

Errors of Justice

Brian Forst

Errors of Justice

Nature, Sources, and Remedies

Brian Forst

American University



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK

40 West 20th Street, New York, NY 10011-4211, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Ruiz de Alarcón 13, 28014 Madrid, Spain

Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Brian Forst 2004

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2004

Printed in the United States of America

Typeface ITC New Baskerville 10/14 pt. *System* L^AT_EX 2_ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Forst, Brian.

Errors of justice : nature, sources, and remedies / Brian Forst.

p. cm. – (Cambridge studies in criminology)

Includes bibliographical references and index.

ISBN 0-521-82130-4 – ISBN 0-521-52882-8 (pbk.)

1. Criminal justice, Administration of – United States. 2. Judicial error –
United States. I. Title. II. Cambridge studies in criminology (Cambridge
University Press)

HV9950.F66 2004

364.973–dc21 2003046132

ISBN 0 521 82130 4 hardback

ISBN 0 521 52882 8 paperback

Errors of Justice

In this book, Brian Forst takes a fresh new perspective on the assessment of criminal justice policy, examining the prospect of assessing policies based on their impact on errors of justice: the error of failing to bring offenders to justice, on the one hand, and the error of imposing costs on innocent people and excessive costs on offenders, on the other. Noting that we have sophisticated systems for managing errors in statistical inference and quality control processes and no parallel system for managing errors of a more socially costly variety – on matters of guilt and innocence – the author first lays the foundation for a commonsense approach to the management of errors in the criminal justice system, from policing and prosecution to sentencing and corrections, then examines the sources of error in each sector, the harms they impose on society, and frameworks for analyzing and reducing them.

Brian Forst is Professor of Justice, Law and Society at the School of Public Affairs, American University, in Washington, DC. He is the author of several books, including *The Privatization of Policing: Two Views* with Peter Manning.

Cambridge Studies in Criminology

Edited by

Alfred Blumstein, *H. John Heinz School of Public Policy and Management,
Carnegie Mellon University*

and David Farrington, *Institute of Criminology, University of Cambridge*

Other Books in the Series:

Life in the Gang: Family, Friends, and Violence, by Scott H. Decker and
Barrik Van Winkle

Delinquency and Crime: Current Theories, edited by J. David Hawkins

*Recriminalizing Delinquency: Violent Juvenile Crime and Juvenile Justice
Reform*, by Simon I. Singer

Mean Streets: Youth Crime and Homelessness, by John Hagan and Bill
McCarthy

The Framework of Judicial Sentencing: A Study in Legal Decision Making, by
Austin Lovegrove

The Criminal Recidivism Process, by Edward Zamble and Vernon L.
Quinsey

Violence and Childhood in the Inner City, by Joan McCord

*Judicial Policy Making and the Modern State: How the Courts Reformed
America's Prisons*, by Malcolm M. Feeley and Edward L. Rubin

Schools and Delinquency, by Denise C. Gottfredson

The Crime Drop in America, edited by Alfred Blumstein and Joel Wallman

Delinquent-Prone Communities, by Don Weatherburn and Bronwyn Lind

White-Collar Crime and Criminal Careers, by David Weisburd and Elin
Waring, with Ellen F. Chayet

*Sex Differences in Antisocial Behavior: Conduct Disorder, Delinquency, and
Violence in the Dunedin Longitudinal Study*, by Terrie Moffitt, Avshalom
Caspi, Michael Rutter, and Phil A. Silva

Delinquent Networks: Youth Co-Offending in Stockholm, by Jerzy Sarnecki

Continued on page following the Index

To Eric and Laura

Preface

Requiring students of criminal justice to learn the fundamentals of statistical inference may or may not be good for them, but it surely can enlighten the instructor. In searching for a way to motivate my students to learn about Type I and II errors and the logic of statistical inference, I have asked them whether they are concerned about errors of inference made by police, prosecutors, juries, and sentencing judges. It has struck me, in discussing these metaphors, that we have a coherent, sophisticated, effective framework for managing errors in statistical inference, but no such framework for managing errors in the criminal justice system. The errors are not identical, to be sure, but they are parallel. In both domains, some procedures tend to shift errors, others either reduce or increase both sets of errors. We can examine the shifts in errors of inference in hypothesis testing that derive from changes in the alpha level, but haven't a clue as to the effect of a change in the standard of evidence on corresponding errors of justice. We haven't attempted even to ask. We know precisely how increases in sample size reduce both Type I and II errors for given parameter values, but we have no idea the extent to which DNA evidence simultaneously reduces the rate of erroneous convictions in homicide or rape cases and increases the rate at which such crimes are solved. This has to do largely with our inability to establish factual guilt, but inability to know the truth has not prevented statisticians from developing power functions and operating characteristic curves, tolerance tests, and all the other useful components of our widely accepted system for managing errors in statistical inference.

This book describes an inquiry into the prospect of developing a parallel system for error management in the criminal justice system, in a spirit akin to Walter Lippmann's observation, "The study of error is not only in the highest degree prophylactic, but it serves as a stimulating introduction to the study of truth."¹ At the very least, we should be able to catalogue more systematically the nature and sources of errors on both sides of the scale of justice and consider how they may be affected by changes in rules and laws, policies and procedures. We should be able also to examine more thoroughly than we have prospects for borrowing from systems for managing errors in other domains involving risk with often high stakes, including not only statistical inference, but quality control management, epidemiology and health care systems, and financial portfolio analysis, so that we may be able to better manage errors of justice.

Some of the more technical material in the text is likely to have the approximate effect on the reader that discussions of Type I and Type II errors have on my students. I wish to assure the reader who has difficulty with this material that it is not necessary to understand all the specifics. I have attempted to present the essentials in a manner that will leave all readers with a basic appreciation for and understanding of the nature and sources of errors of justice and approaches to minimizing their harmful effects on society. The technical material is intended for the more technically oriented reader and is included to deal with issues that are important to scholars and others who care about certain details. I have attempted to speak to both audiences in a single volume in a way that minimizes pain and suffering for all who take the journey.

Errors of justice harm us all. They undermine trust, drain our resources, create inequities, and restrict our freedom. They diminish the quality of our lives. They warrant more coherent treatment than we have given them.

¹ Lippmann, *Public Opinion* (1922, reissued by Touchstone Books, 1997), p. 256.

Acknowledgments

I wish to thank several people who supported the development of this work. First and foremost is my wife, Judith, who was once again the understanding and interested partner who indulged my preoccupation with yet another project of paramount importance. She made thoughtful comments on each of the dozens of drafts of material for this book that I placed before her as the work unfolded. To her I promise to make more time to play. To our wonderful children I dedicate this book.

My colleagues and friends Jim Fyfe, Jim Lynch, and Joan Petersilia gave the manuscript particularly thorough reviews and offered comments that were extremely perceptive and helpful. I am grateful also for astute readings and constructive suggestions provided by Dick Bennett, Tom Brady, Phil Cook, Heather Davies, Ron Huff, Rob Kane, Alisa Kramer, Laura Langbein, Jennifer Segal, and Peter von zur Muehlen. My research assistant, Lakera Tompkins, provided extraordinary support – accurately, comprehensively, quickly, and cheerfully – whenever I asked for it. These discerning and generous people are in no way responsible for errors of omission or commission, due process or impunity, Type I or Type II, or any other sort, random or systematic, that may be found on the pages that follow.

My publisher, Cambridge University Press, lived every bit up to the reputation that drew me to them in the first place. Acquisitions editor Mary Child, Humanities and Social Sciences editor Alia Winters, production and copy editor Laura Lawrie, project manager Anoop Chaturvedi, production controller Susanna Fry, and production

contact Shari Chappell were thoroughly professional and helpful throughout in moving the project from proposal to finished product, and Cambridge Criminology Series editors Al Blumstein and David Farrington gave the levels of superior support for which they are both so renowned and respected among criminologists worldwide.

Many of the basic ideas that provide the core material for this book were set forth in the article "Toward an Understanding of the Effect of Changes in Standards of Proof on Errors of Justice," published in the Summer 2001 issue of *Jurimetrics* (Volume 41). I thank the editors of *Jurimetrics* and reviewers of the draft manuscript of that article for their thoughtful comments.

I wish, finally, to acknowledge my mentor in the quantitative aspects of justice, Hans Zeisel. He was the perfect model in so many ways. Incisive yet graceful, he understood complexity – in the law, in human behavior, and in public policy – and managed always to find a way to express it simply and elegantly in prose and say it even more clearly with figures. Hans managed always to find a way to maintain his twinkling sense of humor and goodwill even when confronted with boorish grandstanding and pettiness. He was a living testament to the idea that one's ceaseless commitment to the highest standard of scholarly integrity can faithfully serve one's passion for justice. He left an indelible impression, one that has inspired me now for some 25 years and will continue to do so for as long as I do this work.

Contents

	<i>Preface</i>	page xiii
	<i>Acknowledgments</i>	xv
1	The Problem	1
	<i>Introduction</i>	1
	<i>What Is an Error of Justice?</i>	3
	<i>Aim and Overview of the Book</i>	7
2	Errors of Due Process	10
	<i>Introduction</i>	10
	<i>What Is Due Process?</i>	11
	<i>Landmark Due Process Cases</i>	13
	<i>The Sources of Due Process Errors and Their Social Significance</i>	16
	<i>Managing Due Process Errors</i>	19
	<i>Conclusion</i>	21
3	Errors of Impunity	22
	<i>Introduction</i>	22
	<i>What Is an Error of Impunity?</i>	23
	<i>The Sources and Consequences of Errors of Impunity</i>	23
	<i>Managing Errors of Impunity</i>	27
	<i>Conclusion</i>	30
4	Frameworks for Analyzing the Incidence of Justice Errors	31
	<i>Introduction</i>	31
		ix

	<i>Managing Errors of Statistical Inference: The Problem of Reliability</i>	32
	<i>Managing Errors of Statistical Inference: The Problem of Validity</i>	36
	<i>Parallels between Errors of Statistical Inference and Errors of Justice</i>	40
	<i>Managing Errors in Production and Service Delivery Processes</i>	41
	<i>Conclusion</i>	43
5	<i>Assessing the Cost of Justice Errors</i>	45
	<i>Introduction</i>	45
	<i>What Are the Social Costs of Crime and Justice?</i>	46
	<i>Difficulties in Assessing the Social Costs of Crime and Justice</i>	48
	<i>Optimal Levels of Interventions Against Crime</i>	52
	<i>Initial Estimates</i>	54
	<i>Conclusion</i>	55
6	<i>Standards of Evidence</i>	57
	<i>Introduction</i>	57
	<i>Varying the Parameters</i>	58
	<i>Conclusion</i>	64
7	<i>Police-Induced Errors</i>	66
	<i>Introduction</i>	66
	<i>Making Sense of Policing Errors</i>	67
	<i>Nature and Sources of Justice Errors Associated with the Police</i>	69
	<i>Managing Justice Errors Attributable to the Police</i>	92
	<i>Balancing Error Management with Other Policing Goals</i>	106
	<i>Conclusion</i>	109
8	<i>Prosecution Policy and Justice Errors</i>	112
	<i>Introduction</i>	112
	<i>Prosecutorial Discretion and Errors of Justice</i>	114
	<i>Improved Coordination with Police</i>	116

	<i>Errors of Fact, Questions of Culpability, and Tactical Errors</i>	118
	<i>Should the Prosecutor Emphasize Conviction Quality or Quantity?</i>	120
	<i>Analyzing Data on Prosecution under a Range of Assumptions about Factual Guilt</i>	122
	<i>Analysis by Crime Category</i>	127
	<i>Conclusion</i>	131
9	<i>The Jury</i>	134
	<i>Introduction</i>	134
	<i>Jury Policy, Representativeness, and Justice Errors</i>	136
	<i>How Many Jurors? Must Their Decision be Unanimous?</i>	140
	<i>Jury Dynamics</i>	145
	<i>Conclusion</i>	149
10	<i>Sentencing and Corrections</i>	150
	<i>Introduction</i>	150
	<i>Optimum Sanctions under Alternative Frameworks</i>	152
	<i>Sources of Excessive Social Costs in Sentencing</i>	172
	<i>Who Might Cause Sentences to be Outside the Norm?</i>	173
	<i>Should Sanctions be Based on Predictions?</i>	176
	<i>Errors in Corrections</i>	178
	<i>The Critical Role of Incentives and Systems of Accountability</i>	180
	<i>Conclusion</i>	182
11	<i>Homicide</i>	184
	<i>Introduction</i>	184
	<i>Basics about Homicide: Opportunities for Error in Classification</i>	185
	<i>Failures to Bring Homicide Offenders to Justice</i>	190
	<i>Excessive Intrusions in Homicide Cases</i>	197
	<i>The Death Penalty</i>	199
	<i>Remedies and Impediments to the Management of Errors in Homicide Cases</i>	203
	<i>Conclusion</i>	210

12	A Matter of Legitimacy	212
	<i>Introduction</i>	212
	<i>What Is Legitimacy?</i>	213
	<i>Operationalizing the Notion of Legitimacy</i>	215
	<i>Conclusion</i>	217
	 <i>Bibliography</i>	 221
	<i>Index</i>	243

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 people¹ 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 costs⁵ 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.