are not trade-off reforms, but "win-win reforms," or at least what we might call "no-loss reforms"—they reduce the rate of false convictions by improving the diagnostic capacities of the system, not by putting a thumb on one side of the scales of justice.²⁰⁷ Indeed, despite their criticisms of Professor Sango's trade-off reforms, Professors Menashe and Biber acknowledge that

²⁰⁵ LAUDAN, *supra* note 1, at 15.

²⁰⁶ LAUDAN, *supra* note 1, at 23.

²⁰⁷ It is worth noting that Paul Cassell, another of Zalman's "anti-Blackstonians," unlike Professor Laudan, recognizes the possibility of no-loss reforms. See Paul G. Cassell, *Can We Protect the Innocent Without Freeing the Guilty? Thoughts on Innocence Reforms that Avoid Harmful Trade-offs*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION* 264 (Daniel S. Medwed ed. 2017). Interestingly, though, most of Cassell's no-loss reforms adhere to his crime-control orientation in that they include, among others, abolishing the Fourth Amendment exclusionary rule, overruling *Miranda* (and simultaneously requiring electronic recording of custodial interrogations), and requiring all defense attorneys to ask their clients if they committed the crime. *Id.* at 274–80. Some of these might have some effect on mitigating wrongful convictions, but others likely would not, for reasons that are beyond the scope of what I can explore here.

other “safety measures” offered by Sangero, like improving police lineup identification protocol or recording lineups on video—which will give the court a direct, full documentation of the evidence—will provide fact-finders better information about the nature of the specific eyewitness testimony laid before them, while leaving them full discretion about the weight of that piece of evidence and the ability to convict upon it. Under those restraints Sangero’s theory can truly be considered a win-win improvement to evidence law.²⁰⁸

Professors Menashe and Biber also include reforming forensic sciences to improve their scientific validity as another type of win-win reform.²⁰⁹

In his now-classic summary of the reforms, Sam Gross described the standard list of innocence-based reforms as follows:

There is a canonical list of factors that lead to false convictions: eyewitness misidentification; false confession; misleading, false, or fraudulent forensic evidence; testimony by highly motivated police informants such as “jailhouse snitches;” perjury in general; prosecutorial misconduct; ineffective legal defense. All these factors are common among cases of known exonerations.²¹⁰

For reasons I have previously articulated in detail, most fixes for almost all of these error points are no-loss reforms, not trade-off reforms; they almost universally strive to improve the reliability of the system without forcing dramatic trade-offs.²¹¹ I will not cover that ground again here, except to address one—eyewitness identification reform—because Professor Laudan identifies it, I believe misleadingly, as a trade-off reform.²¹²

The most widely discussed of the core innocence reforms is to improve the way police collect eyewitness identification evidence (and related reforms, such as admitting expert testimony so jurors are better equipped to rationally evaluate eyewitness evidence). The range of reforms typically includes ensuring non-suggestive construction of lineups and photo arrays with appropriate fillers; instructing witnesses that the true perpetrator might or might not be present, so that witnesses do not feel compelled to pick someone even if the real perpetrator is not present; using a detective to run the procedure who does not know who the suspect is (or otherwise “blinding”

²⁰⁸ Menashe & Biber, *supra* note 202, at 156 (footnotes omitted).

²⁰⁹ *Id.* at 151–52.

²¹⁰ Gross, *supra* note 198, at 186.

²¹¹ Keith A. Findley, *Toward a New Paradigm for Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008).

²¹² See LAUDAN, *supra* note 1, at 129–32.

the detective) so that the detective cannot even unwittingly cue the witnesses (so-called “double-blind” administration); including only one witness per identification procedure; conducting only one identification procedure per witness; and promptly assessing the eyewitness’s level of confidence, before the witness is given any confirming or disconfirming feedback.²¹³ The social science research literature on these reforms is extensive, and confirms that they are indeed no-loss, if not win-win reforms.

In his book, however, Professor Laudan, hones in on just one of the reforms that has been widely discussed, and argues that it threatens to cause a loss of factually correct convictions. That additional reform is the recommendation, adopted in some jurisdictions, that police present fillers and suspects in a photo array or lineup to the witness sequentially rather than simultaneously, as has been done traditionally.²¹⁴ Professor Laudan’s point is that this is a classic trade-off reform because, while it does reduce mistaken identification, it also reduces accurate identifications. There is, indeed, some evidence from laboratory studies suggesting that the sequential procedure does have this general suppressing effect, reducing both mistaken and accurate picks.²¹⁵ But Professor Laudan’s treatment of this issue is both incomplete and misleading, for three reasons.

First, as noted, this is only one of the many reforms innocence advocates have advanced for improving eyewitness evidence, and the others do not involve this type of trade-off, and it is the one that those reformers recommend least often. Given that there is legitimate laboratory data suggesting a trade-off for the sequential procedure, innocence advocates usually make note of the sequential procedure, but do not necessarily advocate it; they instead advise policy makers that they need to consider the possible trade-offs for themselves and decide what policy they want to pursue. The Innocence Project—the flagship innocence organization—for example, lists the following on its web site as the key reform elements: (1) “The ‘Double-blind’ Procedure/Use of a Blind Administrator;” (2) “Instructions That the Suspect May Not be Present;” (3) “Composing the Lineup [So That All Fillers Match the Description of the Perpetrator;]” (4) “[Prompt Recording of] Confidence Statements;” and (5) “The Lineup Procedure Should Be Documented.”²¹⁶ The sequential procedure is not

²¹³ For a fuller summary of the standard eyewitness identification reforms, see Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 386–400 (2016).

²¹⁴ See LAUDAN, *supra* note 1, at 129–32.

²¹⁵ See, e.g., Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 468 (2001).

²¹⁶ *Eyewitness Identification Reform: Mistaken Identifications are the Leading Factor In Wrongful Convictions*, INNOCENCE PROJECT (2017), <https://www.innocenceproject.org/eyewi>

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among them. This, alone, belies Professor Laudan's claim that innocence reformers "are apparently wedded to the idea that *any* measure that reduces the false conviction rate is to be preferred over its rival(s), no matter what the cost paid in lost true convictions may be."²¹⁷

Second, Professor Laudan's argument is misleading because of the way he presents the data from the laboratory studies. It is true, as he reports, that in the laboratory the sequential procedure reduces both mistaken and accurate identifications. But Professor Laudan wholly ignores that the reason some advocates push for the sequential, and some policy makers (including many police departments) choose it, nonetheless, is because its diagnosticity ratio—that is, the ratio of accurate picks to mistakes—is dramatically improved with the sequential procedure. The meta-analytic data reveal that, in laboratory studies, accurate identifications are reduced from about 50% to about 35%. But mistaken identifications of innocent suspects are reduced even more dramatically, from 27% to 9%.²¹⁸ That translates into a dramatic increase in the diagnosticity ratio from 1.85 (0.50/0.27) for the simultaneous procedure to 3.89 (0.35/0.09) for the sequential procedure.²¹⁹ In other words, with the sequential procedure the overall rate of picking may be lower, but when witnesses do pick, they are much more likely to be correct.

Third, and finally, Professor Laudan ignores field research, as opposed to laboratory research, that shows that in actual case work the sequential procedure reduces the rate that witnesses pick innocent fillers (known mistakes), but does not produce any drop-off in the rate of suspect picks.²²⁰ The most prominent field study—the best real-world data we have—suggests that the sequential procedure might be not a trade-off reform at all, but indeed a no-loss reform. Nonetheless, despite Professor Laudan's indictment that innocence reformers do not care about trade-off costs, the Innocence Project, out of an abundance of caution, has reserved judgment on the sequential procedure.

In a short prior article Professor Laudan has also criticized other aspects of the eyewitness-identification-reform agenda, most notably the recommendation that witnesses should be given "unbiased" instructions (informing the witness that the real perpetrator might or might not be present), and the preference for lineup or photo array procedures over

tness-identification-reform/.

²¹⁷ LAUDAN, *supra* note 1.

²¹⁸ Steblay, *supra* note 215, at 463; Wells, *supra* note 136, at 627.

²¹⁹ See Wells, *supra* note 136, at 627.

²²⁰ Gary L. Wells et al., *Double-Blind Photo-Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, 39 *LAW & HUM. BEHAV.* 1 (2015).

showups (one-on-one identification confrontations on the street between a witness and a single suspect).²²¹ Those criticisms, however, are hard to reconcile with serious concern about the search for the truth. To complain about “unbiased” witness instructions is akin to complaining about rules that prohibit police from telling the witness which lineup member to pick because it reduces the rate at which witnesses pick the suspect. If it reduces conviction rates—and the research actually shows that unbiased instructions in fact improve reliability without any appreciable reduction in accurate picks²²²—then it does so only by preventing the police from cheating, and by ensuring that the evidence is actually real evidence.

Contrary to Professor Laudan’s criticisms, the preference for lineups over show-ups also is well supported by the research as a no-loss or even win-win reform.²²³ Moreover, Professor Laudan entirely overlooks that one reason show-ups are so much more dangerous to the search for the truth is because in a target-present lineup,²²⁴ when a witness makes a mistake and picks a filler, usually no harm is done, because police know the witness has erred. No one goes to prison wrongly for it. But in a show-up, where there are no fillers, when a witness makes a mistaken identification, that mistake will always incriminate an innocent person whom police will then pursue and prosecute. Professor Laudan pays no heed to these real-world concerns, and the reasons why the eyewitness identification reforms are indeed at least no-loss reforms.

²²¹ Larry Laudan, *Eyewitness Identifications: One More Lesson on the Costs of Excluding Relevant Evidence*, 7 *PERSP. ON PSYCHOL. SCI.* 272 (2012).

²²² Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 *J. APPLIED PSYCHOL.* 482, 486–87 (1981).

²²³ Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 *PERSP. ON PSYCHOL. SCI.* 238, 244 (2012) (noting that while some eyewitness identification reforms might cause some drop-off in correct identifications, lineups are superior to showups both in terms of reduced misidentifications and increased accurate identifications); Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 *APPLIED COGNITIVE PSYCHOL.* 1, 10 (1996) (discussing the risk of false positive identifications when showup procedures are used with children); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 *LAW & HUMAN BEHAV.* 391, 402 (1997) (discussing the increased danger of false identifications with showups); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *LAW & HUMAN BEHAV.* 459, 475 (1996) (discussing the inferiority of showup procedures to successive lineups).

²²⁴ That is, a lineup that includes the suspect, as is typically the case in real-world police lineups.

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VII. CONCLUSION

The point of all this is, in the end, regardless of the rate of false convictions or false acquittals, we can all agree that the system can do better. But because the data about comparative rates of false positives and false negatives and about how to assess the comparative harms from each simply are not there, and do not appear to be reliably ascertainable, looking first for dramatic trade-off reforms is the wrong place to start. As I have previously written:

[O]nce the rate of wrongful convictions rises above the trivial level—and the evidence convincingly tells us that is now so—then we need not identify a precise rate of error to recognize the need for action. The question then becomes not so much how many wrongful convictions there are, but whether we can do anything to reduce the rate of error. *Any* wrongful convictions are too many if they can be avoided without imposing too much strain on the system. In this sense, as one prosecutor at a conference on preventing wrongful convictions asserted, the question is not one of how many innocents are wrongly convicted, but simply whether we can do better. Are there best practices that can be implemented to reduce that number, whatever it is?

In this sense, the issue can be analogized to public transportation disasters, such as airplane crashes. The rate of airline crashes is minuscule; in 2007, the airline industry experienced only one fatal accident in about every 4.5 million departures. Nonetheless, we continue to take airline crashes very seriously, and do all we can to reduce the accident rate as much as possible.

The rate of wrongful conviction is clearly much higher than that of airline crashes. And, like airline safety, there is much we can do to improve the reliability of the criminal justice system. The imperative is there, then, to learn about and implement the best practices that can make the system function more reliably. . . .²²⁵

Professor Laudan reminds us that the same can be said about false negatives. But, just as with false convictions, that is most immediately and appropriately understood as a call for reforms to improve the overall functioning of the system, not to tilt the scales and trade one set of harms for another. And there is much we can do in that regard by studying what actually works for preventing recidivism; by increasing resources for police,

²²⁵ Findley, *supra* note 72, at 1172–73.

prosecutors, and defense counsel for the indigent (because in an adversary system, robust defense counsel is a critical component in the process of ensuring accurate and full discovery and evaluation of the facts); by improving relations between police and low-income or minority communities so that they are more likely to trust them and report crimes; and the list goes on. But what we should not do is abandon fundamental principles like the reasonable doubt standard that so thoroughly reflect who we are as a society, and thereby inevitably create a sad and wholly unnecessary trade-off—sacrificing even more innocent people to make the rest of us feel marginally safer.