

# BLACKSTONE’S RULE HAS LIMITED OUR ABILITY TO THINK

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*The study of error is not only in the highest degree prophylactic, but it serves as a stimulating introduction to the study of truth.<sup>1</sup>*

- Walter Lippmann

## ABSTRACT

*Blackstone’s Rule—better that ten guilty persons escape than that one innocent suffer<sup>2</sup>—may serve well for many felony offenses, but it is grossly inadequate for dealing with the most serious criminal matters facing society and millions of other felonies annually in the U.S. The community of criminologists and legal scholars has done little to help. This Article addresses the nature and sources of the problem and how to deal with errors of justice more thoughtfully. It is more productive and more just to manage the false positives and false negatives of justice and balance their respective social costs than follow Blackstone’s Rule and focus excessively on wrongful convictions.*

## INTRODUCTION

Peruse the criminology and legal scholarly literature and you will find hundreds of books and articles on wrongful convictions, but very few on failures to convict dangerous offenders. You will find even fewer on the problem of balancing these two types of justice errors and their social costs. Wrongful convictions could be reduced to zero by ending all convictions, but that would produce anarchy. The challenge is to find the right balance—in policing, prosecution, adjudication, sentencing, and reintegration.

Blackstone’s Rule—“[i]t is better that ten guilty persons escape than that one innocent suffer”—became a staple of Britain’s legal system in the early

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1. WALTER LIPPMANN, PUBLIC OPINION, ch. XXVII, para. 20 (1922).

2. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 208 (J. W. Jones trans., Lonang Institute 2d ed. 2005) (1765).

nineteenth century.<sup>3</sup> Benjamin Franklin upped the ante in helping make it part of American common law too: “It is better 100 guilty Persons should escape than that one innocent Person should suffer.”<sup>4</sup>

But the Goddess of Justice holds a balance scale with two plates, and Blackstone’s Rule and its variants work poorly for many matters placed on her scale. It may serve as a workable rule of thumb for the prosecution of shoplifters, but what about serial rapists, murderers, and robbers? Should a community be satisfied with the dropping of ten or more cases of rapists to prevent the conviction of an innocent person charged with rape? How can innocent victims be protected against the harms of crimes subsequently committed by such offenders not brought to justice?

Nor does Blackstone’s Rule suggest how criminal justice practitioners—police, prosecutors, judges, and correctional officials—should act at various stages of criminal justice processing. It says nothing about a suitable sentence for the convicted offender. It is silent too about how much larger a number than ten is acceptable as a justice norm. Better ten than one? What about fifty? Where is the break-even point? And how should the personal and social costs of different kinds of crime enter the calculus? Blackstone’s Rule doesn’t say.

There is another, more productive, just, and serviceable way to think about the problem of wrongful convictions and other miscarriages of justice: think of them instead as the false positives and false negatives of justice and manage them accordingly, as false positives and negatives are managed in other domains, taking into account their respective social costs.<sup>5</sup>

Wrongful convictions—and wrongful arrests rejected by the prosecutor—are the false positives of our criminal justice system. They are gross perversions of justice, ones that the architects of our criminal justice system have taken great pains to minimize. We have more than ample reason for such concern. Wrongful arrests and convictions impose wasteful losses of liberty and needless pain, suffering, and lost income on innocent people, and losses to their friends and families too. And they undermine criminal justice legitimacy, causing the harmed to be less inclined to provide critical information in the interests of justice in future cases. Wrongful convictions are bad in their own right, but they are often doubly harmful because they can cause the actual offenders to remain at large, free to commit further offenses.<sup>6</sup>

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3. Sarah Hobson’s Case (1831) 168 Eng. Rep. 1034; 1 Lew. 262 (Eng).

4. G. Tim Aynesworth, Letter, *An Illogical Truism*, AUSTIN AM.-STATESMAN, Apr. 18, 1996, at A14.

5. Social costs may vary from setting to setting, depending, for example, on how communities are constituted in the first place. WILLIAM A. BARBIERI, JR., *CONSTITUTIVE JUSTICE* (2015).

6. See Brian Forst & C. Ronald Huff, *Preventing Violent Crimes by Reducing Wrongful Convictions*, in *CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* 438 (Alexander T. Vazsonyi et al. eds., 2d ed. 2018).

## I. ERRORS OF IMPUNITY AND WHY THEY MATTER

But false negatives are important too, in ways not reflected in Blackstone's Rule. We can begin to correct the problem by giving a name to the error of failure to convict culpable offenders—the false negatives of justice. I have called them *errors of impunity*.<sup>7</sup> Examples: chronic domestic violence offenders, neighborhood bullies and gangs who terrorize local residents afraid to report their numerous, often deadly crimes, and the thousands of unpunished lynchings in the decades after the Civil War. The many crimes committed by the notorious white-collar offenders Ivan Boesky and Bernard Madoff are examples of the problem of flagrant errors of impunity at the Wall Street level.

The actual number of errors of impunity per wrongful conviction in the U.S. is today surely well beyond Blackstone's ten-to-one ratio, and even Franklin's hundred-to-one. Consider the approximately ten million felony crimes reported to the police each year. These are roughly half of all felony victimizations, according to the National Crime Victimization Survey.<sup>8</sup> About two million of the ten million reported crimes result in arrest, and about half of those—one million—result in conviction. Thus, about five percent of all felony victimizations result in conviction, and the other nineteen million might be regarded as an upper-end estimate of errors of impunity.<sup>9</sup> One of the most widely cited works on wrongful convictions, by Huff et al.,<sup>10</sup> estimated that about one in 200 convictions are wrongful, or about 5,000 persons annually nationwide. This suggests that well over 3,000 felony offenses do not result in conviction for every wrongful conviction—over two orders of magnitude more than Blackstone's Rule.<sup>11</sup> Many of those offenders are eventually convicted for committing another crime, but they are not usually held to account for the earlier felony.<sup>12</sup>

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7. See BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 22–30 (2004).

8. See ALEXANDRA THOMPSON & SUSANNAH N. TAPP, BUREAU JUST. STAT., CRIMINAL VICTIMIZATION, 2022, at 1, 1 fig.1 (Edrienne Su ed., 2022).

9. Accounts of victimization may be more often overstated than understated. For example, accounts of burglary victimization that are actually the product of lost rather than stolen goods may be more common than undercounts of burglary due to unawareness that the crime was committed. See also *infra* note 12 on the distinction between number of offenses and number of offenders.

10. See generally C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (Christina Hill ed., 1996).

11. See also Shawn D. Bushway & Brian Forst, *Studying Discretion in the Processes That Generate Criminal Justice Sanctions*, 30 JUST. Q. 199, 199–222 (2013). The ratio appears to be much smaller for murder—in the neighborhood of fifty to one in Chicago—due to higher clearance rates and greater diligence by police and prosecutors than for other felonies. Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1093 n.24 (2010) (citing Bushway & Forst, *supra* note 11, at 218).

12. Blackstone's Rule refers to offenders, not their offenses, without distinguishing between the offender who commits one offense over a lifetime and ones who commit several in a week. If we assume that the mean number of offenses per offender is four, we still end up with a ratio in the neighborhood of 1,000 felony offenders freed for every innocent convicted.

A key barrier to such estimates is definitional: Some of those nineteen million cases are rejected or dropped by prosecutors or judges “in the interests of justice,” usually because it is believed that little good would be achieved by a conviction and sentence. A conviction could, for example, only worsen matters by making the person less employable at a moment when keeping or getting a job is the preferred solution.<sup>13</sup> For such cases, mediation and a program of restitution may indeed be the preferred solution—an alternative to conviction. Such cases, unknown in number, could justifiably be regarded as something other than errors of impunity, although many such negotiated, non-judicial proceedings end up failing to resolve the problem.

Whether failed restorative justice outcomes are truly errors of impunity is very much in the eyes of the beholder. The victim unhappy with a mediated outcome might well see it as a miscarriage of justice—an error of impunity. The judge and mediator might see it otherwise—the best that could be achieved under the circumstances. Defendants may have their own unique perspectives. In many such cases, errors of impunity will be difficult to assess and measure.

Regardless of one’s precise definitions of the false positives and negatives of justice, it is clear that they impose enormous costs on society. Justice means balancing the rights of innocent suspects with protecting the community, and the dark sides of these two plates of the Goddess’s balance scale are wrongful arrests and convictions on one side and errors of impunity on the other. The two make up errors, if not miscarriages of justice. Wrongful convictions must be managed to ensure due process of the accused, but errors of impunity must be managed too, to ensure that offenders are held to account for their crimes and, in the process, to protect the community. If the Goddess of Justice is to ensure a proper balance, without prejudice, in assessing various practices in policing, prosecution, adjudication, and sentencing, and how they affect case outcomes and errors, she must consider the social costs of the two basic types of justice errors.

## II. HOW CRIMINOLOGISTS AND LEGAL SCHOLARS GET IT WRONG

But this is not the conventional wisdom. As noted earlier, criminologists and legal scholars have devoted thousands of published pages to wrongful convictions and very few to errors of impunity. A rare exception is a recent article by Jon Gould, et al.: “Over the last twenty years, the scholarly field of erroneous convictions has skyrocketed, with multiple articles and books exploring the failures that convict the innocent. But, there has been comparatively little attention to the other side of the coin, failed prosecutions, when the criminal justice system falls short in convicting the likely

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13. Insufficiency of resources available to convict and suitably sanction everyone who is culpable is sometimes also given as a reason to divert defendants from conventional adjudication. This may serve budgetary concerns, but the interests of economy are clearly in a domain apart from the interests of justice. Serving one may come at the expense of the other.

perpetrator.”<sup>14</sup> They go on to say “Forst considers the failure to convict and punish a culpable criminal for the appropriate offense an ‘error of impunity.’ We use the term ‘failed prosecution.’”<sup>15</sup> As if the two were the same.

Unfortunately, most errors of impunity never make it to the prosecutor’s office, so failed prosecutions—even leaving aside whether the defendants in those cases were truly culpable—is a dubious measure of actual errors of impunity, most of which occur in policing.<sup>16</sup> Errors of impunity include not just failed prosecutions, but also arrests of true offenders rejected by the prosecutor and police failures to arrest culpable offenders. An analysis of failed prosecutions will be invalid for the vast majority of errors of impunity, since we know that cases accepted for prosecution differ from cases involving offenders either rejected for prosecution or not brought to the prosecutor at all—they tend to have stronger evidence and to be more serious.<sup>17</sup> Thus, criminological and scholarly legal preoccupations with wrongful convictions have come at the expense of thoughtful consideration of wrongful arrests rejected by prosecutors and the much larger universe of errors of impunity—offenders who are not convicted.

Wikipedia obfuscates too: “A miscarriage of justice occurs when an unfair outcome occurs in a criminal or civil proceeding, such as the conviction and punishment of a person for a crime they did not commit. Miscarriages are also known as wrongful convictions.”<sup>18</sup> Evidently, for Wikipedia, errors of impunity are not miscarriages of justice. Wikipedia does have an entry for “error of impunity,” but in it Wikipedia equates miscarriages of justice with wrongful convictions. Search Wikipedia for “wrongful conviction” and you get redirected to “miscarriage of justice.” Wikipedia does not redirect the readers of “error of impunity” to “miscarriage of justice.”<sup>19</sup>

Another recent example of the downplaying of errors of impunity is from Ruth Marcus, deputy editorial page editor for the *Washington Post*. In a Post op-ed following the indictment of Donald Trump in the U.S. District Court for

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14. Jon B. Gould, Victoria M. Smiegocki & Richard A. Leo, *Theorizing Failed Prosecutions*, 112 J. CRIM. L. & CRIMINOLOGY 329, 331 (2022).

15. *Id.* at 332.

16. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1076 n.39 (2015) (quoting Bushway, *supra* note 11, at 1091). Epps also ignores errors of impunity that never make it to court: “Are we obliged to design the criminal justice system to err strongly in favor of false acquittals in order to minimize false convictions?” and “the social costs of false convictions are many times higher than those of false acquittals.” *Id.* at 1076, 1087.

17. Brian Forst & Kathleen B. Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177, 186 (1977).

18. *Miscarriage of justice*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Miscarriage\\_of\\_justice](https://en.wikipedia.org/wiki/Miscarriage_of_justice) (last visited Apr. 5, 2024) (citation omitted).

19. Others take a more expansive view. James Acker, for example, in his forward to a special edition of the *Albany Law Review* on miscarriages of justice, writes: “The focus on ‘miscarriages of justice’ is deliberately expansive. It encompasses wrongful convictions and their antecedents and consequences, erroneous acquittals and corresponding lapses in law enforcement and prosecution, disservices to the victims of crime, inequitable punishments, and related matters.” James Acker, *Foreword*, 74 ALB. L. REV. 1067, 1068 (2010). See also FORST, *supra* note 7.

Washington, D.C., Marcus asks whether this indictment of Trump is one too many, are the prosecutors “piling on”?<sup>20</sup> The better question is whether we are finding the right balance between errors of due process and errors of impunity on the very serious charges against Mr. Trump. There could indeed be a problem of “piling on” if he were convicted both federally and in Georgia for essentially the same acts. To date, however, the much graver problem has been the failure to hold Trump to account for acts that have undermined democracy and the rule of law in America. No wrongful conviction has ever posed such an existential threat to the United States system of justice. The piling-on problem would present itself only after Trump was convicted either in Georgia or in the federal court in the District of Columbia, at which time slack could be cut in the other case. Until then, we are living in an extended period—three years and counting—of what is arguably the gravest miscarriage of justice in U.S. history: failure to hold Donald Trump to account for trying fraudulently to overturn a legitimate presidential election outcome and thus effectively working to replace democratic governance with autocracy.

### III. REDUCING ERRORS OF IMPUNITY

Errors of impunity can be reduced. Police, prosecutors, judges, and legislators can all play important roles, and they can reduce errors of due process as well.

Blackstone’s rule applies largely to the standard of evidence used at each stage of criminal justice processing, from “probable cause” at the arrest stage to “proof beyond a reasonable doubt” in trial. Lowering the standard at any stage is likely to produce more convictions, but more wrongful ones too, typically in the name of crime control.

Errors of impunity can be reduced without increasing wrongful convictions. This begins with the police, who can solve crimes more effectively by encouraging more and better cooperation with the community and by making use of basic evidence gathering and analysis methods. Relations with the community have been found to improve through the use of basic problem-solving skills,<sup>21</sup> investments in community policing interventions like foot and bike patrols,<sup>22</sup> and the use of improved accountability systems, relying more on metrics that increase incentives to improve ties to the community and less on traditional measures like number of arrests. The widespread use of DNA evidence and body cameras has been a boon to the reduction of wrongful arrests and errors of impunity too, and improved relations with the community may achieve a similar result.

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20. Ruth Marcus, Opinion, *Is Georgia’s Case Against Trump One Too Many?*, WASH. POST, Aug. 16, 2023, at A19.

21. See generally HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990).

22. See Brian Forst, *Police in the Community, Community in the Police*, RESPONSIVE COMMUNITY, Summer 1993, at 57–62, reprinted in AMITAI ETZIONI, *RIGHTS & THE COMMON GOOD* (1994).

When the police bring stronger cases to the prosecutor, the rates of both wrongful convictions and errors of impunity decline, other factors constant.<sup>23</sup> And much as improved relations with the community reduce errors of justice associated with the police, so are improved police-prosecutor relations—and prosecutor-community relations—likely to reduce errors of justice associated with the prosecutor. Witnesses are bound to be more cooperative when they see the prosecutor more as a member of the community and less as a distant ivory tower figure. Prosecutors can reduce both wrongful convictions and errors of impunity by raising standards of evidence at the case screening stage from probable cause to trial worthy—by taking more cases to trial and reducing the number of “cheap,” ineffectual pleas.<sup>24</sup>

Although cases that come to trial represent just five percent of all felony arrests,<sup>25</sup> errors of justice can be reduced at the trial and sentencing stages of adjudication too. These cases are relatively few, but they tend to be more serious and visible than the run-of-mill felony arrest. Judges have the power to dismiss these cases and free culpable offenders in the process. They sign off on pleas and manage trials: sustaining or overruling objections raised by prosecutors and defense counsel, meeting with principals at the bench as needed, and governing the flow of events. They also give instructions to juries and can inadvertently (or otherwise) signal to the jury a message that induces jurors to either convict an innocent person or acquit a culpable offender.

Juries too can be sources of miscarriages of justice. Jurors often do not understand legal and scientific complexities, even when the facts and the law are presented and explained clearly. They often forget what was presented in trial, and in many jurisdictions are prevented from taking notes that could help reduce such memory lapses.<sup>26</sup> The jury in the sensational O. J. Simpson murder trial did little to bolster support for the notion that our jury selection processes can be trusted to produce deliberative bodies that weigh the evidence objectively and render reliable verdicts.

Finally, sentencing matters too, and on that front the errors have been mostly on the side of being *overly* punitive—due largely to the politicization of sentencing. The extraordinary quadrupling of prison and jail populations in the United States over less than three decades, from 500,000 in 1980 to 2,300,000 in 2008, a period that also witnessed an unprecedented decline in crime (the number of homicides declined from approximately 23,000 to 16,000 during this period—despite a thirty-four percent increase in the resident population)—suggests a substantial shift toward systematic errors of over-incarceration, well beyond the boundaries of reasonableness and sufficiency articulated by Jeremy

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23. See FORST, *supra* note 7, at 122–27.

24. See Barbara Boland & Brian Forst, *Prosecutors Don't Always Aim to Pleas*, FED. PROB., June 1985, at 10. See also FORST, *supra* note 7.

25. See Brian Forst, *Prosecution*, in CRIME AND PUBLIC POLICY 440 (James Q. Wilson & Joan Petersilia eds., 2011).

26. Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. L., June 1997, at 20, 24.

Bentham and others.<sup>27</sup> Attempts to fix the problem have helped, but with prison and jail populations still close to two million inmates,<sup>28</sup> we continue to lean excessively in the direction of over-incarceration, with wastefully long sentences.

#### IV. CONCLUSION

Many everyday problems in our system of criminal justice are manifestations of our failure to put in place interventions to reduce miscarriages of justice. We have sophisticated systems for managing errors in statistical inference and quality control processes, widely used to improve the delivery of goods and services throughout the public and private spheres, and no parallel system for managing errors of a more socially costly sort in our criminal justice system. This makes little sense. It could be fixed incrementally through more enlightened law enforcement, prosecution, and adjudication policies, and for sentencing, less draconian and more just statutory terms.<sup>29</sup> It is not too late to begin fixing the problem now.

Criminal justice legitimacy would likely be enhanced in the process. Legitimacy depends on the balancing of errors of due process and errors of impunity, and in helping the public perceive that a reasonable balance is actually being achieved. If criminal justice policies are to meet these basic tests, the assessment of policies and practices that produce miscarriages of justice must be grounded in a coherent framework for relating the policies and practices of police, prosecutors, and judges to these miscarriages, incorporating their respective social costs in the assessment.

Miscarriages of justice—including both wrongful arrests and convictions *and* errors of impunity—harm those wrongfully arrested and convicted. They harm victims. They harm us all. They drain our resources, create inequities, restrict our freedoms, and undermine the legitimacy of our system of justice. They threaten the trust needed for democracy to thrive. They reduce our quality of life. They warrant more thoughtful consideration than we have given them.

**Keywords:** Blackstone's Rule; Errors of due process; Errors of impunity; Miscarriages of justice; Wrongful convictions; Wrongful arrests

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27. One can argue that the decline in crime after 1991 was the product of a policy of massive incarcerations, but the vast preponderance of empirical evidence suggests that the certainty of punishment is the primary deterrent to crime, not the term of punishment, and that long terms mostly punish people well beyond their crime-prone years. *See, e.g.*, VALERIE WRIGHT, SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010).

28. U.S. DEP'T JUST., BUREAU JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 (2022).

29. *See generally* Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209 (2010).