

The Anti-Blackstonians

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I. INTRODUCTION

This Article is occasioned by my role as one of several responders to Dr. Larry Laudan’s paper at the Seton Hall Law School symposium honoring D. Michael Risinger.¹ Although a brief comment could suffice, thanks to the flexibility of law reviews and their relative indifference to article length, I’ve taken the opportunity to offer an extended comment on Laudan and other authors whose positions on criminal procedure and criminal justice I label anti-Blackstonian. The authors reviewed herein are (i) Daniel Epps,² (ii)

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¹ For other comments, see Keith Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV 1265 (2018); and Roger Koppl, *Comment on Laudan*, 48 SETON HALL L. REV 1255 (2018).

² Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015). Prof. Epps declined to respond to my critique, pointing out that he had responded to other critiques; see Daniel Epps, *Essay: One Last Word on the Blackstone Principle*, 102 VA.

Larry Laudan,³ along with Ronald Allen,⁴ and (iii) Paul Cassell.⁵ These authors do not agree on all points and their approaches differ in some respects. Nevertheless, their core positions share the view that reducing defendants' procedural protections would make criminal trials more accurate and would reduce crime—positions that can reasonably be labeled anti-Blackstonian.⁶

At the outset it is useful to borrow from Epps who distinguishes the famous Blackstone ratio from the Blackstone principle. The Blackstone ratio—"it is better that ten guilty persons escape than that one innocent suffer"⁷ was the subject of an amusing and informative article that rang changes on all its variations.⁸ The ratio seems to attract the attention of quantitatively oriented scholars who enjoy manipulating its parameters.⁹ Among the anti-Blackstonians, Allen and Laudan are most drawn to taking the Blackstone ratio seriously. Epps does not think much of the ratio; instead, he defines a Blackstone principle:

Of course, no one maintains that our system produces exactly ten false acquittals for every false conviction — nor do many hold that out as a serious goal. But the constant recitation of Blackstone's

L. REV. ONLINE 34; responding to Joel S. Johnson, *Note: Benefits of Error in Criminal Justice*, 102 VA. L. REV. 237 (2016); John Bronsteen & Jonathan S. Masur, *The Overlooked Benefits of the Blackstone Principle*, 128 HARV. L. REV. F. 289 (2015), and Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91 (2015)

³ LARRY LAUDAN, *THE LAW'S FLAWS: RETHINKING TRIAL AND ERRORS?* (2016); 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 Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEXAS TECH L. REV. 65 (2008). At times I will evaluate Dr. Laudan's work alone and at other times refer to their joint work.

⁵ Paul G. Cassell, *Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New "Innocence" Procedures*, 56 N.Y. L. SCH. L. REV. 1063 (2011-12) [hereinafter, Cassell, *Freeing*]; 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: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 264-290 (Daniel S. Medwed ed. 2017). [hereinafter, Cassell, *Protect*].

⁶ As a result of my critique of Paul Cassell's work and his reply, Prof. Risinger expanded the Symposium to include Prof. Cassell's response and my reply. Rather than incorporating all of Prof. Cassell's points in a revision of this Article, my complete position should include "A Reply to Professor Cassell," 48 SETON HALL L. REV. 1493 (2018).

⁷ Robert J. Norris et al., *"Than That One Innocent Suffer:" Evaluating State Safeguards Against Wrongful Convictions*, 74 ALBANY L. REV. 1301, 1301 (2010-11) (quoting WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 358 (1760)).

⁸ Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

⁹ "The continuing interest in trying to fix the Blackstone ratio is scarcely surprising." LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 48. Epps and others are indifferent to or even dismissive about this fascination.

ratio matters, even if the numbers themselves do not. The maxim is “a slogan meant to convey a message quickly and memorably,” standing for a more general rule, which I’ll call the “Blackstone principle”: in distributing criminal punishment, we must strongly err in favor of false negatives (failures to convict the guilty) in order to minimize false positives (convictions of the innocent), even if doing so significantly decreases overall accuracy.¹⁰

Whether or not no one maintains a 10-to-1 or some other ratio as a description or goal of verdict error, Epps’s clear statement of the principle is a helpful starting point.

To summarize each author, Epps presents a major exposition of the Blackstone principle with an elaborate jurisprudential argument for replacing procedural asymmetry favoring defendants (i.e., the Blackstone principle) with a principle of neutral adjudication.¹¹ His concern is with the principle itself and not with procedural rules with which it is consistent. Epps dismisses the Blackstone ratio as one that “can’t be taken literally.”¹² Laudan and Allen, contrary to Epps, *are* concerned with the ratio of false acquittals to false convictions; in *The Law’s Flaws*, Laudan calculates a different ratio. Although Laudan, unlike Epps, agrees with the Blackstone principle that false convictions are more harmful than false acquittals, his numerical calculations with crime and criminal justice data show that defendants’ advantages in procedural adjudication rules result in excessive false acquittals. Consequently, he argues for changing the standard of proof for recidivist defendants from beyond a reasonable doubt to clear and convincing evidence, and advocates eliminating a host of pro-defendant criminal procedure rules.¹³ Cassell’s article and chapter do not explicitly address the Blackstone ratio, although he adopts some of Allen and Laudan’s

¹⁰ Epps, *supra* note 2, at 1068. Michael Risinger agrees: “As for the ‘Blackstone ratio,’ . . . I believe that all we can say about the intendment of this expression was that it was meant as a general declaration that, for any given crime, an error that convicts an innocent person is much worse morally than an error that acquits a guilty person.” 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*]. Taking the Blackstone ratio seriously can produce weird results. LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 47. For example, Laudan asserts, “Blackstone opined that a false positive was ten times more harmful than a false negative.” This statement is specious. There is nothing in Blackstone other than the quote to suggest that he engaged in this come of comparative harm analysis. Laudan, however, seems not to be concerned with a qualitative measure of harm but rather with the number of people victimized by two kinds of error. *See infra* III.B.1. *See also* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEXAS TECH L. REV. 133, 136 (2008).

¹¹ *See* Part III. A. 1 *infra*.

¹² Epps, *supra* note 2, at 1072.

¹³ *See* Part III. B. 1 & 2 *infra*.

reasoning. Unlike Epps and like Laudan, Cassell accepts the Blackstone principle.¹⁴ Unlike both Epps and Laudan and Allen, Cassell is concerned with sources of error throughout the criminal justice system, not just the adjudication process. As a self-defined innocence skeptic, Cassell offers a mix of proposals that would benefit and harm defendants' interests; some would purportedly improve system accuracy and others might generate greater error.¹⁵ The overall direction of Cassell's proposals would reduce defendants' procedural protections. I have no doubt that Epps, Laudan and Allen, and Cassell genuinely grieve over false convictions. However, although Laudan claims adherence to a variation of the Blackstone ratio and Cassell agrees with the Blackstone principle, I still count them as anti-Blackstonians because, despite their claims, in my view their programs would (1) seriously weaken defendants' rights, (2) not reduce wrongful convictions, and (3) not enhance public safety.¹⁶

These authors advance theories and propose rules that seek to make the adjudication process more accurate and that would reduce overall harm to society by reducing the number of false acquittals relative to false convictions. To Epps, rejecting the Blackstone principle "would mean better committing ourselves to accuracy in criminal adjudication."¹⁷ Allen and Laudan conclude that "the objective should be the pursuit of overall factual accuracy, and we think much could be done that would, in general, facilitate truth finding rather than just one aspect of it."¹⁸ Cassell, also concerned with the one-sided skew of the innocence movement and innocence scholars, asserts, "it is possible to craft reforms that help to protect the innocent without allowing the escape of the guilty."¹⁹ Because all these authors would

¹⁴ "Proceeding from the perspective of "innocentrism" (that is, the idea that exoneration of the "innocent" ought to be privileged over other values in the criminal justice system), I suggest eight proposals for reformFalse" Cassell, *Freeing*, *supra* note 5, at 1065.

¹⁵ See Part III. C. 1 *infra*.

¹⁶ See Part III. A. 2, B. 3 & 4, C. 2 *infra*.

¹⁷ Epps, *supra* note 2, at 1143.

¹⁸ Allen & Laudan, *supra* note 4, at 89. This conclusion follows a somewhat polemical article that takes innocence scholars to task for fastening on wrongful convictions and not considering wrongful acquittals. They propose, by way of examples, six procedural reforms that would make the criminal justice process more accurate: robust discovery, videotaping police interviews of witnesses and suspects, explaining the meaning of privileges to juries, eliminating the fruit of the poisonous tree doctrine, allowing retrial after acquittal on the basis of substantial evidence, and admitting corroborated, voluntary, non-Mirandized confessions, *ibid.*, at 89-90.

¹⁹ Cassell, *Protect*, *supra* note 5, at 264. His list of prescriptions overlaps with those of Allen and Laudan: implementing the *Brady* requirement, increasing defense and prosecutorial resources to focus on innocence issues, abolishing the Fourth Amendment exclusionary rule, replacing *Miranda* with videotaped interrogation, barring state habeas petitions without a colorable claim of factual innocence, and requiring defense attorneys to ask clients if they committed the crime charged. Cassell, *Freeing*, *supra* note 5, at 1084-95. While some of these proposals are balanced, for the most part they read like a prosecutor's wish list.

purportedly achieve these laudable goals by neutralizing the theory of pro-defendant procedural asymmetry (Epps), by reducing the standard of proof (Laudan and Allen), and by eliminating some procedural protections (Cassell), is no stretch to label these authors anti-Blackstonians.

The innocence movement has influenced these authors.²⁰ Along with most criminal justice professionals, the anti-Blackstonians now accept that false convictions are not vanishingly rare. Cassell, who challenged early innocence scholarship in the 1980s before DNA exonerations sparked the movement,²¹ now seems to believe that the number of false convictions is nontrivial.²² His article and chapter respond most directly to innocence issues among the four authors. As an innocence skeptic, he raises the reasonable concern (along with Laudan and Allen) that innocence reforms not increase false acquittals. Allen and Laudan's article reacts to a perception of excessive innocence movement concern for exonerees and little concern for crime victims.²³ In their article, they reason their way to a wrongful conviction rate of between one-half of one percent and one percent, but by 2016 Laudan accepted a wrongful conviction rate of about three percent.²⁴ Epps's major arguments are largely orthogonal to innocence movement concerns. He develops a concept that the Blackstone principle has dynamic effects that generate error and, contrary to common thinking, works to the detriment of criminal defendants. The Blackstone principle should therefore be dismissed as an organizing principle of criminal procedure. Epps's dynamic thesis obliquely comments on innocence movement positions.

²⁰ See *infra* Part II. A for a description of the innocence movement.

²¹ Stephen J. Markman & Paul G. Cassell, *Comment: Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121(1988).

²² See Cassell, *Protect*, *supra* note 5, at 266.

²³ Allen & Laudan, *supra* note 4, at 66 ("The significance of the externalities that wrongful executions impose may be seen in the emergent national concern that has reached a crescendo in the last decade over the accuracy of capital convictions specifically and the criminal justice system generally."). The authors loosely link the concern for wrongful convictions, which implies dissatisfaction with government, with what they perceive as a widespread attack on the legitimacy of the American state since the 1960s, slyly linking liberal American critiques of governance to Mao Zedong's initiation of the Cultural Revolution, *ibid.* at 66-67. Curiously, the current authoritarian (and increasingly repressive) regime in China attempts to remediate many of its citizens' concerns, like air pollution. The Chinese party/state reacted to widespread demonstrations set off by the wrongful conviction of homicide defendants with what I interpret as a Chinese innocence movement that operates within the party/state. See Marvin Zalman, *Wrongful Convictions: A Comparative Analysis in 2 THE CAMBRIDGE HANDBOOK OF SOCIAL PROBLEMS* 449-72 (A. J. Treviño ed., 2018).

²⁴ Allen & Laudan, *supra* note 4, at 71; LAUDAN, *LAW'S FLAWS*, at xi, *passim*. Laudan states that he borrows this figure from assessments by innocence projects. *Id.* at 50-55.

As a self-defined innocence scholar, I analyze the works of Epps, Laudan and Allen, and Cassell from an “innocentric” perspective.²⁵ This is a bit odd because innocence movement advocacy and scholarship differs from the standard criminal defense orientation. The usual juxtaposition of Blackstonian and anti-Blackstonian is defense vs. prosecution, or in reformist terms that Risinger popularized, between Romillist or Payleyite positions.²⁶ These Enlightenment Era thinkers staked out their positions when English criminal justice predated the bureaucratic system that arose in the nineteenth century.²⁷ In eighteenth century England no organized police force existed and prisons were not yet invented. Order depended on the *in terrorem* use of the death penalty and the criminal law as applied by judges who mixed harshness and mercy, and whose punishment options were limited to the noose, flogging, fines and transportation to the colonies.²⁸ Contemporary innocence reforms address an array of justice system processes that did not then exist, including police investigation and forensic science, which are believed to generate errors that lead not only to wrongful convictions, but also to wrongful acquittals. In this light, the trial-related focus of the anti-Blackstonians, especially of Laudan and Allen and of Epps, seems archaic and overly abstract.²⁹

My critique might be a case of scholars talking past each another. I argue that Epps and Cassell lack empirical support for their positions, while Laudan and Allen’s reductionist empiricism misses relevant evidence. A

²⁵ Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (2008). See Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction: A Research Agenda*, 17 CRIM. JUST. POL’Y REV. 468 (2006); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 73 ALB. L. REV. 1465 (2011) [hereinafter, Zalman, *Integrated*]; Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955 (2014). I am not affiliated with any Innocence Network (<http://innocencenetwork.org/>) organization, but do serve as a “senior advisor” to Proving Innocence (<http://www.provinginnocence.org/about-pi/senior-advisors.html>), a local innocence organization that provides some investigation assistance to the Michigan Innocence Clinic (<http://www.law.umich.edu/clinical/innocenceclinic/Pages/default.aspx>).

²⁶ D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 763-764 (2007) [hereinafter Risinger, *Innocents Convicted*]. Risinger introduced readers to two late eighteenth century English leaders. Paley believed that convicting the innocent is inevitable and a necessary price paid to maintain security while Romilly abhorred wrongful convictions and argued for many reforms to avoid them. They wrote in the context of an Enlightenment sensibility, see J. M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 294-98 (1992).

²⁷ SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* (2nd ed. 1997) [hereinafter WALKER, *POPULAR JUSTICE*].

²⁸ LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948); Douglas Hay, *Property, Authority, and the Criminal Law*, in DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17-63 (1975).

²⁹ Epps, *supra* note 2, at 1081-87 uses this historical view to support his anti-Blackstonian argument.

criminal law theorist like Epps might shrug off my criticism as not relevant to his vocation. But where empirical evidence contradicts a theoretical position the theory must be reconsidered. Law is ultimately a profession that shapes the way in which individuals and institutions behave, which means that legal theory must at some point be concerned with empirical effects.³⁰ The latter point is amplified by my position as a law/criminal justice scholar, and my understanding of the difference in how criminologists and legal scholars address the same issues.

Part II includes three sections that establish contexts for thinking about the Blackstone ratio and Blackstone principle and that draw admittedly tendentious conclusions. Part II.A briefly describes the innocence movement and suggests that the classic Blackstonian and anti-Blackstonian debate has been changed by the innocence movement's research and reform project. Part II.B describes Brian Forst's labor-economics vision of balanced justice, which is more comprehensive and less polemical than that of Epps and Laudan and Allen. The latter describe only glimpses of balanced justice, mixed with teleological arguments. Although Forst's policy orientation seems more Blackstonian than not, the book-length scope of his work and his data-driven and criminological perspective provides a less argumentative basis for analysis. Part II.C describes two Blackstone ratio analyses by criminologists Shawn Bushway and Brian Forst. Bushway describes an empirical imbalance between potential suspects not convicted and defendants convicted for homicides. I argue that this real imbalance is well-known and results mainly from features of society, law enforcement, and prosecution rather from the operations of trial courts. Forst's mathematical manipulation of the ratio shows that the population of false negatives (wrongful acquittals) must be hugely expanded in order to reduce the number of false positives (wrongful convictions).³¹ I argue that the exercise is hypothetical and does not describe the actual court or justice system. These arguments form the core of my position that Laudan and Allen and to a degree Epps, are fundamentally mistaken.

Part III describes the positions of Epps, Laudan and Allen, and Cassell, followed by "internal" critiques that are peculiar to each author, although some overlap occurs. Part IV is an "external" critique of anti-Blackstonianism that provides empirical examples of a justice system

³⁰ This, of course, does not mean that particular legal philosophers must work out all or any of the practical implications of their positions. However, Laudan and Allen and Cassell either make strong empirical predictions or operate on the level of standard legal scholarship, which implies conclusions that have real-world effects; Epps writes on a theoretical plane but does make empirical/theoretical predictions that I take empirical aim at.

³¹ False negatives/false positives can be narrowly defined as false acquittals/convictions, which implicate only the trial process, or more broadly viewed as errors of impunity/due process, which implicate the entire criminal justice system.

stacked against defendants and filled with error-generating processes that are orthogonal to anti-Blackstonian concerns. In such a system anti-Blackstonian reforms could generate greater error.³² Part V, the Conclusion, provides positive reasons for the Blackstone principle that rest not only on the anti-Blackstonian critique in Part III and the depiction of a flawed, prosecution-friendly justice system in Part IV, but also on the ground of constraining government power, which is orthogonal to concerns of verdict accuracy.

Although I am critical of the works reviewed herein, it must be said that at the most general level their base idea—that trade-offs exist in all social processes including criminal justice—is not wrong, which is surely why the “Paleyite-Romillist” debate has continued for more than two centuries.³³ The innocence movement’s growth period (which has probably not ended), seeks to potentially reduce the incidence of errors by emphasizing the benefits of innocence reforms based on logic and scientific research. It is noteworthy that many innocence reforms seek to improve system accuracy in ways that increase the potential of *both* convicting the guilty and not-selecting or quickly exonerating innocent suspects. Still, the point that most pro-innocence scholarship does not focus on trade-offs is fair criticism. When Allen and Laudan, however, seek to explore “a highly complicated matrix of relationships” where serious crime impunity (“other equally

³² The anti-Blackstonians critiqued in my article discuss issues, which have been the basis of research by criminologists and criminal justice social scientists. As a side comment, I suggest that some of what I see as serious deficiencies in their work could have been avoided by collaboration with crime scientists or by paying greater attention to criminological literature. This point hit home when Epps, *supra* note 2, at 1117, referred to “criminal justice scholars” who abhor hyper- incarceration, and mentioned to two superb law-school based scholars. In my world “criminal justice scholars” hang out in departments of criminal justice, criminology, and sociology. Very few are employed in law schools; indeed the only one who comes to mind is Jeffrey Fagan at Columbia Law School. Ideally, crime scholarship should see greater cooperation of empirical and doctrinal scholars, but I don’t expect a rush of greater collaboration because professional rewards are generally not enhanced by crossing disciplinary boundaries.

Neither legal scholars nor social scientists make the practical agency decisions or the policy innovations made by a range of administrators, supervisors, legislators, and judges. But their ideas can stimulate, impede or influence reforms. Scholars and researchers, of course, have an obligation to extend the imagination of system personnel and policy makers and in doing so might go pretty far out on some weak limbs. It helps for academics who study criminal justice (whether in law, social science or both), a field of inquiry which is bounded by the realities of practice, to strive to appreciate the system’s complexity into which our ideas may fall. An effort to know the system as best as possible might improve our scholarship by channeling efforts into usable forms and to avoid injecting ideas that could generate unintended and possibly deleterious consequences. The ideas that animate justice scholarship will inevitably reflect the ideological variations in the larger polity. However, before law professors or philosophers make claims about the effects of their ideas on crime or on justice system operations, it would be helpful for them to consult relevant empirical research.

³³ See Risinger, *supra* note 26.

horrifying mistakes”) “go unnoticed in the conventional discourse,” their quantitative reasoning is wrapped up in a polemic that seems aimed less at sorting out real costs and benefits but more at drowning the innocence movement like a kitten in a bathtub.³⁴ As will be seen, a more balanced and far from obscure cost-benefit analysis exists which has not been referenced by the anti-Blackstonians.³⁵ Also, anti-Blackstonians are not wrong to keep the suffering of serious crime victims in mind, but my observations of innocence lawyers and policy people is that in practice and in policy they are sensitive to the pains of crime victimization.³⁶

These thoughts about costs and benefits lead me to characterize the approaches of Epps, Laudan and Allen, and, in a different register, Cassell, as kinds of “global” anti-Blackstonianism, in that they analyze the entire justice process through the Blackstone principle, or the Blackstone ratio, or a conservative criminal procedure filter. In doing so, their analyses try to cover too much ground in too little space and result in arguments with weaknesses that I seek to expose in this Article. Other scholars honing in on specific processes can offer more convincing anti-Blackstonian arguments, which is where the innocence movement’s intellectual battle lines will surely be drawn. One prominent example is the work of Steven Clark, a psychological scientist who has empirically challenged the benefits of eyewitness reforms.³⁷ I would finally note that this Article cannot address every argument made by anti-Blackstonians.³⁸

³⁴ Allen & Laudan, *supra* note 4, at 68.

³⁵ I refer to Brian Forst, *Errors of Justice*, *see infra* note 80.

³⁶ Although this is a worthy point in Allen & Laudan, *supra* note 4, at 85 they seem almost to libel innocence advocates with a lack of concern for crime victims by being concerned with only one kind of error, an attitude that I’ve never sensed in the presence of innocence lawyers or exonerees. I doubt if an attempt to weigh relative harms is useful or reasonably possible (e.g., is a murder always worse than a wrongful conviction resulting in a life spent in/dying in prison). While some violent crime victimizations do not always leave much if any trauma (e.g., some armed robberies), I assert that a wrongful conviction *always* leaves a defendant with, at the least, a profound distrust in the legitimacy of the justice system and at most severe psychological incapacitation. *See* Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST., 165 (2004).

³⁷ *See e.g.*, Steven E. Clark, *Cost and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 PERSPECTIVES PSYCH. SCI. 238 (2012); *see also* Cassell, *Protect* *supra* note 5, at 267, which alludes to this issue; *see discussion at infra*, Part III.C.2.f.

³⁸ At several points in this article I point out specific points not addressed. Epps, *supra* note 2, at 1089-92, briefly reviews the works of other thinkers, including Laudan, who have been critical of a Blackstonian approach.

II. CONTEXTS FOR THINKING ABOUT THE BLACKSTONE PRINCIPLE

The innocence movement provides the impetus and the setting for the contemporary anti-Blackstonians, especially Laudan and Allen and Cassell. The partial sketch of the movement herein helps place the anti-Blackstonian writings in context. Additional context is provided by reviewing analyses of two criminologists with quantitative and labor-economic skill sets. Forst provides a vision of a balanced criminal justice system; Bushway and Forst analyze the Blackstone ratio in ways that provide useful comparisons those of the anti-Blackstonians.³⁹

A. *The Innocence Movement and Its Critics*

The innocence movement has existed for about 25 years; its organizational core lies in more than 50 innocence projects or organizations.⁴⁰ I have described it as “a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States.”⁴¹ Most innocence reform efforts target practices thought to generate (or not screen out at trial) erroneous convictions, especially in police investigation (lineups, interrogation, informants), forensic science (faulty methods like bite mark analysis; deficient crime laboratories), prosecution (failure to turn over exculpatory evidence to defendants, prejudicial remarks in closing statements), ineffective defense counsel, and limited post-conviction review.⁴² As a result, justice system professionals now accept the regular occurrence of a non-trivial number of wrongful convictions.⁴³ Until recently innocence scholars gave little attention to adjudication as a source of error.⁴⁴

³⁹ Note that Epps, *supra* note 2, is more concerned with establishing a theoretical basis for his anti-Blackstonian stance rather than advocating procedural changes; nevertheless, it seems that his argument could be employed to weaken procedural rules that favor defendants.

⁴⁰ See INNOCENCE NETWORK, <http://innocencenetwork.org/>.

⁴¹ Zalman, *Integrated*, *supra* note 25, at 1468.

⁴² See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); Brandon L. Garrett, *Convicting the Innocent Redux*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 40-56 (Daniel S. Medwed ed. 2017).

⁴³ See ROBERT J. NORRIS, *EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT* (2017) [hereinafter Norris, *Exonerated*]; Richard A. Leo, *The Criminology of Wrongful Conviction: A Decade Later*, 33 J. CONTEMP. CRIM. JUST. 82 (2017).

⁴⁴ Marvin Zalman, *Notes on the ‘Adversary System’ and Wrongful Convictions*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 71-91 (C. Ronald Huff & Martin Killias, eds., 2008) [hereinafter, Zalman, *Notes*].

The innocence movement is, ostensibly, politically and ideologically neutral. It is often said, “[n]obody wants to convict an innocent person.” Some prominent conservatives have championed the innocence movement.⁴⁵ In this spirit Jon Gould described the Innocence Commission for Virginia as nonprofit, nongovernmental, and nonpartisan.⁴⁶ Robert Norris interviewed innocence movement founders who raised the intriguing speculation that penal harshness may have played a role in the movement’s rise. The innocence movement, paradoxically, arose just as America’s “tough on crime” and pro-death penalty policies reached their apogee in the 1990s and well before political conservatives became skittish about the costs of mass incarceration and began to advocate milder punishments.⁴⁷ As penalties became increasingly draconian, “tough on crime” states passed strong innocence laws; an example is Texas, whose exoneree compensation law offers the highest awards in the country.⁴⁸ According to Steve Saloom, former Innocence Project policy director, “[t]hose who want to be tough on crime also want to seem like they’re being fair at the same time.”⁴⁹

Yet, partisan divides often occur in valence issues, usually over implementation methods.⁵⁰ Soon after the innocence movement came into public consciousness criticisms arose from defense-oriented scholars on the “left” and a few critics on the “right.” The defense critics were concerned that juries would absorb the lessons of “actual innocence” and would disregard judges’ instructions regarding proof beyond a reasonable doubt; they would return not guilty verdicts only when convinced of a defendant’s actual innocence, shifting the burden of proof to the defendant.⁵¹ These fears

⁴⁵ See e.g., Christine C. Mumma, *The North Carolina Innocence Inquiry Commission: Catching Cases that Fall Through the Cracks*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 249-65 (M. Zalman & J. Carrano, eds., 2014) (discussing North Carolina Chief Justice I. Beverly Lake); see JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 58 (2008) (discussing William Sessions, former federal judge and FBI director under President Reagan); Jon B. Gould, *Introduction*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 5 (2014) (explaining former Attorney General Edwin Meese told Jon Gould that he supported the study of and rectification of wrongful convictions).

⁴⁶ Gould, Commission, *supra* note 45.

⁴⁷ HADAR AVIRAM, *CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015); DAVID DAGAN AND STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016).

⁴⁸ Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 *CRIM. J. POL’Y REV.* 352 (2012).

⁴⁹ Norris, *Exonerated*, *supra* note 43, at 135.

⁵⁰ Marvin Zalman, Brad Smith & Angie Kiger, *Officials’ Estimates of the Incidence of ‘Actual Innocence’ Convictions*, 25 *JUST. Q.* 72, 74 (2008); see also W. M. OLIVER, *THE LAW & ORDER PRESIDENCY* 125 (2003).

⁵¹ Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *J. CRIM.*

have not materialized. Another defense criticism, trenchantly stated by Abbe Smith, was that growing concern about actual innocence devalues legitimate concerns about factually guilty defendants, most of whom are society's losers, who are more in need of support than the stereotypical predator who the public imagines when the label "criminal" is brandished.⁵²

On the right, a noted scholar-judge erroneously claimed that innocence movement activists believe that one-half of all convicted defendants are innocent; his own wrongful conviction estimate was in fact close to the low estimate made by innocence scholars.⁵³ A prosecutor's casual and misguided effort to dismiss the number of wrongful convictions,⁵⁴ although taken to heart by a Supreme Court Justice,⁵⁵ was simply wrong.⁵⁶ Another more potent criticism is found in the work of philosopher of science Larry Laudan, who along with evidence professor Ronald Allen, has staked out a critique of the innocence movement based on cost/benefit reasoning⁵⁷ and an analysis of the Blackstone ratio, which is reviewed herein.

Two innocence movement defenses against such critiques appeared in 2008; they positioned the innocence movement in a middle ground, threatening neither traditional defense nor crime control orientations. Daniel Medwed, replying in part to a death penalty cost/benefit analysis,⁵⁸ challenged a "mechanical" view of the Blackstone ratio, stating that "wrongful convictions do not seem to be incidental effects of a system designed to maximize social benefit [i.e., of a Blackstone ratio]; on the contrary they are direct, unabashed examples of the system's flaws."⁵⁹ Medwed also argued that defining a conviction as one of actual innocence

L. & CRIMINOLOGY 587 (2005); Raymond, *infra* note 165.

⁵² Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety about Innocence Projects*, 13 UNIV. PA. J. L. & SOC. CHANGE 315 (2010); DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* (2006); Steve Saloom also links Smith's point to pro-innocence activism among conservatives. See, Norris *supra* note 43, at 128 ("the harsher the punishments, the more you want to keep the innocent out because really you're trying to scapegoat [offenders].") (quoting Steve Saloom).

⁵³ Morris Hoffman, *The Myth of Factual Innocence*, 82 CHICAGO-KENT L. REV. 663 (2007).

⁵⁴ Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES Jan. 26, 2006, <http://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html> (last visited May 12, 2018).

⁵⁵ *Kansas v. Marsh*, 548 U.S. 163, 185-99 (2006) (Scalia, J., concurring).

⁵⁶ Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67-72 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/gross.pdf>

⁵⁷ Allen & Laudan, *supra* note 4.

⁵⁸ Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005).

⁵⁹ Medwed, *Innocentrism*, *supra* note 25, at 1564.

“should aim as close to certainty as possible” but not be based on absolute proof. The latter standard, advocated by some innocence movement critics, would severely undercount wrongful convictions.⁶⁰

Keith Findley identified the innocence movement as a new justice paradigm—a “Reliability Model” aiming for investigation and prosecution accuracy. His model is situated between Herbert Packer’s adversary conceptualization of criminal justice as marked by the “Due Process” and “Crime Control” models.⁶¹ Both Findley and Medwed agreed that in the “real world” there are and must be some limits to which the justice system will go to prevent convicting the innocent. Accordingly, their essays were mindful of the time and resource constraints that attend any proposed justice system change to reduce the number of false convictions.⁶²

In all fairness, the innocence movement has a strong defense flavor.⁶³ Most innocence lawyers came from the world of criminal defense, and the Innocence Network⁶⁴ appears to have informal ties with the National

⁶⁰ Medwed, *Innocentrism*, *supra* note 25, at 1563. The definition-of-wrongful-conviction issue is not entirely settled and is a potential area of contest. See Richard A. Leo, *Has the Innocence Movement Become an Exonerated Movement? The Risks and Rewards of Redefining Innocence*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 57-83 (Daniel S. Medwed ed., 2017).

⁶¹ Findley, *New Paradigm*, *supra* note 10; see HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-246 (1968) (hereinafter *PACKER, LIMITS*).

⁶² The gist of their essays, especially Findley’s, was to sketch out a defense of innocence movement reforms in broad terms, but their attentiveness to a working system indicates that they would not seek impossible or unfeasible changes. In Findley’s case, he and the Wisconsin Innocence Project worked with a bipartisan commission established by the Wisconsin legislature to develop accuracy-enhancing reforms in relation to police lineup and interrogation procedures, see Keith Findley & Larry Golden, *The Innocence Movement, the Innocence Network, and Policy Reform*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 93-110 (M. Zalman & J. Carrano, eds., 2014). The cost/benefit and other practical constraints on reforms occur in the give-and-take of the practical politics that underlie virtually all policymaking. For two innocence reform examples, see Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 *U. BALTIMORE L. REV.* 535 (2013) and Mumma, *North Carolina*, *supra* note 45.

⁶³ “[W]hile the Innocence Movement is largely perceived as a defense-oriented movement, its rhetoric includes respect for fundamental crime control values.” Findley, *New Paradigm*, *supra* note 10, at 141.

⁶⁴ The Innocence Network:

“is an affiliation of 69 organizations from all over the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions. Currently, the Innocence Network consists of 56 U.S. based and 13 non-U.S. based organizations.”

Association of Criminal Defense Lawyers (NACDL).⁶⁵ Barry Scheck, the co-founder of the Innocence Project and in many ways the face of the innocence movement, was a past president of the NACDL.⁶⁶ Some prosecutorial conviction integrity units have hired defense attorneys to better guarantee their effectiveness.⁶⁷ Nevertheless, as Risinger and Risinger have noted, the role of the “innocence lawyer” differs from the traditional defense lawyer in significant ways. The innocence lawyer—a lawyer representing clients at various innocence organizations or innocence projects—does not represent *any* convicted prisoner and is not indifferent to the client’s factual guilt or innocence. The innocence lawyer is committed to carefully investigating cases for factual innocence and in so doing violates the “anti-signaling” ethic of standard defense lawyers. Innocence advocacy involves intense scrutiny and winnowing (triage) of cases before taking on clients and the investment of extraordinary investigation and litigation resources once a case is accepted. A client will be dropped if evidence convinces the innocence lawyers that the person is factually guilty. The Risingers opine that most criminal defense lawyers will not be comfortable with the innocence lawyer’s role because innocence advocacy in one or a few cases tends to undermine the anti-signaling posture related to their other clients.⁶⁸

Putting aside the differences between innocence lawyering and standard defense advocacy, Keith Findley suggested that innocence movement policy reforms would benefit prosecutors as well as innocent defendants and prisoners, through the greater accuracy in police investigation and forensic science methods. On balance, such diagnosticity-improving procedures will help police convict a larger number of “bad guys” while snaring a smaller number of innocent suspects. To put a familiar face on this point, the same Barry Scheck who was a president of the NACDL was also a commissioner on New York State’s Forensic Science Review Board from 1994 to 2016, “a body that regulates all crime and forensic DNA laboratories in the state.”⁶⁹

⁶⁵ NAT’L ASS’N CRIM. DEF. LAW., NADCL, <https://www.nacdl.org/> (last visited Apr. 15, 2018).

⁶⁶ The popularity of the innocence movement is displayed in a Time Magazine special edition devoted to the 25th anniversary of the Innocence Project. See *Innocent: The Fight Against Wrongful Convictions—25 Years of the Innocence Project*, TIME MAG. (Larry Sutton ed., 2017).

⁶⁷ Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033(2012).

⁶⁸ D. Michael Risinger & Lesley C. Risinger, *The Emerging Role of Innocence Lawyer and the Need for Role-Differentiated Standards of Professional Conduct*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 123, 135 (Sarah L. Cooper, ed., 2014).

⁶⁹ Univ. of Hawai’i at Manoa William. S. Richardson Sch. of L., *Barry Scheck: Visiting Professor* (2018) <https://www.law.hawaii.edu/person/barry-scheck>.

To reiterate, until recently wrongful conviction scholarship had little to say about the adjudication process.⁷⁰ The enormous bulk of innocence scholarship focused on what Sam Gross has famously called the canonical causes of false convictions:

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.⁷¹

Despite the considerable literature on these subjects, other possible sources of wrongful convictions require more research.⁷² More recently, however, legal scholars have turned their attention to attributes of the adjudicative process that might either be a source of wrongful convictions or, more likely, fail to screen out errors made by police investigators, forensic scientists, or in the pre-trial and prosecutorial charging process. A German legal scholar and I reviewed five studies by prominent legal scholars, including our symposium host, D. Michael Risinger, Tim Bakken, Keith Findley, Samuel Gross, and Christopher Slobogin.⁷³ These authors proposed novel trial procedure modifications aimed at preventing wrongful convictions and producing more accurate verdicts. Among the anti-Blackstonians, Cassell, who is more concerned with adversarially testing innocence movement claims than with developing a theoretical model, offered a spirited and in some ways convincing rebuttal to Bakken’s approach.⁷⁴ These five more or less inquisitorial proposals, sparked by judicial process diagnostic weakness disclosed by the innocence movement, on the whole provide better approaches to resolving adversary system inadequacies than the anti-Blackstonians’ proposals. While not reviewing them in detail, they offer other ways to think about system improvement.

⁷⁰ Zalman, Notes, *supra* note 44.

⁷¹ Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008) (citations omitted).

⁷² A recent law review symposium explored “non-canonical” sources of wrongful convictions. See James R. Acker, Allison D. Redlich, Catherine L. Bonventre & Robert J. Norris, *Elephants in the Courtroom: Examining Overlooked Issues In Wrongful Convictions*, 79 ALB. L. REV. 705 (2016).

⁷³ Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEXAS A&M L. REV. 189 (2015). In this article, we also addressed the plausibility of any of the reforms coming into being. *Id.* at 238-41. Laudan does not address the feasibility of adoption.

⁷⁴ Cassell, *Freeing*, *supra* note 5, at 1064-80. Cassell has not proposed alternate error-reducing trial procedures.

It seems to me that Epps and Laudan and Allen are unconcerned with this kind of innocent modeling (which Cassell critiqued). Adjudication errors flow from many structural and psychological factors that skew errors against the state as well as the defendant.⁷⁵ Many possible levers of change could produce more accurate trials in addition to the few analyzed by the anti-Blackstonians. Grunewald and I identified fourteen proposed accuracy-enhancing changes (not simply wrongful-conviction reducing proposals) raised by the five studies. Of these, several focused on the trial process as such: (1) drop the jury or constrain the evidence it receives, (2) enhance judicial control over the entire process, (3) increase judicial control over expert witnesses, (4) modify the lawyer's role, (5) allow a plea of "innocent," and (6) expand discovery. Among the concerns discussed, four of the five authors recommended some change to the rules of trial procedure or evidence, with only Keith Findley leaving the trial process "as it lays," but modifying the institutional setting for defense attorneys and prosecutors.⁷⁶

The innocence movement is more concerned with decision-accuracy throughout the criminal justice process than the anti-Blackstonians credit.⁷⁷ The defense lawyer's classic position, tasked with putting the state to its proof and owing full concern to ethically defending the client, is not concerned with overall system accuracy. The defense background of most innocence organization lawyers and their use of defense strategies in post-conviction litigation makes innocence work seem like standard defense work. But innocence lawyers encourage and work with prosecutors' conviction integrity units⁷⁸ and interact with police officials and forensic scientists to promote accuracy-enhancing investigations, supporting the innocence movement's "Reliability Model." In short, many diagnostic-improving innocence reforms will make police, forensic scientists, and prosecutors more proficient in convicting serious offenders. Nevertheless, it seems that innocence movement advocates wish to preserve the rules of trial evidence, whether embedded in constitutional principle or not, which favor the defendant and are targets of anti-Blackstonian critiques.⁷⁹

⁷⁵ A critical source for understanding the human sources of error in the trial process is Dan Simon's magisterial review of the psychological literature. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 144-222, 324-74 (2012).

⁷⁶ Zalman & Grunewald, *supra* note 73, at 212. None of the five authors whose work was analyzed were concerned with the standard of proof.

⁷⁷ This criticism applies more to Epps and Laudan and Allen than to Cassell. *See generally* Allen & Laudan, *supra* note 4; Epps, *supra* note 2; Cassell, *supra* note 5.

⁷⁸ John Hollway, *Conviction Review Units: A National Comparison*, (Univ. Penn., Working Paper No. 1614 2016), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?fyarticle=2615&context=faculty_scholarship.

⁷⁹ I elaborate on this point in the Conclusion, *infra* Part V.

B. *The Ideal of Balanced Justice*

The anti-Blackstonians desire a level adversary process playing field, but their balanced system descriptions, grounded in the tradition of legal scholarship, tend to tilt toward the prosecution. I believe the clearest and least partisan theoretical description of a balanced criminal justice system is Brian Forst's *Errors of Justice*.⁸⁰ It examines procedural and substantive errors of justice across a range of criminal justice processes.⁸¹ Forst conceives of "justice" as "an optimal outcome of justice for a criminal case. An optimal outcome is one that minimizes the total social cost of crime *and* crime control."⁸² The anti-Blackstonians, especially Allen and Laudan, and Cassell, emphasize the costs of crime without sufficiently weighing the effects and costs of crime control.⁸³

Errors of justice impose social costs of both crimes *and* sanctions, and are defined as "the net reduction in aggregate wealth associated with the act."⁸⁴ From the point of optimal justice, errors of justice—"errors in the interpretation, procedure, or execution of the law"—can run in opposite directions. The two directions are labeled "errors of due process" and "errors of impunity." The social costs of due process errors fall not only on innocent defendants but "include as well excessive intrusions against those who violate the law."⁸⁵ In the opposite direction, errors of impunity involve insufficient criminal law sanctions or "none at all where one is warranted."⁸⁶ Errors of due process or impunity can be *systematic* (the product of justice policies that bias outcomes toward errors) or *random* (actions of individual justice practitioners or private individuals or unforeseeable events that

⁸⁰ BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES* (2004); Laudan covers some of the ground specified by Forst in *Law's Flaws*, *supra* note 3, at xix-xx but in a casual and discursive, rather than in a systematic, way.

⁸¹ FORST, *supra* note 80, at 3.

⁸² FORST, *supra* note 80, at 4 (partial emphasis in original deleted and emphasis added).

⁸³ Thus, although it seems counterintuitive, it is likely that mass incarceration may have increased crime in some areas by weakening community social control. See TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

⁸⁴ FORST, *supra* note 80, at 46. Forst divides social costs into costs associated with crimes and costs of prevention and response to crime. He observes that costs are incurred privately (e.g., *Costs of crime*: property lost, medical costs, pain and suffering; *Costs of prevention*: locks, dependents deprived of income) and publicly (e.g., *Costs of crime*: insurance costs for theft, lost productivity of victims; *Costs of prevention*: criminal justice system). Forst discusses the difficulties of measuring intangible costs and the difficulty of measuring costs related to offenses with hard-to-identify victims. Costs include the costs of intervention. *Id.* at 52. A critical unanswered "piece of information" in these theoretical calculations is "the social cost of the detention, conviction and incarceration of an innocent person." *Id.* at 55.

⁸⁵ FORST, *supra* note 80, at 4.

⁸⁶ FORST, *supra* note 80, at 4.

inhibit or facilitate detection and conviction or that generate false convictions).⁸⁷

The anti-Blackstonians focus attention on the criminal trial/adjudication process rather than the entire criminal justice process (referring to false positives/negatives rather than errors of due process/impunity),⁸⁸ although some inconsistency may be present.⁸⁹ Laudan and Allen also expand the adjudication category by mislabeling prosecutorial dismissals as acquittals. Forst's book differs from that narrow approach in that his data-analytic analyses apply to a variety of justice system areas across the criminal justice system, including police-induced errors, prosecution policy and justice errors, sentencing, and homicide, as well as to the issue that fascinates anti-Blackstonians—standards of evidence at trials. His analyses use data relevant to those procedures in separate chapters and provide alternative analytic approaches to better understand these pressing issues.⁹⁰ He counts the failure of the justice system to adhere to rules of constitutional criminal procedure as due process errors of justice (in analytic rather than legal terms). To him, such errors have more than symbolic consequences. If constitutional protections are reduced, "protections falter, innocent people are more likely to be harassed, detained, and convicted, and actions taken against offenders, from interrogation to the terms of incarceration, may become needlessly harsh, with avoidable external costs imposed on taxpayers, the punished, and their dependents."⁹¹ If the justice system comes to be seen as "increasingly corrupt," consequences of due process errors may include increased crime and civil unrest.⁹² The sources of due process errors

⁸⁷ FORST, *supra* note 80, at 4.

⁸⁸ Epps, *supra* note 2, at 1128 ("The Blackstone principle can prevent only those harms that are caused by the adjudicative system itself. A false conviction may represent a greater tragedy than a false acquittal, but that tells us little about how the justice system should distribute errors."). This terminology diverts attention from a larger array of processes that allow potentially dangerous people who have committed acts that could lead to prosecution to escape detection.

⁸⁹ LAUDAN, *LAW'S FLAWS*, *supra* note 3, seems to have it both ways by asserting the decisions in the adjudication stage can have substantial effects on crime. This is discussed *infra* Part III.B.1&3. Laudan also raises the loophole that police action can also reduce crime, but he strongly emphasizes that changes in the standard of proof will reduce crime.

⁹⁰ FORST, *supra* note 80.

⁹¹ FORST, *supra* note 80, at 16. This is in stark contrast to Laudan, who asserts that adherence to rules of constitutional criminal procedure will increase wrongful acquittals and increase crime, LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 110-37 (Chapter 6).

⁹² Epps advances this idea. Epps, *supra* note 2; *see also infra* Part III.A.2.a. This point is not abstract from the perspective of linking riots or rebellions of African Americans since the 1960s to the effects of deeply embedded racialized policies borne of frustration with justice system wrongs, and at a more mundane level viewing the friction between police and minority communities that impedes the effectiveness of law enforcement as a factor in causing crime. *See infra*, Part IV; Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, Smithsonian.com (March 1, 2018) <https://www.smithsonianmag.com/smit>

may be innocent or inadvertent (e.g., mistaken eyewitness identification), due to systemic resource deficiencies, the result of unprofessionalism, or to more sinister motives involved in unjustified police killings. In Forst's scheme, legal but unduly harsh punishment is an error of due process. This Blackstonian position is made in a principled manner (the obverse of Epps's anti-Blackstonianism), and is not influenced by his Blackstone ratio calculations, discussed below.⁹³

C. *Criminologists on Blackstone*

Criminologists Shawn Bushway and Brian Forst estimated criminal justice system errors. Bushway's estimate relied on a data set of homicide investigations and convictions in Chicago, while Forst applied the Blackstone ratio to hypothetical trial data. Bushway asserted that Blackstone took it seriously: "Blackstone hypothesizes that it would be ideal to have a justice system that generates ten false negatives for every false positive."⁹⁴

1. Bushway on the Blackstone Ratio.

Sean Bushway conducted what he called a Blackstone ratio of murder convictions based on a detailed study of a sample of sixty-three Chicago murders reported to police in 1979.⁹⁵ Investigators reported the suspects per case they believed to be involved in the murders, which totaled to ninety.⁹⁶ Of these ninety suspects, sixty-one were not convicted and twenty-nine were convicted. Bushway assumed all sixty-one suspects who were not convicted were false negatives (falsely acquitted) due to the "strong assumption that the police estimate the number of suspects based on witness testimony, and evidence is a good estimate of the number of people who were actually guilty of murder."⁹⁷ He extrapolated a 3.4 percent wrongful conviction rate from

hsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/ (last visited, May 19, 2018); CHRIS HAYES, *A COLONY IN A NATION* (2017).

⁹³ *Infra* at Part III.A.

⁹⁴ Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1088 (2011). Volokh, *supra*, note 8, (citing that the idea that it is better for guilty men to go free than an innocent man be imprisoned was a deeply rooted cultural tradition). In light of Epps's note that the ratio was propounded somewhat casually, it is likely that Blackstone himself used the number as a way of emphasizing the principle's importance. Epps, *supra* note 2.

⁹⁵ Actually, seventy-two were reported to police, but nine were dropped. No data about the number of suspects was reported. Bushway, *supra* note 94, at 1092.

⁹⁶ Bushway, *supra* note 94, at 1092. This was a unique feature of the data set. See also Joseph L. Peterson et al., *Forensic Evidence and the Police, 1976-1980* (2006) <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/8186/detail>.

⁹⁷ Bushway, *supra* note 94, at 1093 (comma added to original). For a less sanguine view of evidence-based murder investigations by Chicago police, see Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENGLAND L. REV. 1 (1993). To his credit, Bushway notes that his estimate "rests crucially on

Risinger's estimate of error in rape/murder cases and assigned one of the twenty-nine convicted to the factually falsely convicted category.⁹⁸

Thus, when estimating the suspects who were assumed to commit/not commit the crime by people convicted/not convicted, sixty-one were assumed guilty/not convicted, twenty-eight were assumed guilty/convicted, and one was assumed not guilty/convicted. None were assumed to be not guilty/not convicted.⁹⁹ The original data set included detailed descriptions of the adjudications and final conviction charges. Of the twenty-nine found guilty of murder, attempted murder, or voluntary or involuntary manslaughter, Bushway reports that fourteen pleaded guilty and three were convicted by jury. He does not report, but we might assume, that the remaining twelve were convicted in bench trials. Unfortunately Bushway does not report whether any of the sixty-one who were not convicted were acquitted at trial or were dismissed. It may not matter to some utilitarians, but given what we know about trial acquittals, most of the sixty-one probably were not charged by prosecutors.¹⁰⁰

With the lopsided assumption of police accuracy that equates a suspect with a guilty defendant, Bushway estimated a Blackstone ratio of sixty-one to one. He then pulled back from the assumption that all ninety suspects identified by the police were guilty perpetrators, and as an alternative reduced the number of murderers in the 1979 data set from ninety to sixty-three, "the smallest number of murderers possible."¹⁰¹ Recalculating the table with sixty-three instead of eighty-nine "guilty" murderers "provides an estimate of thirty-five false negatives, which provides a false negative rate of 55.5 percent, and an empirical Blackstone ratio of thirty five-to-one. As a result, I feel confident that the lower bound or floor of the Blackstone ratio in this data is thirty-five-to-one."¹⁰² Either estimate is far above the Blackstone ratio "ideal" of ten guilty to one innocent.

the assumption that the police estimate of the number of perpetrators is a good estimate of the number of guilty parties. If this assumption is incorrect, the exercise is flawed." Bushway, *supra* note 94, at 1094.

⁹⁸ Risinger, *Innocents Convicted*, *supra* note 26. Risinger warns against such extrapolation.

⁹⁹ See Bushway, *supra*, note 94, at 1092. ("[T]he total number of people who did not commit the crime, is a difficult conceptual number. Clearly, any number of people in Chicago did not commit the crime, so this number could be arbitrarily large.")

¹⁰⁰ It is important to understand the underlying criminal process that generates these statistics. Laudan, for example, calls dismissals "acquittals." Laudan, *Different Strokes*, *supra* note 3; LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 60 ("We know that of those arrested by the police and charged with violent crimes in 2008, some 37% never made it to a trial or plea bargain; the prosecutor or the pre-trial judge, in effect, acquits them."). I will return to Bushway's data when I offer a critique of Laudan's approach, *infra* Part III.B.3.

¹⁰¹ Bushway, *supra* note 94, at 1093–94.

¹⁰² Bushway, *supra*, note 94, at 1094.

Bushway's analysis, although based on "strong assumptions," is surely correct in broad strokes: there are many more people who commit criminal acts and are not sanctioned by the criminal justice system than are convicted. This point is worth lingering over because Laudan and Allen's argument rests in good part on the finding that the risk of being a crime victim is much higher than the risk of being wrongfully convicted. This point, however, comes as no surprise to anyone familiar with the criminal justice and trial systems. Defense attorneys know that most of their clients are factually guilty to some degree. Laudan recites criminal justice data to that effect and Risinger makes the point in his response to Allen and Laudan: "the numbers given by Allen and Laudan are almost certainly artificially high and seem to have been selected to make their readership . . . more threatened."¹⁰³ But in Risinger's view the ratio of false acquittals to false convictions does not matter or is to be expected "because *some* such substantially higher risk must always attach to the risk of being a victim over the risk of being a convicted innocent simply as an inevitability of any likely set of social arrangements in the real world. Any other result is virtually unimaginable."¹⁰⁴

Risinger's observation makes sense if we ask, what is the source of Bushway's 35-to-1 ratio of false negatives (false "acquittals") to false positives (false convictions)? To the anti-Blackstonians the sources of error lie mainly in rules of criminal procedure that make it harder to convict the guilty at trial. I assume, however, that most if not all of the sixty-one suspects in Bushway's sample who were "not convicted" were dismissed by the prosecutor (perhaps a few were acquitted at trial). Some of the sixty-one (probably dismissed) non-convicted may have been guilty.¹⁰⁵ But it is risky to make assumptions about what goes on in prosecutorial charging and dismissal, a process which is not that well documented.¹⁰⁶ In any event, the source of the disproportion of convicted guilty to unconvicted guilty is important because Laudan argued that increasing the proportion of trial convictions, lowering the proportion of dismissals, and longer prison sentences will reduce crime. If, however, the primary sources of unconvicted guilty people lie *outside* the adjudication process, then the focus of crime reduction should be on those areas, not the trial.

¹⁰³ Risinger, *Tragic*, *supra* note 10, at 1016.

¹⁰⁴ *Id.* I would add that it is unimaginable in any "normal" state; one could imagine that in a repressive, totalitarian dictatorship going through a phase of "eliminating enemies" a different ratio might exist.

¹⁰⁵ Laudan, *Different Strokes*, *supra* note 3, at 1-2 argues that prosecutorial dismissals should be treated as acquittals, a point that will be discussed, discussed *infra*.

¹⁰⁶ See discussion *infra*, at notes 147-154.

For Laudan and Allen, crime will be reduced and verdict accuracy increased by lowering the standard of proof, eliminate defendants' procedural protections, dismissing fewer cases and convicting more of the guilty at trial (which will result from a relaxed standard of proof and fewer procedural protections). But empirical knowledge about the criminal justice system demonstrates that the fault probably lies in the failure to report and apprehend, and the (poor) quality of evidence in cases that came to the attention of prosecutors. If evidence in the Chicago homicide cases was stronger, the prosecutor would likely have obtained more guilty pleas and brought more cases to trial. The innocence/empirical perspective is that deficiencies in processing cases at *all* pretrial stages, not only at trial, generates false prosecutions and false convictions, *and* that these pretrial deficiencies also reduce the state's ability to successfully prosecute serious crimes.

So, Bushway's Blackstone ratio rests not so much on the difficulty of proving their guilt at trial because the burden of proof is too high, but more on upstream problems allowing serious criminals to go uncaught and handing prosecutors weak cases that lead juries to acquit.¹⁰⁷ The reasons for this are well known. Aside from murder, which usually comes to the attention of police, many violent crimes are not reported. Non-reporting might indicate distrust of the police based on mistreatment of minority populations; deportation of undocumented immigrants; fear that police might negligently injure or kill a witness;¹⁰⁸ mental disability; or a sense of hopelessness generated by conditions of poverty and systemic deprivation of standard government services by law, custom, or the greater political influence of the affluent.¹⁰⁹ Flaws in police and forensic investigation and the lack of defense investigation services compound the problem by not screening out innocent suspects. It is likely that lowering the burden of proof without correcting current weaknesses in the upstream criminal justice process will deepen the sense of impunity or negligence among police and forensic investigators.¹¹⁰

¹⁰⁷ To be clear, Bushway does not assert an anti-Blackstonian reason for his speculation. See generally Bushway, *supra* note 94.

¹⁰⁸ See John Eligon, Vivian Yee & Matt Furber, *In Minneapolis, Unusual Police Killing Raises an Old Outcry: Why?*, N.Y. TIMES, July 22, 2017, <https://www.nytimes.com/2017/07/22/us/minneapolis-police-shooting.html?ref=todayspaper>

¹⁰⁹ See Part IV.B.5, *Murder, Race, and the State*, *infra*.

¹¹⁰ This point is made by Forst, *supra* note 80, at 64. I discuss this moral hazard in the critique of Laudan and Allen regarding the Blackstone ratio, *infra* Part III.B.3.

2. *Forst on Reasonable Doubt.*

Brian Forst, in Chapter 6 of his book, examines standards of evidence in cases that go to trial, asking, “[w]hat precisely is meant by ‘proof beyond a reasonable doubt?’”¹¹¹ Forst takes readers through hypothetical scenarios by “establishing relationships among three variables: the percentage of cases with true offenders, the conviction rate, and the percentage of defendants convicted who actually committed the crime.”¹¹² In scenarios in which he holds the actually guilty and actually innocent rates constant while varying the conviction rate, Forst demonstrates that if a “super-judge” (my term) were to try to reduce the number of false convictions by decreasing the conviction rate, the number of falsely acquitted would increase sharply, producing “Blackstone ratios” of up to 101-to-1 (where the conviction rate is decreased to forty percent). If, in his scenarios, the conviction rate were increased to eighty percent, the ratio would be one to one, or eight factually guilty acquitted and eight factually innocent convicted, a scenario that “violates” the Blackstone ratio but convicts far more guilty persons. This exercise shows if one were to strictly apply the Blackstone ratio as if it were a law of nature, a very large number of guilty people must be freed in order to reduce the number of wrongfully convicted. Forst’s abstract analysis of standards of proof is only one chapter in a larger and more empirically informed project to speculate about possible challenges to optimal justice.

Given the mathematically reciprocal ratios in Forst’s scenarios, the presentation almost suggests an automatic or “hydraulic” effect of modifying the standard of proof. Laudan and Allen engage in a similar exercise and seem almost to invest the quantitative relationships with agency.¹¹³ But Forst’s mathematical exercise in Chapter 6 must be read in the context of comments in Chapter 5, which comprehensively and normatively assess justice error costs. He asks, for example, whether the ratio should apply equally in serious and trivial crime, implying that the ratio masks ethical questions.¹¹⁴ So for all of the numeric manipulation of the *trial* standard of evidence in Chapter 6, Forst makes it clear that the trial is only one venue for thinking about tradeoffs in the justice system, and that a system of optimal interventions against crime must consider the social costs of both crime (including pain and suffering) and the application of the justice system (monetary costs to society, deprivations to prisoners’ families, etc.), special evaluations for victimless crimes, and the like. A rational frame for making

¹¹¹ FORST, *supra* note 80, at 58.

¹¹² FORST, *supra* note 80, at 58.

¹¹³ *Infra* Part III.B.1&3.

¹¹⁴ FORST, *supra* note 80, at 45 (“Blackstone’s dictum places an arbitrary lower bound on the tradeoff, leaving open the question, ‘How *much* better,?’ thus side-stepping an assessment of the respective social costs of each type of error.”) (emphasis in original).

cost/benefit estimates of justice might exist, but the data to make firm conclusions are not available, and the frame itself does “not eliminate the prospects for ideology to trump objectivity in the development of an error-sensitive justice policy.”¹¹⁵

Forst pulls back from going this far and, along with cordoning off his Blackstonian analysis in a separate chapter, applies data-analytic approaches to a variety of justice system issues.¹¹⁶ Each issue is analyzed in the context of contemporary criminological research and where possible uses available or hypothetical data relevant to that issue (rather than a global Blackstone ratio). This is quite different from Laudan and Allen who seem to claim that every aspect of criminal investigation, prosecution and crime control can be manipulated by adjusting the conviction ratio. Forst warns readers: “such information provides just a single piece of the large and complex puzzle of criminal justice policy.”¹¹⁷ So Forst’s Blackstonian study, like a musician’s finger exercises, provides a sense of how the Blackstone ratio would operate *if* it were like a natural law of hydraulics. But his more wide-ranging book offers different and more specific analytic strategies that provide food for thought and potential guides for action. He clearly knows too much about justice institutions to propose radical changes based on hypothetical analysis: “[t]he obvious problem with the numbers used in these scenarios is that we don’t know which set is nearest to the truth in any jurisdiction.”¹¹⁸ Also, like most criminologists, he identifies the source of error with system actors and not on the automatic operation of legal standards of proof.¹¹⁹

¹¹⁵ FORST, *supra* note 80, at 55.

¹¹⁶ The chapters in his book assess the sources of error of due process and impunity in regard to police investigation, prosecution policy, the jury, sentencing and corrections, and homicide. He concludes with a chapter on the legitimacy of the criminal justice system. *See generally* FORST, *supra* note 80.

¹¹⁷ FORST, *supra* note 80, at 65.

¹¹⁸ FORST, *supra* note 80, at 63.

¹¹⁹ FORST, *supra* note 80, at 62-63. (“The percentage of those convicted who did not commit the crime will be based largely on police and prosecution practices, as well as the inclination of judges to protect the rights of the defendant and the willingness of juries to decide on verdicts of guilt. . . . The number of offenders freed per innocent defendant convicted and corresponding total error rate are likely to be affected also by the quality of defense counsel in the jurisdiction and the willingness of each side to engage in plea negotiations”).

III. OVERVIEW AND INTERNAL CRITIQUES OF EPPS, LAUDAN AND ALLEN, AND CASSELL

A. *Epps on Blackstone*

1. Overview

Epps's encyclopedic review of the Blackstone principle situates the principle as a regnant idea shaping the legal world's views of procedural rules asymmetrically favoring the defendant. Given his uphill battle against its entrenched position, he is justified in covering as many bases as possible.¹²⁰ He ties the principle's development to the amelioration of the death penalty and harsh trial procedures of eighteenth-century English criminal law, suggesting that the current justification for the principle is attenuated or no longer necessary.¹²¹ He then traces the traditional account, which prefers the cost of a wrongful acquittal to that of a wrongful conviction, and the utilitarian reaction against it going back to Bentham.¹²² Epps follows this review with his original idea that the principle's effects are not static but dynamic, and supports this claim with six analyses that suggest that the Blackstone principle might make a defendant worse off.¹²³ This argument is grounded in a mix of theoretical and empirical observations; my critique, in Part III.A.2, will address only this part of Epps's Article. The gist of my criticism does not deny the dynamic effects of legal rules, but argues that Epps's logical and theoretically supported points are, based on an empirical understanding of criminal justice, too small to significantly affect the justice system.¹²⁴

Epps follows his analysis of the dynamic Blackstone principle with "alternative justifications," that raise, meet, challenge, and (in his estimation) vanquish a number of jurisprudential defenses of Blackstonianism, both

¹²⁰ Epps, *supra* note 2, at 1072-77. His overview includes a few glimmers of social reality: (i) Blackstone-Principle analysis may be limited where vast majority of convictions are obtained by guilty plea; (ii) he raises the "real-world" effect with a concern that terrorists may escape conviction (although he makes no reference either to the costs of crime victims or the wrongfully convicted); and (iii) he refers to two opinion polls. These stabs at social reality do not topple his largely theoretic exercise. *Id.*

¹²¹ Epps, *supra* note 2, at 1077-87. Above, I suggested a different approach to this historical understanding, namely that analyzing criminal justice only through adjudication procedures fails to account for the ways in which the contemporary criminal justice system is a product of the world since the 1820s. See WALKER, POPULAR JUSTICE, *supra* note 27.

¹²² Epps, *supra* note 2, at 1087-92. Laudan and Allen continue the Benthamite/utilitarian critique of the Blackstone principle. Allen & Laudan, *supra* note 4.

¹²³ Epps, *supra* note 2, at 1092-1124.

¹²⁴ The temperature of a lit match is higher than the water temperature of the Atlantic Ocean, but tossing a lit match into the surf at Jones Beach has a minuscule effect on the Ocean's mean temperature.

consequentialist and deontological.¹²⁵ About these arguments I have nothing to say, aside from some incidental comment. My critique is based on what I can bring to the table as a criminal justice scholar and not as a legal philosopher. Whether my critique might cause an anti-Blackstonian to pause depends perhaps on whether one is convinced more by legal-theoretical analysis or by less elegant empirical considerations.¹²⁶

An engaging element of Epps's article is his caution and openness to possible error. He allows, despite his intellectual *tour de force* (which he assumes has undermined "complete and persuasive justification for the Blackstone principle"), that "[a] compelling argument for the Blackstone principle could well emerge."¹²⁷ He also addresses a number of reasons why his analysis might fall short, including plea-bargaining, unintended consequences, and limited knowledge of how the system produces error.¹²⁸ He refreshingly notes, "we can't reach conclusions about how our system produces errors by looking solely to formal rules."¹²⁹

Epps's anti-Blackstonianism differs from Laudan and Allen's in at least two ways. First, he avoids the numerical Blackstone ratio and focuses on the Blackstone principle, while Laudan and Allen make assumption-based numerical calculations with crime statistics. In keeping with his quantitative approach, Laudan approximately equates the harm of a wrongful conviction with the harm of a violent victimization and replaces the Blackstone ten to one ratio with his "metric [that] a false conviction (2.2 victims) is roughly twice as harmful as a false negative (1.2 victims). That justifies that the state should make it harder to convict an innocent person than it is to acquit a guilty one."¹³⁰

Second, Epps rejects the Blackstone principle entirely while Laudan "does not dispute the traditional and familiar claim that a typical false positive [i.e., wrongful conviction] is more harmful to society than a false negative."¹³¹ The Blackstone principle is reflected in a number of procedural rules like proof beyond a reasonable doubt that create formal asymmetries in favor of the defendant. Epps emphasizes that his Article is not aimed at attacking these rules; rather he "is critiquing an *idea* about how criminal punishment should be distributed, one that may not actually be consistent

¹²⁵ Epps, *supra* note 2, at 1124-43.

¹²⁶ FORST, *supra* note 80, at 159 takes a certain brand of theoreticians to task: "Many criminologists are justifiably skeptical of the economist's rather narrow approach to analyzing crime, regarding it not so much incorrect as reductionist and incomplete."

¹²⁷ Epps, *supra* note 2, at 1142-43.

¹²⁸ Epps, *supra* note 2, at 1143-48. This section reads much like the obligatory section in social science journal articles, which specify the limits of the research.

¹²⁹ Epps, *supra* note 2, at 1145.

¹³⁰ LAUDAN, LAW'S FLAWS, *supra* note 3, at 80.

¹³¹ LAUDAN, LAW'S FLAWS, *supra* note 3, at 80.

with the way our system operates.”¹³² Epps rejects the Blackstone principle “as a theory of the proper distribution of punishment” for two reasons: (1) its benefits are “smaller than usually assumed” (and might make defendants worse off) and (2) it causes voters to be inclined toward harsh punishment and to feel less sympathy for defendants—labeled a “political-process failure,” that hurts defendants and society as a whole.¹³³ My critique of Epps (which overlaps with those of Laudan and Allen and Cassell) is aimed at the six arguments he raises to support his dynamic interpretation. To the degree that my analysis is based on empirical evidence and conjecture, it could be seen as orthogonal to Epps’s rational/theoretical approach.

2. Internal Critique of Epps

Epps’s rests his assertion that the Blackstone principle (BP) does not deliver benefits to defendants on his speculative thesis¹³⁴ that the Blackstone principle is “dynamic” and that a system that includes the Blackstone principle will lessen benefits to defendants. This thesis is not based on quantitative reasoning but upon six “imaginative comparison[s]” between two systems (a BP system and a non-BP system).¹³⁵ On the whole I found Epps six “imaginative comparison[s]” less than compelling, and often tentatively phrased.

i. Crime, Punishment, and Policing¹³⁶

The base argument in this section is that the BP, by making convictions harder to obtain, makes crime more prevalent than in a non-BP society.¹³⁷ This theory makes little sense from a criminological perspective, which links the prevalence of crime to a number of social, economic, political, cultural, situational, and psychological factors. For example, one of the most debated topics in contemporary criminal justice policy is why serious crime dropped precipitously after 1990.¹³⁸ Crime increased from 1965 to the 1980s,

¹³² Epps, *supra* note 2, at 1074 (emphasis in original). Some asymmetries listed by Epps include, for example, reasonable doubt, jury unanimity, and no prosecution appeal of not guilty verdicts. *Id.* at 1073. Laudan takes on many of these asymmetries. See LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 110-37. Epps claims that the Blackstone principle is given lip service but “surprisingly little rigorous analysis.” Epps, *supra* note 2, at 1069.

¹³³ Epps, *supra* note 2, at 1070, 1102-04.

¹³⁴ Epps, *supra* note 2, at 1094 (admitting that his thesis involves a generous dose of speculation but claims that “is preferable to implicitly assuming that the Blackstone principle has no systemic consequences at all”).

¹³⁵ Epps, *supra* note 2, at 1094.

¹³⁶ Epps, *supra* note 2, at 1095-99.

¹³⁷ Epps, *supra* note 2, at 1095-99. The argument is also asserted, in different ways, by Laudan and Allen and Cassell, so my critique in this section applies generally to the other anti-Blackstonians. See Cassell, *supra* note 5; Allen & Laudan, *supra* note 4.

¹³⁸ Candidates include harsh sentences, improved policing, economic upturn,

fluctuated for a decade, and then dropped continuously throughout the 1990s and into the 2000s absent changes in the fundamental rules guiding adjudication practices. Epps's analysis includes a passel of arguments that mostly rest on abstract utilitarian or economic thinking and wanders off in a number of directions. He discusses: the counter-argument that the BP decreases crime through increasing respect for and obedience to law;¹³⁹ one public opinion poll showing that a majority of citizens disagree with the BP;¹⁴⁰ public outrage at verdicts like the Casey Anthony acquittal;¹⁴¹ an assumption that increased crime caused by the Blackstone principle reduces accuracy in the criminal justice process;¹⁴² economic reasoning that the fewer people punished, the harsher the punishment;¹⁴³ speculation about

demographic changes, changes in illicit drug markets, legal abortion, and more. See THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman, eds., 2000); FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007); JOHN E. CONKLIN, WHY CRIME RATES FELL (2003); Shawn D. Bushway, *Labor Markets and Crime*, in CRIME AND PUBLIC POLICY 183-209 (James Q. Wilson & Joan Petersilia eds., 2011). A recently published study provides data and analysis to support the role played by local, community-based, nonprofit organizations in reducing serious crime since 1990. See Patrick Sharkey et al., *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, AM. SOCIOLOGICAL REV. (2017).

¹³⁹ Epps, *supra* note 2 at 1095-96; in discussing errors of impunity, Forst, *supra* note 80 at 23, observes that "the credibility of deterrent effectiveness is lost, and citizens become increasingly inclined to perceive injustices to victims and alienation from the police and the courts, if not from government generally."

¹⁴⁰ Epps, *supra* note 2 (citing one opinion poll showing that 56% of respondent disagreed with the BP could simply be a makeweight argument). Contrast Baumgartner et al.'s review of *all* the public opinion polls related to the death penalty in America from 1953 to 2005, showing that while public opinion on a topic as deeply rooted as capital punishment is inertial, it does respond to environmental factors the number of homicides and to the innocence frame. These factors led to a historic decline in support for the death penalty. See FRANK R. BAUMGARTNER, SUZANNA L. DEBOEF, & AMBER E. BOYDSTUN, THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 166-99 (2008).

¹⁴¹ False acquittals at trial do occur and notorious false negatives raise public ire, but along with other, perhaps less justified social ills, are absorbed by society. The 1990s seems to have been a big false negative decade, or perhaps that perception is shaped by a number of notorious cases. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS (1996); POSTMORTEM: THE O. J. SIMPSON CASE—JUSTICE CONFRONTS RACE, DOMESTIC VIOLENCE, LAWYERS, MONEY AND THE MEDIA (Jeffrey Abramson ed., 1996).

¹⁴² There may have been a link between the increase of serious crime from the 1960 to the 1980s, the metastatic expansion of punitiveness known as the war on drugs and mass incarceration that flooded the courts, and an increase of wrongful convictions. See Hannah Laqueur et al., *Wrongful Conviction, Policing, and the "Wars on Crime and Drugs,"* in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 93-107 (Allison D. Redlich, et al., eds. 2014). Laqueur et al. did not include the BP as a cause of the problem. *Id.*

¹⁴³ This theory seems refuted by the lower imprisonment rates and shorter average sentences before 1970 and the increase in the prison rate and longer average sentences in the mass incarceration era. I would think that any empirical examination of the issue would include surplus wealth available to the state, crime rate, and ideology to an equation.

whether police spending would increase in a BP world to compensate for the “heightened difficulty” of obtaining convictions; and doubts about whether increased policing would compensate for the alleged increase in crime cause by Blackstonianism. Epps concludes the section with this: “The key point, however, is that unless the legitimacy thesis is right and the Blackstone principle is essential for deterrence, then letting more guilty people go free must result in *some* combination of increased crime, heightened punishment, and greater investment in policing.”¹⁴⁴

Even if proven, the asserted Blackstonian effect, while logical, would have a minuscule effect on crime, one that is, perhaps, too small to measure. Epps’s speculation rests on a premise that what occurs in the conviction of criminal cases already in the adjudication stage will directly impact crime rates. This must be the case because Epps insists that his reasoning applies only to errors “that are endogenous to the rules governing criminal adjudicationFalse Expanding the lens to include all of the justice system’s failures to correctly identify wrongdoers would implicate a much broader set of normative tradeoffs — such as how much society should invest in policing as opposed to other social goals — that needlessly complicate the inquiry.”¹⁴⁵ However, Epps does not limit effects to those caused by the false positives and false negatives among the five percent of cases that go to trial, but, like Laudan, includes cases dismissed by prosecutors based on limits of proof, thus expanding the impact of the BP on crime rates.¹⁴⁶

By bringing prosecutorial dismissals into his qualitative analysis, Epps must be assuming that he can precisely measure the reasons for why prosecutors dismiss cases. But the truth is that data on prosecutorial dismissals are severely limited. John Pfaff, perhaps exaggeratedly claims “we have almost no information whatsoever on what prosecutors do or how (or why) they do it.”¹⁴⁷ Some data, gathered by legal scholars and criminologists do exist, but it reveals general patterns not sufficiently refined to answer the kinds of questions relevant to the anti-Blackstonians’ concerns of separating the guilty from the innocent. Miller and Wright, for example, mined a decade’s worth of data on reasons for prosecutorial dismissals in

¹⁴⁴ Epps, *supra* note 2, at 1099.

¹⁴⁵ Epps, *supra* note 2, at 1076, at n. 39. Of course, looking at upstream causes of error is a major concern of the innocence movement.

¹⁴⁶ Epps, *supra* note 2, at 1076, n. 39 (“[I]t also includes dispositions short of actual trial, such as a prosecutor’s decision to drop charges upon determining that she could not prove guilt beyond a reasonable doubt; such an outcome is the product of the rules that govern trials even if no trial occurs.”).

¹⁴⁷ JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 17 (2017). Pfaff uncovered data about gross charging statistics. *Id.* at 71-72. However, data is unavailable “about how prosecutors . . . determine who they will charge and how they will charge them.” *Id.* at 42.

New Orleans (before that data collection was terminated), and concluded that the regularity of those decisions demonstrates that discretion is exercised in ways that “reveal[s] an internal legal order at work.”¹⁴⁸ While it is reassuring that prosecutors do not exercise discretion in lawless or entirely arbitrary ways, the gross categories of reasons given do not answer whether cases were dismissed because of actual innocence. Criminological studies of prosecutorial discretion have been criticized as “dated, restricted to small samples, and focused on limited offense types in specific jurisdictions.”¹⁴⁹ Nevertheless, those studies, like the Miller and Wright data, show reasonable general patterns and professionalism in decision-making. A large-sample federal charge reduction study under mandatory guidelines, for example, found no evidence of racially biased decisions.¹⁵⁰ The bulk of criminological research shows that prosecutorial discretion is motivated primarily by evidence strength and crime seriousness.¹⁵¹ Yet, according to Forst, the data are not sufficiently refined to dispel the hypothesis that many decisions are subjective.¹⁵² Reflecting on the termination of a systemic data gathering program, Forst comments that “it is really remarkable that we have *less* useful information now about the routine prosecution of felony cases than we did 30 years ago.”¹⁵³

Not knowing, with specificity, what goes on in the opaque world of prosecutorial charging and dismissals weakens Epps’s speculation. Even with available studies we might speculate that thoughtful prosecutors in the charging process, alert to an array of justice concerns, may be conducting a kind of Khadi justice and dismissing cases based on complex, perhaps somewhat personalistic, notions of right and wrong but guided by more or less reasonable factors. Or, in the alternative, policies may vary from one county to another without much rationale except for the elected prosecutor’s predilections.¹⁵⁴ In any event, it is hard to know how a sudden drop in the

¹⁴⁸ Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 130 (2008). The reasons for recording dismissals by assistant prosecutors was for internal review; although the practice was discontinued when a new prosecutor came into office there is no reason to believe that the general pattern of dismissal reasons would be dramatically different under a different prosecutor.

¹⁴⁹ Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 396 (2010).

¹⁵⁰ Shermer & Johnson, *supra* note 149.

¹⁵¹ Brian Forst, *Prosecution*, in CRIME AND PUBLIC POLICY 437-66, 446 (James Q. Wilson & Joan Petersilia, eds., 2011).

¹⁵² Forst, *Prosecution*, *supra* note 151, at 447.

¹⁵³ Forst, *Prosecution*, *supra* note 151, at 439 (emphasis in original); see Shermer & Johnson, *supra* note 149, at 396 n. 1 (Prosecutor’s Management Information System [PROMIS] terminated in 1992).

¹⁵⁴ Recent data from the new web-based county-level justice information system, Measures for Justice (MFJ), allows us to peer into justice processes as never before. On

standard of proof would affect prosecutors' decisions related to their assessment of the factual guilt of defendants. Perhaps most prosecutors would seek to increase the number of convictions but others might not.

Epps's "imaginative comparisons" operate under a presumably unchanged or contemporary criminal justice system and Laudan and Allen seem to think that a lowered burden of proof would simply be passed by rational legislators convinced by rationalistic argument. But consider a political scenario that might have to exist to cause state legislatures to enact evidence statutes that replace beyond a reasonable doubt with clear and convincing evidence. Such a radical departure would most likely be part of an extreme right-wing or alt-right political advance that would make the Tea Party appear middle of the road and, like the attempt of the Polish government in 2017, would make courts subservient to the government.¹⁵⁵ One could then imagine intense polarization over the issue, with staunch ACLU opposition, a possible red-state-blue-state divide, and some prosecutors in clear and convincing jurisdictions, having an attachment to older ideals, holding to beyond-a-reasonable-doubt prosecutorial charging standards. Although passage of such a law might strike some as bizarre, adherence to the traditional rule of law ideas, at least in criminal cases, should not be assumed.¹⁵⁶

August 28, 2017, data for "Cases Not Prosecuted" in Florida indicate very different dismissal rates for two *adjacent* counties in the Florida panhandle: Liberty County (8.45%) and Calhoun County (26.39%), and two large *adjacent* counties on the Atlantic coast: Broward County (15.2%) and Palm Beach County (31.35%). Why these differences exist in adjacent counties in anybody's guess, but Measures for Justice should be thought of as the equivalent of van Leeuwenhoek's microscope for America's justice system – we are beginning to see things about the justice system never before clearly seen, even if their existence was sensed.

The need for expert knowledge and caution when assessing the sources of criminal justice data is provided by an exchange with MFJ. State Attorney Offices in Florida are organized by Judicial Circuit, some of which have jurisdiction over multiple counties. Thus, although Liberty and Calhoun Counties belong to different judicial circuits, there are high variations of declination rates between some counties within the same Judicial Circuit/State Attorney Office (email communication with Gipsy Escobar, MFJ, Feb. 2, 2018, on file with author). The wide variations in rates of prosecutorial declination that may exist within a prosecutor's office, suggest that scholars apply extreme caution when making statements about prosecutorial decision-making.

¹⁵⁵ Any government that wants its trials to come out in a preordained way is better off handpicking safe judges. See Rick Lyman, *In Poland, an Assault on the Courts Provokes Outrage*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html?ref=todayspaper>. The attempt to control the courts led to massive opposition, with the government backing off. Rick Lyman & Joanna Berendt, *Poland's Court Crisis Cools Off, but It's Far From Over*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/07/29/world/europe/poland-court-protests-andrzej-dukda.html>; Marc Santora and Joanna Berendt, *Poland Overhauls Courts, and Critics See Retreat From Democracy*, N.Y. TIMES, Dec. 20, 2017, <https://www.nytimes.com/2017/12/20/world/europe/eu-poland-law.html>

¹⁵⁶ Tom Delay, who rose to the position of House Majority Leader, holds the radically

In today's America, a historically and comparatively unprecedented number of people are under penal control not because of the BP or a rational response to serious crime but because of two generations of irrational fear of drugs and a politicized and racialized justice policy.¹⁵⁷ Contra the purely rational idea of more policing reducing serious crime, the historic pattern shows police treating black-on-black crime and homicide with impunity, thus not deterring or incapacitating serious criminals, while a neoliberal polity simultaneously avoids addressing criminogenic and correctible social, economic, and health needs of minority and poor communities.¹⁵⁸ In any event, the number and deployment of police is determined by a range of practical, political, and budgetary influences and the impact of police alone on crime levels is subject to debate.¹⁵⁹ Penalization may increase crime under some conditions.¹⁶⁰ The length of prison terms might, for example, result from an increase in the number of full time rural prosecutors and low visibility prosecutorial decisions driven by organizational incentives.¹⁶¹ These multiple factors are orthogonal to the BP.

populist view that court decisions should be subservient to legislation, although he applies that view only to right-wing issues. Bill Hoffman, *Tom DeLay: Trump Should Buck Courts on Immigration*, NEWSMAX (June 29, 2017), <http://www.newsmax.com/Newsmax-Tv/Tom-DeLay-immigration-SCOTUS-courts/2017/06/29/id/799026/> (“People need to re-read Article III of the Constitution. The opinions by the courts are only opinions, the rulings by the court are only opinions, but they’re not enforced by the executive branch or the legislative branch,” DeLay said.”). It is also the case, however, that some conservative benefactors, most notably the Koch brothers, have supported traditional defense protections in the law in part to better defend against criminal prosecutions for environmental law violations. See Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, THE ATLANTIC (Mar 3, 2015) <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/>.

¹⁵⁷ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed., 2012); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); David A. Boyum, Jonathan P. Caulkins & Mark A. R. Kleiman, *Drugs, Crime, and Public Policy*, in *CRIME AND PUBLIC POLICY* 368-410 (James Q. Wilson & Joan Petersilia, eds., 2011). On the range of theoretical orientations that can explain variations in crime control policies, see Peter B. Kraska, *Criminal Justice Theory: Toward Legitimacy and an Infrastructure*, 23 JUST. Q. 167 (2006).

¹⁵⁸ See JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015); LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* (2008); NICK REDING, *METHLAND: THE DEATH AND LIFE OF AN AMERICAN SMALL TOWN* (2010). See *infra* Part IV.

¹⁵⁹ See, e.g., Gary Kleck & J. C. Barnes, *Do More Police Lead to More Crime Deterrence?* 60 CRIME & DELINQ. 716 (2014) (finding no relationship found between officers per capita and perceptions of risk of arrest).

¹⁶⁰ TODD CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

¹⁶¹ PFAFF, *supra* note 147.

Empirical analysis of crime and criminal justice grounded in observation and data analysis does not have the elegance of economic modeling, so my listing of a few recent, prominent works on criminal justice policy may not carry weight with law and economics adepts, even as conservative politicians and interests selectively step away from their earlier harsh crime policies.¹⁶² I place these sources on the table to support my position that Epps's crime analysis seems thin and unconvincing.¹⁶³

ii. Social Meaning¹⁶⁴

Epps's next point is that the stigma of criminal convictions is not as great as it should be in a BP society because people harbor doubts about the accuracy of guilty verdicts. Evidence for this includes the chance of holding an acquitted person liable for intentional torts and the difficulty of clearing the name of acquitted defendants. The evidence is weak and indirect. Epps asserts that in a non-BP world, acquittals will be more closely aligned with actual innocence. This reasoning parallels Margaret Raymond's concern that growing knowledge of actual innocence will lead juries to demand proof greater than reasonable doubt to acquit; except for the special case of the decline of death sentences, this fear has not materialized.¹⁶⁵ Epps's social meaning argument is based on abstract reasoning and indirect evidence at best. It seems a recklessly thin ground as a basis for dumping procedural rights.

iii. Voter Attitudes¹⁶⁶

Most voters are not very likely to become defendants; they identify with victims, not criminal defendants. In the abstract logic employed by Epps the BP should make average voters more inclined toward harsh punishment and feel less sympathetic toward defendants. Criminologists, sociologists, political scientists and legal scholars have given the fear of crime a good deal of thought and the influence of the burden of proof or the BP has never entered into their calculations.¹⁶⁷ James Q. Whitman's comparative social history of punishment explored the deep cultural roots of penal harshness in

¹⁶² HADAR AVIRAM, *CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015); DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016).

¹⁶³ This approach is expanded in Part IV, *infra*.

¹⁶⁴ Epps, *supra* note 2, at 1099-1102.

¹⁶⁵ Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 449-64 (2001); see BAUMGARTNER et al., *supra* note 140; Medwed, *Innocentrism*, *supra* note 25.

¹⁶⁶ Epps, *supra* note 2, at 1102-06.

¹⁶⁷ See, e.g., Brian R. Wyant, *Multilevel Impacts of Perceived Incivilities and Perceptions of Crime Risk on Fear of Crime: Isolating Endogenous Impacts*, 45 J. RES. CRIME & DELINQ. 39 (2008) (finding perceived incivility positively correlated with fear of crime).

the United States, and his comparison of the United States (a harsh “BP nation”) with France and Germany (mild inquisitorial systems) might offer some facile support for Epps, although his historical evidence does not rest on different modes of proof in the different systems.¹⁶⁸ Other socio-legal scholarship offers macro-economic and political explanations for the rise in punitiveness after the 1970s.¹⁶⁹ An empirical/statistical study demonstrated President Clinton’s use of the levers of presidential discourse to run up the fear of crime in opinion polls, at a time when crime was dropping, in order to mitigate the political defeat of his failed attempt to revamp the American health care system, thus paving the way for the 1994 Violent Crime Control Act.¹⁷⁰ None of these shifts in public opinion or crime rates had anything to do with the BP, which presumably remained constant. Whatever the underlying attitudes to crime, with the decline in crime rates, the substantial monetary and social costs of crime control have led to a significant conservative turn-around on justice issues, with contemporary conservative crime rhetoric expressing sympathy for stereotypical first-time, low-level drug offenders, although not for stereotypical predators.¹⁷¹ In light of this and much more empirical research on the politics of crime and crime control, the abstract reasoning employed by Epps, unsupported by empirical research, is weak at best.

iv. Law Enforcement Behavior.¹⁷²

“The Blackstone principle *could* also influence the behavior of law enforcement actors.”¹⁷³ So could many other factors, but this idea is missing in contemporary studies of police behavior. His following argument is specious: “the Blackstone principle could lead actors within the system to feel less responsibility for preventing false convictions because those actors will know that the procedural system is already designed to guard against such outcomes.”¹⁷⁴ Even if police dwelled on the Blackstone principle — which I doubt, given the staggering fragmentation of American law enforcement into about 17,000 agencies, the wide discretion allowed to line

¹⁶⁸ JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). His argument provides evidence that challenges a popular criminological theory that attributes increasing punitiveness to penal modernism. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

¹⁶⁹ SIMON, *supra* note 157.

¹⁷⁰ OLIVER, *supra* note 50.

¹⁷¹ AVIRAM, *supra* note 162; DAGAN & TELES, *supra* note 162. See also RIGHT ON CRIME, <http://rightoncrime.com/> (last visited May 14, 2018).

¹⁷² Epps, *supra* note 2, at 1106-08.

¹⁷³ Epps, *supra* note 2, at 1106 (emphasis added).

¹⁷⁴ Epps, *supra* note 2, at 1106.

officers, the limited professional training required, and substantial differences in role orientations and even ideologies of policing among officers in the same agencies—such a broad statement cannot hold up without some empirical research support. The same is true for prosecutors' offices and individual prosecutors.¹⁷⁵ The innocence literature is replete with stories of misconduct by callous cops and indifferent prosecutors leading to wrongful convictions. There are also many instances of conscience-stricken and conscientious law enforcement officers who go on missions to exonerate the innocent. Facile abstract assumptions based on assertions rather than empirical evidence, and a principle that in many ways may have very little grip in actual justice system practice outside the courtroom,¹⁷⁶ are makeweight arguments at best.

v. Legislative Behavior.¹⁷⁷

Epps argues that legislators will broaden criminal statutes to help obviate the benefits of procedural safeguards in a BP world, based on a hypothetical put forward by William J. Stuntz.¹⁷⁸ Is the obverse true? Does lowering the standard of proof and eliminating procedural protections mean that legislatures will pass mild criminal laws? I speculated that any political movement powerful enough to reverse the Blackstone principle would likely be a right-wing authoritarian movement, favoring severe crime legislation.¹⁷⁹ The shift among conservative politicians toward milder punishment since about 2012 has been a rational response to the costs of mass incarceration, but the pushback by Attorney General Sessions appears to be driven by ideology and political calculation. None of this has anything to do with the BP. Strong opinion exists among a large number of Americans to once again criminalize medical abortions, use criminal law to stigmatize LGBT folks, and the like. I cannot believe that this opinion would be deterred by lowering the burden of proof. In addition, if American states were to begin to emulate the penal mildness of western European democracies, my speculation is that

¹⁷⁵ I recently attended a meeting of the Criminal Law Section of the Michigan State Bar on the topic of conviction integrity and heard a number of young assistant prosecutors making statements that would be hard to differentiate from opinions of defense lawyers. My biases are probably influencing my perception, but for a study of justice system actors related to wrongful conviction that produced more stereotypical results, see Brad Smith, Marvin Zalman, and Angie Kiger, *How Justice System Officials View Wrongful Convictions*, 57 CRIME & DELINQ. 663 (2009) (finding defense lawyers significantly more favorable to innocence reforms than police or prosecutors in Michigan). The prosecutorial respondents were presumably the county chief prosecutors.

¹⁷⁶ I address this in Part III, *infra*.

¹⁷⁷ Epps, *supra* note 2, at 1108.

¹⁷⁸ Epps, *supra* note 2, at 1108 (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001)).

¹⁷⁹ See text and note at footnote 155 *supra*.

such changes would have nothing to do with changes in burdens of proof. As for legislatures' willingness to trash constitutional rights to support reelection, Justice O'Connor had enough political experience to dissent from extending the Fourth Amendment good faith reliance doctrine from search warrants to legislation.¹⁸⁰ As a high-ranking legislator, she knew that many state legislators, faced with re-election where a "weak-on-crime" stance would expose them to defeat, would vote for blatantly unconstitutional laws in a heartbeat, expecting the courts to fix the problem later. This depended on a political context in which being "tough-on-crime" was essential for re-election. In light of this political and social reality, Epps's argument that legislatures pass harsher criminal legislation because of the BP is thin and abstract.

vi. Procedural Subversion.¹⁸¹

"A final potential effect flowing from a system's formal commitment to the Blackstone principle is outright subversion by judges, prosecutors, and the other actors who run the system."¹⁸² Epps draws on John Langbein's exemplary scholarship linking the use of judicial torture in medieval continental courts to their burden of proof to argue that contemporary standards of proof generate unfair plea bargaining.¹⁸³ Epps is correct but understates medieval Europe's law of proof as "overly demanding"; it was more—it was an absolute requirement of perfect proof even for covert crimes: two eye-witnesses (which has Biblical roots)¹⁸⁴ or a confession that made convictions in serious cases nearly impossible without resorting to torture.¹⁸⁵ Langbein compared the rigidity of the continental system to the common law's "torture-free" law of proof, with verdicts rendered not by professional judges but by lay juries. "The jury standard of proof gave England no cause to torture."¹⁸⁶ Thus, Langbein's research is justification

¹⁸⁰ *Illinois v. Krull*, 480 U.S. 340, 361-69 (1987).

¹⁸¹ Epps, *supra* note 2, at 1108-09. Epps drops his tentative approach and asserts "[l]ike police and prosecutors, legislators *will* also behave differently in a world with the Blackstone principle" Epps, *supra* note 2, at 1108 (emphasis added).

¹⁸² Epps *supra* note 2, at 1108.

¹⁸³ JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* (1977).

¹⁸⁴ DEUT. 19:15, ETZ HAYIM: TORAH AND COMMENTARY 1100 (2001).

¹⁸⁵ In addition, the theological roots of continental procedure, and the fears of professional judges, who may have taken holy orders, of eternal damnation, is a further reason for why torture was used on the continent and was not a feature of English common law trials where decisions were made by a group of laymen who gave no reasons for their verdict. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008) [hereinafter WHITMAN, *ORIGINS*].

¹⁸⁶ LANGBEIN, *supra* note 183, at 78. When judicial torture was applied under Henry VIII and under Elizabeth, it was applied in a warrant procedure occasioned by state trials of alleged enemies of the crown by the Privy Council, and not in ordinary criminal trials. *Id.* at 81-128.

for proof beyond a reasonable doubt as a workable standard.

Langbein is not the only scholar to link the contemporary pressures on defendants in plea-bargaining to the torture regime.¹⁸⁷ Epps admits that “[w]hile rules justified by the Blackstone principle are not the only force making trials costly, they certainly contribute to those costs and thus could contribute to this phenomenon.” Whatever pressure to plead guilty may be exerted by reasonable doubt, far greater weight is accorded to the rise of caseloads and a bureaucratic justice system and the ratcheting up of harsh penalties.¹⁸⁸ Epps does not draw on plea-bargaining scholarship to substantiate his abstract, theoretical point. Again, the evidence for a dynamic effect of the plea-bargaining is thin to the point of vanishing.

In short, all of Epps’s reasons for claiming a “dynamic” effect of the BP are based on thin evidence and theoretical reasoning that is abstracted from empirical analyses that describe the way that police, prosecutors, courts and other justice personnel and institutions operate. I find his rationale for a dynamic effect unconvincing.¹⁸⁹ Anti-Blackstonians may take heart from Epps’s lengthy assessment of the positives and negatives of the Blackstone principle,¹⁹⁰ and alternative justifications,¹⁹¹ but I think that his jurisprudential analyses must make better sense in social practice.

B. *Laudan and Allen on Blackstone*

I address two major related themes and arguments in Laudan and Allen’s works: (i) that the Blackstone ratio works injustice by allowing too many false acquittals, and (ii) that the effects of the Blackstone ratio increases violent crime, suggesting that violent crime can be reduced by convicting a larger number of defendants and sentencing them to longer terms. I have already responded in part to their anti-Blackstonian thesis in my review of Forst’s “Blackstonian” analysis¹⁹² and in my argument against Epps.¹⁹³ I do not address the empirical and numeric calculations in Laudan’s

“[T]he systematic use of torture to investigate crime never established itself in English criminal procedure” *Id.* at 73.

¹⁸⁷ See Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y. L. SCH. L. REV. 1009 (2011).

¹⁸⁸ See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 205-30 (2003) (discussing the balance of power between prosecutors and judges mediated by sentencing structures accounts for much of the prosecutor’s power in plea bargaining); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014) <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>. (commenting on draconian penalties).

¹⁸⁹ Epps, *supra* note 2, at 1121-24.

¹⁹⁰ Epps, *supra* note 2, at 1110-21.

¹⁹¹ Epps, *supra* note 2, at 1124-43.

¹⁹² *Infra* Part II.C.

¹⁹³ *Infra* Part III.A.

symposium paper and book that leads him to assert that proof beyond a reasonable doubt should be replaced by clear and convincing evidence for repeat offenders or any legal issues arising from that conclusion, except insofar as it relates Laudan and Allen's crime reduction theory.¹⁹⁴ I also do not directly address his challenge to many procedural protections including the constitutional prohibition against double jeopardy.¹⁹⁵ Nor will I comment on Laudan's proposals regarding bail, sentences, probation, and parole.¹⁹⁶

1. Laudan and Allen's Blackstonian Analysis

Their first argument—that the Blackstone ratio (or a ratio variation or at least the Blackstone principle) causes too many false acquittals—is traced in Allen and Laudan and *The Law's Flaws*.¹⁹⁷ They begin by stating the Blackstonian view that only by “strict adherence to this principle” “keep[ing] the error-ratio of false acquittals to false convictions. . . very high. . . can we protect the principle that false convictions are much more egregious than false acquittals.”¹⁹⁸ Mathematical manipulation of various Blackstone ratios show that driving down false conviction levels drives up false acquittal levels, and, based on a formula and attendant proof, a possible false conviction rate and overall conviction rate produces rates of false acquittals far above the ten to one Blackstone ratio.¹⁹⁹ Next, Blackstonians hold “that the false conviction rate (understood as the proportion of the convicted who are innocent) must be minimized as much as possible.”²⁰⁰ But Blackstonians fail to account for the apparent reciprocal effects of the ratio that determines the false conviction rate as a product of the number of trials by the conviction rate by the false conviction rate.²⁰¹ If Blackstonians did, they would see that

¹⁹⁴ For a critique, see Koppl, *supra* note 1.

¹⁹⁵ For a critique, see Findley, *supra* note 1.

¹⁹⁶ LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 110-72.

¹⁹⁷ My analysis of their core argument cuts through or ignores other issues including their critical analysis of the rate of wrongful convictions in Allen & Laudan, *supra* note 4, especially their review of Risinger, *Innocents Convicted*, *supra* note 26. The interweaving of arguments about wrongful conviction rates and the Blackstone ratio made their points about the Blackstone ratio hard to disentangle and follow. Similarly, Risinger's reply, *Tragic*, *supra* note 10, at 991-97, also addresses issues related to the incidence of wrongful convictions.

¹⁹⁸ Allen & Laudan, *supra* note 4, at 75.

¹⁹⁹ Allen & Laudan, *supra* note 4, at 75-77, 90-92. Their calculations are similar to those conducted by FORST, *supra* note 80, at 57-65; see Part II.C.2, *supra*.

²⁰⁰ Allen & Laudan, *supra* note 4, at 77. This assumes that Blackstone took the ratio seriously, as Bushway asserted, rather than using the number as a way to emphasize the Blackstone principle. If his starting premise is wrong, then the analytic edifice built by Laudan and Allen collapses. This is a major premise of my critique and will be reiterated *infra*.

²⁰¹ The product is stated in formulaic terms in Allen & Laudan, *supra* note 4, at 78; the characterization of their position is my own and forms a basis of my internal critique. It is not

“[w]ithout accounting for the frequency of convictions and the frequency of trials, we can infer nothing from the false conviction rate regarding whether we are convicting too many of the innocent.”²⁰²

Allen and Laudan then assert, “neither the Blackstone ratio nor the false conviction rate approach seems to be a promising vehicle for protecting the innocent from false conviction[.]”²⁰³ I am not sure I understand why this is so. Nevertheless, they propose to “step[] back to look at the larger context” because “[w]hat matters is how many innocent persons in the *general population* are falsely convicted—the risk that an ordinary citizen has of being falsely convicted of a serious crime.”²⁰⁴ Notice that this shifts the focus from measuring errors in trials (where the error rate might be small but worrisome, say from three to five percent) to dividing those errors by the total population (where the error rate becomes infinitesimal). I pause to insert a critical comment. The innocence movement focuses on justice system problems and seeks to correct them. Trial processes that fail to screen out erroneous prosecutions constitute a worrisome problem. Making trials more accurate should reduce the number of wrongful convictions and perhaps factually erroneous acquittals as well. Innocence reforms are not aimed at reducing the crime rate or ameliorating society beyond reducing wrongful convictions.²⁰⁵ Allen and Laudan’s shift makes the problem of wrongful convictions (at trial) a small one when the number is compared to the issue of crime in society, because far more serious crimes than wrongful convictions exist. Yet, I assume they take this path because they believe and assert that by convicting more defendants at trial (and having prosecutors dismiss fewer) violent crime will be substantially reduced.²⁰⁶ Because I believe that Allen and Laudan’s crime-reduction thesis is wrong, I see their shift from a trial-error rate to a societal-error rate as meretricious.

clear to me if Laudan and Allen view the effects of the Blackstone ratio, or perhaps the Blackstone principle, as determinate in the manner of the effects of laws of physics or chemistry. Some language seems to imply this and other language does not.

²⁰² Allen & Laudan, *supra* note 4, at 78.

²⁰³ Allen & Laudan, *supra* note 4, at 78.

²⁰⁴ *Id.* (emphasis added). I found some of the language used on this page cloudy, making it difficult to extract the gist of their points. For example, their reference to “causal surrogates” left me puzzled, and “stepping back to look at the larger context” seemed like advertising language. I present a broader context herein that I believe is relevant.

²⁰⁵ We might hope that by confronting system officials with evidence-based approaches, innocence reforms will make the system’s culture more transparent, but that is not a necessary part of the innocence program. For justice system resistance to change, see DAVID HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* (2012).

²⁰⁶ *But see* Epps, *supra* note 2, at 1128. Epps seems to say that extending an anti-Blackstonian argument to a crime prevention rationale is mistaken: “The Blackstone principle can prevent only those harms that are caused by the adjudicative system itself.” *Id.*

Next, in theory, an acceptable Blackstone ratio can be achieved by having very few trials and leaving criminals to run amok, but this is not acceptable to society.²⁰⁷ Thus, false convictions can be reduced by “either decreas[ing] the rate of convictions per trial, decreas[ing] the false conviction rate, or both.”²⁰⁸ This can be done by making it more difficult to convict guilty people.²⁰⁹ Thus, a “deadly dilemma” arises because “[e]very failure to convict the guilty means additional crimes undeterred and bad guys who, when left to their own devices, will almost certainly commit additional crimes.”²¹⁰

Why did Allen and Laudan switch focus from the trial-false-conviction-error rate to a societal-false-conviction-error rate? They assert, “[t]he social contract obliges the state to minimize the aggregate cost innocent citizens face, which consists of exposure to false conviction as well as criminal victimization.”²¹¹ This formulation of the social contract, in my words, requires that total costs of becoming a crime victim or a wrongful conviction victim be minimized. Allen and Laudan state these goals as resulting from trials: “[t]his thesis implies that the standard of proof and other rules of *trial* should be set at that point where the total cost of being victimized or falsely convicted is minimized.”²¹² They then calculate the risk of being the victim of a serious crime in the United States as “significantly more than 300 times greater than the lifetime risk of being falsely convicted of a serious crime.”²¹³

I do not dispute that the overall risk of becoming a crime victim is much higher than being wrongfully convicted. It might be off by a bit, as Risinger noted in his response to Allen and Laudan, but any informed understanding of the way that crimes are reported and responded to would see this as

²⁰⁷ Allen & Laudan, *supra* note 4, at 78. I believe the proper name for this argument is “straw man” or “red herring,” but that depends on the degree to which one takes the Blackstone ratio seriously. Risinger, *Tragic*, *supra* note 10, at 999, made this point.

²⁰⁸ Allen & Laudan, *supra* note 4, at 79.

²⁰⁹ This can be done by “[r]aising the standard of proof or “making the rules of evidence more acquittal-prone[.]” *Id.* at 79. The “upstream” corrections to police and forensic science investigation methods, which are central to the innocence movement, seem to have no place in this argument, although Laudan injects a loophole into his argument. *See* discussion *infra* at notes 252-253.

²¹⁰ Allen & Laudan, *supra* note 4, at 79. Strictly speaking, this sentence encapsulates the second Laudan argument, which is elaborated in *The Law’s Flaws* and which I address separately.

²¹¹ Allen & Laudan, *supra* note 4, at 79. This is unobjectionable, as far as it goes, but its seeming limit (i.e., the social contract consists in nothing other than this) can create real problems. In this Article, I avoid the intricacies of Laudan and Allen’s reliance on Laplace for their social contract discussion. Risinger responded to this matter, *Tragic*, *supra* note 10, at 1004-14.

²¹² Allen & Laudan, *supra* note 4, at 79 (emphasis added).

²¹³ Allen & Laudan, *supra* note 4, at 79–80.

roughly correct.²¹⁴ As noted, Bushway came up with a similarly large ratio.²¹⁵ My critique does not challenge this imbalance as such (which is probably empirically correct) but challenges its source and the policy conclusions drawn by Allen and Laudan. In brief, Laudan and Allen say that this imbalance results from trial rules that produce too many acquittals and prosecutors who dismiss too many cases. Some errors of impunity have to result from this, but the larger impunity results from crimes not detected or reported, or as I will show in Part IV, by the exercise of prosecutorial discretion that devalues certain kinds of convictions.²¹⁶

To expand on my comments regarding Bushway's Blackstone ratio calculations,²¹⁷ the main reasons for the impunity of so many unconvicted offenders walking free have little to do with false acquittals at trial. The problems of non-reporting and flawed investigations are major reasons why serious crimes go unpunished.²¹⁸ Laudan provides data on the criminal justice process or "funnel" that is familiar to every criminologist/criminal justice scholar.²¹⁹ There were 1.7 million victims of completed violent crimes in 2008; of these 790,000 were reported to police. Thus, Laudan really has nothing to say about 910,000 victims who were too afraid, confused, or nonplussed to report these crimes.²²⁰ These are police problems, and however effective are the courts, they will not be able to bring justice to those victims. Of the 790,000 victimizations reported to police, 542,000 suspects were arrested and charged, leaving a quarter of a million

²¹⁴ Risinger, *Tragic*, *supra* note 10, at 1016–17.

²¹⁵ *Supra* Part II.B.1. So did Forst: he noted that 9 million felonies reported to police each year do not end in conviction and assumes a 1 percent erroneous conviction rate (10,000 defendants), creating a ratio of 900 to 1, FORST, *supra* note 80, at 45, n. 2.

²¹⁶ *Infra* Part IV.B.1.

²¹⁷ *Supra* notes 83–85 and accompanying text.

²¹⁸ Concern with unreported crime goes back many decades. See Wesley G. Skogan, *Dimensions of the Dark Figure of Unreported Crime*, 23 CRIME & DELINQ. 41 (1977). The research has continued. See, e.g., Steven D. Levitt, *The Relationship between Crime Reporting and Police: Implications for the Use of Uniform Crime Reports*, 14 J. QUANT. CRIMINOLOGY 61 (1998).

²¹⁹ LAUDAN, LAW'S FLAWS, *supra* note 3, at 48; *Different Strokes*, *supra* note 3.

²²⁰ Laudan, *Different Strokes*, *supra* note 3, at 13. Perhaps Laudan and Allen believe that increasing the number of convictions will cut into the number of unreported felonies, but this is speculative. The figure is derived from national victimization surveys, which are the best crime data we have, but still is an estimate of the reality of crime and victimization. On the penultimate page of LAUDAN, LAW'S FLAWS, *supra* note 3, at 177, Laudan does assert that the demands of the social contract requires that "citizens" report more violent crimes that occur and the police need to arrest a higher proportion of reported crimes. However, he says nothing about the social reality of these complex matters. For example, crime reporting depends on whether "citizens" trust the police. I assume that Laudan used "citizen" innocently to mean "civilian," but undocumented aliens may not report serious crime or fear of being deported. See Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. LAW SOC. SCI. 141 (2012).

victims (248,000) without justice. Of the 542,000 violent victimizations reported, 179,000 had charges dropped by prosecutors, 333,000 pleaded guilty,²²¹ 30,000 were convicted at trial, and 15,000 were tried and acquitted. When Laudan assess the number of false negatives he looks to the 15,000 who were tried and acquitted and the 179,000 whose charges were dropped by prosecutors.²²²

The next important step in Laudan's program is to assess the possible number of factually guilty people among the 15,000 who are acquitted at trial and among prosecutors' dismissals. A trial exoneration means "legal innocence" and to Laudan is "vastly different from factual innocence."²²³ Citing several studies estimating the incidence of wrongful convictions, he adopts three percent as an approximate wrongful conviction figure, a number that "will loom very large in [his] arguments . . . since that percentage is the lynchpin for numerous interesting inferences."²²⁴ He also argues that the false positive rate for convictions obtained by plea-bargaining may be much lower.²²⁵ He then attempts to measure false negatives. "Conventional wisdom has it that most defendants acquitted at trial are probably factually guilty."²²⁶ Laudan plays with estimates and suggests that an "apparent guilt" range "from about 70% to 90%" of those acquitted is reasonable, suggesting that trial evidence did not support convictions. He then muses "that about half of those 15k acquitted at trial are guilty giving us 7.5k false negatives[.]"²²⁷ Then, after considering verdicts in Scotland, which include a "not proven verdict," and the results of the famous Kalven and Zeisel study,²²⁸ he settles on a false-acquittal-at-trial rate of seventy-five percent or 11,200 of the 15,000 acquittals.²²⁹ He concludes this section by alluding to

²²¹ Laudan, *Different Strokes*, *supra* note 3, at 13. Laudan labels these "confessions." For a reasoned explanation of why plea bargains differ from confessions, see Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415 (2016) (discussing that plea bargains lacks essential facts of case, complicate sentencing, where explicit sentence not bargained for, do not preclude factual challenges in subsequent proceedings).

²²² Laudan, *Different Strokes*, *supra* note 3, at 13. In LAUDAN, LAW'S FLAWS, *supra* note 3, at 48 the figure of dismissed cases is given as "217k." Laudan's reasoning is provided at greater length in LAW'S FLAWS, *supra* note 3, at 56–66.

²²³ LAUDAN, LAW'S FLAWS, *supra* note 3, at 52.

²²⁴ LAUDAN, LAW'S FLAWS, *supra* note 3, at 54.

²²⁵ Recent attention to guilty pleas and wrongful conviction suggests that the wrongful conviction rate is as high for guilty pleas as for trial verdicts, see *infra* Part IV.B.3.

²²⁶ LAUDAN, LAW'S FLAWS, *supra* note 3, at 57; see Epps, *supra* note 2, at 1127 (footnote omitted) ("[G]iven that prosecutors have been known stubbornly to insist on the guilt of previously convicted defendants despite exonerating DNA evidence, it would be surprising if prosecutors took jury acquittals as reason to conclude that they had charged the wrong person.").

²²⁷ LAUDAN, LAW'S FLAWS, *supra* note 3, at 58.

²²⁸ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

²²⁹ LAUDAN, LAW'S FLAWS, *supra* note 3, at 59.

the Givelber and Farrell study “devoted to trying to make the case that the factually innocent are abundant among those acquitted at trial” but then castigates their conclusion that they cannot establish the claim empirically even though their data are consistent with the possibility.²³⁰

Following this section that estimates a trial-acquittal-false-negative rate, Laudan turns to prosecutorial dismissals which he labels acquittals, reviews two studies offering some sense of the reasons for dismissals, and concludes that they point to an estimate “that about 56% of the dismissed and dropped arrestees were probably factually guilty.”²³¹ He then states his estimate that seventy-five percent of those acquitted at trial “are probably truly guilty” and then notes that two-thirds of all who went to trial were convicted and states that this provides “a plausible rationale for saying that, among those defendants who had the charges against them dropped for *non-evidentiary* reasons, approximately two-out-of-three (and probably more) are highly likely to be guilty. Hence we shall assume that about 37% to 38% (that is two-thirds of the 56% of those whom were booted out of the trial system for non-evidentiary reasons) are factually guilty (and, if they had gone to trial, would have been convicted).”²³² This translates to 81,000 out of 217,000 dismissed cases, and when added to 12,000 probably guilty defendants acquitted at trial, puts 93,000 “guilty” criminals into society.

What to do about these 93,000 unconvicted criminals? At one point Laudan alludes to the possibility that better police investigation can increase the proportion of convictions but does not explore that path.²³³ Allen and Laudan fear that “the remedies usually proposed for the ‘excessive’ levels of false conviction involve measures that further increase the already grave risk of criminal victimization.”²³⁴ As a result the main devices proposed for having prosecutors charge more defendants and for juries to convict more is to lower the standard of proof and eliminate many of the defendant’s procedural protections.²³⁵

²³⁰ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 60. See DANIEL GIVELBER & AMY FARRELL, *NOT GUILTY: ARE THE ACQUITTED INNOCENT?* (2012).

²³¹ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 63–64.

²³² LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 64 (emphasis in original).

²³³ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 36–37.

²³⁴ Allen & Laudan, *supra* note 4, at 80.

²³⁵ The rules Allen and Laudan might excise include the constitutional prohibition on double jeopardy, exclusionary rules that favor defendants, the exclusion of evidence from trial that is unfairly prejudicial to the defendant where a judge rules that the prejudice outweighs its probative value, privileged testimony of the defendant’s lawyer, doctor, etc., the rule that a jury will be instructed to not infer guilt from a defendant’s decision to not testify, and more. My assumption is based on a chapter in *THE LAW’S FLAWS* that lists rules that Laudan would change to favor the prosecution. Ronald Allen may or may not agree with the list, but from *Deadly Dilemmas* he was probably on board with modifying the standard of proof. See LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 110–37.

2. Laudan and Allen's Crime Reduction Thesis

Laudan and Allen claim that higher conviction rates and more incarceration will reduce violent crime.²³⁶ “[T]his book will argue 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.*”²³⁷ Laudan fleshes out this point as follows:

In general, rates of conviction prove to be good predictors of rates of serious crime (far better than any other, including the severity of sentences). If, for whatever reasons, a society begins convicting a smaller and smaller proportion of those charged with committing serious crimes, more and more people will evidently find the commission of such crimes worth the risk. Contrariwise, if the courts raise conviction rates, fewer crimes will be committed. This general correlation is borne out across the full spectrum of serious crimes and across a broad range of countries with different legal systems.²³⁸

Laudan's evidence for this conclusion is found in two graphs showing inverse relationships between serious felony (Figure 1) or murder (Figure 2) rates from 1950 to 1998 along one axis and expected punishment measured in days in prison (for serious crimes) and years in prison (for murders) for each *known* crime along the other axis.²³⁹ These measures of punitiveness depend on penalties meted out to convicted criminals (whose total convictions constitute a small proportion of known crimes) against all crime, possibly including crimes not reported to police, never leading to apprehension, and leading to dismissals—a very large number.²⁴⁰ I am not

²³⁶ LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 44 (“[I]t is empirically true that incarcerating more perpetrators of serious crimes reduces the future frequency of those crimes.”). This claim is worked out most fully in Chapter 2 of *THE LAW'S FLAWS*, extending the argument in *Deadly Dilemmas*. LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 18-45.

²³⁷ LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 25 (emphasis in original).

²³⁸ LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 37. The hypothetical argument has something of the straw man quality observed in my review of Epps, *supra* at note 2, by hinting that conviction rates could fall to ridiculously low rates. In extreme cases, like police strikes or major riots and disorder, there can be a quick increase in opportunistic crimes, including murders. This aside, Laudan does use contemporary crime and justice system data to analyze the routine operation of the justice system.

²³⁹ LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 35-36 (Figures 2 and 3). The figures seem approximately correct but might be a bit impressionistic, as Figure 2 has the murder rate in 1998 as at slightly below 1 per 100,000 which is off by a factor of five. See U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS: BUREAU OF JUST. STAT., NCJ 247060, *THE NATION'S TWO MEASURES OF HOMICIDE*, (2014) (showing the homicide rate to hover around 6 per 100,000 from about 1998 to around 2008 and declining to slightly above 5 per 100,000 by 2011).

²⁴⁰ One problem with the graphs going back to the 1950s is that the use of victimization

sure that this is a fair way correlate crime and punishment, but it is not standard.²⁴¹ His two graphs also begin counting crime rates from 1950, when most men in the high-crime-prone groups were World War II veterans or being shipped off to fight in Korea—experiences that reduced the number violent crimes in the United States. Also the oldest members of the post-war baby bulge, who started committing larger number of crimes in the 1960s, were about three years old in 1950 and most were not yet born. Figure 2 shows the rise and fall of the murder rates against years in prison from 1950 to 1998, a subject studied closely by criminologists.

When criminologists disaggregate crime rates by age and other factors, much of the crime drop since 1990 has been attributed to the aging of the population and changes in illicit drug markets.²⁴² The simple correlations that constitute the results in Figures 1 and 2 cannot be taken at face value as explaining causal relationships in light of other knowledge about the effects of punishment on crime and what is left out. Laudan is not entirely insensitive to the concept that crime might be affected by factors other than conviction and incarceration. Before presenting Figures 1 and 2 he alludes, dismissively, to the idea that factors like “poverty or unemployment to inequitable distribution of wealth or a bad educational system or a demographic spike in the number of young males in the population” influence the frequency of crime.²⁴³ Thus, he seems aware of some of the social factors that to criminologists explain much crime. Laudan is clearly unimpressed by criminological explanations of crime, but he does not seem to refer to the empirical studies of the “great crime drop” that, I think, undermine his base argument about the scope of the effect of imprisonment on crime rates.²⁴⁴

To return to Laudan’s argument, he prefers incapacitation as a rationale and policy for crime reduction over deterrence because the evidence of higher conviction rates reducing crime via deterrence is weak: “[a] much

surveys began in the 1970s so that the crime rates in Figures 1 and 2 are presumably taken from the Uniform Crime Reports.

²⁴¹ His statement that “[i]n general, rates of conviction prove to be good predictors of rates of serious crime” does not appear accurate if we were to examine the rising prison rates after 1990 with dropping crime rates. I think it is wise, however, to withhold judgment on the idea if it were limited to the kinds of violent crime that is the focus of *The Law’s Flaws*: murder, rape, robbery and aggravated assault. Less discretion is exercised in either dismissing or criminalizing such behavior, in comparison to other crimes.

²⁴² Bruce Johnson, Andrew Golub & Eloise Dunlap, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, in *THE CRIME DROP IN AMERICA* 164-206 (Alfred Blumstein & Joel Wallman, eds., 2000); James Alan Fox, *Demographics and U.S. Homicide*, in *THE CRIME DROP IN AMERICA* 288-317 (Alfred Blumstein & Joel Wallman, eds., 2000).

²⁴³ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 29-30.

²⁴⁴ Blumstein & Wallman, *supra* note 138; ZIMRING, *supra* note 138.

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surer route to decreasing crime is, I believe, by incarcerating wrong-doers, especially serial offenders.” He then asserts that the conviction rate can be increased either by the police identifying and arresting

a larger proportion of those likely to have committed a serious crime and/or . . . increase[ing] the rate of convictions among those who are arrested and probably guilty. . . . The second mechanism . . . depends almost entirely on the efficiency of the courts in identifying and convicting those truly guilty arrestees who are actually arrested.

He indicated that “[m]uch of the rest of the book will be focused on the latter issue” rather than discussing the ability of police to arrest a higher proportion of offenders.²⁴⁵

At this point in the book he does not specify what the courts have to do to identify and convict more arrestees, but later he proposes eliminating proof beyond a reasonable doubt in criminal trials and replacing it with a lower standard (in Chapter 5) and eliminating a number of procedural safeguards for defendants (in Chapter 6). He calculates the lower standard of proof from his assumption-based estimates of the costs of false positives and false negatives as 0.65, or roughly equivalent to the “clear and convincing” standard, which he proposes to replace the ninety or ninety-five percent certainty commonly associated with proof beyond a reasonable doubt.²⁴⁶

Laudan’s crime-fighting argument rests importantly on the known high recidivism rates of convicted offenders.²⁴⁷ Two large NIJ surveys of 1983 and 1994 cohorts of released offenders showed that rearrest rates were about two-thirds in both cohorts “although the incarceration rate had roughly doubled between 1983 and 1994.”²⁴⁸ Because “most serious [sic] felons sent to prison are *serial offenders*” “incarcerating sizeable numbers of offenders

²⁴⁵ LAUDAN, LAW’S FLAWS, *supra* note 3, at 38-39. I suppose that as a philosopher Laudan is free to label convicted offenders in his own way, but his application of the term “serial” to repeat violent and property crimes is what criminologists would label “career” criminals. For a standard definition of serial criminals see Marvin Zalman & Matthew Larson, *Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation*, 79 ALB. L. REV. 941, 977-81 (2015).

²⁴⁶ These calculations are found in Chapter 4 of LAW’S FLAWS, *supra* note 3.

²⁴⁷ LAUDAN, LAW’S FLAWS, *supra* note 3, at 40-45.

²⁴⁸ Jeremy Travis, Bruce Western & Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 151 (Washington, DC: National Research Council) [hereinafter, NRC, Growth]; Laudan, *Different Strokes*, *supra* note 3.

²⁴⁸ LAUDAN, LAW’S FLAWS, *supra* note 3, at 40-45.

lowers the crime rate.”²⁴⁹ Thus, he calculates, for example, that “increasing the conviction rate for aggravated assault by 15% (from 148,000 to 170,000 per year), one could reduce the frequency of violent crimes by about 17,000 per year.”²⁵⁰ He also bolsters his argument by citing a 1999 article by crime statistician Daniel Nagin to the effect that incapacitation substantially contributed to crime reduction.²⁵¹

For all his boldness in asserting that changing the burden of proof in the small percentage of cases that go to trial (and in a larger number dismissed by prosecutors) will reduce crime, Laudan does allow a loophole, which he mentions in passing:

The moral of the story seems clear: increasing the conviction rate generally lowers the violent crime rate. That is *not* to say that the only way of lowering the crime rate is by convicting more of the guilty. Increasing sentences would doubtless have done something to lower the homicide and rape rates via longer incapacitation; so would decreasing the number of murders and rapists who eluded police detection. It is no part of my brief to argue that raising conviction rates is the only way to control serious crime. It *is* important to my later arguments to show, however, that it is *a* way, and an effective way at that, to reduce the ordinary citizen’s risk of ending up a violent crime victim.²⁵²

This loophole implies that any effective critique of Laudan and Allen’s incapacitation thesis should lead them to rationally modify their extreme position and to pay more attention to the various ways in which the kinds of social, economic and justice system inputs that Laudan cavalierly dismisses ought to be treated with greater respect.²⁵³ In any event, my internal critique

²⁴⁹ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 40 (emphasis in original) (“If delinquents were not serial offenders, incapacitation would not be a very promising strategy.”).

²⁵⁰ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 43.

²⁵¹ LAUDAN, *LAW’S FLAWS*, *supra* note 3, at 43.

²⁵² LAUDAN, *LAW’S FLAWS*, *supra* note 3, 36-37 (emphasis in original).

²⁵³ Listing some “fashionable hypotheses” of variables related to crime, Laudan tells the reader to “choose your favorite, according to your political predilections.” I could be over reading this quip, but Laudan seems to be saying that *you* are ideological if you disagree with his evidence, but that *he* is scientific. My understanding is that every person, however unlettered, carries an ideology (i.e., a political preference), although even for those of us who think about these things, we may never be able to entirely fathom what drives our views. It is also possible to recognize and to mitigate predilections and to observe empirical evidence as an important guide to action (which, I suppose is also an ideological predisposition, but any further discourse will lead to infinite regress). Every lawyer should read JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1986) to better grasp the professional ideology she calls “legalism.” There is also a conventional difference between understanding one’s political predilections (i.e., “ideologies”) and acting or thinking in rigidly doctrinaire ways that are labeled “ideological.”

will challenge their overreliance on incapacitation.²⁵⁴

3. Internal Critique of Laudan and Allen Regarding the Blackstone Ratio

If I understand Laudan and Allen's position correctly, they attribute most—if not all—false negatives and/or false acquittals in trials and “false” cases dismissed by prosecutors to the rules that flow from the Blackstone principle, especially proof beyond a reasonable doubt and procedural trial rules that formally advantage defendants.²⁵⁵ In addition, their writing at points seems to attribute to the Blackstone ratio an intrinsic power to force a high rate of false positives. Unlike Forst, whose Blackstone ratio calculations were an abstract exercise informed by normative concerns, Laudan and Allen seem to say that all failures to convict guilty defendants and all “false” prosecutor dismissals result from the effects of proof beyond a reasonable doubt and defense-oriented trial rules. If this means that their formulas *determine* the outcomes of trials in the same way that fixed inputs in a high school physics or chemistry “experiment” designed to show how a law of nature works, then it seems to me that they are engaging in magical thinking.

It may be, however, that their formula essentially boils down to a way of expressing the Blackstone principle. In any event, on the basis of available data Laudan calculated that the justice system annually produces 93,000 false negatives, 12,000 false acquittals and 81,000 dismissals of cases against factually guilty defendants. Lowering the standard of proof will result in more of them being convicted.

How solid are his figures? Although they seem to be in a plausible range, they are estimates based on several assumptions. The most serious challenge to his numbers is Givelber and Farrell's analysis. Laudan dismisses their work because they honestly note that “[i]n the end, we cannot establish through empirical research with certainty that many (or indeed most) of the acquitted are innocent. We can only point out that the data are entirely consistent with this possibility.”²⁵⁶ Just because Laudan attaches numbers to his guesses does not make his estimate stronger than theirs. What lies behind their caveat is a careful analysis of data on judge and jury decision making in 401 noncapital felony jury cases collected by the National Center on State Courts (NCSC) that were decided in four municipal courts. Their book successfully challenges Kalven and Zeisel's “liberation hypothesis,” which analyzed judge-jury disagreements over proper verdicts, and held that jury decisions to acquit where the facts were close were based on “sentiment”

²⁵⁴ *Infra* Part III.B.4.

²⁵⁵ Excepting for the “loophole” references, see discussion *supra* at notes 252-253.

²⁵⁶ GIVELBER & FARRELL, *supra* note 230, at 143.

rather than evidence.²⁵⁷ As for the relationship between acquittals and innocence, Givelber and Farrell offer convincing challenges to the assumptions that support the conventional wisdom that (all) acquitted defendants are guilty.²⁵⁸ Their close analysis weakens the bases for conventional wisdom, and should weaken the confidence one has in Laudan's assumed rate of false negatives. Moreover, their data analysis shows that factors consistent with innocence are correlated with acquittals. Defendants with no criminal records are more likely to be innocent, and acquittals were twice as great for defendants with no known arrests or convictions (45.0%) than those with records that the jury learned of or did not learn of (21.2% and 23.8%, respectfully).²⁵⁹ In a large number of exoneration cases prisoners consistently maintain their innocence, even at the cost of forfeiting parole.²⁶⁰ In the NCSC data, acquittal rates were more than twice as high for defendants who claimed innocence to their lawyers (45.7%) than for defendants who went to trial because plea-bargaining failed (18.2%).²⁶¹ Finally, consistent with the reasonable thesis that innocent defendants have more information about their case than the prosecutor, the acquittal rates of defendants increased as they entered progressively more evidence, from having no defense witnesses testify (16.7%), to the defendant alone testifying (21.6%), to one defense witness testifying without the defendant testifying (34.9%), to the defendant and at least one other witness testifying (41.4%).²⁶² Because researchers can almost never know the ground truth of verdicts it is incautious to make definitive statements about innocence or guilt. Givelber and Farrell's caveat at the conclusion of their book is the kind of caution one expects from good scholars and scientists.

For all of Givelber and Farrell's evidence, Laudan may be right about the false negative rate, but his estimate should not be seen as a sufficiently strong basis for radical policy changes in the trial process. Before dismissing acquittals as inherently false we should consider that defendants are brought to trial by police who typically make decisions about guilt quickly and by partisan prosecutors. "Juries are typically the first remotely neutral decision makers to hear the defendants' stories from the defendants, or, more

²⁵⁷ GIVELBER & FARRELL, *supra* note 230, at 5, 71-79, 95.

²⁵⁸ These assumptions are the belief that prosecutors proceed only against the guilty, that prosecutors are better at evaluating evidence, that the reasonable doubt burden of proof causes the acquittal of a guilty defendant (data supports the view that judges and juries differed mainly because of differing interpretations of evidence), that some information is not available to the prosecution. GIVELBER & FARRELL, *supra* note 230, at 53-63.

²⁵⁹ GIVELBER & FARRELL, *supra* note 230, at 58.

²⁶⁰ See, e.g., Maurice Possley, *Everton Wagstaffe*, THE NATIONAL REGISTRY OF EXONERATIONS (June 14, 2017) <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4725>.

²⁶¹ GIVELBER & FARRELL, *supra* note 230, at 64.

²⁶² GIVELBER & FARRELL, *supra* note 230, at 65.

importantly, other witnesses. The simplest explanation for acquittals may be that it is only at trial that defendants can actually tell their stories.”²⁶³

Aside from Givelber and Farrell’s important research suggesting that a higher proportion of acquittals represent actually innocent defendants than generally thought of, Laudan and Allen miss another element: that a wrongful conviction in wrong person cases²⁶⁴ allows a possibly recidivist criminal to go free, so that repressing false positives at trial enhances crime control.²⁶⁵ Forst and Huff used Innocence Project (IP) and National Registry of Exonerations (NRE) databases to estimate “the magnitude of wrongful conviction in violent crimes” and the implications for victimization caused by actual perpetrators not brought to justice.²⁶⁶ Among the IP cases, almost none of which are “no crime cases,” 147 perpetrators were not initially brought to justice, but when discovered were shown to have committed 146 additional crimes. They then totaled the number of NRE cases for violent crime (1,125 out of 1,851 exonerations at the time of their analysis).²⁶⁷ They then estimated that an assumed wrongful conviction rate of 1 percent of 339,093 convictions in 2014 would yield 3,391 false convictions. A 3

²⁶³ GIVELBER & FARRELL, *supra* note 230, at 55.

²⁶⁴ One third of exonerations reported by the National Registry of Exoneration are “no crime” cases, including arsons that were accidental fires (David Lee Gavitt); “Shaken Baby Syndrome” cases where children’s symptoms were caused by underlying medical condition or accidental falls (Julie Baumer); false accusations of child sex abuse, common in divorce cases (Ronnie Mark Gariepy); corporate malfeasance in charging employees with theft (Cheryl Adams); the misidentification of substances as drugs (Mariah Simmons); mistaking a statement intended as a joke as a threat (Thomas Shreve); no conspiracy to bribe a foreign head of state occurred when undercover agent fabricated story that actions were approved by the U.S. State Department (Haim Geri); no threat against the President occurred when fellow jail inmates fabricated charge against defendant to get better deals in their own cases (Daniel Cvijanovich); no burglary–complainant fabricated “crime” out of anger (Michael Waithe); no assault occurred– sheriff’s deputy fabricated charge against teen-ager (Jonathan Dominguez); death accidental and not vehicular homicide when audio statement to police, heard by appellate court, corrected erroneous transcript (Sierra Rigel); no money laundering by defense attorney defendant where testimony against him by criminal clients inconsistent, and no proof of specific intent in advising woman to purchase a home with funds that were drug sale proceeds (M. Donald Cardwell); no theft–money deposited in bank night drop was stuck in the vault (Robert Farnsworth). The names in parentheses are examples of the reason for a “no crime” exoneration and are found in the NRE. On August 4, 2017, the NRE reported 2,074 exonerations and 713 “no crime” cases (34.38%). See also Personal Identity, 10 People Who Were Wrongly Convicted Of Nonexistent Crimes, (contemporary and historic “no crime” wrongful convictions), <https://listverse.com/2014/07/21/10-people-who-were-wrongly-convicted-of-nonexistent-crimes/>. (last visited May 20, 2018).

²⁶⁵ Laudan does build the crime-committed-by-the-true-perpetrator into his support for the Blackstone principle, but his thinking does not extend to the Forst-Huff analysis.

²⁶⁶ BRIAN FORST & C. RONALD HUFF, *Preventing Violent Crimes by Reducing Wrongful Convictions*, in CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION, 2ND ED. (Vazsoni, Flannery & DeLisi, 2017)

²⁶⁷ These were 742 murders, 287 sexual assaults, and 96 robberies) FORST & HUFF, *supra* note 266.

percent wrongful conviction rate “would translate to an estimated 10,173 cases of wrongful conviction in violent crimes in that year.” Thus, allowing for only *one* crime by the criminals who were free to commit them because an innocent person was convicted, would generate 3,000 to 10,000 “excess” crimes each year. Forst and Huff note that those crimes account for only one cohort of convictions in one year and “does not include the 57 percent of DNA exonerations reported by the Innocence Project for which no actual perpetrators were identified.”²⁶⁸ This conservative estimate is even lower than Laudan would allow, for if assumptions of recidivism were applied to a portion of those who escaped justice, the excess crimes resulting from wrongful convictions for violent crimes would be higher. Thus, at the least, the crimes prevented by lowering the number of false convictions should be factored into Laudan and Allen’s crime reduction analysis, which necessarily increases the number of wrongful convictions.

Of course, requiring a prosecutor to prove a case beyond a reasonable doubt makes the prosecution more difficult and as a result some factually guilty defendants will be acquitted. My critique of Laudan and Allen’s proof-shifting idea, as well as Epps’s position, includes two interrelated points that pick up on my comments on Bushway’s analysis.²⁶⁹ The first part of my argument is that a verdict depends on more than the standard of proof, and that abstracting away from a verdict such factors as the strength of evidence (which might reflect the quality of police investigation work) overvalues the effect of proof-standards and rules of trial procedure. The kind of “Blackstone ratio” found by Bushway and the number of the errors of impunity that result are more logically the failure upstream processes and decisions. If these upstream decisions place weak evidence before jurors, as Givelber and Farrell show, the prosecution is logically more likely to fail.²⁷⁰ What Laudan and Allen’s abstract analysis does not account for, then, is that proof beyond a reasonable doubt and defense-friendly procedures on trial outcomes are part of a mix of elements that go into a verdict. These elements include many of the built-in prosecutorial advantages in plea bargaining and the conduct of trials, the array of evidence collected by the police investigation and forensic science process, the way in which that evidence is shaped into usable trial evidence by prosecutors before trial, and the entirety of defense preparation.²⁷¹ Once trial preparation is concluded, the outcome depends on the complex execution of the trial by prosecution and defense; the guidance, evidentiary decisions, and instructions by the judge; and the composition and deliberations of the jury. The Blackstone ratio is only one

²⁶⁸ FORST & HUFF, *supra* note 266.

²⁶⁹ *Supra* Part II.C.1.

²⁷⁰ *But see* GOULD, CARRANO, LEO, & HAIL-JARES, *infra* note 373.

²⁷¹ Some of this will be discussed in Part IV.

factor in this mix.

The second part of my argument is the moral hazard that a change in the burden of proof will likely have effects on actors and decisions throughout the criminal justice system. In a thought experiment one can hold everything constant in the justice system except the standard of proof. In this thought experiment the number of convictions will probably rise and in accord with Laudan's calculations result in many true convictions at a cost of a small increased number of wrongful convictions. But, perhaps, in light of Givelber and Farrell's analysis, the shift might not be as strong. Still, were the burden dropped from reasonable doubt to clear and convincing, it is highly unlikely that system actors would not react to it. Instead of showing greater concern for weaknesses in police investigation and forensic science (as does the innocence movement), Laudan and Allen would make it easier for a poorly resourced, or lazy, or poorly trained, or even corrupt criminal justice system personnel to convict defendants they assume are guilty by making the trial less of a screen and more of a conduit. Lowering the standard of proof would likely have a dynamic effect on police investigators and prosecutors by creating a moral hazard of indicting and bringing to trial weaker cases. Weaker cases produced by an uneven criminal justice system (see, *infra*, Part IV) will likely include far more false positives than now get through police investigatory screens. When these weaker cases are filtered through a trial process with a less stringent screen (clear and convincing evidence) a far larger proportion of false positives will pass through, possibly a far larger number than now result in wrongful convictions. Of course, we cannot be sure if the proportion of false positives to false negatives will be much worse for innocent defendants, and not so beneficial to potential crime victims than Laudan calculates.

Some evidence for this argument is found in Gould et al.'s empirical study of the causes of wrongful convictions. Perhaps the least explicable factor that was significantly correlated with wrongful convictions was a prosecutor's *weak* case.²⁷² With the assistance of an expert panel whose majority included police and prosecution professionals,²⁷³ the researchers concluded that when prosecutors are dealt a weak hand in a case that is later shown to be a wrongful conviction, this also means that the defense has less evidence with which to challenge the prosecution. As for the moral hazard argument,

²⁷² GOULD ET AL., *infra* note 373, at 491, 494, 501-02 ("Of all the statistically significant factors that harm an innocent defendant, a weak prosecution case is hardest to explain. Intuitively, we might expect the opposite—that cases with weaker evidence against the defendant would be more likely to end in dismissal or acquittal."). *Id.* at 501.

²⁷³ GOULD ET AL., *infra* note 373, at 505 n.84.

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.²⁷⁴

The "need" to prevail where prosecutors subjectively believe in defendants' guilt despite the lack of solid evidence led prosecutors in Gould et al.'s national sample of wrongful convictions and near misses to rely on weak evidence. This tendency of prosecutors to win even with weak evidence, a statistically significant factor, was not spurious according the panel of experts enlisted to assist Gould et al. to interpret their statistical results. "To a large extent, the panelists attributed tunnel vision in our cases to a police and prosecutorial culture in which questioning and independent thinking are not valued, procedures are not designed to probe already gathered evidence, and little or no concern is given to learning from past errors."²⁷⁵

Laudan and Allen's serious concern for crime victims might have produced its own form of tunnel vision, leading to exuberant claims that may overstate the extent of false acquittals, brush the larger criminal justice system out of their analysis, disvalue counter-research without giving it full consideration, ignore the strongest research on the causes of wrongful convictions, and fail to consider the likely effects that their proposed changes would have on actors in the justice system.²⁷⁶ Their analysis is valuable as an academic challenge to innocent thinking, ideally producing a dialectic to improve how we think about issues of guilt and innocence and the trial process. However, as a foundation for drastically changing the decision rules

²⁷⁴ GOULD ET AL., *infra* note 373, at 501.

²⁷⁵ GOULD ET AL., *supra* note 373, at 505.

²⁷⁶ For what it's worth, in my interactions with innocence advocates, including attendance at annual Innocence Network meetings where exonerees are valorized, I have often noticed real concern for the well-being of the initial crime victims, and concern for the double victimization that occurs when a rape victim or the family of a murdered person learns of the wrongful conviction. Sometimes, these victims react by denying the truth, at whatever psychic cost. See TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008). More recently, the innocence movement has expanded to include an organization founded by Jennifer Thompson who herself underwent the double trauma of a rape and coming to grips with her innocent misidentification of Ronald Cotton. Their story is told in JENNIFER THOMPSON-CANNINO, RONALD COTTON, & ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009). The organization, Healing Justice, works to assist crime survivors or the families of murder victims who have doubly suffered upon learning of the wrongful convictions in their cases.

for something as weighty as verdicts in criminal cases, even in a system as problematic as the American adversary system, Laudan and Allen's work falls short. Perhaps all these weaknesses can be forgiven if implementing their thinking will sharply reduce crime.

4. Internal Critique of Laudan and Allen's Crime Reduction Thesis²⁷⁷

In any event, the central theme running through Laudan and Allen was labeled as the most serious of the deadly dilemmas: "Every failure to convict the guilty means additional crimes undeterred and bad guys who, when left to their own devices, will almost certainly commit additional crimes."²⁷⁸ It should be kept in mind that Laudan's focus is on four violent crimes: murder, rape, aggravated assault, and robbery.²⁷⁹ Criminologists have come to recognize the intellectual trap held out by the promise of incapacitation.²⁸⁰ Incapacitation requires no behavioral hypothesis, as does deterrence theory, and it is beyond doubt that a prison inmate cannot commit four violent crimes (murder, rape, robbery, aggravated assault) addressed by Laudan and Allen outside the prison walls. The best thinking in criminology, however, is that any broad program of incapacitation has inherent limits. I base my conclusions on a recent and authoritative volume of the Committee on Causes and Consequences of High Rates of Incarceration of the National Research Council of the National Academy of Sciences published in 2014. I draw specifically from Chapter 5, "The Crime Prevention Effects of Incarceration."²⁸¹ Laudan bolstered his incapacitation argument by referencing an endorsement of that concept by Daniel Nagin. The first footnote in Chapter 5 indicates that it "draws substantially" on more recent work by Nagin and Durlauf.²⁸² That chapter separately evaluates the research on deterrence, incapacitation, and recidivism for most crimes and

²⁷⁷ The sections follow Part III.B.2, *supra*.

²⁷⁸ Allen & Laudan, *supra* note 4, at 79.

²⁷⁹ LAUDAN, LAW'S FLAWS, *supra* note 3; Laudan, *supra* note 3; *Different Strokes*, *supra* note 3, *passim*.

²⁸⁰ NRC, Growth, *supra* note 248, at 130–31 ("There is of course a plausibility to the belief that putting many more convicted felons behind bars would reduce crime." Yet, for the first two decades of massively increasing incarceration in the United States after 1974, "there was no clear trend in violent crime rates.").

²⁸¹ NRC, Growth, *supra* note 248. It is referred to in the text as "the NRC report" or "the NRC Committee" depending on context.

²⁸² The chapter draws on S.N. Durlauf & D.S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* 10 CRIMINOLOGY & PUB. POL'Y 13 (2011); S.N. DURLAUF & D.S. NAGIN, *The Deterrent Effect of Punishment*, in CONTROLLING CRIME: STRATEGIES AND TRADEOFFS 43-94 (P.J. Cook, L. Jens, & J. McCrary, eds., 2011); D.S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83 (2013); and D.S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, in 42 CRIME & JUSTICE: A REVIEW OF RESEARCH 199-262 (M. Tonry, ed., 2013).

treats the research on the effect of incarceration for drug offenses on drug prices and drug use separately.²⁸³ National Academy reports draw on the most noted scholars in any field, and although possibly subject to groupthink, the report analyzes published research, has been carefully vetted, and at the least is not the spurious product of an eccentric scholar.²⁸⁴

The overall conclusion of the NRC chapter highly qualifies Laudan and Allen's incapacitation hypothesis. Incapacitation necessarily has a crime suppressing effect. However, studies, such as those including analyses on the role played by incarceration in the great crime drop after 1990, have shown that incarceration played a limited role, despite the significant increase of imprisonment. The NRC report concludes that "[m]ost studies estimate the crime-reducing effect of incarceration to be small."²⁸⁵ Why should this be so? Focusing only on incapacitation, the NRC committee reviewed econometric research beginning in the 1970s that found small decreases in crime rates in response to increases in the imprisonment rate. As more econometric studies of the relevant elasticity—"the percentage change in the crime rate in response to a 1 percent increase in the imprisonment rate"—were conducted, it was found that the results varied widely, from no reduction in crime to "a reduction of -0.4 or more."²⁸⁶ As a result the NRC committee concluded that it "cannot arrive at a precise estimate, or even a modest range of estimates, of the magnitude of the effect of incarceration on crime rates."²⁸⁷ The reasons for this conclusion give some support to a modified version of Laudan and Allen's enthusiasm for incapacitation.²⁸⁸ Among the reasons are that the incapacitation studies may

²⁸³ NRC, Growth, *supra* note 248, at v, vii, 435-44.

²⁸⁴ The chapter was authorized by the 18-member Committee on Law and Justice of the National Research Council. The committee included notable criminological researchers, including Nagin, three economists, and the former director of the Bureau of Justice Statistics, and other noted scholars. The volume is also sponsored and vetted by the 20-member Committee on Causes and Consequences of High Rates of Incarceration. The memberships of the two committees overlap somewhat. The latter committee included Nagin, two economists, an epidemiologist and other distinguished scholars. NRC, Growth, *supra* note 248, at v, vii, 435-44.

²⁸⁵ NRC, Growth, *supra* note 248, at 155.

²⁸⁶ NRC, Growth, *supra* note 248, at 140.

²⁸⁷ NRC, Growth, *supra* note 248, at 141.

Many factors contribute to the large differences in estimates of the crimes averted by incapacitation. These factors include whether the data used to estimate crime averted pertain to people in prison, people in jail, or nonincarcerated individuals with criminal histories; the geographic region from which the data are derived; the types of crimes included in the accounting of crimes averted; and a host of technical issues related to the measurement and modeling of key dimensions of the criminal career.

include a variety of crime types. As I'll cautiously suggest below, targeted incapacitation programs may have greater crime reduction effect.

Even a targeted incapacitation program is limited by two factors related to criminal career research that have emerged from incapacitation research. These matters are not mentioned by Laudan and Allen, who treat criminals and defendants more like colorless physical entities, with unchanging characteristics, than human beings who vary in behavior, respond to incentives, and who experience change over time.²⁸⁹ Although the research base for estimating criminal careers is limited, it has been shown that the mean annual rate of offending over a criminal career, designated λ , is not constant and is highly skewed among different populations.²⁹⁰ The two major limits of general incapacitation programs are that incapacitation has diminishing returns and that λ diminishes with age.

Recent research has identified "stochastic selectivity" as a factor that implicates diminishing returns for incapacitation.

Stochastic selectivity formalizes the observation that unless high-rate offenders are extremely skillful in avoiding apprehension, they will be represented in prison disproportionately relative to their representation in the population of nonincarcerated offenders. This is the case because they put themselves at risk of apprehension so much more frequently than lower-rate offenders.²⁹¹

Thus, 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. The NRC Report indicated that self-report surveys of the number of crime committed per inmate overstate the benefits of increase incarceration "because most of the high-rate offenders will already have been apprehended and incarcerated."²⁹² It seems that Laudan's analysis in *The Law's Flaws* made the same assumptions of recidivism uniformity as did the earlier incapacitation studies. After the theoretical exposition on stochastic

NRC, Growth, *supra* note 248, at 141.

²⁸⁹ Although I focus my critique on Chapter 2 in LAUDAN, *LAW'S FLAWS*, no reference to the effects of diminished returns or aging out of crime is made in Chapter 8, dealing with bail, sentences, and probation and parole. LAUDAN, *LAW'S FLAWS*, *supra* note 3, at 153-72.

²⁹⁰ NRC, Growth, *supra* note 248, at 141-43. A technical implication of skewedness is that "as a matter of accounting, the estimated size of incapacitation effects will be highly sensitive to whether the mean, median, or some other statistic is used to summarize the offending rate distribution." *Id.* at 142.

²⁹¹ NRC, Growth, *supra* note 248, at 142-43.

²⁹² NRC, Growth, *supra* note 248, at 143.

selectivity was developed, other analyses have supported it along with an empirical a study of sentencing in the Netherlands.²⁹³

The other factor that limits the effectiveness of general incapacitation programs is that violent crime is highly age-dependent, with rates peaking in “the late teenage years for violent offenses, followed by rapid declines.”²⁹⁴ This factor is better known in criminology than stochastic selectivity and it is a bit surprising that it is not alluded to by Laudan and Allen. The growth of “geriatric prisons” with tens of thousands of prisoners whose likelihood of reoffending is very low attests to the willingness of American society to punish severely without achieving crime-reduction effects.²⁹⁵ In any event, the research strongly suggests that imprisoning large numbers of offenders and sentencing them to longer terms dependent on their having substantial prior criminal histories will have a smaller effect on crime rates because many such offenders have “aged out” of crime; this would be a form of false negative incarceration and sentencing.

The NRC Report covers other issues that are germane to Laudan and Allen’s analysis. Regarding recidivism, it concludes that research shows no deterrent or rehabilitative effects of imprisonment alone, but that recent research indicates that some rehabilitative programming is shown to reduce reoffending.²⁹⁶ On the question of whether prison is a school for crime, research shows “either no effect or a criminogenic effect.”²⁹⁷ Given their preoccupation with trade-offs, in my estimation Laudan and Allen’s view of the social contract that does not take into account the harms of prison on offenders, their families, their home communities, and the kinds of employment that prison work provides in economically devastated rural towns is a cramped view. In our society prison is strong but necessary “medicine,” but unlike responsible medical regimens (or penal policies in other democratic countries), prison is “prescribed” in reckless doses that do harm to the “patient.”

My critique admits that incapacitation has a place. “Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large prevention benefitsFalse”²⁹⁸ But Laudan and Allen’s blunderbuss approach is the opposite of a targeted program, which can, in terms of the NRC report, “. . . have a small prevention effect or, even

²⁹³ NRC, Growth, *supra* note 248, at 143.

²⁹⁴ NRC, Growth, *supra* note 248, at 143.

²⁹⁵ See TINA CHIU, VERA INST. OF JUST., IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (2010) [https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/leg](https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf)

²⁹⁶ See *infra* Part IV.B.2.

²⁹⁷ NRC, Growth, *supra* note 248, at 150.

²⁹⁸ NRC, Growth, *supra* note 248, at 155.

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worse, increase crime in the long run if [their policies] have the effect of increasing postrelease criminality.”²⁹⁹ It should also be noted that a good deal of research on selective incapacitation, greeted with enthusiasm in the 1970s, cooled off when the ability to identify high-risk offenders with precision was found to be limited.³⁰⁰ Laudan and Allen would create a permanent, wide-scale, and indiscriminate incapacitation program, with limited if not counterproductive effects, if their proposal to lower the standard of proof were ever taken seriously.

I’ll end with a note about targeted programming aimed at high-risk offenders that seems to have had real effect. The program known as “Operation Ceasefire,” which began with the Boston Gun Project in 1996, targets young, high-risk gang members, threatens them with prosecution and severe sentencing if they reoffend, and then offers job, educational and other services to reorient their lives.³⁰¹ A cautious, methodological review of what police researchers call “lever-pulling” operations provides some support for the effectiveness of the program.³⁰² Again, this approach, which combines the threat of legal force with a generous and humane provision of services, represents the kind of social contract that makes sense to me, although I understand that in our polarized society many people hold radically differing views about state-civil-society-individual relations including crime and punishment.³⁰³

▪

This is an appropriate place to add a postscript to my review of Laudan and Allen, or better, my review of Laudan, as we transition from the work of a philosopher, self-taught in slices of law, evidence, and proof, to the analysis of two writings by Paul Cassell, a conservative legal warrior. Laudan had already staked out most of the positions made in Laudan and Allen in a well-received book, which includes an engaging short Preface on how he was intellectually drawn to issues of legal theory, a new field for him.³⁰⁴ His

²⁹⁹ NRC, Growth, *supra* note 248, at 155.

³⁰⁰ Shawn Bushway, *Incapacitation*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2447 (Gerben Bruinsma & David Weisburd, eds., 2014).

³⁰¹ DAVID M. KENNEDY ET AL., U.S. DEP’T OF JUST., REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT’S OPERATION CEASEFIRE, DEVELOPING AND IMPLEMENTING OPERATION CEASEFIRE (2001); ANTHONY A. BRAGA ET AL., MEASURING THE IMPACT OF OPERATION CEASEFIRE (2001); DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2011).

³⁰² See Cody W. Telep & David Weisburd, *What is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?* 15 POLICE Q. 331, 338-39 (2012).

³⁰³ See Jaweed Kaleem & Kurtis Lee, *Atty. Gen. Jeff Sessions Wants to Get Tough on Crime. These People Think He’s Got It All Wrong*, L.A. TIMES (June 23, 2017), <http://www.latimes.com/nation/la-na-doj-crime-district-attorneys-20170623-htlstory.html>.

³⁰⁴ LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY xi-xiii (2006). For an acute review, see Michael S. Pardo, *On Misshapen*

plunge into the study of law brought him into contact with scholars of superior intellect and acquainted him with aspects of the continental/inquisitorial system. A complete analysis of Laudan's work should probably parse any shifts from his 2006 volume to Laudan and Allen's writings, but as my focus is on Laudan in the context of other anti-Blackstonians, I might be doing injustice to his ideas. Yet, the notion that Laudan has never been, or has never given any consideration to what it might be like to be a practicing lawyer, representing clients (whether individual, corporate, or the state), grubbing a living from the law, gives rise to something that has bothered me in my review of the anti-Blackstonians. I note at several points in this article that the anti-Blackstonians abstract too much from the empirical reality of criminal justice and the court process. Without denying the value of different levels of abstract thought, at some point the analysis of law needs to connect to the empirical world.³⁰⁵ A quick skim presents *Truth, Error, and Criminal Law* as a work of jurisprudence that analyzes legal concepts, judicial opinions, and the writings of other scholars and with a selective connection to "real world" issues.³⁰⁶ Though fair enough, the strengths of abstract thought in the law need to be balanced with considerations of the possible effects and unintended consequences of turning the products of jurisprudence into practical law.

Some of my concern is seen in Pardo's generally favorable review of *Truth, Error, and Criminal Law*.³⁰⁷ Pardo's main points of his critique of Laudan's error reduction analysis are that error reduction rules should not simply distribute error, should be shown to reduce error in the long run, and should show that the rules are not justified on nonepistemic grounds.³⁰⁸ By raising nonepistemic grounds, Pardo betrays his roots as a person trained in

Stones and Criminal Law's Epistemology, 86 TEX. L. REV. 347, 347-84 (2007) (book review).

³⁰⁵ That, at least, is my view. A standard survey of "western legal theory" closely tracks political theory and is related to changing notions and realities of the state, implicating ways that the rule of law is understood. See Kelly, *supra* note 26. Thus, even at the highly abstract level of legal theory, links to material and ideational changes in the nature of governance cannot be avoided. I fail to understand how theorizing about criminal law cannot at some point link to policy preferences. A tired analogy to the relationship of mathematics and physics to engineering comes to mind; there is a place for jurisprudence but at some point law is more a practical endeavor like engineering (some might say plumbing).

³⁰⁶ Laudan, *Truth*, *supra* note 304, at 2, notes that "whatever else it is, a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators." This is an appropriate starting place for a book on legal epistemology. Yet, when it comes to recommending changes to legal trial rules, like the standard of proof, attention must be paid to "whatever else it is." I argue, *infra* Part IV, that the narrow focus on trial rules is a misplaced effort in comparison to the work of scholars who explore ways to realign the American adversary process in ways that are more "inquisitorial."

³⁰⁷ Pardo, *supra* note 304.

³⁰⁸ Pardo, *supra* note 304, at 371.

a law school and who practiced or entertained the idea of practicing law. Even as a legal scholar, his mind travels to thoughts about the law's wider field of interests that if tickled would probably draw on empirical and historical evidence. Such "external" evidence does cloud the reductionist tendency of the kind of jurisprudential field that Laudan traverses. Nevertheless, at the point of making changes to law and policy based on theoretical analysis, empirical effects must be considered. It seems that the major externality that animates Laudan and Allen is crime victimization, offset by wrongful convictions, and all their analysis and calculations go to that trade-off. Yet Pardo seriously complicates this focus. "As an analytic matter, there is no reason why the benefit of the doubt must be isolated in the standard of proof rather than divided between the standard and one or more other prodefendant rules."³⁰⁹ Laudan does not do this and his,

[R]eason for locating [the proper ratio of false positives to false negatives] solely within the standard of proof is that it will be easier to calibrate. This is most likely true, and it makes for a simpler and more elegant theory of the epistemology of legal proof. While it may be easier to calibrate, however, it will still be an incredibly difficult task.³¹⁰

This critique can be applied to Laudan's *The Law's Flaws*, where his model is based on issues of standards of proof, but his challenge to procedural rules are dealt with seriatim.³¹¹ The messiness of the entire mix of values and processes that go into the adjudication process (to say nothing of the criminal justice system) may be beyond the ability of a simple model to describe, and may instead require a mix of legal, empirical, historical, and analytic scholarship to fathom, all of which wise judges and legislators need to consider.³¹² As Pardo notes, referring to understanding jurors' beliefs in relation to evidence in cases, "[e]ven if we knew what ratio we were looking for, developing a standard that would produce roughly this ratio across all categories of criminal cases may be virtually impossible."³¹³ If this is so in the case of juror decision-making, I think it applies even more to a macro-analysis of the adjudicatory or the criminal justice system. Admittedly, one's belief in this conclusion might depend on one's affinity for reductionist or

³⁰⁹ Pardo, *supra* note 304, at 372.

³¹⁰ Pardo, *supra* note 304, at 373.

³¹¹ LAUDAN, *LAW'S FLAWS*, *supra* note 3, 110-37.

³¹² See, for example, the variations that have been played on Packer's two models, Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 L. & SOC. INQUIRY 237 (2011).

³¹³ Pardo, *supra* note 304, at 373.

contextualist analyses of social phenomena.³¹⁴

Judges tend to think contextually.³¹⁵ I'll pluck out one more feather from *Truth, Error, and Criminal Law*. In a chapter on "dubious motives for flawed rules," Laudan joins the conservative judicial critique of *Miranda* on the ground that exclusion of evidence against a guilty person in order to discipline the police weighs "a known and serious cost against an uncertain and probably modest gain." To him, joining Justice Rehnquist's pre-*Dickerson* view of the *Miranda* rule "should be an easy call."³¹⁶

In a little noticed aside in the key paragraph in *Weeks v. United States*,³¹⁷ the case that found an exclusionary rule necessary to the meaning of the Fourth Amendment,³¹⁸ Justice Day commented that:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and *enforced confessions*, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.³¹⁹

"Enforced confessions"? This sloppy writing, injecting a due process or Fifth Amendment matter into a Fourth Amendment case,³²⁰ would never occur after first drafts of opinions came to be written by justices' clerks. The truth is that by 1914 the use of "third degree" police methods was well

³¹⁴ See Forst's comments on economists' reductionist approaches to criminology, *supra* note 80, at 126, quoted *supra* at footnote 126.

³¹⁵ Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999) ("[T]he particular decisions courts make are neither inevitable nor mechanically made. These decisions are influenced, explicitly and implicitly, by factors that are political, social, psychological, and cultural. There are many such factors that lead courts to mask or discount systemic harm.").

³¹⁶ Laudan, *Truth*, *supra* note 304, at 275. Laudan relies on the reasoning of Justice Rehnquist in *Michigan v. Tucker*, 417 U.S. 433 (1974), back in the day when as an Associate Justice he was pedaling the "Miranda is a prophylactic device" theory and before his realpolitik about face, as Chief Justice of the United States, in *Dickerson v. United States*, 530 U.S. 428 (2000).

³¹⁷ 232 U.S. 383 (1914).

³¹⁸ See William C. Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L. J. 799 (2000).

³¹⁹ 232 U.S. at 392 (emphasis added).

³²⁰ Although the *Boyd v. United States*, 116 U.S. 616 (1886) concept of the Fourth and Fifth Amendments "running into one another" was still alive, it only seemed to apply in cases involving writings, like the lottery tickets in *Weeks*.

known,³²¹ and the fact that torture was practiced routinely by police throughout the United States, and not only in the Jim Crow South,³²² was a national scandal. Perhaps the movement to constitutionalize rules of criminal procedure in order to protect defendants' rights was a romantic fling by liberal justices responding to nonepistemic grounds.³²³ Perhaps not. A page and a half description of the kind of treatment doled out by Cleveland police to Tony Colletti in 1930 over 26 hours has none of the elegance of a formal proof,³²⁴ but this kind of raw empirical and historical evidence is factored into calculations of judicial intervention. Of course, police torture is no longer routine. Still, routine and egregious torture went on for more than a decade from the 1970s to the 1980s in a Chicago station house, applied against more than 100 suspects, all African American.³²⁵ In Chicago, the courts were aware of these abuses and by the context of Chicago-style judging, enabled the torture regime to continue through their rulings.³²⁶

In significant ways, the innocence movement's empiricism, based in part on psychological science³²⁷ and other empirically grounded legal research,³²⁸ has exposed the limits of procedural legal liberalism and thus provided some support to the conservative critique of "nonepistemic" rulings, like *Miranda*. We now know that false confessions in proven

³²¹ RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 68 (2008) (discussing third degree subject of U.S. Senate hearings in 1910).

³²² *Brown v. Mississippi*, 297 U.S. 278 (1936); see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

³²³ Proponents prefer to view the incorporation movement as a process of perfecting of American constitutionalism, and incorporation has been finally accepted by conservative justices. See *McDonald v. Chicago*, 561 U.S. 742 (2010).

³²⁴ Colletti was "questioned nonstop, lied to, threatened, screamed and cursed at, deprived of food and water, and made to stand for hours. He was slugged with bare fists, stripped naked, and beaten with a rubber hose. . . . [Detectives] slapped him whenever he appeared to fall asleep. . . . They jolted him whenever his knees sagged or he sought support from the wall. Detective Welch repeatedly punched him just below the ribs on both sides and slapped him in the back of the head, causing Colletti's face to strike the wall." He confessed. LEO, *supra* note 321, at 41-43.

³²⁵ Methods included "suffocating the suspect, placing a revolver in the suspect's mouth, squeezing the suspect's testicles, and playing Russian roulette," —methods which leave no bodily marks. Other methods included electroshocks with a cattle prod and being forced against a hot radiator. Bades, *supra* note 315, at 1290, 1294. See Juleyka Lantigua-Williams, *A Digital Archive Documents Two Decades of Torture by Chicago Police*, THE ATLANTIC (Oct. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/10/10000-files-on-chicago-police-torture-decades-now-online/504233/>.

³²⁶ Bades, *supra* note 315.

³²⁷ The error reduction reforms regarding lineups come mainly from the work of cognitive psychologists. See generally NATIONAL RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014).

³²⁸ Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585 (2005); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 288-89 (2011).

wrongful convictions are almost always generated by police feeding incriminating information to suspects, which occurs in and seems to be a byproduct of the psychological pressure methods that describe contemporary American police interrogation.³²⁹ And if video recording and more enlightened police administration makes the revival of police torture unlikely in 2016, a constitutionalist with a sense of history should consider that anything is possible after 2017. If, thanks to innocence reforms, the criminal justice system can reduce wrongful convictions without increasing impunity, it would be potentially tragic to lose sight of the nonepistemological factors that continue to raise concerns for defendants' rights. Pardo gets this: "It would be a step in the right direction to try to reduce errors, not only by revising current truth-thwarting practices but by developing new ones that improve the accuracy of outcomes—such as better forensic-science techniques, more reliable (and visible) interrogation practices, more reliable lineup procedures, and more open and available discovery."³³⁰ Simply abolishing Miranda, although it is on life-support, does nothing to improve the accuracy of interrogation-induced confessions.

C. *Cassell on Criminal Justice*

Paul Cassell's historic role in innocence scholarship was set off by Bedau and Radelet's 1987 *Stanford Law Review* article identifying 350 capital miscarriages of justice and claiming that 22 resulted in wrongful executions.³³¹ His response with Stephen Markman challenged Bedau and Radelet's somewhat subjective method of assessing a wrongful conviction by carefully reviewing case facts.³³² Markman, then an Assistant Attorney General under Edwin Meese in the Reagan Administration, and Cassell, a former Department of Justice Associate Deputy Attorney General, aimed to squelch death penalty challenges, which they defended as a deterrent to homicide. This high-visibility exchange occurred on the eve of the first DNA exonerations. Although DNA exclusions forcefully placed the fact of wrongful convictions beyond challenge, the widely read exchange alerted innocence advocates that assertions of actual innocence were subject to close observation and criticism by crime control advocates if there was any doubt about the innocence claim. As a result, the innocence movement has become, in Richard Leo's words, an exoneration movement.³³³ Michael

³²⁹ Brandon L. Garrett, The Substance of False Confessions, 62 *Stanf. L. Rev.* 1051 (2010); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 *VA. L. REV.* 395 (2015).

³³⁰ Pardo, *supra* note 304, at 372 (footnote omitted).

³³¹ Hugo Adam Bedau, & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21 (1987).

³³² Markman & Cassell, *supra* note 21.

³³³ Richard A. Leo, *Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence*, in *WRONGFUL CONVICTIONS AND THE DNA*

Radelet acknowledged the role played by Cassell and Markman in forcing innocence advocates to be more parsimonious in defining wrongful convictions.³³⁴

Cassell moved from academe to the federal bench and back to academe.³³⁵ Professor Cassell's 2011/12 article and 2017 chapter include several recommendations for better getting to the truth in criminal cases that are drawn from a coherent approach to criminal procedure that is grounded in reversing most Warren Court decisions. These include abolishing the Fourth Amendment exclusionary rule, overruling *Miranda* and requiring videotaping of custodial interrogation, and barring habeas corpus petitions except on colorable claims of factual innocence. This "conservative" approach returns readers to the great clash in constitutional criminal procedure that played out over the decades since 1961, as a more or less conservative Supreme Court after 1970 whittled down defendant's procedural rights established in the 1960s.³³⁶ It reminds us that conservatives viewed Warren Court rulings, including expanded access to federal habeas corpus by state prisoners, as truth-thwarting protections for the guilty.³³⁷ The

REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 57-83 (Daniel S. Medwed ed., 2017). The concern with defining wrongful convictions parsimoniously can be seen in the National Registry of Exonerations' definition of an exoneration, *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited May 15, 2018).

³³⁴ Michael L. Radelet, *How DNA Has Changed Contemporary Death Penalty Debates*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 138, 141 (Daniel S. Medwed ed., 2017). Since the concept of trade-offs is central to the Blackstonian debate, note that the more parsimonious the definition of a false conviction, the fewer errors of justice will be acknowledged. Leo, *supra* note 321 (discussing definitions of exonerations that are even more parsimonious than the National Registry of Exonerations' conservative definition).

³³⁵ As a law professor, he promoted the cause of abolishing *Miranda v. Arizona*, 384 U.S. 436 (1966) on the grounds that the decision increased crime by reducing the number of confessions. Cassell engaged in a series of academic debates on the subject. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998); Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001). The debate continues: Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B. U. L. REV. 685 (2017).

³³⁶ Any contemporary law school criminal procedure casebook traces this monumental history. E.g., YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (14th ed. 2015). As explained below, Herbert Packer's "crime control" and "due process" models are preferable statements of ideological predilections on crime subjects than "conservative" and "liberal." See PACKER, LIMITS, *supra* note 61; *infra* text at footnote 560; Marvin Zalman, *A Brief Reply to Professor Cassell*, 48 SETON HALL L. REV. 1493 (2018).

³³⁷ Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 143 (1970).

“innocence factor,” that was mobilized by criminal procedure conservatives in opposition to expanded procedural protections is highlighted by a series of eight essays labeled “Truth in Criminal Justice” that were internally published by the Justice Department in 1986.³³⁸ These well researched legal briefs were drawn up under Stephen Markman’s direction. In a preface to the reports he wrote that little of the voluminous legal writing on criminal procedure “concerns increasing the system’s effectiveness in bringing criminals to justice, or doing justice for the actual and potential victims of crime.”³³⁹

The conservative crime agenda, of which limiting constitutional rights was only a part, and which was later supported by President Clinton, succeeded in pushing incarceration rates to unprecedented heights.³⁴⁰ Labeled mass incarceration, this policy is now disfavored even by conservatives and is undergoing partial revision.³⁴¹ It seems in retrospect that the conservative crime agenda of advancing capital punishment, harsh punishment, and prison building, despite its rhetoric about factual accuracy,

³³⁸ The reports were later re-published in volume 22, numbers 3 & 4 of the *University of Michigan Journal of Law Reform*, Spring & Summer 1989. See generally Preface, 22 U. MICH. J. L. REFORM 393 (1989). The reports discuss the law of pretrial interrogation, search and seizure exclusionary rules, Sixth Amendment right to counsel cases regarding interrogation, admission of criminal histories at trial, judiciary’s supervisory power, double jeopardy, habeas corpus review of state judgments, and drawing adverse inferences for silence. Each report was a brief for overruling pro-defendant Warren Court rulings and expanding prosecutorial power. See generally *id.*

³³⁹ Stephen J. Markman, *Foreword: The ‘Truth in Criminal Justice’ Series*, 22 U. MICH. J. L. REFORM 425 (1989). In fairness, it should be noted that as a Justice of Michigan’s Supreme Court, Markman has voted to grant new trials in post-conviction cases that led to exonerations. See e.g., *People v. Moldowan*, 643 N.W.2d 570 (Mich. 2002); *People v. Swain* 878 N.W.2d 476 (Mich. 2016).

³⁴⁰ ALEXANDER, *NEW JIM CROW*, *supra* note 157; OLIVER, *supra* note 50; TRAVIS C. PRATT, *ADDICTED TO INCARCERATION* (2009); ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011).

³⁴¹ A leading voice for a conservative turn toward liberal penal ideas (up to a point) has been the think tank Right on Crime, which may be the oldest such organization. See RIGHT ON CRIME, <http://rightoncrime.com/> (last visited May 15, 2018). It is, according to its web site, a “project of the Texas Public Policy Foundation, in partnership with the American Conservative Union Foundation and Prison Fellowship.” See *id.* The Texas Public Policy Foundation is a think tank that supports and is supported by the “establishment” or monied sector of the conservative movement. See TEXAS PUBLIC POLICY FOUNDATION, <https://www.texaspolicy.com/> (last visited May 15, 2018). See AVIRAM, *supra* note 47; DAGAN & TELES, *supra* note 47. This conservative shift to more measured criminal justice and sentencing policies has not been uniformly adopted by all lawmakers and under Attorney General Sessions the federal government seeks to revert to the tough on crime and drug policies that generated mass incarceration in the first place. Editorial, *The Right Way to Fix Prisons*, N.Y. TIMES (May 20, 2018) <https://www.nytimes.com/2018/05/20/opinion/trump-prison-reform.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region®ion=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region>

was not much concerned with actual innocence. Wrongful conviction was not recognized as a problem by leading conservative jurists and did not become a major policy issue until the innocence movement and DNA exonerations put it on the public policy agenda.³⁴² This background places Cassell's proposals in context.

1. Overview of Cassell's Perspectives on Innocence Reforms

Cassell's 2011/12 article appeared in a symposium addressing trial procedures and wrongful conviction, a topic that had been ignored in the first wave of innocence scholarship.³⁴³ In Part I of his article, Cassell challenged Tim Bakken's proposal for a novel trial process that would allow a defendant to plead "innocent."³⁴⁴ As noted above, Bakken's article and four other thought experiments suggested modifying trial procedures to improve verdict accuracy.³⁴⁵ Given their novelty, such proposals call out for review and Cassell's critique of Bakken is the most valuable part of his article. The merits of those articles and Cassell's thoughtful critique are not germane to the present article. My focus is on Part II of Cassell's article, which proposed changes to reduce wrongful convictions and increase justice system accuracy. His arguments are reiterated in a shorter chapter which adds an appreciation of Allen and Laudan's "Deadly Dilemmas."³⁴⁶

Cassell's list of accuracy-increasing criminal justice reform proposals is embedded in his proto-anti-Blackstonian vision: "the goal of innocence protection must proceed against a backdrop of a few needles—innocents wrongfully convicted—in a comparatively big hay stack—the vast pool of guilty defendants. Reform proposals designed without an awareness of these trade-offs can end up presenting far more problems than they would solve."³⁴⁷ As with my assessment of Laudan and Allen's writings, this

³⁴² Marvin Zalman & Nancy E. Marion, *The Public Policy Process and Innocence Reform*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 11-38 (M. Zalman & J. Carrano, eds., 2014).

³⁴³ Cassell, Freeing, *supra* note 5; Tim Bakken & Lewis M. Steel, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825-1096 (2011-12).

³⁴⁴ Cassell, Freeing, *supra* note 5, at 1065-80.

³⁴⁵ See discussion *supra* at notes 73-74. The articles reviewed in Zalman and Grunewald, *supra* note 73, are: Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008); Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911 (2011-12); Gross, *Pretrial Incentives*, *supra* note 187; D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004); Christopher Slobogin, *Lessons From Inquisitorialism*, 87 S. CAL. L. REV. 699 (2014).

³⁴⁶ "Rather than try to reinvent the wheel here on quantitative assessments of the trade-off, I want to simply take the Allen and Laudan calculation as accurate." Cassell, *Protect*, *supra* note 5, at 266.

³⁴⁷ Cassell, Freeing, *supra* note 5, at 1080.

generalization is not wrong but is overstated. How the trade-offs are assessed by researchers and managed by decision makers, however, can expose ideologies and political calculations that can muddy any rational choice.³⁴⁸ Getting public policy right is an arduous and continuous task.

Cassell's article seems to include a sleight-of-hand. I'd assume that an author would list his or her most potent argument first. In Part II Cassell lists and analyzes eight accuracy-enhancing proposals, but buries the most powerful point in position four only to dismiss it.

[T]he root cause of wrongful convictions is probably lack of resources devoted to the criminal justice system. Whatever individual causes might be pinpointed in particular cases, more resources would often have enabled defense counsel (or police and prosecuting agencies) to locate persuasive evidence of innocence. If this diagnosis is correct, then the *true solution* to the wrongful conviction problem is devoting additional resources to the criminal justice system.

Given the fiscal realities of the world we live in, however, it would truly be an academic proposal to call for significant new funding for defense attorneys, for example. At a macro level, the funds devoted to the criminal justice system are probably roughly fixed and not much is likely to change in the near term. What is needed, then, is to prioritize innocence over other criminal justice expenditures. Fortunately, for those who truly believe innocentism, there are ways to do this.³⁴⁹

³⁴⁸ For example, relatively minimal government expenditure under the Obama administration established the Attorney General's National Commission on Forensic Science (NCFS) in 2013 as a joint effort of the Department of Justice and the National Institute of Standards and Technology. *National Commission on Forensic Science*, JUSTICE.GOV <https://www.justice.gov/archives/ncfs> (last visited May 15, 2018). Attorney General Jefferson Beauregard Sessions III in the Trump administration allowed the NCFS charter to expire on April 23, 2017, a decision generally met with dismay. See, e.g., Erin Murphy, *Sessions Is Wrong to Take Science Out of Forensic Science*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-for-ensic-science.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-right-region®ion=opinion-c-col-right-region&WT.nav=opinion-c-col-right-region&r=0>. Given the critical assessment of the forensic sciences, the NCFS was an appropriate vehicle to improve services that are vital to accuracy in criminal investigation and prosecution. See NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). Sessions' call for a new evaluation of forensic science will either "reinvent the NCFS wheel" (while losing momentum) or hinder the advance of a more accurate criminal justice system. It is possible that Sessions' decision was political, animated in part by a visceral antipathy to any policy that originated under President Barack Hussein Obama.

³⁴⁹ Cassell, Freeing, *supra* note 5, at 1086 (footnotes omitted, emphasis added).

Cassell's stark realism can't be wished away. His observation, however, could, and depending on one's values or interests, should raise questions about the capacity of the criminal justice system to create efficiencies with current resources.³⁵⁰ A deep flaw in his overall argument on this point is exposed when at one part of his article he takes Bakken to task for proposing a right to demand police investigation by defendants claiming innocence, which Cassell claims is beyond the capacity of police.³⁵¹ Later in his article, he would require all defense attorneys to "truly attempt to learn whether their clients are guilty or innocent." Forgetting his observation that the criminal justice system is strapped for cash, he asserts that defense attorneys will "adequately investigate the claim" because, as he blithely remarks, "[p]resumably adequate defense investigation happens in most cases, regardless of whether a defendant claims to be innocent or guilty."³⁵² Overlooking this glaring internal inconsistency, Cassell's other "low cost" proposals that "prioritize innocence over other criminal justice expenditures" are admittedly second-best solutions.

First on Cassell's list is "more research on the frequency and causes of wrongful convictions."³⁵³ He acknowledges considerable prior research but urges more research to pinpoint the number of factually erroneous convictions, a figure that most experts acknowledge is an estimate and cannot be known with mathematical precision. Researchers should take a random sample of filed felony cases and "track them through the system to see what happens." As I will indicate in my critique, an empirical project completed after Cassell's article was published that focused on the causes of wrongful convictions and not on the difficult and arguably impossible task of assessing the precise proportion of wrongful convictions outside of death penalty cases.

³⁵⁰ To that end see Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OH. ST. J. CRIM. L. 403 (2017); Andrew Lucas Blaise Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, 51 L. & SOC'Y REV. 313 (2017).

³⁵¹ Cassell, Freeing, *supra* note 5, at 1075 (arguing that Bakken's proposal does not assess the adequacy of police investigation and would "divert[] both police and judicial resources into many wild-goose chases.").

³⁵² Cassell, Freeing, *supra* note 5, at 1093-94. I am not aware of social scientific studies that assess whether "adequate defense investigation happens in *most* cases" so Cassell's assertion may be correct; however, legal scholarship on the resources available to indigent defense has been decrying the lack of resources for decades, and in that light this casual assertion by Cassell should not be accepted at face value as accurate. See Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice*, 75 MO. L. REV. 684 (2010); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

³⁵³ Cassell, Freeing, *supra* note 5, at 1080-83 (italics and capitalization deleted).

Next on Cassell's list, he approved of Samuel Gross's proposal that defendants' relinquish trial rights in return for innocence procedures.³⁵⁴ With Ralph Grunewald, I commented on these experimental trial processes and do not address them herein. I would add that Laudan and Allen and Cassell allude to inquisitorial approaches to adjudication but do not expand on many of the features of continental justice systems or inquisitorial tweaks to our adversary system that would offer other ideas for improving system accuracy.

Cassell urged implementing the prosecutor's *Brady* requirement of disclosing exculpatory evidence to criminal defendants.³⁵⁵ He described a case before him as a federal judge involving inadvertently withheld exculpatory evidence where he ordered a new trial based on doubts about the defendant's guilt. He proposed information-sharing technologies as a possible solution. He also supported a reciprocal discovery proposal in the same symposium issue by Michael and Lesley Risinger.³⁵⁶ This is one area where Cassell's ideas seem to be in sync with those of the innocence movement and might be more appealing to defense attorneys than to prosecutors.

Cassell next turns to proposals, based on the conservative criminal procedure agenda, which would free up attorney time and resources that could be invested in trying cases: abolishing the Fourth Amendment exclusionary rule and replacing it with civil damage remedies; replacing "the *Miranda* regime" with videotaped custodial interrogation; and barring prisoners from filing for habeas relief without a colorable claim of actual innocence. The Fourth Amendment argument rests on analysis by William Stuntz that "a system with limited resources that emphasizes procedure over substance will give short shrift to factual claims of innocence."³⁵⁷ The same argument applies to interrogation and the *Miranda* issue. Viewing *Miranda* as a "triumph of formalism," he would shift the limited resources of "defense attorney time and attention away from claims of innocence" and divert judicial attention away from the reliability of confessions—positions

³⁵⁴ Cassell, Freeing, *supra* note 5, at 1083-84; see Gross, *Pretrial Incentives*, *supra* note 187 (one of the five articles proposing innovative trial procedures analyzed in Zalman and Grunewald, *supra* note 7376, at 203-206, *passim*). Gross's proposal is part of a carefully calibrated set of trade-offs that would replace the traditional adversary trial with an inquisitorial-like process; to be clear Gross did not suggest that defendants give up existing constitutional rights in the present adversary process.

³⁵⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

³⁵⁶ See D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y. L. SCH. L. REV. 869, 886-90 (2011-12).

³⁵⁷ Cassell, Freeing, *supra* note 5, at 1087 (citing William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37-40 (1997)).

supported by both liberal and conservative academicians.³⁵⁸ The argument for restricting habeas corpus, which I will not evaluate, rests on commentary going back to the 1960s,³⁵⁹ and is a current debate among leading habeas scholars.³⁶⁰

Cassell's last proposal would require defense attorneys to directly ask their clients if they are actually innocent.³⁶¹ I have already alluded to Cassell's internally contradictory notion that resource-strapped defense attorneys have the resources to carefully investigate all cases (while police do not have the resources to investigate all the permutations of a suspect's leads). To Cassell, this requirement would give defense attorneys a role to play in preventing wrongful convictions. If a client convinces an attorney that he or she is innocent, Cassell's advice amounts to this: "Within [the] traditional structure [of a criminal trial], defense attorneys have many tools that they can employ in the defense of innocent clients."³⁶²

Cassell's 2017 chapter adopts Allen and Laudan's position and adds other interesting points. He raises concerns about the comparative moral worth of some exonerees depending on their prior criminal status and plea-bargaining behavior, given that the innocence literature seems to show that "many of those wrongfully convicted were convicted because they had committed other crimes."³⁶³ Reflecting on a case in which he served as an expert witness for law enforcement officers defending a civil suit resulting from a wrongful conviction, Cassell asserts that where factually innocent defendants plead guilty without entering an *Alford* plea, they make "a decision to mislead the Court and enter a guilty plea [which] produces a wrongful conviction that is, at least to some extent, the result of illegal choices on their part and presumably entitled to somewhat less weight in a social harm calculus."³⁶⁴ He also suggests that eyewitness identification and false confession reforms can increase the number of criminals who escape justice. This has a kernel of truth but avoids countervailing arguments.³⁶⁵

³⁵⁸ Cassell, Freeing, *supra* note 5, at 1089 (citing Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 156 (1997) and JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 206-16 (1993)).

³⁵⁹ Friendly, *supra* note 337.

³⁶⁰ Compare Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) with John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435 (2011).

³⁶¹ Cassell, Freeing, *supra* note 5, at 1092-95; Cassell Protect, *supra* note 5, at 277-80.

³⁶² Cassell, Freeing, *supra* note 5, at 1094; Cassell Protect, *supra* note 5, at 279-80 (similar quote).

³⁶³ Cassell, Protect, *supra* note 5, at 268.

³⁶⁴ Cassell, Protect, *supra* note 5, at 270.

³⁶⁵ The conservative view was that the Warren Court criminal procedure reforms were truth-defeating. See footnotes and accompanying text at 337-339. The liberal view is that the failure to adhere to the constitutional procedural dictates as shaped by the Warren Court's

Cassell also proposes to study exonerees' prior criminal histories on the supposition that a prior conviction may be a source of wrongful convictions.

2. Critique of Cassell's Innocence Reforms

i. Research the Frequency and Causes of Wrongful Convictions.³⁶⁶

There appears to be nothing objectionable to calling for "more research." Cassell seems fixated on the number of wrongful convictions and suggests taking a random sample of cases from one jurisdiction and following them up.³⁶⁷ It should be noted, however, that scientific research is subject to the same issues of limited resources and trade-offs that confront all enterprises. Poorly conceived research creates lost opportunity costs for better research and may set analysts off on unproductive research paths.³⁶⁸ That is why funded scientific research is subjected to close scrutiny by peer reviewers before scarce research dollars are allocated.³⁶⁹ What we know about the incidence of wrongful convictions we know from a small number of empirical studies that offer precise estimates, other empirical studies with less precise estimates, and a smattering of works that try to make sense of this inherently challenging issue.³⁷⁰ Aside from issues of costs, the time needed to follow cases through appeals, and the confounding problem of knowing the ground truth, Cassell's proposed sketch of a research project misses Risinger's important observation about the substructure of wrongful convictions.³⁷¹ This suggests, among other things, that wrongful conviction

reforms increase the number of false convictions, see Forst, *supra* note 80, at 13-18. A narrower scientific debate has arisen over whether error-reducing innocent reforms may fail to identify the guilty, see discussion *infra* at notes 424-426.

³⁶⁶ Cassell, Protect, *supra* note 5, at 271; Cassell, Freeing, *supra* note 5, at 1080-83.

³⁶⁷ Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Incidence of Wrongful Convictions* (unpublished manuscript).

³⁶⁸ As the late John Sulston, a Nobel-winning geneticist noted, "There is no point in wasting good thoughts on bad data." Gina Kolata, *Obituaries John E. Sulston, 75, Dies*, N.Y. TIMES (Mar. 15, 2018) <https://www.nytimes.com/2018/03/15/obituaries/john-e-sulston-75-dies-found-clues-to-genes-in-a-worm.html?rref=collection%2Fissuecollection%2Ftoday-s-new-york-times&action=click&contentCollection=todayspaper®ion=rank&module=p&ackage&version=highlights&contentPlacement=2&pgtype=collection>

³⁶⁹ See, e.g., NATIONAL SCIENCE FOUNDATION, FUNDING, <https://www.nsf.gov/funding/> (last visited May 15, 2018).

³⁷⁰ Some of the research is discussed in Marvin Zalman, *Measuring Wrongful Convictions*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (G. Bruinsma & D. Weisburd eds., 2014); see also Samuel R. Gross, Barbara O'Brien, Chen Hu, & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 11 PROCEEDINGS NAT'L ACAD. SCI. 20 (2014).

³⁷¹ Risinger, *Innocents Convicted*, *supra* note 26, at 783. Cassell may have understood what can be called a subjective sense of substructuring of wrongful conviction, because he

rates can (and likely do) vary considerably from one jurisdiction to another, but the methods and metrics for assessing such variation is at the present time underdeveloped or even non-existent. Until the field of wrongful conviction develops techniques parallel to those of geologists who can make cost-effective guesses of where to dig, Cassell's proposal could produce a dry well.

Given his (and Laudan and Allen's) concern with cost-effectiveness, a decision to fund a proposed study about the proportion of wrongful convictions would have to evaluate its likely success and the lost opportunity costs of other kinds of research. The National Institute of Justice (NIJ) is at present wisely putting its money into sentinel event initiative research and programming, a concept that arose from James Doyle's thinking about wrongful convictions and that has promise for correcting errors throughout the criminal justice system.³⁷² For lawyers unfamiliar with this area, consideration might be given to the NIJ funding of the Gould-Carrano-Leo study on wrongful convictions causes that has generated useful information and should be more widely disseminated.³⁷³ In passing, note that the general field of wrongful conviction scholarship is packed with empirical or experimental studies in psychology journals, law reviews, and forensic science journals. The diverse nature of the field does make it challenging to keep up, and several recent anthologies are valuable resources.³⁷⁴

stated that he did not detect one wrongful conviction among a sample of 173 filed criminal cases in a study he conducted. Cassell, Freeing, *supra* note 5, at 1082. It would be wise to consider Gross's point that "False convictions are not merely unobserved, but in most cases are also unobservable." Gross, *Convicting the Innocent*, *supra* note 71, at 175. Given the great challenges involved in assessing involved in post-conviction, Cassell's confidence in not finding any wrongful convictions may be correct but should be taken with caution. Risinger, *Tragic*, *supra* note 10, at 1014 (observing that Allen and Laudan also "failed to account for the substructuring of risks generally" by relying on general statistics).

³⁷² James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010); James M. Doyle, *An Etiology of Wrongful Convictions: Error, Safety, and Forward-Looking Accountability in Criminal Justice*, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 56-72 (M. Zalman & J. Carrano eds., 2014). See *NIJ's Sentinel Events Initiative*, NAT'L INST. OF JUST., <https://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx> (last visited May 15, 2018).

³⁷³ JON B. GOULD, JULIA CARRANO, RICHARD LEO & JOSEPH YOUNG. PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE (2012) The results have been published in at least two places: Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471 (2014); Jon Gould, Julia Carrano, Richard Leo & Katie Hail-Jares, *Innocent Defendants: Divergent Case Outcomes and What They Teach Us*, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 73-89 (M. Zalman & J. Carrano eds., 2014).

³⁷⁴ CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH (B. L. Cutler ed., 2012); FORENSIC SCIENCE REFORM: PROTECTING THE INNOCENT (W. J. Koen & C. M. Bowers eds., 2017); WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel Medwed ed., 2017).

ii. Implement Existing Rules on Disclosing Exculpatory Evidence³⁷⁵

The greater disclosure of evidence in prosecutors' hands to defense attorneys is high on the list innocence movement reforms.³⁷⁶ While Cassell is to be commended for advocating the issue, his tone differs from innocence advocates who were heartened by Judge Kozinski's claim that "*Brady* violations have reached epidemic proportions in recent years."³⁷⁷ Cassell characterizes the quantum of *Brady* violations as having occurred "in a few cases" and wrongful convictions resulting from failures to discharge *Brady* obligations "in some smaller subset of these cases."³⁷⁸ He might be right. The generally held view is that most prosecutors act professionally. Yet, the bulk of legal academic writings raise concerns about the *Brady* materiality standard and other critiques report on *Brady* violations including the famous exoneration of Senator Ted Stevens, compare American disclosure practice to that in England, discuss weak internal administrative practices, and the like.³⁷⁹ A recent article commissioned by California prosecutors challenged Judge Kozinski's conclusion; it carefully reviewed the 29 *Brady*-violation cases Kozinski cited and concluded that some cases were negligent, although more than half were intentional or reckless.³⁸⁰ As is the case with most

³⁷⁵ Cassell, Freeing, *supra* note 5, at 1084-86.

³⁷⁶ Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y. L. SCH. L. REV. 969 (2011-12).

³⁷⁷ *United States v. Olson*, 737 F.3d 625, 631 (9th Cir. 2013) (en banc, Kozinski, C.J. dissenting from denial of rehearing en banc). See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii-ix (2015) (challenging 10 accepted ideas about criminal law, including "prosecutors play fair").

³⁷⁸ Cassell, Freeing, *supra* note 5, at 1084.

³⁷⁹ Griffin, *supra* note 376; Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379 (2000); Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33 (2004); Robert Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (2014); Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 68 LOY. U. CHI. L.J. 695 (2007); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 35-51 (2012).

[T]he statistical presence of these categories of manner of suppression among the total population can be discerned as follows: thirteen cases (45%) comprise intentional suppression, which occurs where the prosecution was aware of exculpatory or impeaching evidence, yet willfully withheld it from the defense. Four cases (14%) can be fairly characterized as reckless, where the trial prosecutor was not personally aware of the favorable evidence, but willfully ignored his duty to search out such evidence in the files of his own office or partner investigative agencies. Another four cases (14%) were simply too unclear to make a definitive conclusion as to manner of suppression. Seven cases (24%) represent mere negligent suppression, meaning the prosecution was unaware of the favorable evidence, which was either

important criminal justice and court practices, the data are very hard to come by. I conducted a “back of the Internet” analysis that suggests that 6.5% of all NRE exonerations were infected with *Brady* violations, but I wouldn’t bet the farm on that figure.³⁸¹ Given this lack of data it is difficult to make overarching conclusions about the way in which prosecutors operate. Good scholarship, like that of Angela Davis, identifies numerous problems while not demonizing prosecutors as a group.³⁸² A recent assessment by experienced scholars on these issues suggests that the clamor about *Brady* violations and other misconduct is beginning to make a dent in practice.³⁸³

iii. Replace Miranda with a System of Videotaping Custodial Interrogation.³⁸⁴

Ridding the world of the *Miranda* decision has been Cassell’s lifelong quest. Hoping to kill off the ruling, he had a hand in maneuvering the Supreme Court case that decided in 2000 that *Miranda* was good law, although hobbled in many ways.³⁸⁵ Without buying into Cassell’s contentious theory that the *Miranda* decision reduced confessions and increased crime, after a half century of endless writing and research it is wise to rethink some of the police processes addressed by Warren Court decisions. Cassell cites criminal procedure scholars who think that *Miranda* and other Warren Court rulings have directed criminal lawyers to argue procedural

actively withheld from it by a law enforcement partner or the evidence was hidden in a totally-unrelated investigation. Finally, one of the Kozinski 29 cases (3%) was reversed on appeal after Judge Kozinski noted it in his *Olsen* dissent (the final court to rule on the matter found no suppression by the prosecution, i.e., no *Brady* violation).

Jerry P. Coleman & Jordan Lockey, *Brady “Epidemic” Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 207-08 (2016) (footnotes omitted) (twenty-nine cases cited at U.S. v. Olson, *supra* note 377, at 631-33).

³⁸¹ On July 29, 2017, the NRE listed 2,069 exonerations. Of those 1,070 indicated OM (official misconduct) under the “Contributing Factors Display.” Using the NRE filter, only four narratives included the term ‘Brady violation’ in the narratives, and only 12 included ‘Brady.’ I searched for ‘withheld exculpatory evidence’ and found 55 cases, and 134 with the term ‘withheld evidence.’ The larger number, 134, is 6.48% of 2,069 exonerations.

³⁸² ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

³⁸³ Griffin, *supra* note 376; Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010).

³⁸⁴ Cassell, *Freeing*, *supra* note 5, at 1088-90; Cassell, *Protect*, *supra* note 5, at 275-77.

³⁸⁵ Dickerson v. United States, 530 U.S. 428 (2000); see Roger Parloff, *Miranda on the Hot Seat*, N.Y. TIMES (Sept. 26, 1999) <http://www.nytimes.com/1999/09/26/magazine/miranda-on-the-hot-seat.html> (describing Cassell as “an indefatigable, ideologically driven young law professor at the University of Utah” and reprising his “seven -year crusade” to bring a case before the Supreme Court that would test the constitutionality of a 1968 law that purportedly “overruled” the *Miranda* decision).

issues rather than the facts of cases, an argument that clearly has merit, although like Epps's arguments, are empirically untested.³⁸⁶ What we seem to be learning from innocence movement fallout is that some of the Warren Court's goals in cases involving interrogation and identification procedures may be better achieved through changes in police management of interrogations, lineups, and other critical investigative procedures. Without overruling *Miranda*, I observe that procedures like video recording and shifting from the psychologically coercive Reid technique to investigative interviewing can be instituted.

Cassell is to be commended for having supported the video recording of confessions from an early date. It demonstrates a desire to effectively curb abusive police practices while promoting accuracy in the justice process. Given the large number of guilty interrogated suspects, video or audio recording will more often help police solve a case rather than free an innocent suspect, a point that innocence advocates accept without any qualms.³⁸⁷ However, as video recording policy is spreading it is becoming apparent that recording is not a panacea to end psychologically abusive interrogation; something more is needed. When video recording was proposed in 1992 by the Police Executive Research Forum, the goals were to improve police administration and public relations. Video recording came to be seen as a way to reduce the number of false confessions only after innocence movement activity raised consciousness that false confessions occur in significant numbers. Cases exist where entire interrogations that produced false confessions were video recorded, and yet were nevertheless deemed true confessions by prosecutors, judges, and juries who later observed the videos.³⁸⁸ The limits of video recording are apparent when

³⁸⁶ STUNTZ, COLLAPSE, *supra* note 328.

³⁸⁷ Thomas P. Sullivan & Andrew W. Vail, *Recent Developments: The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215 (2009).

³⁸⁸ In some cases, downstream observers have watched or heard confessions, later proven false, that were taken to be true by prosecutors, defense attorneys, judges and jurors. See, e.g., Michael Scott, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3622> (last visited May 15, 2018); Robert Springsteen, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3658> (last visited May 15, 2018); see also BEVERLY LOWRY, WHO KILLED THESE GIRLS? COLD CASE: THE YOGURT SHOP MURDERS (2016). The practice of audio or video recording only a confession after a lengthy and possibly psychologically coercive interrogation is inherently biasing and was a target of cognitive psychologists and innocence reformers. See Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010) (APLS Approved White Paper). The preferred practice of recording the entire interrogation is designed to discourage abusive practices and to providing an accurate record. See Saul Kassin et al., *Police Reports of Mock Suspect Interrogations: A Test of Accuracy and Perception*, 41 L. & HUM. BEHAV. 230 (2017) (transcripts or audio recordings of interrogation capture more police tactics than police reports written soon after interrogation). A valuable Netflix documentary, "The

compared to a new method known as the investigative interview, which replaces the psychologically coercive methods of interrogation allowed under American law with non-coercive, fact-based questioning. The investigative interview has become the preferred, sanctioned method of pretrial examination of suspects in England and a number of other nations, where police officials partnered with psychologists to develop more effective and more human ways of questioning suspects. Research has shown that the method, under the PEACE acronym,³⁸⁹ generates the same number of admissions by suspects and is far less likely to pressure a weak suspect into a false confession. The replacement of the more abusive Reid method with investigative interviewing methods by some training companies presages not simply a technological fix, but a shift in the culture of policing that values case facts and evidence-based methods for questioning rather than the kinds of bluffing and bullying that is now supported by law.³⁹⁰

iv. Abolish the Fourth Amendment Exclusionary Rule and
Replace it with Civil Remedies³⁹¹

Cassell does not observe that the exclusionary rule has been rendered less than mandatory by the Supreme Court.³⁹² But that aside, search and seizure has not concerned innocence advocates. Perhaps it should, because the kind of police impunity that was unleashed by the Supreme Court's virtual "drug exception" to the Fourth Amendment,³⁹³ which has enabled

Confession Tapes" "presents six cases of possible false confessions leading to murder convictions of the featured people. In each case, the documentary presents alternate views of how the crime could have taken place and features experts on false confessions, criminal law, miscarriages of justice and psychology." *The Confession Tapes*, WIKIPEDIA https://en.wikipedia.org/wiki/The_Confession_Tapes (last visited May 15, 2018).

³⁸⁹ PEACE stands for 'Preparation and Planning'; 'Engage and Explain'; 'Account, Clarify and Challenge'; 'Closure'; and 'Evaluation.' See Dave Walsh & Ray Bull, *What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills Against Interviewing Outcomes*, 15 LEG. & CRIM. PSYCH. 305 (2010) (finding interviewers who attain the PEACE standard significantly more likely to obtain full comprehensive account or confession). A comprehensive anthology of suspect questioning methods around the globe indicates that three prevalent methods are torture, psychological interrogation (e.g., the Reid method common in the United States) and investigative interviewing. See David Walsh et al., *INTERNATIONAL DEVELOPMENTS AND PRACTICES IN INVESTIGATIVE INTERVIEWING AND INTERROGATION: VOL. 2: SUSPECTS* (2016).

³⁹⁰ See Marvin Zalman, Laura Rubino & Brad Smith, *Beyond Police Compliance with Electronic Recording of Interrogation Legislation: Toward Error Reduction*, CRIM. JUST. POL'Y REV. (2017); JAMES L. TRAINUM, *HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM* (2016).

³⁹¹ Cassell, Freeing, *supra* note 5, at 1087-88; Cassell, Protect, *supra* note 5, at 274-75.

³⁹² *Herring v. United States*, 555 U.S. 135 (2009).

³⁹³ Steven Wisotsky, *Essay: Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L. REV. 889 (1987); Juan R. Torruella, *Deja Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167 (2011); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL.

America's war on drugs and its consequential racialized mass incarceration,³⁹⁴ may have indirectly led to thousands of false convictions. As Ralph Grunewald and I wrote:

As a matter of logic, eliminating the Fourth Amendment exclusionary rule cannot lead to wrongful convictions, because possession of contraband signals guilt and the exclusionary rule itself allows the guilty to escape justice. Is this so in practice? Some legal scholarship has linked defendants' rights to inaccurate verdicts and to that end the Burger Court created a hierarchy of constitutional rights related to factual truth, "with those rights that are trial related at the top, the [F]ifth [A]mendment privilege in the middle and the [F]ourth [A]mendment right with its unpopular remedy of exclusion at the bottom." One consequence of the exclusionary rule is widespread police perjury covering illegal searches, but even then one may argue that the police are using the evidence against "bad guys"—or so it seems from applying the abstract logic of single cases to mass action. Extravagant fears of crime and drugs have led to a four-decade massive increase in prisoners generated by harsh sentencing laws, police incentives, bipartisan political support, a runaway prison-building program, and an enabling role by a conservative Supreme Court that shredded Fourth Amendment protections. It is no longer possible to fall back on brittle logic to support believing that every convicted drug possessor was factually guilty. In too many cases, the war on drugs has corrupted or overwhelmed American police departments, leading to a rise of police corruption and wrongful convictions both in pleaded-to drug convictions and tried homicide convictions.³⁹⁵

As it turns out, there is useful empirical support for the proposition that corrupted drug law enforcement has led to a large number of false convictions. The National Registry of Exonerations (NRE) has collected data on what it calls "group exonerations," or exonerations "of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury and corruption,"³⁹⁶ a phenomenon first identified in Gross's

L. REV. 1389 (1993); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

³⁹⁴ ALEXANDER, NEW JIM CROWN, *supra* note 157.

³⁹⁵ Zalman & Grunewald, *supra* note 76, at 252-253 (footnotes omitted) (typographical error corrected).

³⁹⁶ SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf

pioneering exoneration study in the early 2000s.³⁹⁷ Gross and associates located three group exonerations (previously labeled “mass exonerations”) by 2005: the well-attested Rampart scandal in Los Angeles,³⁹⁸ the Tulia, Texas debacle,³⁹⁹ and the Dallas sheetrock cases. Since that time the NRE has uncovered more group exonerations, up to 12 in 2012.⁴⁰⁰ “Those group exonerations included at least 1100 additional exonerated criminal defendants who are not listed in the Registry itself.”⁴⁰¹ Given the widespread use of militarized policing to enforce drug laws in rural areas, the quasi-private association of some law enforcement drug task forces, and the large sums of money involved, the NRE’s 12 group exonerations may be the tip of a corruption iceberg.⁴⁰²

These corrupt and blatant Fourth Amendment violations were undeterred by the exclusionary rule, providing an occasion to rethink the control of illicit police behavior with methods that go beyond the rule. Police shooting of civilians in the news today and the seeming failure of criminal prosecution in blatant cases of abuse suggests that controlling police misbehavior is an intractable issue.⁴⁰³ At the least, Cassell and other innocence skeptics might consider rethinking some assumptions about the relationship of police search and seizure activity and errors of due process.⁴⁰⁴

³⁹⁷ Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533-35 (2005).

³⁹⁸ Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013).

³⁹⁹ NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005).

⁴⁰⁰ GROSS & SHAFFER, *supra* note 396, at 80-90.

⁴⁰¹ NAT’L REGISTRY OF EXONERATIONS, Update: 2012 1 (2013), http://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf.

⁴⁰² See MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE (Peter B. Kraska ed., (2001); BLAKESLEE, *supra* note 399, at 201-13; Rush v. City of Mansfield, 771 F. Supp. 2d 827 (N.D. Ohio 2011); Jennifer Gonnerman, *How One Woman’s Fight to Save Her Family Helped Lead to a Mass Exoneration*, NEW YORKER (May 28, 2018) (describing first Chicago mass exoneration of 32 people falsely convicted because of corrupt Chicago P.D. officer planting drugs) <https://www.newyorker.com/magazine/2018/05/28/how-one-womans-fight-to-save-her-family-helped-lead-to-a-mass-exoneration>.

⁴⁰³ See, e.g., Justin Nix et al., *A Bird’s Eye View of Civilians Killed by Police in 2015*, 16 CRIMINOLOGY & PUB. POL’Y 309 (2017) (reviewing 990 fatal police shootings compiled by the *Washington Post* and calling for federal data on subject); Roger Dunham & Nick Peterson, *Making Black Lives Matter: Evidence-Based Policies for Reducing Police Bias in the Use of Deadly Force*, 16 CRIMINOLOGY & PUB. POL’Y 341 (2017); Matt Ferner & Nick Wing, *Here’s How Many Cops Got Convicted of Murder Last Year For On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da (based on data from Assoc. Prof. Philip Stinson at Bowling Green University, no police convicted in 2015 and only 13 convictions of 18 charged from 2005 to 2013).

⁴⁰⁴ Even impressive efforts by leading legal scholars to re-think issues related to policing

Hauling out jurists' well-intentioned but ideologically-driven proposals from the 1980s to control police misconduct that have had little traction is not an adequate approach. Legal scholars seeking genuine attempts to curb police excesses through civil and administrative measures need to engage more with criminological and criminal justice policy research.⁴⁰⁵ Any such overtures are welcome at a time when the nation's chief magistrate has publicly encouraged police to be "rough."⁴⁰⁶

v. Require All Defense Attorneys to Ask Clients if They
Committed the Alleged Crime and Aggressively
Investigate Claims of Actual Innocence⁴⁰⁷

This proposal envisions a radical change to the adversary model of adjudication. Whether a defense attorney should know or be concerned about a client's guilt is a perennial ethical issue, but one which, given long adversary system traditions, resolves by allowing attorney indifference to factual guilt or innocence. The attorney's role is to put the prosecution to its proof so as to insure prosecutorial integrity. Cassell justifies a radical threat to the adversary system by asserting that "[i]nnocent persons ensnared in the criminal justice system have a stronger claim to our attention than do the guilty."⁴⁰⁸ Leaving aside the difficulty of assessing whether a client is guilty,⁴⁰⁹ this position might be arguably correct from an ethical position and may indeed be felt, psychologically, by attorneys who are representing a palpably innocent client,⁴¹⁰ but it is not a correct statement of my understanding of the law. The adversary system, as an objective and imperial (and even imperious) entity, is concerned with procedural integrity and counts on proper procedure to get the substance right.⁴¹¹

proceed almost entirely within the world of law reviews, talking only to other legal scholars and not engaging with police researchers. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016).

⁴⁰⁵ See, e.g., SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005).

⁴⁰⁶ Philip Bump, *Trump's Speech Encouraging Police to be 'Rough,' Annotated*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/28/trumps-speech-encouraging-police-to-be-rough-annotated/?utm_term=.1427973f2bcb.

⁴⁰⁷ Cassell, *Freeing*, *supra* note 5, at 1092-95; Cassell, *Protect*, *supra* note 5, at 277-80.

⁴⁰⁸ Cassell, *Protect*, *supra* note 5, at 278.

⁴⁰⁹ Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010).

⁴¹⁰ This is stated plaintively by attorney Patrick McGuinness on the night before trial in the documentary film *MURDER ON A SUNDAY MORNING* (Direct Cinema 2001).

⁴¹¹ WHITMAN, *ORIGINS*, *supra* note 185, at 27-49 (describing development of this ethic and rule among the Church Fathers who were confronted with the need to judge, and thus to draw blood, as power to govern shifted from the Roman Empire to the Church). "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 319 U.S. 332, 347 (1943).

Debating the merits of the adversary system is fair game and is a well-established tradition of legal scholarship.⁴¹² Were Cassell to flesh out his argument, as have other scholars, with some thought given to his proposal's possible negatives and better detailing the operation of such a novel approach,⁴¹³ I would respect the product as an interesting innocentric trial procedure innovation. However, given his inconsistency between the limited resources in criminal justice and an assertion that defense attorneys have the capacity to fully investigate cases, and the total lack of any "innocentric" procedures as a tradeoff for an attorney's obligation to inquire into innocence,⁴¹⁴ I have to view this proposal as a provocation. The proposal could become a talking point for prosecutors opposed to innocence reforms. Were such a proposal to be enacted, with no other changes to the adversary model, and without erecting some of the accuracy-enhancing elements in modern, European, inquisitorial systems,⁴¹⁵ its effect would be to make defendants' lawyers structurally subservient to prosecutors, at least by limiting the scope of defense cross-examination of witnesses.

vi. Arguments Raised in "Can We Protect the Innocent Without Freeing the Guilty?"

As noted above, Cassell added a few points in his Chapter in Medwed's anthology. He raises an interesting criminological point about the number of exonerees (and by proxy the proportion of the wrongfully convicted) with prior criminal records. Innocence movement legal scholarship is not concerned with the question but at least two valuable criminological studies have explored pre- and post-exoneration offending. Gould et al.'s study of what factors cause erroneous prosecutions to become wrongful convictions identifies a prior criminal record as a statistically significant variable.⁴¹⁶ A study of post-conviction offending found a correlation between high monetary exoneree awards and lower levels of offending, suggesting that

⁴¹² CRIMINAL PROCEDURE: A WORLDWIDE STUDY, SECOND EDITION (Craig M Bradley ed., 2007); articles abound, *see e.g.*, Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 542 (1990); James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119 (2009).

⁴¹³ This is a point Cassell makes in his somewhat positive appraisal of Gross's "investigative trial." Cassell, *Freeing*, *supra* note 5, at 56.

⁴¹⁴ "Within [the] traditional structure [of a criminal trial], defense attorneys have many tools that they can employ in the defense of innocent clients." Cassell, *Freeing*, *supra* note 5, at 1094.

⁴¹⁵ In the part of our article that focused on German trial procedures, my colleague Ralph Grunewald specified the ways that German criminal procedure protects defendants rights, "often much more broadly than in the United States." Zalman & Grunewald, *supra* note 7376, at 226.

⁴¹⁶ Jon Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 498-99 (2014).

crimes by exonerees are driven by economic factors.⁴¹⁷ These factors are relevant to certain kinds of innocence policies, including exoneree compensation, but should not be relevant to adjudication under existing adversary system theory. However, one of the eight proposals that came out of the Justice Department's Reagan-era "truth in criminal justice" series advocated that defendants' criminal histories be admitted at trial.⁴¹⁸ A defendant's full background is made available to judges and jurors in French criminal trials, but a French defendant is entitled to request extensive police reinvestigation of facts (as was proposed by Bakken), and another significant material trade-off is that criminal penalties are far less draconian in France and Europe generally.⁴¹⁹ Cassell's intellectual career suggests that his proposals derive from a conservative, crime control model⁴²⁰ vision of criminal justice that would depart from the present adversary system with no countervailing civil liberty protections.

Nevertheless, police investigators are not wrong to question people with certain prior criminal histories as possible suspects (as they are not wrong to question family members in suspicious deaths). The danger, however, arises when investigators stupidly turn a probabilistic factor into a categorical one.⁴²¹ Cassell pokes holes in the rectitude of some or many exonerees by raising the reality that some have been involved in criminal activity. A balanced inquiry about the criminal conduct of those involved in wrongful conviction cases would also examine the degree to which wrongful convictions are caused by the criminal misconduct of police, forensic examiners and prosecutors, and not only among the group exonerations identified by the NRE.⁴²² The bulk of wrongful conviction scholarship examines justice system errors, and although many exoneration narratives expose criminal wrongdoing, very few scholars have systematically studied criminality by system actors as a source of wrongful conviction.⁴²³

⁴¹⁷ Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353 (2014).

⁴¹⁸ Office of Legal Policy, *A Report to the Attorney General on the Admission of Criminal Histories at Trial [1986]*, 22 J. L. REFORM 707 (1989).

⁴¹⁹ See Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527 (1997); Richard Vogler, *Criminal Procedure in France*, in CRIMINAL PROCEDURE IN EUROPE 171 (Richard Vogler & Barbara Huber eds., 2008).

⁴²⁰ As described by PACKER, *LIMITS*, *supra* note 61.

⁴²¹ See, e.g., CALVIN C. JOHNSON, JR. WITH GREG HAMPIKIAN, *EXIT TO FREEDOM* (2003).

⁴²² See e.g., BLAKESLEE, *supra* note 399. GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 230-33 (2012) (discussing the impunity murder of prisoner Samuel Shepherd and shooting of prisoner Walter Irvin by Sheriff Willis McCall); THOMAS FRISBIE & RANDY GARRETT, *VICTIMS OF JUSTICE: REVISITED* (2005) (discussing prosecutors tried and acquitted for acts in the prosecution of Rolando Cruz and Alejandro Hernandez).

⁴²³ See MICHAEL NAUGHTON, *THE INNOCENT AND THE CRIMINAL JUSTICE SYSTEM: A SOCIOLOGICAL ANALYSIS OF MISCARRIAGES OF JUSTICE* 15-69 (2013) (adopting the term

Exploration of this topic by Prof. Cassell, with his finely tuned sensibility for injustice, would be welcomed.

Cassell raised a concern that eyewitness identification reforms might allow guilty criminals to escape prosecution, but does not flesh out the issue. He follows the empirical challenge to eyewitness reforms by Steven Clark and others demonstrating in laboratory studies that reducing the selection of innocent perpetrators increases the number of guilty perpetrators not identified.⁴²⁴ Clark's work is in contrast to the kind of global anti-Blackstonianism reviewed in this article, and his challenge to *every* eyewitness reform was answered by Wells, Steblay and Dysart.⁴²⁵ Further analysis of this more precise debate is beyond the scope of this article. It is worth noting, however, that National Research Council (NRC) of the National Academy of Sciences has reviewed the debate, and has supported most eyewitness reforms generated by the work of psychological scientists, which should go far to reduce identification errors without "deadly dilemma" tradeoffs. The reforms supported by the NRC include instructing participants that the perpetrator may not be in the lineup, blind administration, fair procedures for filler-selection so that the suspect does not stand out, immediately taking the witness's confidence estimate if an identification is made, video recording the lineup, and insuring that only one suspect is included in a lineup.⁴²⁶ The procedure neither supported nor dismissed by the NRC is the sequential lineup procedure. Although substantial research shows greater accuracy with sequential lineups,⁴²⁷ the concern that they result in fewer overall picks, which in turn reduces the number of guilty suspects being picked and ultimately convicted, has not been resolved. As a result of methodological and substantive concerns, the NRC did not recommend that police departments adopt sequential lineups at this time.⁴²⁸

"abortions of justice" for wrongful convictions generated by police illegality).

⁴²⁴ Clark, *supra* note 37.

⁴²⁵ Gary L. Wells et al., *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 PERSPECTIVES ON PSYCH. SCI. 264 (2012).

⁴²⁶ See Gary L. Wells, *Eyewitness Identification: Systemic Reform*, 2006 WIS. L. REV. 615 (2006).

⁴²⁷ Nancy K., Steblay et al., *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 PSYCH. PUB. POL'Y AND L. 99-139 (2011).

⁴²⁸ National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, NAT'L ACADS. OF SCI. (2014).

IV. AN EMPIRICAL CRITIQUE AND ARGUMENT FOR THE
BLACKSTONE PRINCIPLE—THE REAL JUSTICE
SYSTEM

Part III presented “internal” critiques of the anti-Blackstonians. The “external” critique in this Part does not propound a systematic theory of adjudication or the criminal justice process. Its empirical sketches of criminal justice show several things. “The Prosecutor as a Source of Impunity” shows that *prosecutorial* practices can allow serious crime to go unpunished and unjustly distribute public safety. “Recidivism and Rehabilitation” offers research findings that weaken Laudan’s insinuation that once convicted a person is a continuous, inveterate recidivator who can be stopped from committing crime at every turn only by perpetual imprisonment. “Plea Bargaining” provides evidence to undermine the idea that convictions obtained by plea must be more factually accurate than convictions obtained by trial. “How Courts Operate” draws on an ethnography which shows one of the busiest criminal courts in the country to operate in ways that are poles apart from the idealized vision held by many and weakens one’s confidence that all criminal courts can routinely deliver accurate verdicts or pleas. “Murder, Race, and the State” argues that the source of high black-on-black serious crime rates is the withdrawal of state protection in poor minority communities that has existed at least since the mid-nineteenth century. The anti-Blackstonians’ programs appear oblivious to this and would only continue or exacerbate this sorry state of affairs. Many more sketches could be offered, but together they display an uneven justice process in which crime control relies on more than convictions and prison. They imply that an anti-Blackstonian agenda would possibly increase the number of wrongful convictions, perhaps substantially, without offering greater protection against crime victimization, a consideration that offsets crime increases hypothesized by anti-Blackstonians as a result of innocence reforms.

A. *Introduction*

Epps and Laudan and Allen’s jurisprudential analyses are applied to rules of criminal procedure, justice system statistics, Supreme Court decisions, and evidence theories. These approaches, by abstracting too much from the quotidian reality of adjudication and criminal justice, undermine or at least weaken their conclusions. Criminological insights and a gritty picture of contemporary practices drawn from legal scholarship and investigative journalism depict a justice system favoring the prosecution, and in which, oddly, errors of impunity are sometimes generated by prosecutors and not only by the criminal defense. Cassell’s approach is more empirical and grounded in a coherent conservative approach to criminal procedure that

grew out of a backlash to Warren Court rulings.⁴²⁹

Before offering an exposé, I need to state a belief that most system actors act professionally and usually get correct results.⁴³⁰ This belief is based on readings, research, and interactions with system actors. American criminal justice is no longer the “third degree” system of a century ago,⁴³¹ and for all the real problems of racial friction, is not the kind of “old” Jim Crow era system that was a thriving reality in my lifetime.⁴³² Academic writings describe positive changes in policing, forensic science, prosecution, defense lawyering, and the education of judges about forensic science, although all justice institutions fall short of achieving attainable ideals.⁴³³ Innocence movement leaders never claimed that the American criminal justice system is so thoroughly corrupt that it is irredeemable.⁴³⁴ Indeed, the systemic innocentric reforms proposed reflect a paradox: while a nontrivial number of wrongful convictions occur because of serious justice system problems, reform is possible because of systemic improvements and a high

⁴²⁹ Most legal criminal procedure scholarship is “liberal,” fueled in part by a realization that the Supreme Court’s decisions enabled the “war on crime and drugs,” which imposed enormous burdens on society. See ALEXANDER, *NEW JIM CROW*, *supra* note 157; FORMAN, *supra* note 157. Recently, the conservative position on crime *policy*, silently accepting the liberal critique, has moved away from the “war on crime/drugs” trope (although the Trump administration has revived the tough on crime position for federal prosecutors). See DAGAN & TELES, *supra* note 162; AVIRAM, *supra* note 162; PFAFF, *supra* note 147. Whether conservative Supreme Court justices will align their constitutional criminal procedure decisions to accommodate a new position remains to be seen. A sign of internecine conservative conflict is the conflicting positions taken by Justice Clarence Thomas and Attorney General Sessions on asset forfeiture. See Damon Root, *Clarence Thomas vs. Jeff Sessions on Asset Forfeiture*, REASON (July 20, 2017) <http://reason.com/blog/2017/07/20/clarence-thomas-vs-jeff-sessions-on-civi>.

⁴³⁰ We need to pay attention to genres. I observed in a chapter about detective work that the kind of narrative writing that extols the acuity and success of police investigators (the true crime genre) leads readers to be in awe of the ability of detectives. On the other end of the spectrum, articles and books about wrongful convictions (some of which falls into the true crime genre) almost uniformly paint a picture of police incompetence, tunnel vision, or malfeasance. Between these factually accurate but incomplete genres, social science research about police investigation depicts a less glamorous and less “noir” world of deadlines, heavy caseloads, resource limitations and bounded rationality. See Marvin Zalman, *The Detective and Wrongful Conviction*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 147-63 (M. Zalman & J. Carrano eds., 2014).

⁴³¹ ERNEST JEROME HOPKINS, *OUR LAWLESS POLICE: A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW* (1931).

⁴³² S. JONATHAN BASS, *HE CALLS ME BY LIGHTENING: THE LIFE OF CALIPH WASHINGTON AND THE FORGOTTEN SAGA OF JIM CROW, SOUTHERN JUSTICE, AND THE DEATH PENALTY* (2017); KING, *supra* note 422.

⁴³³ See, e.g., Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 *CRIME & JUST.* 55 (2010).

⁴³⁴ This characterization of the innocence movement is implied in Hoffman, *supra* note 53.

level of professionalism and self-awareness among today's criminal justice leaders compared to the past.⁴³⁵

The anti-Blackstonians' "crime and punishment" perspective fastens analysis on substantive criminal law, criminal procedure, trials, evidence law and imprisonment. Except for the hangman and transports to Australia, this was the institutional context of the debate about justice system trade-offs between Rev. William Paley and Samuel Romilly around 1800. An empirical criminological focus on how the justice system operates today draws on a wider slice of reality. The burden in this Part is to provide empirical evidence that the system is stacked against defendants, that justice systems errors arise from a variety of sources that have little or nothing to do with standards of proof and criminal procedure, that anti-Blackstonian reforms would do little to diminish most errors of impunity, and would likely increase wrongful convictions with little crime-reduction effect. The intuition that the deck is normally stacked against the defendant, requiring non-symmetrical pro-defendant procedures, is prominent in common law countries but less so in liberal democracies with so-called inquisitorial justice systems.⁴³⁶ As it seems impossible to finely calculate the state's advantage,⁴³⁷ the Blackstone principle and asymmetric rules like reasonable doubt seem to be intuitive attempts to even the scales that has been noticed in many justice systems.⁴³⁸

⁴³⁵ I've made a case for this proposition in Marvin Zalman, *Edwin Borchard and the Limits of Innocence Reform*, in *WRONGFUL CONVICTIONS & MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 329-55 (C. R. Huff & M. Killias eds., 2013).

⁴³⁶ The notion that wrongful convictions occur very rarely in inquisitorial countries is beginning to change. See *UNDERSTANDING WRONGFUL CONVICTION: THE PROTECTION OF THE INNOCENT ACROSS EUROPE AND AMERICA* (Luca Lupária ed., 2015).

⁴³⁷ FORST, *supra* note 80, at 45-56.

⁴³⁸ The Talmudists understood this. Rabbis were granted power to regulate Jews' daily lives under the Romans and their successors after the Temple was destroyed and the Jewish commonwealth crushed in 70 CE. They asserted the need for effective criminal justice. In *Pirke Avot*, the "ethics of the fathers," a fundamental collection of basic Talmudic principles, "Rabbi Chanina, the Deputy High Priest, says: Pray for the welfare of the government, for were it not of the fear of it, people would swallow each other alive" REUVEN P. BULKA, *CHAPTERS OF THE SAGES: A PSYCHOLOGICAL COMMENTARY ON PIRKEY AVOTH* 93 (Jason Aronson, 1993) (*Pirke Avot* [PA] chapter & verse 3:2). Yet, the Rabbis knew that their governing overlords were essentially despotic. "Be cautious with the ruling authorities, for they befriend a person only for their own needs. They appear as friends when it is to their advantage, but they do not stand by the individual at the time of that person's distress" (PA 2:3) *Id.* at 57. Nevertheless, when they had the ability, the Rabbinical authorities were enjoined to conduct trials aimed at achieving the truth. "Rabban Shimon, the son of Gamliel says: The world is preserved through three things: truth, justice, and peace, as it is said: 'Administer truth and the justice of peace in your gates' (Zechariah 8:16)" (PA 1:18) *Id.* at 47.

With these injunctions in mind, the Talmudists created decidedly "Blackstonian" criminal procedure rules. While a civil tribunal consists of 3 judges, a criminal tribunal was

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B. *Sketches*1. The Prosecutor as a Source of Impunity — Amy Bach, *Ordinary Injustice*⁴³⁹

Under a district attorney for four Mississippi counties, the conviction rate in one county dropped from about 90 percent to only 15 percent over a period of years. The District Attorney was not corrupt but exercised his discretion to focus on what he saw as major cases. Amy Bach listed 16 proper factors that a prosecutor could use to decide whether to not prosecute a case, from doubt about guilt to the mental status of the accused. Admittedly, factors like restitution or undue hardship to the accused will play little or no role in the serious crimes addressed by Laudan (homicide, rape, robbery, aggravated assault), but the Mississippi prosecutor's pattern of decisions led to systematic impunity that withdrew legal protection from victims of serious domestic abuse (many of whom were seriously assaulted), storeowners subject to theft and embezzlement, children victimized by statutory rape, and people assaulted by those with severe mental problems. The D.A. even refused to prosecute a large-scale illicit drug manufacturing operation. One reason for the lack of effective prosecution in the county was underfunded and inadequate policing.

It is not clear whether Bach's in-depth investigation in one locality is representative of other rural prosecutors. It may be an outlier, but we cannot know how far from the norm without better county-level criminal justice data

comprised of 23. In a civil case the opening argument can favor or oppose the defendant; in a capital case the opening statement must favor the defendant. A civil case can be decided by a simple majority as can a capital acquittal. But no execution can be had on a unanimous vote as it is presumed corrupt, but only by a super-majority. A civil verdict may be reversed whether the defendant was held liable or absolved, but in capital cases an acquittal may not be later reversed. In a capital cases, some must argue for the defendant, while in a civil case all judges could argue against a defendant. A person who argued for acquittal in a capital case cannot thereafter change his position. Civil cases are discussed in daylight and may be decided during the nighttime, but in capital cases the merits are argued in daytime, and the verdict must be reached in the daytime, either an acquittal on the same day, but a guilty verdict must be decided on the following day. In civil cases the senior judges are polled first, but in capital cases the junior judges are polled first, so as not to be swayed by seniority. A capital verdict of guilt is based only on direct evidence and not on hearsay. Witnesses in capital cases are admonished that they will be cross-examined severely. A witness who saw the defendant committing a murder had to warn him that his act was sinful and unlawful. The testimony of witnesses who contradict one another becomes invalid. Composition is not allowed in capital cases as it is in civil cases. Capital guilt is followed by execution, normally by stoning. The site of execution must be far from court (the judges must remain in the courthouse) to give time for a convicting judge to change his mind (officers at the court and with the execution procession remain in eye contact). If the rules of procedure disallowed the execution (e.g., if a witness did not warn the perpetrator to desist) but there were witnesses to intentional murder, provisions for life imprisonment existed. HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE, MISHNAH: SANHEDRIN—MAKKOT 106-26 (1952).

⁴³⁹ AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 130-90 (2009).

and analysis, the kind that *Measures for Justice* made public for the first time in 2017.⁴⁴⁰ It is reasonable to assume that poorly funded rural county justice systems operate below par, leading to injustices of impunity that ought to drive anti-Blackstonians to distraction and focusing their attention on improving and strengthening prosecutorial professionalism. This sketch does not alone undercut an anti-Blackstonian message, but suggests that before seeking to weaken defendant's rights, analysis should explore whether prosecutors contribute to errors of impunity.

2. Recidivism and Rehabilitation— Cullen and Jonson: Change is Possible⁴⁴¹

Offenders' high persistent recidivism rates were used by Laudan as support for reducing the standard of proof. Recidivism rates are problematic and need to be factored into sound crime reduction policies. The surveys Laudan relied on were taken during America's mass incarceration binge when rehabilitation programs were at low ebb.⁴⁴² While no criminologist claims that rehabilitation can eliminate recidivism, evidence-based rehabilitation programs do reduce recidivism. It would be negligent for policy officials (or criminal law scholars) to consider diminishing legal or constitutional rights of defendants as a way to (ultimately) reduce crime without considering recent scientific evidence on rehabilitation. Francis Cullen, a leading criminologist, and Cheryl Jonson thoroughly review more than 200 research articles tracing the trajectory of rehabilitation studies.

Until about 1970 rehabilitation was the reigning criminological theory of punishment, included in the Model Penal Code as a valid punishment rationale.⁴⁴³ Reviews of recidivism research around 1970s showed that many programs were not effective. A famous article by researcher Robert Martinson declared that "nothing works." That anti-government mantra was picked up both by left-leaning academics wary of discretion used by justice

⁴⁴⁰ Bach diagnosed lack of county level data as a source of errors of justice in her book and has worked to rectify this with an organization that is providing usable data. MEASURES FOR JUSTICE, <https://measuresforjustice.org/> (last visited May 17, 2018); see discussion *supra* in note 154.

⁴⁴¹ Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, in CRIME AND PUBLIC POLICY 293-330 (James Q. Wilson & Joan Petersilia eds., 2011).

⁴⁴² I do not mean to imply that the timing of those surveys alone means that the reported recidivism rates were necessarily higher than at other times, although it is a hypothesis worth testing. To the degree that imprisonment is a criminogenic factor, avoiding the unnecessary use of imprisonment for less serious felonies is a factor in reducing the number of recidivists even if rates are uniformly high.

⁴⁴³ The Model Penal Code takes a utilitarian approach and includes rehabilitation along with deterrence as a general purpose for sentencing and treatment of offenders. MODEL PENAL CODE, § 1.102 (2) (AM. LAW. INST. 2016). This section also advances use of scientific knowledge as a desideratum aimed at future implementation by legislatures.

system actors to control offenders, and by right-leaning policy makers who saw rehabilitation as coddling inmates. Rehabilitation rapidly declined as a reigning punishment philosophy, followed quickly by the elimination of many rehabilitation programs as prisons became overly crowded and community corrections became bloated.⁴⁴⁴ This change was consistent with America's turn from a New Deal consensus and the denigration of government service by high ranking politicians who valorized business and the private sector, a process abetted by "wars" on drugs and crime that led to mass incarceration.⁴⁴⁵ Some criminologists supportive of weak state ideologies (anarchists on the left, libertarians on the right) favored "radical non-intervention" for many offenders. A more prescient political theoretic analysis holds that unlike Switzerland, where prison is modeled as a place to make democratic citizens, in America's "virtual" and "potential" democracy in which not more than half the electorate participates in elections, prison is relatively invisible. As a result prison inmates and probationers and parolees have been turned over to criminological specialists who are "not concerned with issues of citizenship and democracy."⁴⁴⁶

Correctional programming did not disappear, but was held in low esteem by many criminologists. A shift toward methods of multi-program analysis from narrative approaches to meta-analysis in the 1980s allowed for more robust studies of the average effect size of rehabilitation treatment, defined as "a planned correctional intervention that targets for change internal and/or social criminogenic factors with the goal of reducing recidivism and, where possible, of improving other aspects of an offender's life."⁴⁴⁷ Despite some limitations of meta-analysis, studies of heterogeneous programs showed decreases in recidivism of from ten to up to forty percent.⁴⁴⁸ Education and work programs were found to have positive effects, although measurement was limited by participant selection bias; more refined analysis suggested that treatment effect was modified by prisoner's prior level of education and that to be effective a minimum exposure was required. As for drug treatment, residential therapeutic

⁴⁴⁴ JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 (1993); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014).

⁴⁴⁵ SIMON, GOVERNING, *supra* note 157.

⁴⁴⁶ Bernard E. Harcourt, *The Invisibility of the Prison in Democratic Theory: A Problem of "Virtual Democracy"*, 23 GOOD SOC'Y 6, 14 (2014).

⁴⁴⁷ Cullen & Jonson, *supra* note 441, at 295 (italics in original deleted).

⁴⁴⁸ Cullen & Jonson, *supra* note 441, at 303. The authors cited a 2007 review of eight meta-analytic studies of correctional interventions on recidivism, stated that "they showed that treatment programs were consistently associated with reductions in offending. In fact, they discovered that none of the meta-analyses 'found less than a 10 percent reduction in recidivism,' and that 'most of their mean effect sizes represent recidivism reductions in the 20 percent range, varying upward to nearly 40 percent'" (internal citations omitted). *Id.*

community programs were effective in reducing recidivism but group counseling and boot-camps had no effect.⁴⁴⁹

States could put this scientific evidence about rehabilitation to use by investing in programs designed to partially reduce recidivism rates. The way forward toward a more enlightened, evidence-based correctional policy is not entirely clear. Since about 2010 conservative groups have supported milder criminal justice policies, the Obama administration took steps to reverse mass incarceration, and the Senate almost passed bi-partisan legislation to ease harsh federal sentences. But the legislation stalled, overall prison rates have not fallen by much, and the present administration has ordered a reinvigoration of the war on drugs.⁴⁵⁰ In the states, the rhetorical move toward “smart on crime” policies continue, and both prosecutors and public opinion registers favorable opinions of rehabilitation.⁴⁵¹ If an unwillingness to move beyond the low hanging fruit of releasing first time drug offenders becomes the norm,⁴⁵² it is unlikely that a sustained program of rehabilitation will reach its potential effects. In such a case placing low-risk offenders into unnecessary rehabilitation programs might “increase the likelihood of future criminal justice involvement.”⁴⁵³ To the degree that anti-Blackstonians focus on trial procedures as the main driver of crime attitudes or as the prime factor in crime reduction, studied ignorance of correctional programming and the prospects of rehabilitation (as a mitigator of recidivism, at least) is misguided.

⁴⁴⁹ Cullen & Jonson, *supra* note 441, at 312. See also, David Weisburd et al., *What Works in Crime Prevention and Rehabilitation: An Assessment of Systematic Reviews*, 16 CRIMINOLOGY & PUB. POL'Y 415, 419 (2017) (“It is time to abandon the nothing works idea.”).

⁴⁵⁰ Matt Ford, *Jeff Sessions Reinvigorates the Drug War*, ATLANTIC (May 12, 2017, 11:37 AM), <https://www.theatlantic.com/politics/archive/2017/05/sessions-sentencing-memo/526029/>.

⁴⁵¹ Fred Patrick & Meg Reiss, *Criminal Justice Reform Starts with the Prosecutor*, HILL (Aug. 10, 2017, 5:40PM) http://thehill.com/blogs/pundits-blog/the-judiciary/346103-criminal-justice-reform-starts-with-the-prosecutor_ (noting a diverse group of prosecutors agree that rehabilitation is a key determinant of public safety); Timothy Williams, *Trump Wants to Get Tough on Crime. Victims Don't Agree.*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/11/us/crime-victims-poll-trump-agenda.html?&moduleDetai=section-news-2&action=click&contentCollection=U.S.®ion=Footer&module=MoreInSection&version=WhatsNext&contentID=WhatsNext&pgtype=article&_r=0.

⁴⁵² PFAFF, *supra* note 147.

⁴⁵³ Carl Takei, *From Mass Incarceration To Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead To a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125,139 (2017).

3. Plea Bargaining—Any Errors Are False Positives

Allen and Laudan were forced to abandon the myth that innocents almost never plead guilty, but they maintained that pleaded false negatives were rare.⁴⁵⁴ Alas, in the year they published the pilot episode of their deadly errors series,⁴⁵⁵ Josh Bowers shook up the world of plea-bargaining scholarship by asserting that false guilty pleas are frequent and a good thing.⁴⁵⁶ A decade later Laudan applied a three percent false negative rate to

⁴⁵⁴ “Risinger makes the striking claim that the rates of error in plea-bargained cases could be as high as errors at trial. Such an unsubstantiated and highly improbable proposition stands in stark contrast to the commendably empirical cast to his article.” Allen & Laudan, *supra* note 4, at 69 (footnotes omitted). After more analysis, they write: “In short, extrapolating from error rates of trials to error rates in bargains involves a serious category mistake. There may be cases of false positives involving pleas, but there is no reason to think they are relatively plentiful.” *Id.* at 71 (footnote omitted). To determine the rate of plea-bargained false negative, they drew on data from Garrett and from Risinger, *Innocents Convicted*, *supra* note 26, conducted numerology on their data, and produced a plea bargained error rate of 0.84%. See Brandon L. Garrett, *Judging Innocence*, 108 COL. L. REV. 55 (2008). Curiously, that rate is close to the error rate ascertained by Hoffman, *supra* note 53, and is greater than the lower qualitative estimate of wrongful convictions in my study, see Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221 (2012). In my simple calculation, an error rate of .0084 in all plea-bargained cases (assuming one million felony convictions a year) produces 7,896 innocent people who plead guilty each year. If 3 percent of the 95% of one million convicted who plead are innocent, the number rises to 28,500.

⁴⁵⁵ Allen & Laudan, *supra* note 4, inaugurated a deadly dilemmas series: Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI. KENT L. REV. 23 (2010); Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493 (2011); Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781 (2011).

⁴⁵⁶ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008). The utilitarian/libertarian argument in favor of innocent guilty pleas is made succinctly by Albert Alschuler:

It is better to be an innocent person on probation than an innocent person in prison. When an innocent defendant has been offered a beneficial deal, he should be permitted to take it. . . . Convicting the innocent is not wrongful when the innocent want it to happen. [Odds bargaining distributes aggregate punishment differently]. If ten innocent defendants were to stand trial, one might be wrongly convicted and sentenced to ten years. With odds bargaining, all ten may be convicted, but each may serve only one year. The number of wrongful convictions will increase, but not the number of years of wrongful imprisonment. Moreover, with costs bargaining added to the picture, the total quantum of punishment inflicted on the innocent may diminish.

Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2015).

serious felony convictions whether convicted by trial or plea.⁴⁵⁷

The innocence movement caused legal scholars and social scientists to look more closely at plea-bargaining. Albert Alschuler summarizes this research in an article that advertised plea-bargaining as a “nearly perfect system for convicting the innocent.” In brief, the innocent plead guilty because both “odds bargaining” and “cost bargaining” overbalances the defendant’s chance of acquittal.⁴⁵⁸ Alschuler critiques five arguments claiming to limit guilty pleas by innocence defendants. First, although there are reasons why the innocent will plead guilty at lower rates than the guilty, psychological studies and economic reasoning support the idea that substantial numbers of innocent do plead guilty. The enormous difficulty of obtaining exonerations from plea-bargained wrongful convictions explains why very few such cases show up in exoneration databases.⁴⁵⁹ Second, the obligation of courts to establish a factual basis for pleas does not mean that courts in fact carefully review the record or put the defendant to the ordeal of explaining what happened in his or her own words.⁴⁶⁰ Third, the desideratum that a prosecutor must be personally convinced of guilt beyond a reasonable doubt before accepting a plea is not a requirement, and evidence of prosecutorial opinion and behavior weakens that assertion.⁴⁶¹ Fourth, evidence does not show that most defense attorneys would block a client who was believed to be innocent from pleading; in this condition some attorneys pressure innocent clients to plead guilty or withdraw to allow other counsel to represent such clients.⁴⁶² Finally, Alschuler revisits the economic model undergirding guilty pleas (the prosecutor’s offer overbalances the defendant’s chance of acquittal) and proposes that the economic conflict of

⁴⁵⁷ LAUDAN, LAW’S FLAWS, *supra* note 3, *passim*.

⁴⁵⁸ Prosecutors bargain “both to ensure conviction in doubtful cases and to save the costs of a trial.” Alschuler, *supra* note 456, at 919-20. He bolsters his argument by drawing on his prior observational studies of plea bargaining and by an empirical survey of prosecutors conducted by Shawn Bushway, Alison Redlich and Robert Norris. See Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the “Shadow of the Trial”*, 52 CRIMINOLOGY 723 (2014).

⁴⁵⁹ Alschuler, *supra* note 456, at 928-33.

⁴⁶⁰ Alschuler, *supra* note 456, at 933-34. “A defendant’s one-word answer to the question whether he engaged in the conduct described in the indictment establishes a sufficient basis.” *Id.* at 934 (footnote omitted). See the example by Gonzalez Van Cleve, *infra* note 479. This factor is the point on which reform proposals could have the greatest impact. See Gross, *Pretrial Incentives*, *supra* note 187; Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505 (2016) (arguing that a coherent plea bargaining scheme should be procedurally inquisitorial and substantively aimed at rehabilitation); Garrett, *Why Plea Bargains*, *supra* note 220.

⁴⁶¹ Alschuler, *supra* note 456, at 934-35.

⁴⁶² Alschuler, *supra* note 4466, at 935-37. Defense attorney behavior is also considered in the section on courtroom behavior, *infra* Part IV.B.4.

interest among private defense lawyers and the organizational pressures of the courtroom workgroup lead many lawyers to pressure clients to plead with little concern of innocence or guilt because “[a]dvising a guilty plea is nearly always the safe, secure, comfortable, and profitable course.”⁴⁶³

Part of my argument contra-Laudan is that even if the the number of false negatives in criminal cases that go to *trial* are reduced, such a correction cannot influence the many crimes that are not reported to police, that do not lead to arrest, or that are dismissed by prosecutors.⁴⁶⁴ In addition, false negatives/wrongful acquittals simply cannot occur when defendants plead guilty, supporting Alschuler’s reasoning, which suggests that guilty plea false positives could be as high if not higher than trial verdicts.⁴⁶⁵

Is change possible? An empirically-based recent article by two leading criminal procedure scholars reports from the front lines of the judicial process that judicial involvement in plea bargaining is growing. This may in turn be creating an invisible managerial revolution, which, ideally, may by squeezing efficiencies out of the medieval institution that is the court allow for more careful consideration of criminal cases.⁴⁶⁶ Nancy King and Ronald Wright interviewed 100 judges and lawyers in ten states describing how judges routinely engaged in settling criminal cases, much like the civil justice norm. These programs are not haphazard but are allowed by law, rely on case management information technology representing cost-conscience docket management, and emphasize transparency. This shift in judicial attitudes and practice might be achieving the substantive and procedural justice goals called for by plea bargaining reform advocates. The respondents report that judicial involvement is producing better and not just faster pleas. First, judges provide information and a reality check on cases where advocates have unrealistic views of their cases, and can focus discussion on important substantive issues: “how best to rehabilitate the defendant, how do we protect the public, what should we do to accommodate the particular defendant.”⁴⁶⁷ Second, although not all prosecutors were in favor, a number of prosecutor respondents agreed that judicial involvement helped moderate overzealous line prosecutors and that in sensitive cases

⁴⁶³ Alschuler, *supra* note 4566, at 939, *see* 937-39.

⁴⁶⁴ *Supra* note 456.

⁴⁶⁵ This idea is bolstered by the growing number and increasing rate of plea-bargained exonerations reported by the National Registry of Exonerations. On November 10, 2017, the NRE reported 391/2120 or 18 percent guilty plea exonerations, a far higher rate than reported among DNA exonerations and earlier exoneration reports. Given the fortuitous nature of the exoneration experience, it is a mistake to take these shifting figures as a clear reflection of the largely uncharted reality of conviction ground-truth integrity.

⁴⁶⁶ Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

⁴⁶⁷ King & Wright, *supra* note 466, at 368, *generally*, at 366–68.

judges were willing to “take the heat” for unpopular pleas and sentencing decisions, or gave an assistant prosecutor a reason to buck an overly rigid office policy.⁴⁶⁸ Third, judicial involvement almost always produced more lenient sentences, making fans of defense lawyers.⁴⁶⁹ Fourth, defendants craved sentencing certainty, and “judicial input in . . . jurisdictions [with restrictions on judicial sentencing discretion] was valued for the certainty it provided about those aspects of punishment that the law left to the judge’s discretion. And where the judge’s approval offered a way around sentencing restrictions or postsentence review, judicial participation became even more attractive.”⁴⁷⁰ Fifth, respondents indicated that judges are receiving plentiful information about the cases from the parties and from evidence-based risk reports with which to make informed decisions. Judges’ requests for victim information pushed prosecutors to make efforts to obtain it. The absence of presentence reports is largely seen as a matter of less concern, as resources for report preparation is declining and the other sources of information, including prior history data, are routinely available. This paints a considerably different picture from the view that defendants bargain in the absence of information and are at the mercy of prosecutors, which takes us to the next point.⁴⁷¹ Sixth, judicial involvement increases discovery for the defense. Although some lawyers in two states demurred, other respondents reported that judicial involvement “may actually prompt prosecutors to reveal more to defense counsel, and to reveal it earlier.”⁴⁷² Also, settlement conferences served as discovery devices. Seventh, judicial involvement helped defense attorneys with stubborn clients, where judges talked to defendants, to convince them that the plea offers were reasonable and that the sentence recommendations were real. Respondents discounted the concern that judge involvement with defendants was coercive. Defense attorneys said that judge involvement made an already coercive situation less so, and judges did not become involved until after defendants decided to plead guilty. Judges talked to defendants in only five states.⁴⁷³ In sum, these reports about judicial involvement in plea bargaining commonly noted that “judicial settlement conferences provided *better* options for defendants, not worse.”⁴⁷⁴

⁴⁶⁸ King & Wright, *supra* note 466, at 368-71.

⁴⁶⁹ King & Wright, *supra* note 466, at 371-72.

⁴⁷⁰ King & Wright, *supra* note 466, at 376, *generally*, at 373-76.

⁴⁷¹ Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 798 (2014).

⁴⁷² King & Wright, *supra* note 466, at 380, *generally*, at 380-81.

⁴⁷³ King & Wright, *supra* note 466, at 381-87.

⁴⁷⁴ King & Wright, *supra* note 466, at 387 (emphasis in original).

The King and Wright study raises questions about generalizability. They note that “[l]ike the other self-serving claims about defendant perceptions we report here, our interviewees’ assertions deserve testing that this study cannot provide.”⁴⁷⁵ Still, the “consistency with which participants held [positive] view[s] was striking.”⁴⁷⁶ Judicial involvement may very well be a great corrective to the pressures and imbalance that led Judge Jed Rakoff to explain to a wide public “why innocent people plead guilty.”⁴⁷⁷ After repeating the various reasons to believe that the innocent plead guilty,⁴⁷⁸ he was “driven, in the end, to advocate what a few jurisdictions, notably Connecticut and Florida, have begun experimenting with: involving judges in the plea-bargaining process,” which was forbidden to federal judges. He envisioned a process in which prosecutors would have to provide case evidence and both parties would meet with a magistrate. The ten-state survey is encouraging news and may provide a key to reducing a source of procedural injustice and wrongful convictions. King and Wright did not include the issue of false plea bargained decision in their report. Additional empirical research to tease out information about possible pressures that generate false pleas in judge-involved plea-bargaining is called for.

4. How Courts Operate—Racialized Justice in “Cook County”

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.

Nicole Gonzalez Van Cleve’s ethnography of prosecutors and defense lawyers in the Cook County criminal court presents strong evidence that the adjudication process in America’s largest criminal court is indelibly infused with racism, even as openly espoused racist views are no longer permissible in a nominally post-racial society.⁴⁷⁹ Actual innocence is not a main theme of *Cook County*, but Gonzalez Van Cleve’s description of attorney behavior shows that a sloppy and hyper-efficient justice system creates an environment in which wrongful convictions and wrongful acquittals can flourish. As a caution, most of her observations concern drug cases; to the extent that Laudan and the other anti-Blackstonians focus on more serious,

⁴⁷⁵ King & Wright, *supra* note 466, at 383.

⁴⁷⁶ King & Wright, *supra* note 466, at 383.

⁴⁷⁷ Rakoff, *supra* note 188. For a detailed popular account of the problems of the guilty plea regime, see Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC MAG. (Sept. 2017), at 66.

⁴⁷⁸ The process is one-sided and the results dictated by prosecutors, who apply “inordinate pressures to enter plea bargains.” *Id.*

⁴⁷⁹ NICOLE GONZALEZ VAN CLEVE, *COOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

violent crimes, her observations might be discounted.⁴⁸⁰

Gonzalez Van Cleve asserts that Cook County's court culture thrives on racism to function efficiently. Details to support the thesis exposes an adjudication process rife with pressure tactics that silences witnesses and defendants, creating an environment that should produce more error than would be expected if due process norms were operative. This court culture "exists as its own ecosystem, far from the oversight and accountability of the legal bar and the city at large."⁴⁸¹ Her book is infused with tales of racialized and class-based degradation ceremonies (e.g., a judge ranting at an African American woman being sentenced for the killing of her abusive husband) that undermine the motion-picture ideal of wise and sober judges.⁴⁸² Observed crude behavior by professionals both in public and private,⁴⁸³ toward witnesses and defendants indicate a cultural norm that is not attuned to search strenuously for the truth. Indeed, the message was made explicit in an overheard conversation:

Given . . . the view that the paper pushing of plea-bargaining was not "real" legal work, fundamental due process protections are regarded as mere formalities, at best a type of ceremony without substance. This allows professionals to achieve a lowest common denominator of due process.

Socialization was central to the institutional continuity of this belief system and practice. Experienced prosecutors and even judges taught new attorneys how to streamline processes to the bare minimum of legality or laughed at attorneys who were so wet behind the ears that they cited case law. For instance, two senior first- and second-chair prosecutors in one courtroom coached as their third-chair novice how to avoid doing plea bargains that "long way." The third chair would naively read a detailed account of the facts of the case that the defendant was pleading guilty to when asked to do so by the judge. The attorneys told her that this detail was a complete "waste of time." The first chair explained to the third chair that she should put fewer facts on the record.

First Chair: All I say is "on such and such a date," he was found

⁴⁸⁰ Still, if I have solid evidence that the culture in a hospital was negligent and biased in regard to minor ailments, I'd have my doubts about the quality of work in major surgeries.

⁴⁸¹ GONZALEZ VAN CLEVE, *supra* note 479, at 12.

⁴⁸² GONZALEZ VAN CLEVE, *supra* note 479, at 51-54. Whites perceived as lower class are similarly degraded as "hicks" or "rednecks." *Id.* at 68.

⁴⁸³ GONZALEZ VAN CLEVE, *supra* note 479, at 39-41 (discussing the sociological examination of "front-stage" and "back-stage" behavior in social settings and in the Cook County Court).

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stealing. So stipulated? OK. Let's move on.

Third Chair: They [formal management] said I wasn't putting enough facts.

Second Chair: Mary, you can never put too little.⁴⁸⁴

Errors of justice in Cook County's "don't rock the boat" environment could be errors of impunity. In a telling episode, when Gonzalez Van Cleve was a prosecutorial intern she was tasked with organizing the next day's cases, which she misinterpreted as meaning she had to read the files and absorb their content. She became fascinated with a case of a twenty year old man who severely beat his grandmother "with a bat over the head" when she refused to give him money for drugs. The file included gruesome photographs and the grandmother's victim statement asking for a severe sentence. Gonzalez Van Cleve "made the rookie mistake of studying the legal facts of the case while I managed the bureaucratic organization." At a pretrial conference the next day, the public defender (PD) counted on the "prosecutor's lack of legal engagement in the case or, even worse, the lack of concern for another black victim, an elderly grandmother." The PD almost got away with downplaying the injuries and bluffed that the grandmother might not want to pursue the case to the fullest (the PD did so without positively stating an untruth). The prosecutor was about to buy the PD's suggested seven year sentence when Gonzalez Van Cleve violated her dual role as in intern and as an ethnographer by stepping out of the shadows to note that the victim was severely injured and asked for full prosecution.⁴⁸⁵

I violated several norms: I spoke. I negotiated. I advocated for a black victim. I caught the public defender in a lie. I exposed my supervisors' apathy and perhaps their negligence. The resulting silence hung in the room.⁴⁸⁶

When the participants recovered their balance, the defendant was given a fourteen-year sentence. Gonzalez Van Cleve understood that she had "muddied the cultural waters." "[M]y arrogance cost a man a decade more of his life." The prosecutors "came 'prepared' with simplistic moral rubrics ready to pursue the mope rather than legal evidence to pursue the case." She noted that the judge appeared animated, possibly because he was "actually . . . discussing the law rather than simply engaging in the common

⁴⁸⁴ GONZALEZ VAN CLEVE, *supra* note 479, at 74.

⁴⁸⁵ GONZALEZ VAN CLEVE, *supra* note 479, at 123-24.

⁴⁸⁶ GONZALEZ VAN CLEVE, *supra* note 479, at 124.

name-calling and banter that defined most plea bargains.” Yet, what Gonzalez Van Cleve identified as “discussing the law” amounted to the judge noting the existence of permanent physical injury and calculating that eighty-five percent of a seventeen-year sentence would amount to “14 years, 5 months and 12 days” of imprisonment.

As impunity includes not only false negatives but less than optimal sentences, Gonzalez Van Cleve’s anecdote suggests that errors of impunity may be as common as errors of due process. The adoption of Laudan’s lowered standard of proof would perturb a plea bargaining ecosystem that is far from pristine. In any event, the glimmers of racialized, lax, oppressive, and a production-oriented court system offer support for Alschuler’s analysis and weaken Laudan’s implicit picture of a well-functioning plea-bargaining process.

5. Murder, Race, and the State

Allen and Laudan properly express concern for serious crime victims, but their color-blind and ahistoric approach is unlikely to remedy the deeply-rooted unconcern for black lives.⁴⁸⁷

Historical criminology has contributed to the grand observation that state formation is associated with declines in interpersonal violence.⁴⁸⁸ Steven Pinker’s thesis on the decline of violence brings much of this scholarship together, displaying a steady decline in European homicide rates in different regions from the high Middle Ages to the twentieth century as feudal principalities grew into consolidated nation states.⁴⁸⁹ The process continued in a steady fashion in Europe where the post-Enlightenment bureaucratic state applied many controls and the inducements of civilization led to sharp declines of violence among upper class men.⁴⁹⁰ These data are consistent with anthropological studies of warfare death rates in three kinds of non-state societies and in states, with average death rates far higher in non-state societies than in pre-modern and modern states.⁴⁹¹ Pinker’s close-in analysis of violence in the United States observes the much higher American homicide rate (fluctuating from 5 to 10 per 100,000 in the twentieth century) compared to England (steady at about 1 per 100,000 but

⁴⁸⁷ Allen & Laudan, *supra* note 4, at Part III.B.1&3.

⁴⁸⁸ See NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS AND STATE FORMATION AND CIVILIZATION* 450-51 (1994).

⁴⁸⁹ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 63 (2011). Pinker summarizes Elias’s theory. *See id.* at 64-81 (“While Europe was becoming less murderous overall . . .”).

⁴⁹⁰ PINKER, *supra* note 489, at 81-82.

⁴⁹¹ PINKER, *supra* note 489, at 49, Figure 2-2 (displaying data on 21 prehistoric archaeological sites, 8 hunter-gatherer societies, 10 hunter-horticulturalists & other tribal groups, and 8 pre-modern (Ancient Mexico, before 1500 CE) and modern states).

rising gently since 1970), and traces generally downward trends from colonial times to the present.⁴⁹²

But the trends that most draw our attention are the different homicide rates between whites and blacks. Somewhat surprising, from 1800 to the mid-nineteenth century homicide rates among black and whites were quite similar in New York City and Philadelphia but “the second half of the 19th century also saw a fateful change, . . . [when] a gap opened up, and it widened even further in the 20th century, when homicides among African Americans skyrocketed, going from three times the white rate in New York in the 1850s to almost thirteen times the white rate a century later.”⁴⁹³ Aside from economic and social factors, Pinker observes, “communities of lower-income African Americans were effectively *stateless*, relying on a culture of honor (sometimes called “the code of the streets”) to defend their interests rather than calling in the law.”⁴⁹⁴ I’ll return to Pinker’s “statelessness” thesis after discussing the role of racism.

Police officers who patrol lower-income black communities tend to comment on the high rates of violence they encounter in moralistic ways, according to their apparent levels of education and comprehension, but their expressions of frustration are understandable given that they often confront violence and disorder more or less on their own.⁴⁹⁵ I assume that they, and the mass of middle-class suburbanites who are entertained with accounts of inner-city violence on the 11:00 o’clock news, might be surprised by Pinker’s “statelessness” thesis. The unnerving implication is that continuously broadcasting the raw data of black crime fuels deep currents of American racism. The findings of modern genetics indicates that the “vast proportion of genetic diversity (85 to 90 percent) occurs *within* so-called races (i.e., within Asians or Africans) and only a minor proportion (7 percent) between racial groups.”⁴⁹⁶ As Siddhartha Mukherjee puts it, “the genome is strictly a one-way street.” A person’s ancestry can be assessed

⁴⁹² PINKER, *supra* note 489, at 91-97.

⁴⁹³ PINKER, *supra* note 489, at 97.

⁴⁹⁴ PINKER, *supra* note 489, at 97-98 (emphasis added). *Id.* at 85 (“Not surprisingly, lower-status people tend not to avail themselves of the law and may be antagonistic to it, preferring the age-old alternative of self-help justice and a code of honor.”). Pinker notes that police observe and comment on this. *Id.* Pinker describes the violent basis of the honor societies of Homeric Greece, the Hebrew Bible, the Roman Empire and early Christendom, and the chivalrous era of medieval knights. *Id.* at 40-41. See also JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 11 (2015).

⁴⁹⁵ See Peter Nickeas, *What Cops Know: You Can Learn A Lot About a City by Seeing it Through the Eyes of Police Officers Who Patrol It*, CHI. MAG. (June 26, 2017) <http://www.chicagomag.com/Chicago-Magazine/July-2017/What-Cops-Know/>; see also David Couper, *Behind the Badge: What Cops Think*, IMPROVING POLICE (Jan. 12, 2017) <https://improvingpolice.wordpress.com/2017/01/12/behind-the-badge-what-cops-think/>.

⁴⁹⁶ SIDDHARTHA MUKHERJEE, *THE GENE: AN INTIMATE HISTORY* 341-42 (2016).

with genomic tools, but knowing that yields very little knowledge about the person's characteristics. "The geneticist goes home happy; the racist returns empty-handed."⁴⁹⁷ Unfortunately for social observers, however, even as raw racism is fading,⁴⁹⁸ "[t]here is copious evidence that individuals of all races have implicit racial biases linking blacks with criminality."⁴⁹⁹

Several observations about black-on-black homicide are worth noting in light of Laudan and Allen's expressed concern for "colorless" crime victims and their claim that more and longer prison sentences will reduce crime. Jill Leovy, drawing on available research in *Ghettocide*, notes that many liberals in polite society are skittish about confronting the issue and being labeled as racists, leaving this critical issue oddly under-researched. "By the early twenty-first century, popular consensus held that any emphasis on high rates of black criminality risked invoking the stigma of white racism. So people were careful about how they spoke of it."⁵⁰⁰ Nevertheless:

Homicide had ravaged the country's black population for a century or more. But it was at best a curiosity to the mainstream. The raw agony it visited on thousands of ordinary people was mostly invisible. The consequences were only superficially discussed, the costs seldom tallied.

Society's efforts to combat this mostly black-on-black murder epidemic were inept, fragmented, underfunded, contorted by a variety of ideological, political, and racial sensitivities. When homicide did get attention, the focus seemed to be on spectacles—mass shootings, celebrity murders—a step removed from the people who were doing most of the dying: black men.

⁴⁹⁷ *Id.* at 342.

⁴⁹⁸ LEOVY, *supra* note 494, at 11 ("One of the enduring tropes of racist lore had been the 'black beast,' the inferior black man who could not control his impulses and was prone to violence,"). I won't even try to assay the degree to which an 'alt-right' ideology brought in the current administration and its relation to "raw racism"—the picture is complex.

⁴⁹⁹ L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L. J. 862, n.82 (2017) (Book Review). In addition to the edgy topic of black-on-black homicide, a recent data-based report makes the stunning finding that in 400,000 homicides between 1980 and 2014, the killing was deemed justified in 2 percent of cases overall but in 17 percent of cases where a white person killed an African American. Daniel Lathrop & Anna Flagg, *Killings of Blacks by Whites Are Far More Likely to Be Ruled 'Justifiable'*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/upshot/killings-of-blacks-by-whites-are-far-more-likely-to-be-ruled-justifiable.html?rref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us®ion=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=sectionfront.

⁵⁰⁰ LEOVY, *supra* note 494, at 11 ("Researchers describe skirting the subject for fear of being labeled racist. Activists have sought to minimize it."). According to James Forman, Jr., "progressives tend to avoid or change the subject" *Id.*

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They were the nation's number one crime victims. They were the people hurt most badly and most often, just 6 percent of the country's population but nearly 40 percent of those murdered.⁵⁰¹

Leovy, consistent with Pinker, notes that historians traced the high rates of black-on-black homicide to the late nineteenth century and observed that the trend continued in contemporary Los Angeles, with its relatively low African American population, even in mixed black and Hispanic neighborhoods. “[I]t was, as one young man put it, as if black men had bull’s-eyes on their backs.”⁵⁰² Moreover, she also locates the root cause of high black violent-crime rates on statelessness, but a kind of stateless that must be seen clearly. As she puts it, “Few experts examined what was evident every day in [detective] John Skagg’s working life: that the state’s inability to catch and punish even a bare majority of murderers in black enclaves such as Watts was itself a root cause of the violence, and that this was a terrible problem—perhaps the most terrible thing in contemporary American life.”⁵⁰³

High black violence rates reflecting injury to other African Americans is certainly a terrible thing, but “the most terrible”? Perhaps Leovy is getting too close to her subject. Or, perhaps not. The statelessness of poor African Americans is not like the the formal statelessness of Jewish refugees fleeing Nazi Germany on the Hamburg-Amerika Line’s ship the *St. Louis* in May 1939, who were refused entry to Havana and passed the shores of Miami on their return to Europe.⁵⁰⁴ The “statelessness” of African Americans is more precisely seen as the withdrawal of the normal benefits of citizenship. To locate the place of weak police protection in this kind of statelessness, consider Richard Rothstein’s thesis that housing discrimination, which has done as much to separate the races as anything, has been a “consistent government policy that was employed in the mid-twentieth century.”⁵⁰⁵ Housing segregation was enforced throughout the United States by explicit rules and laws at all levels of government that excluded African Americans from or relegated them to segregated enclaves in emergency housing built during World War II and in public housing, by racial zoning, by excluding

⁵⁰¹ LEOVY, *supra* note 494, at 6.

⁵⁰² LEOVY, *supra* note 494, at 10.

⁵⁰³ LEOVY, *supra* note 494, at 7-8.

⁵⁰⁴ Feelings against allowing more Jewish refugees to enter Cuba was fueled by the concern that they would compete for jobs against the native population. A few were allowed entry but 908 others were returned to Germany, despite organized efforts to aid them, passing close to Miami on the return voyage. Some of the 908 held German citizenship, for what it was worth, and others were formally stateless. *Voyage of the St. Louis*, HOLOCAUST ENCYCLOPEDIA, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>.

⁵⁰⁵ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

African Americans from federally subsidized mortgages, by allowing mass home building projects like Levittown to exclude blacks, by permitting private agreements of white home-owners associations to exclude African Americans, and by “the willingness of the Internal Revenue service (IRS) to grant tax exempt status to churches, hospitals, universities, neighborhood associations, and other groups that promoted residential segregation.”⁵⁰⁶ A variety of local initiatives like raising sewer fees, condemning land for parks, or “slum removal” to built interstate highways disrupted plans for proposed interracial housing or simply disrupted established African American neighborhoods.⁵⁰⁷ A result of this massive effort to segregate America was to suppress the job prospects and incomes of black Americans.⁵⁰⁸ And, always and everywhere these laws were backed up with the unwillingness of law enforcement to prevent “move in violence, what Rothstein called state sanctioned violence.”⁵⁰⁹

Few would deny the significant gains among African Americans in education, employment, and participation in American life in recent decades. And yet, despite the gains due in large measure to the reversal of legal segregation with the passage of civil rights laws in the 1950s and 1960s, and despite the growth of a significant black middle class and even elite class, the enduring legacy of segregation has left a seemingly unbridgeable gap. A disproportionate number of African Americans live in poverty. Middle class blacks lag in wealth even if incomes are comparable to whites.⁵¹⁰ Schools have become resegregated because of divided housing patterns and for the most part poorly serve black students. Many African Americans were not able to advance economically as the great economic shifts of globalization, automation, job-loss, and wage stagnation created the “new urban poor,”⁵¹¹ a condition that has now claimed many white victims. White backlash to affirmative action programs and the ominous advance of voter suppression have sought to maintain white advantage if not supremacy.⁵¹² A central factor in preserving a divided polity has been the war on drugs and mass

⁵⁰⁶ ROTHSTEIN, *supra* note 505, at 101.

⁵⁰⁷ See also THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2014).

⁵⁰⁸ ROTHSTEIN, *supra* note 505, at 153-71.

⁵⁰⁹ ROTHSTEIN, *supra* note 505, at 139-51. Move-in violence continues to be a problem. See JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS AND HATE CRIME* (2002).

⁵¹⁰ EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* (2010); see *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 291-94 (Gerald David Jaynes & Robin M. Williams, Jr., eds. 1989).

⁵¹¹ See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

⁵¹² Carroll Rhodes, *Federal Appellate Courts Push Back Against States' Voter Suppression Laws*, 85 *MISS. L. J.* 1227 (2016).

incarceration, i.e., the “new Jim Crow.”⁵¹³

The toleration of black crime, then, is not another problem but an essential part of the deep fabric of anti-black racism that has stained American and holds on with a tenacious grip. Leovy sketched its essential form in the old Jim Crow era, combining the heavy criminalization of African Americans for petty crimes as a gateway to peonage,⁵¹⁴ while completely ignoring black-on-black violence, which according to Jim-Crow era anthropologist Hortense Powdermaker, “places the Negro outside the law.”⁵¹⁵ In the post-civil rights era, blindness to the needs of poor black communities, combined with fear of crime and drugs among African Americans mixed with conventional crime and punishment tropes, played out in a different way. James Forman convincingly shows that while African American leaders and communities helped to initiate mass incarceration by supporting tough on crime measures; their more complete political desires encompassed “root cause solutions” to drug use that included better education and job training.⁵¹⁶ As a newly emergent dominant political class in Washington, D. C. in the 1970s but not entirely in control of budgets, blacks sought better police protection *and* the kinds of social services that would make for more viable communities. They only got the former: harsh drug enforcement and penalties instead of effective drug treatment,⁵¹⁷ strict gun control while the national gun market saturated inner cities,⁵¹⁸ and African American police who did not refrain from violence against suspects.⁵¹⁹ While black police “executives joined many of America’s other black leaders in calling for root-cause solutions to crime, including socioeconomic reform and a health care overhaul, . . . they also demanded a “nationwide war on drugs” and—yes—”minimum mandatory sentencing.”⁵²⁰

It is instructive that once African Americans gained a degree of political agency and control, although they sought to obtain needed social and economic benefits for their communities, in the political competition for resources they drew on a deep well of conventional thinking about crime that turned out to be a trap (although it was not so perceived at the time) but that fit with broader retributive tropes in America,⁵²¹ and the growing reliance on

⁵¹³ ALEXANDER, NEW JIM CROW, *supra* note 157.

⁵¹⁴ See DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

⁵¹⁵ LEOVY, *supra* note 494, at 9.

⁵¹⁶ FORMAN, *supra* note 157, at 29-30.

⁵¹⁷ FORMAN, *supra* note 157, at 17-46.

⁵¹⁸ FORMAN, *supra* note 157, at 47-77.

⁵¹⁹ FORMAN, *supra* note 157, at 78-115.

⁵²⁰ FORMAN, *supra* note 157, at 115.

⁵²¹ WHITMAN, HARSH JUSTICE, *supra* note 168.

“law and order as a source of political legitimacy.”⁵²² They failed, however, to obtain an array of services and benefits from the state that were not in the narrow interests of controlling political elites. This pattern fits Lisa Miller’s analysis and conclusion that “[p]olicies widely supported by local officials and citizen alliances are sometimes thwarted by legislators representing much larger constituencies with little or no connection to local problems and much less connection to serious crime.”⁵²³ The crime problems faced by poor communities are embedded in a complex web of disadvantage that requires complex solutions. The organizations that speak for such communities are more diffuse and less potent than the kinds of single issue lobbies, whether the NRA or the ACLU, that are better able to achieve legislative successes. She argues “that state and national governments . . . operate under structural constraints that can sometimes promote a much narrower range of problem definitions and policy solutions than are apparent in cities.”⁵²⁴ As a result, problems that are intertwined at the community level, like transportation, jobs, blight, crime, health care and public services, get short-shrift. The ultimate irony is that community requests for more police are rooted in dissatisfactions with the quality of life and are nuanced requests for reducing crime and disorder *and* improving communities, while among those who hold the purse strings of government, these pleas are turned into a “good cop, bad cop frame that polarizes much public discourse.”⁵²⁵ The decision makers advance policies that fluctuate between community-friendly policing incentives and “a blank check for aggressive policing styles that are largely distrusted in low-income, particularly black communities.”⁵²⁶

Still, this kind of liberal mewling, even if backed up by solid policy analysis, does not get to the personal responsibility of the person committing the criminal act. But when it comes to black-on-black violent crime and murder, what the government fails to provide gets closer to the placing part of the responsibility on the state. It’s not just better schools and midnight basketball that are missing, but, to repeat, “the state’s inability to catch and punish even a bare majority of murderers in black enclaves such as Watts.” Leovy claims that her thesis is simple: “where the criminal justice system

⁵²² SIMON, GOVERNING, *supra* note 157.

⁵²³ LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 4 (2008).

⁵²⁴ MILLER, *supra* note 523, at 7.

⁵²⁵ MILLER, *supra* note 523, at 163.

⁵²⁶ MILLER, *supra* note 523, at 164. This tension played out in the monumental story of the rise and fall of zero-tolerance and stop, question and frisk policing in New York City. See Michael D. White et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9 (2016).

fails to respond vigorously to violent injury and death, homicide becomes endemic.”⁵²⁷ Well, perhaps this is just a fact of life and limited ability of human institutions that must be endured, like the lack of adequate defense resources accepted as a reality by Cassell. But Leovy digs deeper. In Los Angeles law enforcement is reasonably well resourced. What the LAPD did, perhaps by default, was to marginalize homicide investigation, and doubly marginalize it in poor areas “south of I-10.” Unlike the stereotype and perhaps the reality in other police departments that place homicide detectives at the top of the department’s pecking order, in Los Angeles, patrol work was valorized, reflecting the culture of aggressive control instilled in the department by Chiefs William Parker and William Gates that culminated in the Rodney King beating.⁵²⁸ Working south of I-10 for any length of time hurt an officer’s chances for promotion. Plum assignments were sought in the Robbery-Homicide division located at LAPD headquarters where an officer might investigate an unusually complex or celebrity case that would help make his or her reputation.⁵²⁹ Murders south of I-10 did not make the news and in the high-crime era of the 1980s detectives were often overwhelmed with cases. “According to the old unwritten code of the Los Angeles Police Department” the kinds of murders that went unsolved were “nothing murder[s]. ‘NHI—No Human Involved,’ the cops used to say.”⁵³⁰

This narrative account cannot prove with scientific precision that the state has withdrawn from places like south-central Los Angeles to a degree that renders its inhabitants “stateless.” But a polity and a police department that in 1993 accepted a homicide rate of 368 per 100,000 for black men in their twenties without expending extraordinary resources to reduce it, as did Los Angeles County, should in any moral universe bear some of the responsibility for the killings. As violent crime and homicide rates have generally declined in America in recent decades, the persistently high rates of murder in poor pockets of cities like Baltimore, Chicago and Detroit, point to problems that require serious action by the state.

The anti-Blackstonians propose the simplest of solutions to the complex problem of chilling rates of intraracial violence in poor black communities. Their laser-like focus on the Blackstone ratio or Blackstone principle and trial verdicts can be seen as academic myopia, or more cynically, as a smokescreen that diverts thought among academicians from considering more potent solutions to a real crime problem. Nothing they propose would raise the money and change the attitudes that would get the

⁵²⁷ LEOVY, *supra* note 494, at 8.

⁵²⁸ JOE DOMANICK, *BLUE: THE LAPD AND THE BATTLE TO REDEEM AMERICAN POLICING* (2015).

⁵²⁹ LEOVY, *supra* note 494, at 24-29, 38-39.

⁵³⁰ LEOVY, *supra* note 494, at 6.

police (responding to already committed crimes) and the *state* services (water, education, transportation, jobs, etc. that would lessen the environment for violence) to address the upstream process. And nothing they propose would funnel more money and change attitudes about the day-to-day working reality of indigent defense and the political climate within which resources are sought for an ill-funded fundamental right.⁵³¹

V. CONCLUSION

The authors identified as anti-Blackstonians and challenged in this Article write from different analytic perspectives and with differing aims. What connects them is a mood that challenges Blackstonian legal orthodoxy of the the adversary criminal process and their disconnect from relevant empirical criminological knowledge. Each author's proposals claims to make contemporary criminal procedure law and the attendant judicial process more rational; each posits that their proposal would on average result in more accurate verdicts. My critique challenges their assertions. Although each proposal has reasonable kernel, I have shown that each rests on limited or flawed premises; the proposals would likely increase the number of wrongful convictions without increasing public safety, thereby producing less accurate verdicts.

Epps's thought experiment seeks to hermetically seal the Blackstone principle from its attendant rules (e.g., proof beyond a reasonable doubt) to show that a theoretically even playing field would better distribute punishments. I have shown that the empirical basis for his argument that the Blackstone principle is dynamic and results in lesser benefits to defendants is close to nonexistent. Epps draws on a grab bag of logical ideas that do not reflect the empirical reality of the contemporary criminal justice and adversary systems. Beyond the world of legal academics where a sort of economic rationality divorced from thick description is valued, I am concerned that Epps's naïve foray would be used as ammunition by policy makers (including elected prosecutors who hold significant political power in their localities) who wish to preserve a harsh and punitive crime-control-model ideology at a time when many across the political spectrum are calling for a more temperate justice system.⁵³²

⁵³¹ Indigent defense is funded at the county level and competes with other demands; however, there may be ways to make indigent defense efficient and effective. See Burkhart, *supra* note 350; Davies and Worden, *supra* note 350; Janet Moore & Andrew L. B. Davies, *Knowing Defense*, 14 OH. ST. J. CRIM. L. 345 (2017).

⁵³² It is worth keeping in mind that in America's fragmented political system, a great deal of criminal justice policy making occurs at the county level, where the prosecutor and the sheriff are likely to hold far greater sway over their nominal supervisors on the county commission. When gathered together in politically engaged pressure groups, these officials have the potential to qualify if not erode constitutional rights. See Walt Bogdanich & Grace

Epps is the only writer among the anti-Blackstonians who formally eschews the Blackstone principle. Laudan and Allen formally support their own estimate of the Blackstone ratio developed by formal reasoning and buttressed with mathematics to attack virtually every rule of criminal procedure that is associated with the Blackstone principle. I have challenged two of their arguments. First, their analysis that purports to show that the current system frees “too many” guilty violent criminals is flawed in attributing outcomes resulting from “upstream” criminal justice (i.e., mostly police investigation) to downstream prosecutorial decision-making and trial verdicts. Their analysis overly discounts the strong possibility that many acquitted at trial are factually innocent and undervalues the likelihood of a substantial number of innocent felony defendants pleading guilty. Second, they make assertions about the effects of incapacitation resulting from higher rates of prosecutors’ charges and guilty verdicts that would not hold up in a first-year graduate seminar in criminology. If taken seriously, their proposals would expand prison populations with very little crime suppression effect and possibly increase serious crime in the long run.

Cassell, who supports the Blackstone principle, writes in a different and somewhat less abstract register than the other authors, and more directly addresses issues raised by the innocence movement. With the Blackstone principle as a starting point, each author necessarily writes in the shadow of the new understanding that a nontrivial number of innocent felony defendants are convicted every year. Nevertheless, Epps’s essay is unconnected to concerns raised by innocence movement writings. As for Laudan and Allen, one author was present at the birth of the innocence movement and apparently did not like what he saw.⁵³³ Thus, while Laudan and Allen can be seen in part as a reaction to an innocence movement agenda, the writings proceed along abstract planes that are in the tradition of philosophic inquiries into evidence law.

Cassell’s essay and chapter, however, respond directly to innocence movement concerns. What is intriguing is that he proposes a mix of Blackstone principle (e.g., robust discovery) and anti-Blackstone principle (e.g., eliminate several constitutional protections) proposals that he claims will produce more accurate verdicts. Despite some formal areas of agreement,⁵³⁴ on the whole my evaluation of Cassell’s proposals are that they

Ashford, *An Alabama Sheriff, a Mystery Check and a Blogger Who Cried Foul*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/us/ana-franklin-alabama-sheriff.html?ref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us®ion=rank&module=package&version=highlights&contentPlacement=8&pgtype=sectionfront>.

⁵³³ Allen & Laudan, *Deadly Dilemmas*, *supra* note 4, at 85-86 (expressing reservations about the Northwestern University conference on the death penalty in 1998).

⁵³⁴ A point of possible agreement with Cassell is that cases like *Wade* and *Miranda*, which expressed the desiderata of liberal Supreme Court justices, advanced ultimately ineffective

make unsupportable claims or are stalking horses for maintaining and strengthening a conventionally conservative approach to criminal procedure that was part of the conservative counterrevolution to Warren Court doctrines. The Burger, Rehnquist, and Roberts Courts have in large measure succeeded in advancing a more or less conservative doctrinal agenda in Fourth and Fifth Amendment law. This jurisprudence has enabled the mass incarceration that is plaguing in American criminal justice and society.⁵³⁵ The connection between conservative constitutional criminal procedure and wrongful conviction is not clear, although it may have played a marginal role in increasing wrongful convictions.⁵³⁶ Beyond this, it is hard for me to see what beneficial practical effect overruling Mapp and Miranda would have. Cassell's derivative thesis that defense attorneys freed from the potential need of filing boilerplate constitutional challenges would find the time and resources to mount vigorous, investigator-supported, time-consuming and fact-intensive investigations that, say, are conducted by innocence organizations or police investigating major crime, seems fanciful. It is supported by no empirical evidence.

Empirically grounded adversary process critiques could help to move the mountain of the legal system's entrenched culture.⁵³⁷ My concern is that anti-Blackstonian ideas, if adopted, would generate unintended consequences that could destabilize American adjudication in ways dangerous to the routine civil liberty that we too often take for granted; like the reality that for all their material and reputational advantages, American prosecutors in court are just another set of lawyers who have to prove their

methods for improving the diagnosticity of police-conducted lineups and interrogations. The innocence movement has advanced techniques devised by psychological scientists that have been shown to produce more accurate lineups and less abusive interrogation methods while generating accurate incriminating statements that tend to reduce the incidence of false confessions.

⁵³⁵ See DRUCKER, A PLAGUE OF PRISONS, *supra* note 340.

⁵³⁶ Laqueur et al., *Wrongful Conviction*, *supra* note 142.

⁵³⁷ The anti-Blackstonians could draw on inquisitorial justice systems research. The substantial comparative legal literature offers many ideas that should attract anti-Blackstonians. Beginning at least with MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986), a challenge to the adversary system can consider alternatives. In a few places Laudan cherry-picks references to German procedure but that hardly makes for a consistent argument. Epps and Laudan could have alluded to other ways of conducting trials before plunging into their anti-Blackstonian models. Concerns raised by STUNTZ, *COLLAPSE*, *supra* note 328; Brown, *supra* note 328 and WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* (1999) about hyper-proceduralism, noted by the anti-Blackstonians, is worth following up. Cassell does pay attention to this critique. However, he uses it not to envision an efficient and rights-supportive inquisitorial model as now exists in Germany. Rather he is aimed at keeping the present system minus some procedural protections based on an unproven empirical hypothesis that eliminating a few constitutional rights would magically free up time and reorient defense lawyers attentions to finding cases of actual innocence.

cases.⁵³⁸

So, I remain a wary Blackstonian in spite of agreeing with James Q. Whitman's criticism of reasonable doubt. Whitman's deeply researched intellectual history of two millennia of judging serious crimes in the Western world argues that reasonable doubt developed as a rule of moral comfort to ease the anxieties of judges and jurors faced with the obligation of ordering executions.⁵³⁹ This sense has been lost in the modern world. "Instead we treat reasonable doubt as a fact-finding principle, as a heuristic formula that can help guide the individual juror in the effort to achieve sufficient certainty about uncertain facts."⁵⁴⁰ But the rule, "a fossil, a misconstrued fragment of the Christian past,"⁵⁴¹ does not work well to guide factual decisions. While jurors in earlier times had less doubt about case facts, they had reasons to not decide, including fear of reprisals. "Unlike their ancestors, modern jurors routinely decide cases in which there is authentic uncertainty about the facts."⁵⁴² The project of turning the old moral comfort rule into "a modern factual proof procedure" is "hopeless."⁵⁴³ To make matters worse, exclusionary rules embedded in American law denies evidence to fact finders that may be critical to resolving the factual case accurately,⁵⁴⁴ and becomes "a form of systematic protection for the accused."⁵⁴⁵ This should be music to the ears of anti-Blackstonians. However, they should read on.

Whitman attributes false convictions to the adversary system with its reliance on reasonable doubt and exclusionary rules, but also raises a factor from "the old theology"—the theology of punishment.⁵⁴⁶ In earlier times

⁵³⁸ It is instructive that Italy's curious decision to inject adversarial criminal procedures into their inquisitorial system was motivated in part by a desire to symbolically rid the country of a code drafted under the Fascist regime and to inject democratic principles into the law. *Italy*, in *CRIMINAL PROCEDURE*, *supra* note 412, at 303. This suggests that for major legal changes to occur, as opposed to small, routine technical fixes, may need "external" crises may be necessary. The "discovery" of actual innocence has provided just such a shock to the adversary system, forcing needed reforms.

⁵³⁹ WHITMAN, *ORIGINS*, *supra* note 185. The reasonable doubt scholarship is deep and extensive. See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 *NOTRE DAME L. REV.* 1165, 1168-69, n.5 & n.7 (2003).

⁵⁴⁰ WHITMAN, *ORIGINS*, *supra* note 185, at 202.

⁵⁴¹ WHITMAN, *ORIGINS*, *supra* note 185, at 203.

⁵⁴² WHITMAN, *ORIGINS*, *supra* note 185, at 207.

⁵⁴³ WHITMAN, *ORIGINS*, *supra* note 185, at 205.

⁵⁴⁴ WHITMAN, *ORIGINS*, *supra* note 185, at 207 ("Thus the law of evidence and the law of criminal procedure give rise to trials in which American jurors (unlike French or German ones) often receive a strangely fragmentary selection of the pertinent facts in a given case.").

⁵⁴⁵ Whitman's focus on reasonable doubt does not address the pro-prosecution bias of the adversary system sketched in Part IV, *supra*.

⁵⁴⁶ WHITMAN, *ORIGINS*, *supra* note 185, at 208-09. See also WHITMAN, *HARSH JUSTICE*, *supra* note 168.

a morally justifiable system must protect *both* the innocent *and* the guilty. Our conception of criminal justice has no obvious place for protection of the guilty at all. . . . Our morality demands that we do everything possible to prevent innocent persons from being caught up in the toils of the criminal justice system. But it leaves the guilty to whatever fate the punishment system may hold for them, . . . while tolerating no doubts about ourselves as judges.”⁵⁴⁷

Whitman’s concern for punishment may seem orthogonal to trial procedure issues. Jurors are supposed to decide facts and render verdicts with no care about the sentence, although in the real world residues of human concern dribble through. Since the 1970s our penal system abandoned a concern for balanced justice that had a place for humane treatment of prisoners and instead embarked on harsh policies of world-historic proportions. Current prison practices will surely be seen by future generations with the same horror now reserved for chattel slavery.⁵⁴⁸ Whitman’s radical solution for our weird trial system—to abandon it for “straightforward procedures for determining the truth” along continental lines—is either a non-starter or a very long-range project.⁵⁴⁹ Like Epps, he aims at getting us to think differently. The “tragic error” is to “refuse to recognize the harshness of our nonblood punishments, and the correspondingly high moral stakes in inflicting them. . . .[and] that judging and punishing are morally fearsome acts.”⁵⁵⁰

Whitman’s ethics might simply be confusing to utilitarians, and may not fit into Laudan and Allen’s and Cassell’s Manichean concern for the welfare of potential crime victims and the wrongfully convicted to the exclusion of concern for those who have been correctly convicted of crimes.⁵⁵¹ Scientists’ needs to abstract from reality to accomplish a coherent research strategy may be necessary in the natural sciences where reductionist

⁵⁴⁷ WHITMAN, ORIGINS, *supra* note 185, at 209 (emphasis in original).

⁵⁴⁸ See CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (2006); WHITMAN, HARSH JUSTICE, *supra* note 168; SIMON, MASS INCARCERATION, *supra* note 444; *Brown v. Plata*, 563 U.S. 493 (2011).

⁵⁴⁹ WHITMAN, ORIGINS, *supra* note 185, at 210. The same could be said for Laudan’s proposal to make the prosecutor’s burden of proof dependent on a defendant’s record.

⁵⁵⁰ WHITMAN, ORIGINS, *supra* note 185, at 211.

⁵⁵¹ Restorative justice does not seem to be for them although it could fit into Whitman’s moral universe. See ROSS LONDON, CRIME, PUNISHMENT, AND RESTORATIVE JUSTICE: FROM THE MARGINS TO THE MAINSTREAM (2011). Although I am not an adherent of the original sin doctrine, it seems that those who are might be inclined to look on the non-convicted as including many who have not (yet) been apprehended for their criminal delicts. See Samantha Cooney, *Here Are All the Public Figures Who’ve Been Accused of Sexual Misconduct After Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), <http://time.com/5015204/harvey-weinstein-scandal/>.

methodologies can produce findings not otherwise obtainable.⁵⁵² In some social science research, and in policy analysis and programming, contextualist rather than reductionist strategies require that care be taken in deciding what to include as relevant. There is a place for studying reasonable doubt or trial procedures in the abstract, but Whitman reminds us that abstracting away consequences like the possible effects of our penal system might produce both deadly dilemmas and tragic consequences. As my critique of Laudan and Allen suggests, their idea of expanding punishment—in the absence of a better understanding of the effects of incapacitation—could impose unnecessary harm on prisoners, their families and communities, while doing very little to make potential victims safer.

My opposition to system changes that could impose greater hardship to defendants with perhaps no crime reduction payoff is a partial reason for wanting to keep a Blackstonian adjudication system until something better, perhaps along the lines of the German criminal process,⁵⁵³ is established. To offer a more positive reason for supporting a Blackstonian system, one that might accept the costs of weaker crime control, I claim no originality but piggyback my thinking onto a point made by Risinger.

[I]f you think that the state is more responsible for a wrongful conviction than for a crime that might result from a criminal's freewill-based choice, influenced by a wrongful acquittal, to commit a crime (Laplace's emboldened wretches), then you will reject [Allen and Laudan's] analysis or at least its most extreme implications. That does not mean that you would not be cognizant that wrongful acquittals are indeed undesirable and involve costs that must be taken into account in some calculus that tries to resolve the dilemma that Allen and Laudan have identified. But it does mean that there would be space for special treatment of the problem of convicting the innocent.

Is such a position tenable? Viewing the state as having more responsibility for harm done directly to the immediate subjects of its acts than for 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.⁵⁵⁴

⁵⁵² ERIC R. KANDEL, *IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND* (2006).

⁵⁵³ Zalman & Grunewald, *supra* note 73, at 214-36.

⁵⁵⁴ Risinger, *Tragic*, *supra* note 10, at 1020.

Risinger's observations followed a political-theoretic exchange in which he linked his special concern for wrongful convictions to value choices between liberal/Romillist or conservative /Payleyite styles.⁵⁵⁵ Risinger's observations may be of no concern to a Payleyite who is unconcerned with the source of false acquittals (i.e., the government) and who registers only the fact that false acquittals are (supposedly) imposing deadly dilemmas on civilians requiring greater toughness, which might produce a few more wrongful convictions. This narrow focus, however, discounts the risk that an unconstrained criminal apparatus is the primary tool of tyranny,⁵⁵⁶ an observation that weighed on the minds of the Constitution's framers.⁵⁵⁷

This train of thought leads to an admission that my pro-Blackstonian criminal procedure tilt arises not simply from an evaluation that the justice process is stacked against the defendant,⁵⁵⁸ that innocence reforms can improve system-diagnostics,⁵⁵⁹ or that crime victims are far better protected by upstream criminal justice processes than from tinkering with the standard of proof, which are weaknesses in the anti-Blackstonian view of the adversary system's error-reduction capacity. It arises from a self-appreciation of my ideological predilections. In Packer's two models, crime control ideology favored a speedy and even cursory approach to investigating and prosecuting crimes on the assumption that innocent cases would be accurately weeded out and that errors were excused because of the crime control model's major concern with *factual guilt* and protecting civilians from the violation of their civil right to live peaceably. The due process ideology is fixated on *legal guilt* and is willing to tolerate some level of crime and disorder in order to retain a legal system that has the capacity

⁵⁵⁵ SHKLAR, *supra* note 253; KENNETH R. HOOVER, IDEOLOGY AND POLITICAL LIFE, SECOND EDITION (1994).

In democratic countries the political significance of criminal law had almost been forgotten when the impact of twentieth century dictatorship, with its unvaried immediate seizure of the punitive legal apparatus, revived a startled realization of the dependence of civil liberty on criminal law. By a sure and unconscionable instinct, the forces of repression cut straight to the heart of the traditional institution—the principle of legality. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 2ND EDITION 64 (1960).

⁵⁵⁷ The treason clause was designed to prevent a popular President, or perhaps even an unpopular President with his hands on the police apparatus, from expanding the definition of treason, as did Henry VIII, to label political opponents as “enemies of the state” and crush them with treason convictions. I wrote about this early in my academic career, arguing that the overt use of treason in this way was archaic, but that in times of highly polarized political passions, political actors seek to tarnish opponents in ways that are redolent of traitors. See Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILLANOVA L. REV. 897 (1975).

⁵⁵⁸ See H. RICHARD UVILLER, THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? 141-61 (1994).

⁵⁵⁹ For example, that the innocence model is a Reliability Model. Findley, *New Paradigm*, *supra* note 10.

to slow advances toward executive autocracy and legislatively directed repression of civil liberties.⁵⁶⁰ The ironic result, after a quarter-century of innocence movement policy-thinking, has been to expose real weaknesses in crime control model assumptions about factual guilt; the case is now strong that due-process-model legal procedures (both at trial and post-conviction) are really important for testing the factual guilt of individual cases. In light of the exposure of criminal justice system weaknesses, the kind of intense factual re-examination of specific convictions, exemplified by the forensic methodology of Markman and Cassell's "reprosecution" of James Adams,⁵⁶¹ must be available to defendants and to prisoners in the post-conviction process if a major goal of crime-control ideology (i.e., factual guilt) is to be achieved.

Thus I support the Blackstone principle for epistemic and nonepistemic reasons, the latter out of my concerns about state power and the instruments through which it exercises its supposed monopoly of legitimate force. These nonepistemic grounds may be orthogonal to the concerns of anti-Blackstonians. Indeed, Epps "intuited" that support for the Blackstone principle may be ideologically linked:

Finally, one's intuitions here will also depend on underlying views about the relationship between the state and its citizens. Those that reject the view that the state has a strong obligation to protect its citizens from crime may remain convinced of the moral harm argument. Thoroughgoing libertarians, who prefer a minimal role for the state in all domains, are particularly unlikely to be persuaded. For the many people who reject those premises, however, and who accept the post-New Deal understanding of the government's positive obligations, the Blackstone principle is difficult to justify on deontological grounds.⁵⁶²

Many conservatives and most liberals,⁵⁶³ however, especially those with a sense of history, are concerned about excessive state police power. Conservatives seek to downsize government's social welfare role as a way of limiting state power but are comfortable with more expansive prosecutorial power.⁵⁶⁴ In my view, the complex needs of a modern,

⁵⁶⁰ PACKER. LIMITS, *supra* note 61.

⁵⁶¹ Markman & Cassell, *supra* note 21, at 128-33.

⁵⁶² Epps, *supra* note 2, at 1138. The moral harm argument is a deontological ground for the Blackstone principle based on moral constraints on punishment.

⁵⁶³ These terms are used in conventional, contemporary ways, to identify one's political valence.

⁵⁶⁴ Despite professions of the downsizing goal, state size and power has remained substantial over the last half century at times when more or less conservative Republican

technological, high population, post-industrial society facing unprecedented challenges, implies the necessity of a robust state apparatus in a mixed capitalist—social welfare state, i.e., the so-called administrative state. I also value an effective criminal justice (police and prosecution) apparatus to meet many challenges posed by crime, whether individual or organizational, conventional or novel (e.g., cyber). Appreciating the civil liberties risks flowing from unchecked justice agency power, especially at the behest of excessive executive branch power,⁵⁶⁵ leads me to support an overlapping array of limiting institutions both within and without the justice process. External checks include legislative and executive oversight, free press and alternative media investigative reporting, civil society inquiry through non-profit organizations, individual citizen checks (from video recording police encounters to civil rights lawsuits), and the like. Internal checks are inherent in the adversary system and begin with a robust and fearless defense bar, constitutional criminal procedure limitations exemplified by the specifics and the ethic underlying Warren Court rulings, and an alert and fair judiciary.⁵⁶⁶ Within this mix, I value rules of procedure that slow down the prosecution, but this is simply a way of stating a preference for Packer's due process model, when elements supporting that model, like reasonable doubt, are challenged.⁵⁶⁷ If I thought that Laudan's crime reduction hypothesis held water, my decision would be harder, but I would still adhere to it for these reasons. Although, my values lead me to fear abuses of state power more than criminal harms (both are bad!), actual decisions about radically

party-headed administrations were in power and attempts to seriously check the role of the state have failed. See Max Ehrenfreund, *Kansas's Conservative Experiment May Have Gone Worse Than People Thought*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/15/kansas-conservative-experiment-may-have-gone-worse-than-people-thought/?noredirect=on&utm_term=.e4e0fa60ec1b. Whether the current administration's attempt to radically downsize the "administrative state" will succeed remains to be seen. Also, the conservative "small government" ideology supports the Enlightenment's valorizing individual freedom over communal controls, a value shared by liberals and conservatives albeit in different and not always consistent ways.

⁵⁶⁵ The FBI's role under J. Edgar Hoover during the cold war stands as a paradigmatic example. See RICHARD GID POWERS, *SECRECY AND POWER, THE LIFE OF J. EDGAR HOOVER* (1987). For a comprehensive view of the ways that the potential negatives of state power might be constrained, see Daryl J. Levinson, *Incapacitating the State*, 56 WM. & MARY L. REV. 181, 192-206 (2014).

⁵⁶⁶ Luban makes the point forcefully: "The political argument for zealous criminal defense does not claim that the adversary system is the best way of obtaining justice. It claims just the opposite, that this process is the best way of impeding justice in the name of more fundamental political ends, namely keeping the government's hands off people." DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 63 (1988). For other nonconsequentialist justifications of the adversary system, see *id.* at 81-92.

⁵⁶⁷ Substantive criminal law, if bounded by principle, should also play a role in constraining the state. See HALL, *GENERAL PRINCIPLES*, *supra* note 555, at 27-69 (discussing the principle of legality).

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expanding or curtailing prosecutorial power should be subject to empirical knowledge and testing, to the lessons of history, and to careful, contextual thinking to the greatest degree possible.