

Miscarriage of Justice as Misnomer

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As state action, the penal process might usefully be analyzed from two perspectives, police and law.<sup>1</sup> From the standpoint of police, the penal process is a system for the identification and elimination, or at least reduction, of human risks to the state's police, understood in the traditional sense of good order or welfare.<sup>2</sup> As a species of police, penalty is rooted in the state's "police power." By contrast, if one regards the penal process from the perspective of law, it appears as a "criminal justice system" designed to do justice, meting out punishment to offenders for injuries inflicted on victims. Penalty as a species of law is derived from the state's power to manifest and protect the essential rights of its constituents.

The notion of a miscarriage of justice (or its apparent synonyms, wrongful conviction and criminal justice error<sup>3</sup>) makes sense only within the context of the latter view of the penal process. The Police Power Model of the penal process doesn't seek justice; it seeks efficiency, obedience, order.<sup>4</sup> To the extent that the penal process is in operation—if not in ideology—a police institution, talk of miscarriages of justice is beside the point.

What's more, to the extent that the Law Model of the penal process obscures the operation of the penal process as a police system, a focus on miscarriages of justice may perpetuate the a legality, and a legitimacy, of that process.<sup>5</sup> The power to police has always been, and has been designed to be, free from principled constraint. The myth of criminal law as law has cloaked the process in a false pretense of seeking justice.

Complaints about miscarriages of justice may contribute to this charade of penal legality.

At the same time, however, appeals to justice may be seen as taking the penal process at its word. Taking the claim to criminal justice at face value, pointing out miscarriages of justice may be seen as subjecting the penal process to the norms it pretends to accept as binding. As part of a general principled critique designed to transform the penal process into the criminal justice system it pretends to be, talk of miscarriages of justice may serve to legitimate penalty, rather than perpetuating its illegitimacy.

Here it might be useful to consider the relationship between the rule and the exception in the penal process.<sup>6</sup> As long as miscarriages of justice are regarded as exceptions to the rule of justice delivery, then their exposure does little to challenge the legitimacy of the penal process.<sup>7</sup> The problem with miscarriages of justice is not that they are miscarriages, nor that they are miscarriages of justice. They are not miscarriages because the system does not seek to do justice in the first place. At best, they are miscarriages of police, false positives in a system of risk incapacitation. The problem of mistaken identity thus is not a subsidiary problem within the realm of miscarriages of justice, in that false eyewitness identification may lead to wrongful conviction; misidentification is the problem itself, as labeling (as offensive, or dangerous) is the core task of the penal police process.

One might of course strip the inquiry into miscarriages of justice of all normative content. False labeling might then be treated as an administrative problem, with the attendant concerns about the identification of reliable risk factors, the implementation of these factors in various institutional settings, quality control, reliability testing, and so on. The problem with getting the “wrong man,” however, is not simply that someone has been mistakenly identified as an offender. The problem is that his conviction and

punishment is an injustice, or “wrongful.” Wrongful convictions aren’t simply wrong convictions; they constitute a wrong, qualitatively comparable to the wrong of crime (and, in fact, should give rise to criminal liability absent an applicable defense<sup>8</sup>).

Prescribed solutions for the problem of miscarriages of justice that generate lists of reliability-enhancing proposals in the bureaucratic mode thus are entirely consistent with the view of the penal process as a police system. As a result, they do nothing to challenge the a legality of that system and may help to perpetuate it.

Taking a broader view of the relationship between rule and exception might lead one not only to challenge the assumption that miscarriages of justice are exceptions within a system dedicated to doing justice, but also to reconsider the relationship between the Police Power and Law Models of the penal process. From this perspective, it may appear that the vast majority of cases processed by the system are treated as matters of police, while a small minority of show trials celebrates the legality of the American criminal justice in full bloom. This view, however, also would not be inconsistent with one that regarded the system as a whole as a Police Power system, for once again the theatrical celebration of rules of law in a miniscule proportion of highly visible cases might serve merely to prop up the Law Model as a cover for an essentially a legitimate system.

Just how out of place talk of miscarriages of justice is will depend on just how irrelevant considerations of justice are in the operation—as opposed to the ideological apparatus—of the penal process. Let’s have a look.

#### A. Law, Police, Punishment

Paradoxically, regarding the penal process as a police system is a simple black-letter affair. Whenever American criminal law treatises—or judicial opinions—make a passing reference to the origins of the power to make criminal law, they inevitably hit upon the “police power,” a term long familiar from American constitutional history.<sup>9</sup> States, we can read again and again, make criminal law (and here little distinction is drawn between the general part and the special part of criminal law, i.e., the general principles of criminal liability and the definition of specific offenses) as an exercise of their police power, a power they retained in the federalist system of government as essential markers of their continued sovereignty. States must have the police power, it is said, because without that power they would cease to exist as independent sovereigns. At the same time, the federal government must not have the power to police, because that would identify it as an independent sovereign, as opposed to a government that derives all of its power by delegation from the sovereign member states. The power to police is by definition inherent, essential to the very notion of government itself (which is why, in the end, the federal government as we’ll see shortly had to end up with the police power, too, if not in name).

The police power isn’t just essential; it’s also essentially unlimited, in means as well as in ends. It encompasses any measure that might be appropriate to advance the goal of good police, where the assessment of appropriateness is a matter for the discretion of the entity wielding the power. Scores of American texts, including judicial opinions and treatises, invoked Blackstone’s definition of “public police and oeconomy” as “the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the

rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.”<sup>10</sup>

Remarkably, and as a testament to the engrainedness of the notion of police, this view of the police power survived the American Revolution unchallenged. Blackstone’s pre-revolutionary and very English definition of royal prerogative was quoted verbatim—including its reference to “the kingdom”—well into the twentieth century.<sup>11</sup> The U.S. Supreme Court repeatedly went out of its way to emphasize the vastness of the police power. The *Slaughter-House Cases* announced that the police power “is, and must be from its very nature, incapable of any very exact definition or limitation,”<sup>12</sup> a power that safeguards “the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property”<sup>13</sup> and as such “extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property.”

In American constitutional law, identifying a state action as an exercise of the police power amounted to shielding it from principled constitutional scrutiny. With few exceptions—notably the soon disavowed *Lochner v. New York*<sup>14</sup>—the history of American police power jurisprudence is the history of judicial restraint. *Pace Lochner*, by the 1930s the police power was firmly established as “an idiom of apologetics.”<sup>15</sup>

At the same time as state legislation was protected from federal constitutional scrutiny by the application of the “police power” label, federal legislation was doomed by it. The federal government, after all, wasn’t supposed to have any such power lest the fragile federalist compromise collapse. And so different labels took its place—the commerce power fulfills a similar inoculating function for federal legislation.<sup>16</sup> Nonetheless,

observers soon realized that the federal government came to exercise a *de facto* police power while vehemently denying the *de jure* possession of that power.

To understand the nature of the police power, and its function in American political and legal discourse, it's helpful to consider its roots in the householder's ancient discretionary power over members of his household.<sup>17</sup> Blackstone's reference to state constituents as "members of a well-governed family" hints at a long tradition of police as a mode of governance that can be traced throughout the history of Western government, alongside the parallel, and distinct, mode of governance that eventually gave rise to the modern concept of law.

Aristotle already distinguished between the householder's government of his household in the private sphere—the subject of oeconomics—and the government of householders by other householders in the public sphere—the subject of politics.<sup>18</sup> Household governance was essentially heteronomous, hierarchical, discretionary, efficiency-driven. The householder decided—hopefully wisely—what was best for the household and then—hopefully skillfully—implemented his decisions as he saw fit. Members of the household, be they human, animal, plant, or thing, were resources to be used more or less efficiently.<sup>19</sup> Within his private household, the householder-father enjoyed virtually unlimited discretion. The state's interest was limited to having him prepare private resources for public use, notably in the form of younger males who one day would head households of their own and, as householders, join the public forum of politics.

Politics was defined not by power, but by persuasion. It was autonomous where oeconomics was heteronomous; it was egalitarian, formalized, and concerned with right

and justice. Householders sought to convince one another, rhetoric was a prized skill, brute force an inappropriate means of government, except under conditions of emergency (when an appointed dictator would suspend what later came to be called the rule of law).

Patriarchal household governance continued in Rome, with its highly developed doctrine of *patria potestas*, and throughout the middle ages (with its concept of the householder's peace, or *mund*, which the householder protected by any means he deemed necessary).

In the public sphere, householders would represent their household as they deliberated on matters of justice. In this realm, householders were liable for the misdeeds of their household (animate and inanimate alike) insofar as they affected other households.

At home, householders enjoyed virtually unlimited authority to discipline household members, including—in ancient Rome—the power of life and death over members of his *familia*. In the middle ages, the lord's power over his servant was limited only insofar as it deprived the servant of life or limb. Permanent serious injuries or death so minimized the servant's value as a human household resource that their infliction was thought to indicate the householder's unfitness for his position as the maximizer of the welfare of his household.

Moreover, and this already marks the emergence of a central governmental household (the royal *familia*), rendering a servant useless through harsh discipline also deprived the macro householder of a human resource, as did homicide (including homicide *se defendendo*, which required an exercise of royal mercy) and aggravated assault (which deprived the victim of a limb, rendering him incapable of military service).

The concept of police marks the point of convergence between the private and political realms of government, or rather the transference—or expansion—of one onto the other. The prince who wields the power of police over his subjects rules the state as the Athenian *oikonomos* ruled his *oikos*, and the Roman *dominus* his *domus*. The autonomous model of government disappears as an independent mode of governance, and instead is integrated into the patriarchal governance of the macro household.

The evolution of a science of police in early modern Europe reflects the consolidation of quasi-patriarchal power in the prince, whose government is subject to scientific rules, rather than to principles of justice or right.<sup>20</sup> Of course, the patriarchal prince is free to ignore these scientific rules; they are generated by his advisors, who serve at his discretion and cloak their counsel in scientific authority (a novel source of authority that seeks to supplement, and eventually, to replace divine guidance<sup>21</sup>). Nonetheless, traditional economics—as the science of governing the household (*oikos*)—helps to rationalize discretionary government, notably through the use of statistics (which transform household resources, human or not, into figures, much like William’s Domesday Book transformed his newly conquered subjects into taxable entities) and budgets (*Haushalt* in German).

The rise of the project of “political economy”—which comes to encompass even, and especially, Anglo-American political discourses that often resisted the concept of police as foreign—nicely illustrates the combination of the two basic modes of governance, politics and economy. Political economy, as Rousseau pointed out, “is derived from *oikos*, a house, and *nomos*, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family.” “The meaning of

the term,” Rousseau continues, “was then extended to the government of that great family, the State.”<sup>22</sup>

Note that political economy is a species of economy; politics is integrated into economics, rather than vice versa. The science of police simply transferred the science (or art) of micro economics to the realm of macro government and renamed it police. Political economy does not simply ignore the political element of state government, but places it within the overall context of economic government writ large. Politics doesn't disappear; it simply is reduced to a version of economics.

In the end, then, political economy differs from police only on the surface. The political in political economy serves only to distinguish macro from micro economics, the governance of the state household from that of the private family. Police retains the concept of economy for private governance and renames it police for public governance.

The enlightenment, now, launched a critical enterprise that scrutinized the very foundations of state power, including the power to punish, that most awesome of state powers. The enlightenment can be seen as a radical revival and expansion of the autonomistic project associated with ancient Athenian politics. This time around, however, every person was autonomous as such; autonomy was privatized, even internalized; householder status was no longer the prerequisite for the capacity for autonomy. Every person, including members of households and quasi-households (the military, churches, schools, estates) was entitled to govern himself (in fact, women, along with the poor, were denied the right to autonomy).

In Europe, the enlightenment's critical project was brought to bear on the state's power to punish; the critique of criminal law attracted the attention of major

enlightenment figures, such as Beccaria, Bentham, Kant, Voltaire, and P.J.A. Feuerbach. In the United States, by contrast, the power to punish escaped scrutiny. Instead, the revolutionary generation accepted without serious scrutiny the traditional notion that the power to punish was inherent in the power to police, a power that was inherent in the notion of sovereignty itself and as such was simply passed on from one sovereign (the king) to another (the people, in theory, and largely the executive, in fact).<sup>23</sup>

While European thinkers struggled to legalize the police power, and notably the police power in its most intrusive form, the power to punish, Americans saw no reason to challenge the state's authority to deprive some of its citizens of the very life, liberty, and property it ostensibly existed to protect. Consequentialist and deontological theories of punishment (represented by Beccaria and Bentham, on one hand, and Kant, on the other) represented different efforts to develop a penal process that was consistent with the notion of the punished as fundamentally similar to the punisher (and the non-punished, more generally). In Bentham's system, the pain and pleasure experienced (or anticipated) by the object of punishment deserves as much consideration, and weighs as heavily, as that experienced by the punisher (or the victim). The consequentialist balance of costs and benefits is radically uninterested in distinctions among persons, except insofar as they affect a person's experience of pleasure or pain. Likewise, the deontological insistence on treating every person (including those charged and convicted of a criminal offense) with equal dignity, and not merely as the means to an end, is driven by the enlightenment's insistence on the fundamental equality of persons regardless of their status as householder or household member.

In the U.S, by contrast, the power to punish remained an instance of the power to police and, as such, beyond principled scrutiny. The only federal constitutional amendment (mimicked in state constitutions throughout the land) that might be, but in the end was not, interpreted as a limitation on the state's power to punish—the eighth amendment's proscription of “cruel and unusual punishments”—was not inconsistent with the traditional view of punishment as police. Cruel and unusual punishments had long been beyond the scope of the householder's traditional power to discipline recalcitrant or otherwise offensive household members because they reflected a character that rendered the punisher unfit for his patriarchal position. Cruelty revealed a malignant heart, a meanness of spirit that also marked the murderer and, more generally, the felon (originally, someone who violated his obligation of fealty to his lord). The cruel disciplinarian thus was better suited to receive discipline than to inflict it; as a slave to his passions, he lacked the very discipline he claimed to instill.

To this day, the foundation of the power to punish in that idiom of apologetics, the power to police, has not been seriously questioned, or for that matter, examined. No constitutional law of crime and punishment has ever developed.<sup>24</sup> U.S. penal policy has remained relentlessly consequentialist, despite occasional scholarly urgings to the contrary (“just deserts”), which are then promptly integrated into an incapacitationist discourse about eliminating human risks. Some of these consequentialist programs appear more benign than others (rehabilitationism vs. incapacitationism), but none of them treats the object of punishment as a person capable of self-government. Instead, the object of deterrence, rehabilitation or, most bluntly, incapacitation is the potential offender who is scared, treated or restrained into submission to state authority.

The enlightenment spirit of Bentham's consequentialist project (which merely works out the broad program sketched by Beccaria in *Of Crimes and Punishments*) is nowhere to be found in the offense and offender elimination schemes that have characterized American penalty and that today leave the United States with over six million persons under penal supervision. As an exercise of patriarchal police power, the United States today claims the Roman householder's power of life and death over household members, relying primarily on a paradigmatic instrument of household discipline—imprisonment as a form of close household supervision that infantilizes inmates in the very act of discipline.

#### B. Penal Police and Criminal Justice

The police roots of American punishment manifest themselves throughout the penal process. While the Law Model continues to drive the ideology of the penal process—domestically as well as globally, as the cornerstone of the dogma of American superiority in criminal justice<sup>25</sup>—the Police Model captures much of the actual operation of that process, as well as many of its less reflective, lower order norms.

To begin with the formal prerequisites for criminal liability, the concept of jurisdiction remains firmly rooted in the police notion that the paradigmatic victim of crime is the state. Territorial jurisdiction is the jurisdiction of the householder over his household, which in the case of the macro householder—the king, the people, the state—is defined by territory, just as that of micro householder—the slave owner, the medieval lord, the Roman *paterfamilias*—was spatially defined by the borders of the plantation, the

estate, or the house, where the householder acted to protect, and to enforce his peace. Little attention is given to the question of the applicability of another jurisdiction's penal norms; the peace of the relevant territory has been disturbed and the state-householder is entitled, though of course not obligated, to use his disciplinary power.

The police concept of crime as offense against a sovereign, rather than against an individual, also drives the doctrine of double jeopardy both within and across jurisdictions. Across jurisdictions, the doctrine of dual sovereignty respects the police power of each state. The violation of a state-issued norm amounts to an act of disobedience, literally an offense against the sovereign (so that the prohibition of placing someone twice in jeopardy for "the same offense" doesn't apply). Each state is free to punish any offense against its householder authority; to suggest that only one state may discipline offenders against its sovereignty when another state's norm also has been violated would fly in the face of the latter state's power to police its territory.

The notion of the king/state as the ultimate victim of crime is central to police penalty. All offenses in the end are police offenses. Rather than hovering on the outskirts of criminal law as exceptions to the rule of traditional crime, police (or regulatory or *malum prohibitum*) offenses are the rule of police penalty. There are no victimless crimes under a police regime, not because every offense can be connected to the possibility of someone suffering some harm sometime in the future, but because every offense is a victimful crime for the simple reason that the notion of a victimless crime is an oxymoron in a system of penalty that regards every crime as an offense against the state insofar as it violates a state command.

The idea of a “victims’ rights movement” is therefore entirely inconsistent with a police power model—the model is not concerned with protecting victims’ rights; it is instead concerned with disciplining disobedients.<sup>26</sup> Instead the victims’ rights movement serves to perpetuate the fiction that the penal process is in fact a criminal justice system concerned with protecting individual rights, of victims and defendants alike (though there may be disagreement about whether the protection of rights is a zero sum game and whether victims’ rights deserve more protection than defendants’, or vice versa).

Under the Police Power model, victimless crimes in fact are preferable to victimful ones, since they remove an obstacle to the assertion of state authority. The penal process can operate far more efficiently without personal victims, who may be, and often enough are, unreliable and even unsympathetic. Victims gum up the process, through their insistence that they stay informed of criminal proceedings against “their” offender, that they be consulted on plea negotiations, that they provide victim impact statements, through their memory lapses, and so on.

The paradigmatic crime of modern American police penalty is possession, the victimless crime par excellence, which replaced vagrancy as the policing offense of choice (though vagrancy is attempting to stage a comeback; see *Chicago v. Morales*<sup>27</sup>). Possession offenses—individually and in their totality—provide state officials with a powerful and convenient device for the identification and elimination of individuals deemed offensive.<sup>28</sup> Easy to detect, easy to prove, and potentially devastating in effect (with punishments up to life imprisonment without parole for simple possession<sup>29</sup>), possession offenses are the ideal threat elimination tool in the police power model of the penal process. (Possession offenses, as we’ll see shortly, also operate under the radar

screen of traditional principles of criminal liability, such as actus reus, mens rea, and defenses, removing formal obstacles to conviction.)

The legality principle—the most explicit attempt to “legalize” state punishment by bringing it under “the rule of law”—has no place in the Police Power Model. At best the components of the legality principle—specificity, prospectivity, and, more generally, notice—are guidelines for more efficient government. Specific commands are easier to obey; commands that aren’t prospective can’t be obeyed at all (though they can be useful in eliminating undesirables, at least in states too weak to do so openly), nor can commands given without sufficient notice.

Possession replaced vagrancy as the police sweep offense when vagrancy ran afoul of the specificity requirement, or so it seems. While possession offenses on their face appear to be specific enough, they merely expose the hollowness of the specificity requirement. To begin with, vagrancy was problematic not because it was vague, but because it was broad and, most important, because it was blunt. Vagrancy was explicit about its policing function—it did not pretend to comply with traditional principles of criminal law (though just how traditional these principles are seems doubtful given that vagrancy traces itself back at least to the 14th century and in fact the text of the vagueness ordinance in question in the best known vagueness case, *Papachristou v. City of Jacksonville*,<sup>30</sup> was taken verbatim from an old English statute). Vagrancy listed types, rather than conduct; it listed vagrants. Moreover, it listed many different types of vagrant, casting a deliberately wide net that invited charges of overbreadth (charges that were never substantiated and instead cloaked in unconvincing vagueness arguments):

rogues, vagabonds, dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses.

Possession offenses are more subtle, but no less broad, or vague, or sweeping than vagrancy. They speak not in terms of types; they tend to be short; and they soberly set out the elements of the offense. But in fact, possession also turns on types, though in a less blatant way. Types enter not into the definition of possession offenses (with the notable exception of felon-in-possession offenses), but in the myriad status-based “exemptions” that exclude certain types (e.g., “persons in the military service of the state of New York,” “police officers,” “peace officers,” “persons in the military or other service of the United States,” “persons employed in fulfilling defense contracts with the government of the United States or agencies thereof,” etc.) from the scope of the technical definition of a given possession offense,<sup>31</sup> including compound possession of a weapon with the intent to use it unlawfully against another.<sup>32</sup>

Moreover, the true policing power of possession offenses lies in the concept of constructive possession, which is variously defined as having, or being in a position to exercise, dominion and/or control over contraband (i.e., an object possession of which is

prohibited).<sup>33</sup> The notion of constructive possession is so vague (in the sense of not giving sufficient notice to potential offenders as to the scope of the prohibition *and* in the sense of not providing state officials with meaningful guidance regarding its implementation) and so broad as to run afoul of the spirit of the specificity requirement, if not its letter. While vagrancy wore its breadth on its sleeve (listing any number of vagrant types), possession offenses are differentiated into a complex system of offenses, which add up to a vast possession prohibition far wider and finer than the net even the single most imaginative vagrancy statute could hope to weave.

Possession offenses criminalize actual and constructive possession, simple and compound possession (including an element of intent to use); there is unlawful possession and criminal possession; there is possession of weapons (guns, knives, clubs, etc.), dangerous instruments, drugs (and drug paraphernalia), stolen property, forged checks, burglary tools, and so on. At the same time, possession is an evidentiary tool; simple possession may be presumptive evidence of compound possession (with intent to use)<sup>34</sup> as well as larceny. Possession itself may be established through broad presumptions based on presence near contraband.<sup>35</sup>

Vagueness, in a police regime, in fact may prove expedient. Much of modern federal criminal law is driven by intentionally vague criminal statutes applied by courts that view themselves as participants in a concerted effort to eliminate criminal threats that otherwise would escape penal discipline. Prime examples are RICO and the federal mail fraud statute. Their very vagueness makes them the sort of flexible measure that the holder of the power to police must be free to wield in the name of crime control.<sup>36</sup>

In a police regime, one would expect that prospectivity is treated as cavalierly as specificity, as both are but guidelines that serve the ends of government, rather than principles rooted in minimum requirements of legitimacy.<sup>37</sup> In fact, the prohibition of retroactivity is said not to apply to judicial criminal lawmaking (which remains subject merely to a largely illusory notice requirement associated with the due process clause),<sup>38</sup> changes in once-mandatory and now-advisory sentencing guidelines,<sup>39</sup> or intrusive exercises of state police power labeled civil, rather than criminal, including the indefinite incarceration of offenders classified as “sexually violent predators”<sup>40</sup> and the registration and notification requirements triggered by the classification as a certain category of sex offender.<sup>41</sup>

The general notice requirement amounts to a constructive notice requirement, abandoning a meaningful publicity requirement and, in effect, imposing an impossible duty to keep tabs on the continuous production of penal norms in all branches of government<sup>42</sup>—including assessing the continued precedential force of prior judicial decisions.<sup>43</sup> Ignorance of law is no defense: even a good-faith effort to identify and to apply the applicable norms does not preclude criminal liability, or rather the state’s authority to impose penal discipline.<sup>44</sup>

The discretion to choose the proper response, if any, to a norm violation plays an important role in the operation of the penal police regime.<sup>45</sup> The penal police system has no room for a meaningful principle of proportionate punishment (in quality or quantity)<sup>46</sup> or for a legality principle in the strict, continental, sense of a duty to prosecute all provable cases.<sup>47</sup> The American penal process is essentially discretionary. Ignorance of

law, then, is not a defense as of right, but a matter of police; i.e., it applies only to those whom the state identifies as insufficiently disobedient to require penal discipline.<sup>48</sup>

Ignorance of law is not the only “defense” that amounts to a mere discretionary guideline. So does every traditional (“common law”) principle of criminal liability.

The act requirement, as a requirement rather than a guideline, is out of place in a police regime. Events, including acts, are significant only insofar as they manifest offensiveness that requires—or may require—penal discipline. There is no need, however, to await the acting out of a recalcitrant attitude; any sufficiently reliable evidence of a recalcitrant attitude will do. If a police regime is to have an act requirement at all—so as to maintain the veneer of legality, to the extent keeping up that veneer proves useful to a state that fosters an ideology of legality for the sake of stability—a broad definition of act, perhaps as a “bodily movement,” would do.<sup>49</sup> In this way, any offensive act (disrespectful behavior toward, or disobedience of, a state official, suspicious or “furtive” movements) can be cited as a ground of penal interference.

Nothing better illustrates the fluidity of the act requirement better than possession, the paradigmatic policing tool. Possession doesn’t fit even within the broadest definition of act, as a bodily movement. Possession is a status, a relation between a possessor and the possessed. It is not an act. Code drafters who insisted on retaining the act requirement solved the problem of actless possession offenses by codificatory fiat: they declared possession to be an act (usually either by recasting it as the act of receiving or retaining, or failing to discontinue possession of the object in question).<sup>50</sup> Possession thus once again demonstrates its superiority to vagrancy as a policing tool; it remains within the traditional principles of criminal liability, if only in form, but not in substance. Being a

vagabond flies in the face of the act requirement; being in possession does not, provided being in possession is defined as acting.

Insofar as possession offenses are cast as failure-to-dispossess offenses, they also illustrate the irrelevance of the distinction between act and omission, another line the act requirement is often said to guard.<sup>51</sup> For purposes of detecting individuals offensive to the state who might require penal discipline—offenders for short—the distinction between act and omission is no more pertinent than that between act and status. In fact, it's the status of offensiveness that generates the need to interfere; likewise, it's the failure to comply with state commands that manifests offensiveness. Unlike traditional omission liability, which insists on clearly defined duties before their violation might be criminalized, a police regime sees no need to identify specific duties the violation of which might trigger penal sanctions. The entire penal system is designed to enforce the duty to obey state commands. It is this duty that every offense violates; so obvious and fundamental is this duty that anyone claiming not to be familiar with it thereby identifies herself as someone in need of penal discipline. Moreover, to require the state to spell out the duty to obey its commands would undermine the very authority that punishment for violations of this duty seeks to reassert.

A penal police regime likewise has little use for that other bulwark of traditional Anglo-American criminal law doctrine, *mens rea*. The “disappearance” of *mens rea* has long been bemoaned by criminal law commentators; but inquiries into *mens rea* as modes of culpability are simply irrelevant in a system unconcerned with culpability.

Offensiveness might be measured in degrees, so that the various types of *mens rea*—represented, since the Model Penal Code, as a progression from negligence through

recklessness and knowledge to purpose or intent—might be reinterpreted as increasing levels of offensiveness, from the clueless norm violator to the brazen intentional offender. But already the insistence on a pre-defined mens rea element interferes with the discretion typical of a penal police regime. The objective norm violation itself identifies the violator as presumptively offensive and therefore in need of disciplinary treatment; it is then up to the state to determine whether penal disciplinary is appropriate and, if so, what quality and quantity of sanction is indicated.

Even when some mens rea element is retained in the offense definition, the state's burden of proof on that element can be eased through evidentiary presumptions (recall the use of presumptions to transform proof of presence to proof of constructive possession and then to proof of knowing constructive possession) or by simply declaring that certain types of evidence out of bounds (insanity,<sup>52</sup> intoxication<sup>53</sup>).

Inchoate offenses (attempt, solicitation, conspiracy, facilitation, possession) place particular emphasis on mens rea—since they don't require the commission of the actus reus specified in the crime definition. In a penal police regime, inchoate offenses proliferate as early interference—long before the infliction of harm against another person—may be necessary to assert the state's authority. After all, conduct may be offensive to the state long before it harms another person. The harm under a penal police regime has already been done; in this sense, inchoate offenses are no more inchoate than victimless offenses are victimless.

The doctrine of inchoate offenses, at least since the Model Penal Code, has been remarkably, and unusually, explicit about its focus on the elimination of threats.<sup>54</sup> In this regard, inchoate offenses are the rule in a penal police regime, rather than the exception,

just as, notwithstanding the act requirement, status and omission liability are the rule, not the exception, and notwithstanding the old saw *actus non facit reum nisi mens sit rea*, strict liability is the rule, not the exception.

Similar reversals of the pattern of rule and exception also appear in the realm of criminal procedure. There the celebrated feature of the American criminal process, the jury trial, in fact appears in only a small minority of cases.<sup>55</sup> The American criminal process is a plea bargaining process dominated by the prosecutor, a state official with unlimited discretionary power to decide whether and what to charge. Whatever guidelines may inform the prosecutor's actions are self-generated and self-enforced, informal, unwritten. Plea bargaining may be subject to local and historical patterns, but it is not governed by legal rules. Following the guilty plea, the convicted defendant faces another state official whose discretion is unconstrained by legal rules, though it may be subject to advisory guidelines.

Once sentenced, the convict enters the final stage of the penal process, the infliction of punishment, which—in the United States—is dominated by the sanction of imprisonment. The two million prison inmates—with another four million parolees and probationers on the verge of imprisonment in case of a violation of the conditions of their supervised release—occupy institutions that traditionally followed a quasi-familial model, with the warden serving either as father, military superior, spiritual leader, factory supervisor, or plantation owner. The state, having failed to police offenders sufficiently in the macro household within its jurisdiction, assigns them to smaller household units, so as to better supervise and discipline them through its designees, the warden and his representatives, the prison guards. It makes no difference whether these designees are

themselves state officials or deputized private individuals or entities; the prison's mission is to eliminate human threats, by removing and putting them (literally) in their place. Neither the public nor the private prison is concerned with doing justice; either will do as a warehouse.

For some offenders, merely putting them in their place (i.e., humiliating them) may suffice. Here the state may choose to use explicit public shaming sanctions (as opposed to implicit and private ones, as in prison).<sup>56</sup>

Then again, some offenders are so offensive in their violation of key state norms—notably the norm against intentional killing and treason as a direct intentional act of disloyalty toward the state itself (a macro version of the abominable offense of petit treason<sup>57</sup>)—that no removal is long and strict, and no humiliation complete, enough. These ultimate offenders must be eliminated altogether to reassert the state's superior authority. So foreign is the notion of autonomy to the state's execution of capital punishment (execution of punishment in its purest and bluntest form), the modern manifestation of the Roman householder's *vitae necisque potestas* (power of life and death)<sup>58</sup> over members of his household, that it cannot countenance death row inmates' attempts to hasten their own demise by abandoning appeals. In a penal police regime, the condemned man cannot be permitted to transform the act of execution into an exercise of his right to choose the time and manner of his death, and thereby to transform the ultimate act of humiliation into the ultimate act of self-determination.<sup>59</sup>

### C. Conclusion: Miscarriages of Justice as False Positives

Once the penal process is seen as a police regime, miscarriages of justice are either impossible or irrelevant. There can be errors, of course, but they are not errors of justice since the system does not seek to mete out justice. Put another way, all errors are “harmless” insofar as harm is understood as a violation of some right on the defendant’s part not to be “wrongly” convicted or punished, or even mislabeled.<sup>60</sup> An error of penal classification is harmful only insofar as it is so egregious as to undermine the state’s effort to assert its authority because the only relevant harm is harm to the state, the paradigmatic victim of the penal police process.

Let’s assume, however, that false positives are undesirable even in a police regime (or no more desirable than false negatives). Miscarriages of justice as false positives (or negatives) are errors of bureaucratic misclassification.<sup>61</sup> It might be prudent to minimize classification errors, but even with a few errors of classification here and there, the accuracy of the classification system as a whole is still close enough for government work. A good-faith classification effort is all that’s required; consider as a model the classification system for sex offenders set out in registration and notification statutes.<sup>62</sup>

Now, as with any discretionary police system, even miscarriages of justice as false positives are at least theoretically significant at the extreme margin. The medieval lord was not entitled, without more, to destroy his servant’s value as a human resource (also to the macro householder) by depriving him of life or limb. Likewise, a prosecutor has unlimited discretion when it comes to deciding whether and how to respond to offenses against the state’s sovereignty, but malicious prosecution might reveal him as incapable of self-government in the face of overwhelming malice and therefore unfit for his disciplinary—and classificatory—post.<sup>63</sup>

Without a fundamental reorientation of the penal process, pointing out miscarriages of justice nibbles at the irrelevant margins of an unjust police regime. Within the framework of a penal process aimed at doing justice (to suspects, offenders, and victims), a thorough analysis of miscarriages of justice would extend not only to wrongful convictions, but also to wrongful acquittals and, more broadly, to all aspects of the penal process (or at least the criminal process narrowly speaking, including the imposition of norms and the infliction of sanctions for their violation), including decisions to investigate (or not) and to prosecute (or not).<sup>64</sup>

Moreover, critical analysis must extend beyond the criminal process to reach substantive criminal law as well,<sup>65</sup> encompassing the entire penal process. For a focus on miscarriages of justice might otherwise reinforce the process fetishism common in American legal and political discourse; the elimination of wrongful convictions does not, by itself, transform the penal process into a criminal justice system. Procedural perfection cannot cure substantive illegitimacy.

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<sup>1</sup> On the concept of police in general, and the distinction between police and law in particular, see Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005). The place of the police concept in various disciplinary discourses—including Michel Foucault’s concept of governmentality and Giorgio Agamben’s recent work on sovereignty—is explored in *The New Police Science: The Police Power in Domestic and International Governance* (Markus D. Dubber & Mariana Valverde eds., Stanford: Stanford University Press, 2006).

<sup>2</sup> For a classic definition of police in American jurisprudence, see *Slaughter-House Cases*, 83 U.S. 36, 49-50 (1873) (“the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property”).

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<sup>3</sup> These concepts tend to be used interchangeably, see, e.g., Richard A. Leo, “Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction,” *Journal of Contemporary Criminal Justice* 21 (2005): 201.

<sup>4</sup> The Police Power and Law Models are compared to Herbert Packer’s Due Process and Crime Control Models in Markus D. Dubber, “The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process,” in *Defining Crimes: Essays on the Criminal Law’s Special Part* (R.A. Duff & Stuart Green eds., Oxford: Oxford University Press, 2005), 91. 91-93.

<sup>5</sup> Police power discourse may be alegitimate, but it needn’t be arational. Compare Markus D. Dubber, “Recidivist Statutes as Arational Punishment,” *Buffalo Law Review* 43 (1995): 689 (arational penal policy) with Dubber, *The Police Power*, ch. 8 (internal rationality of police governance).

<sup>6</sup> See also Patricia Ewick, “The Scale of Injustice,” in this volume.

<sup>7</sup> On the long pedigree of this complacency, see Markus D. Dubber, “‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment,” in *Modern Histories of Crime and Punishment* (Markus D. Dubber & Lindsay Farmer eds., Stanford: Stanford University Press, forthcoming 2007).

<sup>8</sup> It is typical of the American penal police system that the criminal liability of state actors is rarely, if ever, explored. Consider also the example of entrapment, which functions as a discretionary, controversial, and awkward defense for the entrapped, rather than as the foundation of criminal liability for the (official) entrapper. See Jacqueline E. Ross, “Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy,” *American Journal of Comparative Law* 52 (2005): 569.

<sup>9</sup> See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.10 (2d ed. 1986).

<sup>10</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4 (1769), 162.

<sup>11</sup> In criminal law, the police power was cited as the *courts’* authority to recognize “common law misdemeanors.” See, for instance, the criminal law textbook standard *Commonwealth v. Keller*, 35 D. & C.2d 615 (Pa. Ct. Com. Pleas 1964) (indecent disposition of a dead body), which quotes Blackstone’s definition of police.

<sup>12</sup> *Slaughter-House Cases*, 83 U.S. 36, 49 (1873).

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<sup>13</sup> Id. at 49-50.

<sup>14</sup> 198 U.S. 45 (1905).

<sup>15</sup> Walton H. Hamilton & Carlton C. Rodee, “Police Power,” in *Encyclopedia of the Social Sciences*, vol. 12 (1933), 190 (quoted in William J. Novak, “Common Regulation: Legal Origins of State Power in America,” *Hastings Law Journal* 45 (1994): 1061, 1082 n.58).

<sup>16</sup> Unless the Supreme Court decides—and this is a recent development—that an apparent exercise of the commerce clause is in fact an exercise of the non-existent police power. See *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>17</sup> For a detailed version of this story, see Dubber, *The Police Power*, supra.

<sup>18</sup> See generally D. Brendan Nagle, *The Household as the Foundation of Aristotle’s Polis* (Cambridge: Cambridge University Press, 2006).

<sup>19</sup> Cf. Anthony Paul Farley, “Twelve Notes to Myself Regarding an Essay on Making Sense of Miscarriages of Justice and ‘Total Communist Fearlessness,’” in this volume, note 5 (“There is no rule of law, there are only masters and slaves, rulers and ruled.”).

<sup>20</sup> See generally *The New Police Science*, supra; Dubber, *The Police Power*, supra, ch. 2.

<sup>21</sup> Pasquale Pasquino, “Spiritual and Earthly Police: Theories of the State in Early-Modern Europe,” in *The New Police Science*, supra, 42.

<sup>22</sup> Jean-Jacques Rousseau, *Discourse on Political Economy* (1755).

<sup>23</sup> See Dubber, “An Extraordinarily Beautiful Document,” supra.

<sup>24</sup> See Markus D. Dubber, “Toward a Constitutional Law of Crime and Punishment,” *Hastings Law Journal* 55 (2004): 509.

<sup>25</sup> Cf. Mary L. Dudziak, “The Case of ‘Death for a Dollar Ninety-Five’: Finding America in American Injustice,” in this volume (U.S. rights ideology nurtured internationally, despite deviations in the American South); see also Tracey L. Meares, “The Path From Miscarriage of Justice to Racial Justice,” in this volume (U.S. rights ideology manifested nationally, by policing the American South).

<sup>26</sup> See Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* (New York: New York University Press, 2002).

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- <sup>27</sup> 527 U.S. 41 (1999); Tracey Meares & Dan Kahan, “The Wages of Antiquated Procedural Thinking: A Critique of *Chicago v. Morales*,” *University of Chicago Legal Forum* 1998 (1998): 197.
- <sup>28</sup> See Markus D. Dubber, “Policing Possession: The War on Crime and the End of Criminal Law,” *Journal of Criminal Law & Criminology* 91 (2002): 829.
- <sup>29</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991).
- <sup>30</sup> 405 U.S. 156 (1972).
- <sup>31</sup> N.Y. Penal Law § 265.20.
- <sup>32</sup> *People v. Desthers*, 73 Misc. 2d 1085, 343 N.Y.S.2d 887 (Criminal Court of the City of New York 1973) (N.Y. City police officers immune from prosecution for possession of a blackjack with intent to use unlawfully) against another).
- <sup>33</sup> N.Y. Penal Law § 10.00(8).
- <sup>34</sup> N.Y. Penal Law § 265.15.
- <sup>35</sup> *Id.*
- <sup>36</sup> *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting); Dan M. Kahan, “Three Conceptions of Federal Criminal-Lawmaking,” *Buffalo Criminal Law Review* 1 (1997): 5. On the flexibility of vagueness’s interpretive/judicial cousin, the “rule” of lenity, see Dan M. Kahan, “Lenity and Federal Common Law Crimes,” *Supreme Court Review* 1994 (1994): 345.
- <sup>37</sup> See Dan M. Kahan, “Some Realism About Retroactive Criminal Lawmaking,” *Roger Williams Law Review* 2 (1997): 95.
- <sup>38</sup> *Rogers v. Tennessee*, 532 U.S. 451 (2001).
- <sup>39</sup> *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006).
- <sup>40</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).
- <sup>41</sup> *Smith v. Doe*, 538 U.S. 84 (2003).
- <sup>42</sup> *United States v. Casson*, 434 F.2d 415 (D.C.Cir.1970).
- <sup>43</sup> *Rogers*, *supra*.
- <sup>44</sup> *People v. Marrero*, 69 N.Y.2d 382 (1987).

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- <sup>45</sup> One of the more explicit instances of discretionary judgment is the sovereign's exercise of the pardon power. Cf. Austin Sarat, "Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State," in this volume.
- <sup>46</sup> See Dubber, "Toward a Constitutional Law," 536-40; Douglas Berman, "The Problem of Over-Punishment," in this volume.
- <sup>47</sup> German Code of Criminal Procedure § 152; see generally Markus D. Dubber & Mark Kelman, *American Criminal Law* (New York: Foundation Press, 2005), 102-07.
- <sup>48</sup> Cf. Dan M. Kahan, "Ignorance of Law Is a Defense—But Only for the Virtuous," *Michigan Law Review* 96 (1997): 127.
- <sup>49</sup> See Model Penal Code § 1.13(2). On the Model Penal Code as policing tool, see Dubber, *Victims in the War on Crime*, supra.
- <sup>50</sup> Model Penal Code § 2.01(1) & (4); N.Y. Penal Law §§ 15.00(2), 15.10.
- <sup>51</sup> See Dubber & Kelman, supra, ch. 4B.
- <sup>52</sup> *Clark v. Arizona*, 548 U. S. (2006).
- <sup>53</sup> *Montana v. Egelhoff*, 518 U.S. 37 (1996).
- <sup>54</sup> See *People v. Dlugash*, 41 N.Y.2d 725 (1977).
- <sup>55</sup> The problem of miscarriages of justice in these few, but symbolic, cases is explored in Daniel Givelber, "Kalven and Zeisel Fifty Years Later: Is the Jury Still the Defendant's Friend?," in this volume.
- <sup>56</sup> See *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004); Dan M. Kahan & Eric A. Posner, "Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines," *Journal of Law & Economics* 42 (1999): 365.
- <sup>57</sup> See Dubber, *The Police Power*, supra, at 26-30.
- <sup>58</sup> Cf. John Crook, "Patria Potestas," *Classical Quarterly* 17 (1967): 113.
- <sup>59</sup> Cf. *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006), rehearing en banc granted, 2006 U.S. App. LEXIS 32045 (Dec. 29, 2006).
- <sup>60</sup> See the judicial soliloquy on harmless error doctrine captured in Robert Weisberg, "Margins of Error," in this volume.

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<sup>61</sup> Cf. Anthony Paul Farley, “Twelve Notes to Myself Regarding an Essay on Making Sense of Miscarriages of Justice and ‘Total Communist Fearlessness,’” in this volume, note 9 (“What we call a miscarriage of justice is only an accounting that seems to have gone awry.”).

<sup>62</sup> See Wayne A. Logan, “Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws,” *Journal of Criminal Law & Criminology* 89 (1999): 1167. On earlier efforts to develop comprehensive classification schemes for purposes of selective incapacitation, see Franklin E. Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (New York: Oxford University Press, 1995); William Spelman, *Criminal Incapacitation* (New York: Plenum Press, 1994).

<sup>63</sup> A prison guard similarly enjoys wide latitude in disciplining inmates, unless he displays “malice or sadism.” See *Hudson v. McMillian*, 503 U.S. 1 (1992). The formalized system of military discipline may provide a useful illustration of the guidelines structuring the exercise of discretion in a complex quasi-patriarchal police regime (so-called military “law”). Cf. Linda Ross Meyer, “Miscarriages of Mercy,” in this volume.

<sup>64</sup> See, e.g., Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004); see also Richard Nobles & David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000); Douglas Berman, “The Problem of Over-Punishment,” in this volume (calling for critique of “over-punishment” as miscarriage of justice).

<sup>65</sup> See Dubber, “Toward a Constitutional Law of Crime and Punishment,” *supra*.