CHAPTER ONE

The Problem

> The logic now in use serves rather to fix and give stability to the errors which have their foundation in commonly received notions than to help the search after truth. So it does more harm than good.
>
> – Francis Bacon (1620)

Introduction

Conventional assessments of the criminal justice system, its practices and policies have long been afflicted by a serious blind spot. Scholars and criminal justice practitioners typically assess justice policies in terms of their effects on crime and recidivism rates, fear of crime, equitability, costs, and levels of public satisfaction. These criteria all have considerable merit and appeal, but the recent discovery of a large number of death sentences imposed on innocent people[1] raises fundamental questions about the comprehensiveness of conventional assessments. This discovery appears to have done more to alter attitudes and policies regarding the death penalty than all other empirically based arguments against capital punishment, including the absence of systematic evidence of a deterrent effect and findings of racial disparity in its application.[2] In 2003, outgoing Governor George Ryan

[1] Berlow (1999) reports over 80 death row inmates released from prison since 1976, having been found innocent, 1.3% of all death row commitments. In 2001, Supreme Court Justice Sandra Day O'Connor cited 90 such releases since 1973. The number surpassed 100 by 2002 (Axtman, 2002). See also Ho (2000), Leahy (1999), and Liebman et al. (2000).

[2] The irrevocable nature of errors in the actual use of the death penalty sets those errors apart from other errors of justice. In her 2001 speech on the death penalty, Justice O'Connor emphasized this unique aspect of errors in the use of the death

commuted the death sentences of all 156 Illinois death row inmates on the grounds that they had been sentenced under a system that was "haunted by the demon of error."[3]

Errors of justice – both the errors of harassing and sanctioning innocent people and those of failure to sanction culpable offenders – do much more than undermine the case for capital punishment. They shake the foundation of public confidence in institutions broadly regarded not long ago as trustworthy, if not sacred, built on sworn oaths to uphold the law. In an era of considerable public cynicism of government authority generally, news of serious lapses in the workings of our formal system of justice can accelerate the drive for people to seek private remedies for protection and justice. Informal mechanisms have always been the dominant form of social control in the United States and elsewhere, but for serious crimes private alternatives to our formal system of justice can be ineffective or counterproductive, and highly unjust. Lapses in the public sector's ability to respond effectively to the crime explosion of the 1960s surely contributed to the parallel explosion in private sector alternatives to crime prevention,[4] and those alternatives have been a mixed blessing – not bound by the same standards of screening, training, and professionalism as are officials of justice, and largely unavailable to the poorest and most crime-ridden neighborhoods, those with strong claims to the highest priority need for protection.

Perhaps the most glaring shortcoming of conventional systems for assessing criminal justice policies is that they have been disassociated from the larger and more profound concept of legitimacy. Legitimacy

penalty: "the system may well be allowing some innocent defendants to be executed" (Lane, 2001). By contrast, life sentences without parole are far more pervasive than executions, and errors in the use of a sanction that condemns an innocent person to live and eventually die in prison may be viewed as equally irreversible and often no less harmful.

[3] Ryan had put a moratorium on the use of the death penalty in Illinois three years earlier, with the same essential justification: "I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life. Thirteen people have been found to have been wrongfully convicted" (Ryan 2000).

[4] The ratio of private security personnel to sworn police officers tripled from 1970 to 1990. Shearing and Stenning (1981), p. 203; Cunningham and Taylor (1985), p. 112; Mangan and Shanahan (1990); Forst and Manning (1999), p. 16.

is essential to a well-functioning, citizen-supported criminal justice system, and while it involves matters other than errors of justice, it is largely about the processes that serve to minimize both types of justice errors.

It seems more than worthwhile to attempt to gain a sense of the likely effects of basic policy changes on two fundamental aspects of the legitimacy of the criminal justice system: the ability of those policies to bring offenders to justice and the ability of the policies to protect the rights of all citizens and minimize costs on innocent people. Such inquiry is likely to accomplish two useful objectives. First, it offers an important complement to conventional frameworks for assessing the criminal justice system, such as crime, recidivism rates, and cost. Second, it is likely to contribute more reliable and balanced knowledge of our ability to manage errors of justice than the sensational accounts of innocent people released from death row following the discovery of exculpatory DNA evidence and the equally sensational episodes that emerge from time to time in popular media accounts of dangerous people committing heinous crimes following lapses in mechanisms for bringing them to justice in prior cases. Political grandstanding has not infrequently followed such sensationalism. Prominent examples of victims whose names have been attached to legislative proposals for tougher sanctions include Megan Kanka (New Jersey, 1994), Polly Klaas (California, 1993), and Stephanie Roper (Maryland, 1982).

What Is an Error of Justice?

In general parlance, errors of justice are taken to mean errors in the interpretation, procedure, or execution of the law – typically, errors that violate due process, often resulting in the conviction of innocent people. In this book, we borrow from the perspective of welfare economics, using the notion of social costs[5] as the basis for defining errors of justice and assessing their consequences.[6] Thus, an error of justice

[5] Social costs, which include the costs of both crime and sanctions (Cook 1983; Cohen 2000), are discussed more fully in Chapter 5.

[6] The framework is consistent also with Herbert Packer's (1968) conceptualization of the due process and crime control models for assessing criminal justice sanctions.

occurs either when an innocent person (i.e., innocent of the crime in question) is harassed, detained or sanctioned, or when a culpable offender[7] receives a sanction that is either more or less than optimal – one that minimizes social cost – or escapes sanctioning altogether. In the former case, which we call an *error of due process*, the social cost of the error is the sum of the costs imposed on the innocent person and his or her dependents[8] and the costs imposed on society for failure to sanction the true offender. Due process errors include as well excessive intrusions against those who violate the law. In the case of an insufficient sanction or none at all where one is warranted, which we call an *error of impunity*, the social cost of the error is the difference between the total cost borne by society under the insufficient or absent sanction and the smaller social cost associated with an optimal sanction.

An error of justice is any departure from an optimal outcome of justice for a criminal case.[9] An optimal outcome is one that minimizes the total social cost of crime and crime control. An error is *systematic* when it is the product of a justice policy or policies that bias outcomes either toward errors of due process or errors of impunity. It is *random* when it results from the actions of individual criminal justice practitioners or private citizens, or from circumstances beyond the immediate control of the offender (e.g., an unforeseeable event or set of events that either inhibit or facilitate detection and conviction) or circumstances surrounding a matter that becomes a criminal case erroneously, without a true crime or offender.

This concept of justice error is quite unlike the notion of legal error that constitutes the business of our courts of appeal, such as questions

[7] We make the distinction "culpable" offenders in recognition that other offenders may be technically subject to formal sanctioning, but the social costs of administering a sanction in those cases may exceed the social benefit of the sanction. It is common practice for prosecutors and courts to drop such cases, often involving trivial offenses and first-time offenders, "in the interest of justice."

[8] This includes the exceptional case in which a person is convicted and sanctioned for a crime that did not, in fact, occur in the first place, as in the case of lost property officially reported as stolen or drug evidence planted on an unsuspecting person.

[9] The general model should apply as well to civil justice, a domain in which the need for error management is also great and the problems of analysis and implementation no less daunting than in the domain of criminal justice. I will leave it to others to work out the specifics of a framework for managing errors in that realm.

as to whether a search or a confession was proper. But it does not ignore legal errors. In the framework used in this book, legal (as distinct from factual) errors add to social cost to the extent that they impose costs on innocent people, offenders, victims, and taxpayers.

Our use of the term "error" to include failures to bring culpable offenders to justice is consistent not only with the notion of social costs and optimal sanctions but also with the bifurcated error structure of scientific inference. While the social costs associated with these justice errors are elusive empirically – they call for estimates of the full set of costs, tangible and intangible, associated with the stream of future crimes prevented by a sanction – we include them in the larger conceptual framework because they are important in the real world. I do not attempt to measure them here, yet they cannot be ignored.

If the costs of these errors are elusive, so too are estimates of their pervasiveness. Accurate counts of the extent of justice errors require knowledge of factual guilt and innocence, and such knowledge is unattainable. If it were otherwise, our elaborate procedures of jurisprudence to determine guilt and innocence would be superfluous. We can attempt, nonetheless, to make crude estimates of the extent of justice errors. Over 10 million felony crimes are reported to the police annually in the United States, and about as many are unreported. Only about two million persons are arrested for felony crimes each year, and about half of the defendants in those cases are convicted, leaving well over 10 million who escape conviction, errors of impunity. If one percent of all convictions are in error – a guess that could be too low, given that 1.3% of persons sentenced to death row since 1976 have been found innocent (Berlow, 1999), or too high given an estimate of 0.5% by Huff et al. (1996, p. xiv) – then some 10,000 people are convicted each year for crimes they did not commit, errors of due process.[10]

[10] The speculative nature of these estimates cannot be overemphasized. The estimate of 10,000 will be too high to the extent that some of the erroneous convictions reported are due to procedural errors in cases with true offenders rather than wrong-person errors. Also, some of the 10,000 may well have committed other felony offenses for which they were not brought to justice, a sort of canceling of errors over time,

We might wish to eliminate all such errors, or at least one type of error or the other. But many random errors of justice are both inevitable and even socially optimal. The cost of bringing some culpable offenders to justice may exceed the social benefit of doing so; for them, randomized enforcement to provide a degree of deterrence may be the preferred strategy. Some random errors of justice may be reduced through systems that structure the exercise of discretion of criminal justice practitioners. Such systems may, in the process, produce systematic errors of justice, as in the case of mandatory sentences that are set above socially optimal levels. Systematic errors of justice include policies and practices that are readily correctable under existing budgets and Constitutional constraints. These are precisely the sorts of policies that warrant rigorous policy analysis and correction, if the policies are found to produce systematic errors or interfere with other goals of justice. Such analysis should focus both on policies designed to reduce the risk of convicting innocent persons or reduce sentences that impose costs on society that exceed the crime control benefits, and on policies that aim to bring culpable offenders to justice.

Some policies may in fact have an effect that is opposite of what had been intended; or they may bring with them unacceptably large increases in the costs associated with failure to bring culpable offenders to justice. Even if we were to start with the most egregious errors on both sides of the justice balance scale and work our way to the less serious ones, at some margin the cost of reducing the errors further would exceed the social benefit of doing so. Given our complex world, we are not likely soon to be able to eliminate either type of error. In the meantime, we would be remiss not to work diligently to find ways of reducing both types, and to find coherent frameworks for resolving tensions between the two.

although an imperfect form of justice that threatens legitimacy along the way. The estimate will be too low to the extent that the rate of erroneous convictions is higher for run-of-the-mill felonies than for capital crimes. Juries may be less inclined to convict when they know that the death penalty may follow their finding of guilt, as Zeisel and Diamond (1974) have reported, or more inclined if prospective jurors are excluded from duty in death penalty cases if they say they are opposed to capital punishment.

Aim and Overview of the Book

This book aims to move that way, toward the development of a coherent framework for assessing criminal justice policies in terms of their effects on justice errors. Both types of errors undermine the legitimacy of the criminal justice system, yet their relationship to criminal justice policy is not well understood. The central thesis of the book is this: *Criminal justice legitimacy is largely about the ability of policies and procedures to reduce criminal justice errors; if criminal justice policies are to meet the test of this basic aspect of legitimacy, the assessment of those policies requires a coherent framework for relating the policies to justice errors.*

There is a long-standing precedent for such an undertaking. The quote that opens this chapter, from Sir Francis Bacon,[11] leads us to question prevailing orthodoxies that perpetuate errors. One of the dominant themes of his celebrated *Novum Organum*, the treatise on scientific method from which the opening quote was taken, is that knowledge is too readily reduced to "idols" of fear and fancy, at the expense of reason.[12] Another is that the use of inductive methods to derive general principles based on observation is preferable to syllogistic reasoning.[13] I make no claim here as to having Bacon's implicit blessing in the current enterprise. Rather, we can aim to follow his counsel that we would do well to scrutinize popular sentiments and work to overcome flawed thinking by taking full

[11] As both a lawyer and scientist, Bacon was an uncommon figure in his day, or any other. He achieved prominence as Britain's attorney general in 1613, but wrote that he considered himself to be primarily a scientist and philosopher (K.M.L., 1974, p. 564).

[12] "The idols and false notions which are now in possession of the human understanding, and have taken deep root therein, not only so beset men's minds that truth can hardly find entrance, but even after entrance obtained, they will again in the very instauration of the sciences meet and trouble us, unless men being forewarned of the danger fortify themselves as far as may be against their assaults. . . . There are four classes of Idols which beset men's minds. To these for distinction's sake I have assigned names – calling the first class Idols of the Tribe; the second, Idols of the Cave; the third, Idols of the Marketplace; the fourth, Idols of the Theatre . . . Idols of the Tribe . . . take their rise either from the homogeneity of the substance of the human spirit, or from its preoccupation, or from its narrowness, or from its restless motion, or from an infusion of the affections, or from the incompetency of the senses, or from the mode of impression." Bacon, Aphorisms 38, 39, and 52, from *Novum Organum*.

[13] See, for example, Aphorisms 13 and 14 from *Novum Organum*.

advantage of available evidence and systematic reasoning to reduce errors.

Chapters 2 and 3 spell out the nature of both types of criminal justice errors and give an overview of the sources of each type. Chapter 4 then describes analytic frameworks in other domains that may provide a basis for managing justice errors and for inquiring into the effects of changes in criminal justice standards, policies, and practices on the incidence of errors of justice: the logic of statistical inference and the associated system for managing errors in hypothesis testing, and principles of quality control and problem of managing errors in production processes and service delivery systems. Chapter 4 considers the parallels and critical differences between errors of justice and errors of inference in other settings. Next, Chapter 5 takes up the concepts of social costs and optimal sanctions, frameworks that permit a weighing of justice errors and assessment of the systemic costs of alternative criminal justice practices and policies.

Chapters 6 through 10 then describe the sources of justice errors in detail. Chapter 6 examines the effects of changes in standards of proof on both types of errors of justice by clarifying the 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. Chapter 7 focuses on the effects of police work on justice errors, including the effects of the quality and integrity of investigation, use of forensic technology, errors associated with witness identifications and use of informants, and the effects of alternative systems of profiling. Chapter 8 examines the effects of prosecution practices and policies on errors of justice, including the effects of alternative screening standards and plea bargaining practices, combining available data and estimates of current practices (case acceptance rates, plea-to-trial rates, and conviction rates) under a range of assumptions about factual innocence.[14] Chapter 9 looks at the jury,

[14] One might ask: Why no chapter on defense counsel? I take up the problem of weak defense representation at several points as a threat to due process. Strong defense counsel is assumed not to be a problem here, except to the extent that they may result in errors of impunity when matched with weak prosecution. A threat to the interest of crime control occurs also when the prosecutor is overburdened.

including the effects of jury size and decision rules on justice errors. Chapter 10 considers the effects of sentencing legislation and judicial decision-making, parole release decisions and related factors on errors of justice.

The last two chapters aim to synthesize the material of the preceding chapters. Chapter 11 applies the principles considered earlier to the problem of homicide. Chapter 12 considers the prospect of enhancing criminal justice legitimacy through the development and use of coherent systems for managing errors of justice. The book closes with a discussion of the limitations of the concepts and methods discussed in the earlier chapters and the prospects for future research and policy.

CHAPTER TWO

Errors of Due Process

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .
>
> – Fifth Amendment to the U.S. Constitution (1791)

Introduction

The United States was founded on the principle that the people should be protected against an intrusive government. The Bill of Rights delineates those protections: the people will not be subjected to unreasonable searches and seizures, unwarranted interrogations, punishment without right to trial by a jury of peers, and other such invasions of life, liberty, or property. These distinctions were unprecedented as founding principles of governance when they were drafted and signed; the framers were sensitive to such intrusions after having freed themselves, at considerable expense, from more than a century of imperial rule. The United States is unique among common-law democracies for incorporating principles of due process explicitly in its constitution, overriding all legislation (Kiralfy, 1974). The basic protections, and the principles on which they were grounded, have survived for well over 200 years.

This chapter examines a class of fundamental problems that such protections aim to prevent: the unwarranted harassment, detention or conviction, or excessive sanctioning of people suspected of crime. The provisions are designed to protect the innocent, but they are designed to prevent excessive intrusions against everyone, including those who violate the law. Following the language of Chapter 1, we shall regard