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Wrongful Conviction, Policing, and the "Wars on Crime and Drugs"

Hannah Laqueur, Stephen Rushin, and Jonathan Simon¹

Wrongful conviction ought to be an aberration for any system of criminal punishment tied to legal adjudication; certainly in a system such as we have in the United States, premised on the constitutional bedrock of requiring a jury to find guilt beyond a reasonable doubt (*Sandstrom v. Montana*). We suggest, however, that during the so-called wars on crime and drugs, wrongful convictions are no longer mere aberrations, any more than is holding to the end of hostilities captured members of an enemy army. Specifically, we hypothesize that these two "fronts" in two parallel national "wars" have transformed police practices in such a way that both homicide and drug crimes have become likely centers of concentration of some form of wrongful conviction.

In this chapter, we begin by discussing the war on crime and the war on drugs. We then discuss the ways in which these wars have transformed American policing and have served to promote wrongful conviction. We conclude the chapter by suggesting that we need political signals and institutional reforms, not just better methods and ad hoc individual correction. Only by clearly ending these wars—and their "state of emergency"-like signal to both frontline enforcers and citizens—can we restore the state of affairs in which wrongful conviction returns to being an aberration in our criminal justice system and a problem subject to effective technical and tactical solutions. Given that personal exoneration is neither practical nor likely for most individuals, we suggest broader policies are required.

Stepping Back: The Wars on Crime and Drugs

The wars on (violent) crime and drugs, declared at the national level in the 1960s and revitalized several times since - under Reagan and Bush around drugs in the 1980s, and around policing and urban violence under Clinton in the 1990s- transformed the once relatively local culture of policing and prosecution in America (Feeley & Sarat, 1981; Stuntz, 2011). The consequences have been enormous for American law and society. Since the beginning of these publicly declared wars, the United States has seen incarceration skyrocket, and the gulf expand between frontline criminal justice enforcers and high-crime communities (see generally, Stuntz, 2011). Wrongful convictions, likely concentrated in those same communities, should ultimately be seen as another and integral consequence of the long war on crime.

The war on crime (as well as the war on drugs), as we discuss here, might be thought of as a metaphor "with teeth." Presidents asserting a war on crime never asserted they were using war powers in a constitutional sense, but by defining the national priority of combating crime as on an equal footing with war, politicians did more than invoke

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emotions and votes—they helped to cognitively reorganize the criminal justice field (Lakoff & Johnson, 2003; Simon, 2008); that is, rework the way frontline criminal justice agents had to intellectually operationalize their activity.

The war metaphor carries from its military source material into the criminal justice field three key implications. First, it marks territory as the key target of operations. Wars are won when the enemy finds itself completely denied freedom of operation in a territory. Thus the war on crime is brought into operation primarily against perceived “high crime” neighborhoods.

Second, wars mark race as a proxy and product of the war. All wars are, or tend to become, race wars in the sense that populations on the other side of the conflict come to be defined in racialized terms as permanently and dangerously “other” to the opposing race (whether, for example, Hutu and Tutsi, Arab and Jew, revolutionary and reactionary) (Foucault 2003). A war on crime tends to become a war against those racialized as deviant and disaffected—in the United States, primarily African American and Latino youth, mostly in blighted urban centers, but increasingly in blighted rural and suburban areas as well (Pager, 2007; Western, 2008).

Third, all wars are preemptive. Once begun, war operations seek to neutralize enemy forces before they can be brought into effective action. The war is over when one side no longer has the capacity to produce new offensive operations or resist defensively. A war on crime becomes a preemptive war on those perceived to be involved in criminal lifestyles.

Police and the Wars on Crime and Drugs

The cognitive remapping of the criminal justice field by the war on crime has had a number of profound effects on the incentives of policing in ways that we hypothesize encourage wrongful conviction. First, the war on crime minimizes the significance of individual guilt. An enemy combatant is not defined by acts but by other attributes. Enemies in the war on crime, as we have noted, are largely marked by race and territory. Second, the imperative of preemptive action gives precedence to crimes that are easily policed and prosecuted regardless of their direct relationship to violence. Third, the ease with which these crimes are “discovered” in territories marked for criminalization means that a large pool of “snitches” is always at hand, in prison or county jail. These snitches are potentially amenable to consideration from the prosecution in their own cases, irrespective of the quality of information they can actually provide. Due to the highly segregated nature of contemporary American cities it is highly likely that they people they know well enough to snitch on will be the same race.

The impact of the federal war on crime on state and local policing has manifested in two important domains: homicides and drug law enforcement. The 1968 Omnibus Crime Control and Safe Streets Act, which is the foundational legal structure for the war on crime (Simon, 2007), was widely identified with the surging homicide rate and violent assaults associated with urban rioting. The specific measures in the federal law could do little to touch either directly, but instead attempted to bolster police effectiveness through a variety of methods. Similarly, the “war on drugs”, declared by President Nixon in the 1971 (Beckett, 1997), and extended by Presidents Reagan and Bush, placed the emphasis on drugs as a source of danger and ultimately violent death. The major thrust of these laws was to encourage police arrests through direct incentives (like sharing in federal forfeitures of drug crime assets) and to encourage longer sentences for drug criminals.

The War on Violent Crime. While the war on drugs often gets most of the attention, especially from critics, violent crime was clearly the first focus of national politics, beginning as early as the Goldwater campaign in 1964 (Beckett 1997), and leading Lyndon Johnson to declare a war on crime in 1967, well before Nixon's emphasis on drugs in 1971 (Simon 2007). While repressing violent crime has a clear legitimacy that the war on drugs often lacks, we point to crucial ways in which a "war on violent crime" can also create structural incentives for wrongful conviction.

Homicide clearance rates and police misconduct. Mounting evidence suggests that law enforcement agencies allocate a disproportionate amount of time and resources towards investigating homicides. In the era of modern policing in which agencies utilize accountability programs (such as Compstat; see below), on-the-ground detectives feel pressure to drive up their clearance rates, particularly for publicly visible crimes like murder. This pressure to solve homicide cases likely results in the apprehension of more guilty culprits. But emerging anecdotal and empirical evidence suggests that this pressure may also increase the likelihood of police misconduct, thus leading to wrongful convictions.

Organizational pressure on homicide detectives. American police departments have undergone major changes over the last few decades that may have contributed to heightened pressure during murder investigations. First, American society has ideologically reoriented to adopt what David Garland (2001: 139) terms a "culture of high crime" in which crime fears are widespread and salient. Police departments have not escaped the pressure of this transformation. In major cities like New York, political leaders turned to police to reduce crime through aggressive urban policing tactics. High crime rates have seemingly reset the rules, expanding public support for aggressive policing tactics. Second, modern innovations in police department organization placed added stress on supervisors to get results. Police departments have rapidly professionalized over the last several decades. During this same time period, accountability programs like Compstat diffused across American law enforcement agencies. William Bratton popularized the use of Compstat when he implemented the system as New York City Police Commissioner. The term Compstat "refers to a 'strategic control system' developed to gather and disseminate information on the NYPD's crime problems and to track efforts to deal with them" (Weisburd et al, 2004: 2). One of the most visible components of the Compstat system is the use of weekly "crime-control strategy meetings," where precinct commanders appear before several of the department's top brass to report on crime problems in their precincts and what they are doing about them" (2). David Weisburd et al. found that by 1999, 32.6 percent of large departments implemented Compstat, with another 25.6 percent planning to in the immediate future. Mapping the trend in Compstat adoption over time, Weisburd et al projected that almost all large departments should have adopted some major elements of Compstat by 2007.

Admittedly, police departments across the United States have long fixated on murder clearance rates as a measure of overall effectiveness. Historical analysis demonstrates that, as far back as 1894, police responded more directly to murders than other felony offenses (Bijleveld & Monkkonen, 1991). But a bevy of contemporary studies have all verified that in the modern policing era, murder clearance rates have evolved into the "single most important quantified measure of police performance, despite questions of their adequacy as such" (Litwin, 2004: 331). And in the age of Compstat, the importance of homicide clearance leads to supervisors placing "unmistakable organizational pressure on homicide detectives" (331). In fact, it is not uncommon to find in the homicide office of a

police department a score card showing the number of cases assigned to each homicide detective next to the number of cases the detective has cleared (Litwin, 2004; Simon, 1991). The conventional wisdom today is that increased performance can be tied to clearance rates² (Keel, Jarvis, & Muirhead, 2008).

Generally, “the pressure to solve homicides produces the intended results” (Gross 1996: 478). That is, this pressure results in clearance rates for homicide offenses that are substantially higher than all other felonies. In 2011, American law enforcement agencies reported clearing about 65% of all reported homicides, compared to only roughly 29% of robberies, 41% of rapes, 57% of aggravated assaults, and only 19% of property crimes (Federal Bureau of Investigations, 2011). In many ways, a police department’s focus on homicides makes sense. Murders are the most dangerous felony offense, and they result in significant public outcry. At the same time, this understandable pressure may motivate some officers to cut corners, lie, or even manufacture evidence to justify an arrest and secure a conviction. Murder convictions—particularly in capital cases—represent a disproportionately high percentage of all known wrongful convictions (Gross, 1996). Various studies have reached this conclusion. For example, Arye Rattner (1988) found that of the 205 known wrongful convictions from 1900 onward, 45% were murder convictions, and 12% were death penalty cases. Keep in mind, homicide arrests “make up a fraction of 1% of all arrests in this country, and about 3% of arrests for crimes of violence” (Gross, 1996: 472).

In part, homicide cases and convictions receive more attention than the criminal processing of other offenses, and therefore a higher proportion of wrongful murder convictions are uncovered relative to other crimes (Gross 2008). But Gross also identifies institutional and organizational pressure during the investigation process as key factors in explaining the disproportionately high number of individuals wrongfully convicted of murder offenses. A department’s investigation of a murder “effectively establishes how the incident is to be remembered by the wider community” (Innes, 2003, p. 270). Detectives face political and organizational pressure to make arrests in unsolved murders (Davies, 2007). This pressure is particularly intense in the era of modern policing, where accountability programs like Compstat hold supervisors accountable for crime statistics and clearance rates. In light of this pressure, police sometimes take on the role of “moral entrepreneurs,” willing to bend the rules and procedures to achieve what they view as a necessary outcome (Huff, Rattner, & Sagarin, 1986, p. 528). An officer may strongly believe that a suspect is guilty of a homicide, but lack sufficient evidence to bring the case to trial. When combined with intense political and social pressure to make an arrest, a well-intentioned officer may participate in misconduct to coerce or frame a criminal suspect.

There is ample anecdotal evidence to bolster the hypothesis that the political, organizational, and institutional pressures on detectives to make arrests may facilitate false convictions. We offer two particularly salient examples. The first comes from Gross’s 1996 article. In 1983, an unknown criminal suspect abducted, raped and killed 10-year-old Jeanine Nicarico from Naperville, Illinois. For 13 frustrating months, the police failed to identify a solid suspect. Less than two weeks before the local prosecutor’s reelection bid, Illinois indicted three suspects. On two separate occasions, a trial court in Illinois found two of the three suspects guilty and sentenced them to death. And after *both* convictions, the

² It is worth noting that clearance rates for some homicide clearance rates have indeed fallen over the last several decades. We do not believe that this fact undermines our argument. Admittedly, this may bolster a claim that decreasing clearance rates would open up the opportunity for fewer wrongful convictions. No doubt this may be true. Conversely, we would argue that decreases in clearance rates may increase the pressure on police departments to clear cases and elevate these measures.

Illinois Supreme Court reversed the trial court's verdict. Finally, 12 years later, during the third trial against the two criminal suspects, a police officer admitted to lying under oath. According to Gross (1996), "under intense pressure, the police convinced themselves that they knew who killed Jeanine Nicarico, and they manufactured evidence to convince the prosecutors and to use in court" (p. 478).

Another case originating in the 1980s involved two Florida men incarcerated, one on death row, one for life, for rape-murders committed by serial killer Eric Mosely in Fort Lauderdale. Simon (2010) describes Mosely's crimes and the failures of Fort Lauderdale Sheriff's Department and the Broward County prosecutors to convict him. The two men convicted represented targets of opportunity, known to law enforcement and with significant vulnerabilities (one was mentally disabled, one was on parole for a murder committed in his youth). In both cases there were significant failures on the parts of police and prosecutors to turn over evidence that would have been helpful to the defense.

Although the Nicarico and Mosely cases seem to represent jarring examples of misconduct in response to possible organizational pressures, it does not appear to be particularly unique. The recent allegations surrounding former Brooklyn Detective Louis Scarcella provide another poignant example. Detective Scarcella worked in New York City during the crack cocaine epidemic of the 1980s and 1990s. New evidence uncovered by the *New York Times* has cast doubt on the validity of many of his arrests. Scarcella apparently relied on the same crack-addicted prostitute as a primary eyewitness in multiple murder cases. Scarcella's supervisor told the *Times* that Scarcella would regularly pay prostitutes \$100 for information. Scarcella also allegedly testified in court about confessions he obtained from suspects who often claimed to have told him nothing. The *Times* learned that Scarcella obtained identifications not through the use of a photo gallery, or in-person lineup, but instead through showing witnesses a single photo and allowing witnesses, "to mingle together while making an identification" (Robles, 2013 A1). Although this case is still under investigation, there is preliminary support that the prosecutor, as in the Nicarico case, potentially facilitated the alleged misconduct—as Brooklyn District Attorney Charles Hynes "has [allegedly] for years aggressively fended off appeals and denied public records requests from inmates who believe they were wrongfully targeted by Mr. Scarcella" (Robles 2013).

The War on Drugs. The rise of stringent sentencing statutes for drug law offenses is perhaps the most transparent and widely cited dimension of the punitive and racially disparate effects of the so-called war on drugs. But the drug war has also had a profound impact on law enforcement activity at the local, state and federal level. It has dramatically expanded the scope, intensity, and stringency of police efforts to detect drug manufacture, sale, and use. The result has been not only a rise in drug law policing, but also a transformation of the tactics and nature of on-the-ground police practices. "Buy and busts," "jump outs," the use of informants, wiretaps, and even paramilitary tactics, as well as the broader expansion of pretextual stops and searches and low-level arrests, have produced an increasingly aggressive, intrusive and indiscriminate form of policing that falls disproportionately on low-income communities of color (e.g. see Alexander, 2012; Balko, 2006; King, 2008; Lynch, 2012)

In 1971, President Richard Nixon called for "a new, all-out offensive" to fight "America's public enemy number one" (Nixon, June 17, 1971). Two years later, he declared "an all-out global war on the drug menace," and issued an Executive Order creating the Drug Enforcement Agency (DEA) within the Department of Justice to consolidate and coordinate the federal government's drug control activities (Administration, 2008, p. 13).

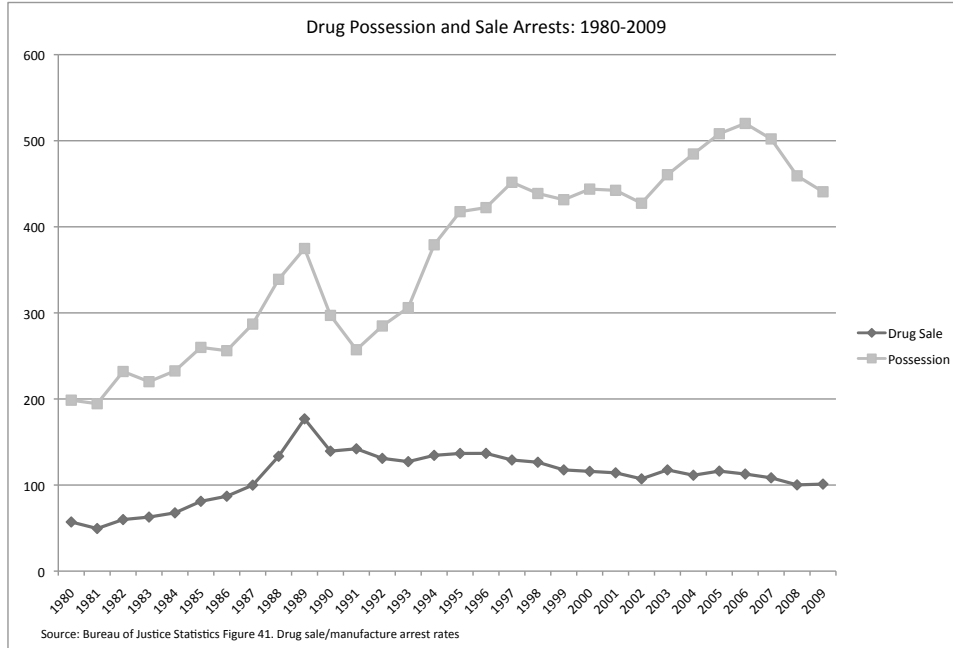
The dramatic and unprecedented expansion of drug law enforcement efforts began in earnest, however, in the early 1980s under the Reagan administration. The federal budget for drug control increased almost six-fold during the decade: from \$1.5 billion in fiscal year 1980 to \$6.7 billion in 1990 (Reuter, 1992).³ Between 70 and 80 percent of this federal spending was devoted to enforcement efforts. State and local level drug enforcement expenditures are generally subsumed within department budgets and are therefore harder to quantify; nonetheless, estimates suggest such spending is at least as much and likely exceeds federal expenditures. Rueter (1992) estimated, for example, that roughly \$14 billion was spent on state and local drug control enforcement (police, courts, and corrections) in 1990.

The quantitative change: Rise in drug arrests. The number of drug arrests in the United States has grown steadily and dramatically since the early 1970s. In 1970, there were under a half million state and local arrests for drug offenses; by 2006, the number of arrests for drug offenses reached a peak close to two million (UCR, BJS 2012). While drug arrests have uniformly risen, the composition of these arrests has changed over time. During the 1980s, while arrests for both possession and distribution grew, distribution arrests increased at a higher rate, accounting for 27 percent of all drug arrests in 1990 as compared to 18 percent in 1980. As Figure 1 shows, since 1991, the rise in arrests for drug offenses has been exclusively for possession charges (Bureau of Justice Statistics, 2010). Roughly 80 percent of the drug arrests made today are for possession.⁴

³ The DEA budget was \$74.9 million in 1973, the year the Drug Enforcement Administration was created. It increased to \$140.9 million in 1975; \$362.4 million in 1985; \$769.2 million in 1990.

⁴ In 1980 the absolute number of arrests was much lower than today, but the composition was similar to the composition of drug arrests today: 70 percent of all drug arrests in 1980 were for marijuana and 82 percent of all drug arrests were possession offenses. In 1990, the composition changed and marijuana arrests comprised only 30 percent of all drug arrests and the percent of arrests for the distribution of drugs increased from 18 to 27 percent. By 2011, drug arrests again primarily involved possession offenses (80 percent), and marijuana sale and possession arrests comprised 49 percent of all the arrests. (Federal Bureau of (Investigation, 1980-2011))

Figure 1:



The aggregate rise in drug arrests at the national level holds across states and localities. An analysis of 43 of the nation’s largest cities shows, for example, that between 1980 and 2003, in all but three cities, drug arrest rates grew, with increases ranging from 13 to 887% (King, 2008). This variation underscores the highly discretionary nature of drug law policing. Drug crimes, like all “victimless” crimes, are rarely reported to police. Drug arrests are therefore in large part the product of enforcement priorities and proactive targeting rather than changes in drug supply or use.

Federally driven changes. While the war on drugs triggered a significant expansion in federal policing, to a great extent, the ‘war’ has been fought at the state and local level. Federal investments, in the form of grants, equipment, training, and the extension of asset forfeiture laws, helped to facilitate this reorientation of state and local police priorities and resources directed towards drug law enforcement. These investments, in combination with police organizational and institutional incentives, and the wide discretion officers have been afforded by the courts, has resulted in the proliferation of aggressive and widespread street-level drug policing throughout the United States.

Grants. The first authorization of direct federal aid to state and local governments for the purpose of combating drug-related crime was authorized under the 1986 Anti-Drug Abuse Act. Two years later, Congress extended and expanded the federal aid program, re-named the Edward Byrne Memorial State and Local Law Enforcement Assistance Program after a New York City officer who was shot dead by drug dealers while in the line of duty protecting a drug case witness (Administration, 2008). The Byrne program was designed to emphasize “the reduction of violent and drug-related crimes” and to foster “multijurisdictional efforts to support national drug control priorities” (BJS, 2002). The largest share of Byrne funding has gone towards multijurisdictional narcotics task forces, which, often quota driven, loosely supervised, and without strict guidelines, have been rife

with corruption and misconduct (Blakeslee, 2006). The Tulia case, among the most publicized of the countless cases of wrongful incarceration associated with Byrne task forces, involved a Byrne-funded narcotics officer in the Texas Panhandle who set up dozens of individuals, most of them black, for allegedly dealing cocaine. After a four-year legal battle, Governor Rick Perry pardoned the wrongfully convicted; by that time, the 38 Tulia defendants had cumulatively spent over 70 years wrongly imprisoned in Texas jails and prisons (Sherrer, 2003).

Asset forfeiture. The "equitable sharing" provisions of the asset forfeiture laws have provided another important source of income for local drug law enforcement. Authority to seize criminally acquired profits and assets was first granted under the 1970 Comprehensive Drug Abuse, Prevention and Control Act (Miller & Selva, 1994).⁷ The Act was amended in 1978 to permit *civil* forfeiture, which permitted the government to seize and retain assets even in cases where the criminal charges were dismissed and reduced the burden of proof. By 1985, 47 states had passed laws resembling the federal model (Miller & Selva, 1994).

Police organizational/institutional incentives. In addition to the federally driven incentives described above, organizational and institutional features of police departments have encouraged the proliferation of aggressive street-level drug policing. Arrests numbers are a commonly used metric of officer productivity. The increasingly statistics-driven model of law enforcement, and relative ease of targeting drug users and low-level street dealers has made drug arrests an attractive way for officers to appear productive and advance their career (Moskos, 2008). In many departments, officers are additionally incentivized to focus on easy drug arrests rather than on solving serious crimes, because the arrests, particularly if made at the end of a shift, can provide guaranteed and effortless overtime pay in the time required to fill out paper-work and appear in court (Levine & Small, 2008).

In the context of fighting the war on drugs, the courts have consistently granted the police broad discretion with respect to their stop, search, seizure and arrest practices (Alexander, 2012). Justice Stevens made this point in his widely cited dissent in *California v. Acevedo* (1991), which ruled the police do not need a warrant to search a container, package or compartment within an automobile provided they have probable cause to believe contraband or evidence is contained within the vehicle: "No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court made today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime" (*California v. Acevedo*, 1991).

The drug war is now widely discredited as a way to reduce crime overall or the particular social problems associated with drug addiction, but its larger effects on the culture of policing, courts and prosecution have yet to be reckoned with and may linger long after the federal incentives to pursue it cease.

⁷ The law was directed towards fighting organized crime, and this including individuals operating trafficking organizations

Moving Forward: How the Wars on Crime and Drug Promote Wrongful Convictions

As the intense politicization of crime policy discussed above has begun to wind down in many respects, it has become possible to open up a broader policy discussion of how our crime fighting choices have compromised some of our core legal and political values and to seek ways to rebalance the system. We lay out our main hypotheses about the links between crime wars and wrongful convictions, before offering suggestions for a path forward.

The Hypothesized Link Between Homicide Policing and Wrongful Conviction

Admittedly, it is impossible to know exactly how often our justice system wrongfully convicts individuals for murder, or any offense. Nevertheless, the available evidence suggests that wrongful convictions for murder are more prevalent than other miscarriages of justice (Gross, 1996). And misconduct by police, even if well intentioned, appears to play a significant role in this phenomenon. Previous attempts to conceptualize the links between policing and wrongful convictions have focused on the micro-level processes that contribute to these injustices—coercive confessions, faulty lineup procedures, and undue reliance on questionable eyewitness testimony (e.g., Kassin, et al., 2010; Wells, et al., 1998). No doubt each of these micro-processes facilitates police-induced wrongful convictions, as noted by Borchard (1932) some 80 years ago. The Supreme Court has also attempted to address these concerns. For example, in *Miranda v. Arizona* (1966) and subsequent cases, the Court has taken steps to limit the coerciveness of interrogations. Similarly, in *Simmons v. United States* (1968), the Court clarified some of the limitations on lineup procedures. These micro-processes are, however, mere symptoms of a broader shift in American policing over the last several decades, largely associated with the national war on crime. New organizational models have increased the demands for accountability in police agencies. Cultural and social trends have put pressure on police departments to reduce crime and respond rapidly to particularly gruesome crimes like homicides. It is in this cultural, social, and organizational environment that police officers sometimes turn to misconduct which can result in wrongful convictions.

The Hypothesized Link Between Drug Policing and Wrongful Convictions

The series of incentives discussed above that have been built into contemporary policing by the war on drugs (e.g., federal grants, asset forfeitures) may have had the unintended consequences of wrongful conviction.

Police corruption. By the end of the 1980s there was growing evidence of the pervasiveness of police corruption in connection with drug law enforcement efforts (Carter 1990). While there is no systematic data quantifying the full scale of drug-related police corruption, there have been numerous cases in cities across the U.S. including Atlanta, Chicago, Cleveland, Detroit, Los Angeles, Miami, New Orleans, New York, and Philadelphia (Office & Division, 1998).¹⁰ Investigations have found officers engaged in overt

¹⁰ Numerous media reports of drug-related police corruption began to proliferate in the late 1980s. Carter (1990) cites reports in cities including Kansas City, Detroit, Miami, New York City: ‘DEA Agents Suspected in Theft of Heroin.’ Kansas City Times (19 December 1988:A-3); ‘Seven Ex-Police Officers Indicted in Philadelphia,’ Kansas

criminal acts for private gain—taking bribes, or stealing drugs or money, for example—as well as the more pervasive problem of illegitimate means used in the pursuit of drug crime—unconstitutional searches and seizures, officers providing false testimony or false crime reports, entrapment of suspected of drug offenders, and planting drugs in drug raids.

A number of features of drug law enforcement make it particularly prone to corruption. Drug law offenses can often involve large sums of money, creating the opportunity for criminal private gain (Newburn, Webb, & Britain, 1999). More generally, the widespread and ‘victimless’ nature of drug use and drug sales makes arrests practices highly discretionary and subject to minimal managerial scrutiny. Further, the consensual nature of drug exchanges has meant officers are ‘required’ to secure information from close to the market. This may mean officers buy or use drugs in the course of their work, or rely on informants to secure information, a practice police have increasingly come to depend on despite the fact that the evidence provided by informants is often highly unreliable (Natapoff, 2009). The rise of mandatory minimums and augmented sentences for drug offenses has increased the incentives for individuals arrested for drug crimes to serve as a ‘snitches’ irrespective of the quality of information they may have; and the surge in the sheer number of drug arrests produces an expanded pool of potential informants. Unlike high-profile informant cases, the use of drug informants by local and state police is largely unregulated. Finally, the “war” rhetoric itself, in pushing a mentality that demands results at all costs, likely encourages officers to engage in unlawful, dishonest, and unreliable practices.

“Policing for profit.” Civil asset forfeiture has been implicated in numerous police abuse scandals, and, more generally, critics argue, corrupts police interests such that they actually come to have a stake in maintaining the perpetual existence of the war on drugs (Alexander, 2012). Asset forfeiture distorts police priorities by incentivizing police departments to devote manpower to drug crimes rather than serious or violent crimes. Further, there is evidence that it directly shapes how and when police make arrests. For example, Miller and Selva (1994) found officers would orchestrate drug busts in order to maximize profit by waiting to arrest suspected dealers until the end of the day when they would have depleted their drug supplies and be flush with cash. Similarly, former New York City Police Commissioner Patrick Murphy testified before congress in 1992 admitting officers routinely imposed roadblocks on southbound rather than northbound lanes to increase the probability of confiscating cash rather than drugs: “seized cash will end up forfeited to the police department while seized drugs can only be destroyed” (Blumenson & Nilsen, 1998; Roberts, 1993).

In addition to the perverting influence of asset forfeiture on police behavior, the practice serves a punitive function before there has been a determination of guilt or formal punishment. The vast majority of civil forfeiture actions—upwards of 90 percent according to some estimates (Hyde, 1995)—are not accompanied by criminal prosecution.¹¹ Given the majority of targeted individuals are low income and, if the criminal case is dropped, do not

City Times (20 July 1988:A-2); -125 Detroit Officers Suspected of Crack Ties.” Detroit Free Press (5 May 1988: 1A); ‘Drug Corruption Claims Growing Number of Miami Cops,’ Law Enforcement News (8 December 1987: 1); 400 Cases Will Be Dropped Because D.C. Cops Stole Drugs,” WA Today (17 September 1987:3A); ‘13 New York Cops Charged With Shaking Down Drug Dealers,’ The State News (7 November 1986:2)

¹¹ Until the 2000 Reform Act, the burden of showing that property or money seized was legitimately earned was the responsibility of owner.

have state provided counsel, most forfeitures, approximately 80 percent, are uncontested (Alexander, 2012).

Aggressive & intrusive policing. The war on drugs has not only provided growing opportunities for police misconduct and distorted law enforcement priorities, but, more broadly, it has institutionalized increasingly intrusive and aggressive forms of policing practices and tactics. This aggressive face of drug law enforcement is exemplified by the proliferation of paramilitary police units across urban, suburban, and even small town police departments (Balko, 2006). The police use of “Special Weapons And Tactics” (SWAT) teams began in Los Angeles in the 1960s, and spread to police departments throughout the country in the 1970s. But their initial use was reserved for highly volatile and unusual circumstances, such as cases involving hostages or hijackings. In the 1980s, the federal government began to provide local jurisdictions with surplus military equipment and federal grants to develop military-style operations for the specific purpose of conducting drug raids (Balko, 2006). SWAT teams and the use of “no-knock” and “quick-knock” drug raids became increasingly common. Even after the violence associated with drug markets had long receded, military-style policing persisted and even escalated in cities across the United States. In 1972, there were a few hundred paramilitary drug raids per year, by the early eighties there were 3,000 annual SWAT deployments, an estimated 30,000 in 1996, and by 2001, an estimated 40,000 raids (Balko, 2006; Kraska, 2005). The most common use of SWAT teams today is to serve narcotics warrants, usually by forced and unannounced entry. In some jurisdictions drug warrants are *only* served by SWAT teams or similar paramilitary units (Balko, 2006).

The enforcement of drug laws has also provided a pretext for the dramatic expansion of stops and searches. The pretense of ‘suspected drug activity’ has allowed officers to broadly target suspects, who, in most cases, have done nothing wrong. Stops are often based not on specific suspicious behavior or evidence, but rather around geographic areas or racial profiles. With few exceptions, the Court has consistently made it easier for the police to establish grounds to stop and search motorists and pedestrians. The police have thus undertaken countless searches with barely probable cause; and the great majority of those stopped and searched are young men of color.

Proliferation of low-level violations. Many have argued the police practices developed and encouraged by the drug war have distorted the nature of police work itself (Simon & Burns, 1998). Officers do not need to learn to conduct investigations or follow procedures in an environment in which street sweeps can easily turn up arrests. And even if drugs are not found, other low-level violations such as loitering or disorderly conduct can often be charged. As a result, groups of individuals are broadly and collectively punished irrespective of their individual culpability. Recent reports on the conduct of the New York City police, for example, have established the widespread practice of wrongful trespassing arrests of young men of color found in or near low-income housing projects (Gross, 2008). Many individuals are arrested in these housing projects simply because they do not have identification to present to the police when entering a building, or they are paying an unannounced visit to a friend (Fabricant, 2011). The incidents of police officer dishonesty with respect to these trespassing arrests is pervasive: officers frequently file boilerplate complaints stating the defendant told the officer he was in the building to purchase marijuana (Gross, 2008). As reported by *The Village Voice*, a judge, in hearing one of these trespassing cases, recognized the duplicity: “This court does not credit the testimony that the defendant disclosed to a person wearing a badge that he was going to buy marijuana.

[That] does not make sense” (Fabricant, 2007, 1). Many of these defendants, despite being innocent, end up pleading guilty to avoid the cost and risk associated with proceedings. The NYPD maintains that the practice of patrolling the buildings keeps drugs and drug dealing out of low-income housing. But whatever its impact on drug trafficking activity, in the process, many innocent people are arrested, charged and convicted (Fabricant, 2007; Gross, 2008).

Solutions: End the Wars on Crime and Drugs

In this chapter we have offered a historically grounded, theoretical account of how the federally mobilized long war on crime (1967- present) has substantially distorted police incentives in such a way that has likely increased the number of wrongful conviction in our contemporary criminal justice system. This distortion of incentives may well have overwhelmed improvements in representation and professional standards during the same period. Two considerations emerge from this, one relevant to political institutions and one relevant to policy.

Political scientists and punishment and society scholars have debated whether America’s punitive turn in policing and imprisonment is best seen as a consequence of the extreme degree of decentralization, or instead as a consequence of the interference of the federal government in local affairs through the war on crime and drugs (Garland 2010; Lacey & Soskind, forthcoming; Stuntz 2011). The model of wrongful conviction incentives that we have outlined suggests that the combination of the two is problematic. The federal “war on crime” has both promoted local crime politics but also helped disable traditional political checks on local criminal justice by overriding local budgeting (forfeitures) and jury trials (severe fixed sentences).

Legal scholars and criminologists have developed a strong evidence-based body of knowledge about investigative techniques that present a high risk for wrongful convictions. These scholars have also made various recommendations on procedures and techniques to help avoid these risks. An inventory of risk factors can obscure, however, the extent to which wrongful convictions are the logical result of the war on crime and the ethos and incentives it entails; not simply the product of individual failures. Furthermore, states have shown remarkable resistance to adopting even these limited protective measures, an enduring result of politics that came out of the war on crime. Given states’ resistance, the federal government may hold a key role in ending the war on crime and the wrongful convictions it produces. There is a recent precedent for such a federal role: President Obama’s Spring 2013 speech to the Naval Academy suggesting the war on terror is now over.

A political decision to end the wars on crime and drugs, whether at the presidential level or at the state and local level, should include several elements if it is to help remove the incentives for wrongful conviction that we have discussed in this chapter.

1. An end to the state of emergency ethos around violent and drug crime. Even the worst crimes can be handled through traditional criminal justice methods with a focus on solving individual crimes and prioritizing the presumption of innocence.
2. A revision of sentences extended recklessly during the past several decades in an effort to incapacitate our way out of a period of high crime. This should be retroactive. Prisons remain overcrowded throughout the country, including thousands of men in their fifties and sixties (or older) convicted of murders or other violent crimes who have now served

sentences that would meet retributive purposes around the world (20 years or more of imprisonment). Some of these are indubitably wrongfully convicted but due to features of their case or blind luck, there will never be a clear opportunity for exoneration. We need broad amnesty aimed at prisoners who have served more than twenty years (mostly without disciplinary problems).

3. Going forward we need an improved commitment and respect for the humanity and dignity of all prisoners, premised on the realization that some of them will inevitably be wrongfully convicted. The only realistic way to achieve this against the ongoing pressure of populist crime fears (a genie that will not go back into the bottle no matter how terrible the consequences of its emergence in the eyes of legal elites) is through constitutional change. The Supreme Court's recent *Brown v. Plata* (2011) invoked dignity as a determinative value in the Eighth Amendment, a trend in jurisprudence last in vogue in the period 1948-1972, but largely missing since the war on crime came to dominate American policy and politics (Simon, 2014). And while *Brown v. Plata* (2011) suggests a growing judicial readiness to protect human dignity against the pressures of populist punitiveness, the degree of inhumanity revealed in that case suggests that something legally stronger would be appropriate. Ultimately a constitutional amendment adopting Article 5 of the Universal Declaration of Human Rights ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") would be the best way to empower courts and public officials to reverse the pattern of deference to both populist driven state penal policies and dubious claims of state penal expertise that characterized the past quarter century of law and policy.

Conclusion

This chapter has sought to analyze the contributions made by the historic transformations in penal policy known popularly as the "war on crime" and the "war on drugs" to the problem of wrongful conviction. We offered hypotheses tracing the incentives that these broad political initiatives have created within the administration of justice that can produce wrongful convictions. Although we do purport to test these hypotheses, satisfying tests may not be possible given the absence of a control sample of police departments or prosecutorial offices not affected by the broad national trends we have summarized. But if our hypotheses capture important dynamics unleashed by the wars on crime and drugs, then technical solutions to the problem of wrongful conviction are unlikely to address the full scope of the problem. We recommend instead that political solutions, including a formal renunciation of the "wars" on crime and drugs, and proactive efforts to deliver relief on a systemic basis to long serving prisoners through parole consideration, clemency and retroactive reductions in sentences for whole categories of offenses where incentives to wrongful conviction were particularly strong.

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