The Adversarial Method

The scientific method for gaining knowledge about nature originated in the sixteenth century. The criminal justice system for determining guilt or innocence for those accused of crime dates back to the earliest recorded human history. The adversarial mode of a governmental trial for a defendant before a judge and jury with prosecutor and defense counsel cross examining witnesses and other evidence became institutionalized during the Middle Ages, and displaced varied practices such as trial by ordeal, oathing, revenge and retribution by kinfolk and clansmen, and compensation for damages after negotiations between stakeholders [Harold Bearman, Law and Revolution. The Formation of the Western Legal Tradition. 1983, Harvard UP]. Early on legal scholars articulated “rules for avoiding distortion and errors in the presentation and evaluation of evidence.” The role of the judge was to enforce rules for argumentation for the exclusion of superfluous, impertinent, obscure, uncertain, and implausible (contrary to nature) evidence, and similar exclusionary rules for witnesses [Bearman, p.154-155]. In the English speaking world the adversarial method for getting at the truth on crime and guilt has become embedded in powerful protections to ensure fairness, integrity, and a true verdict.

The topic is to what extent the adversarial trial delivers a true rather than false verdict, and whether the justice system corrects its mistakes and improves its performance for getting at truth. Further, how does the justice system compare to the scientific method for knowledge and truth. Two issues are of special interest. First, criminal justice institutions were designed for and evolved dealing with ordinary crime, i.e. one person committing an offense against another, or a few against one or a few, as in gang warfare. Much of the information about how the justice system functions is about such crime. How well does the system function for ordinary crime? Second, another situation occurs when agents for a large organization – prison guards in a custodial system, soldiers in a military organization, traders in a financial organization, medical trial testers in a
pharmaceutical company, builders in a construction company, operators of equipment in a polluting industry, etc. – commit crimes in the course of the operation of the organization. Discovery of facts, motives, and incriminating evidence tends to be more difficult than in ordinary crime, e.g. who actually gave orders for a massacre and what the orders actually were, and was there a massacre at all or were the bodies killed in combat elsewhere and buried in one mass grave. A further issue relates to the degree of responsibility of the agents and of those higher in authority who may have ordered them to commit the criminal acts, and whether omission, ignorance, negligence, lack of due diligence and ‘benign neglect’ and so on are mitigating factors for assigning responsibility. Another set of issues in transnational agent and organization situations concern the laws under which criminal acts are defined, who has jurisdiction to prosecute, and some other issues which don’t come up for ordinary crime.

In the U.S. the Constitution and several amendments spell out the rights of citizens in matters of justice vis a vis the power and the rights of the government [Lawrence Friedman, A History of American Law, 1973, New York, Simon Schuster, p.132]. Article One, section 9, protects the citizens against arbitrary arrest and detention by the authorities with “the privilege of the writ of habeas corpus shall not be suspended.” The fourth amendment bars “unreasonable searches and seizures” and requires the authorities to obtain a warrant for specific searches issued “upon probable cause” by a judge. The fifth amendment states that a person accused for a capital or other infamous crime shall not be held (detained) unless indicted by a grand jury, shall not be tried twice for the same crime, cannot be compelled to be a witness against himself, and cannot be “deprived of life, liberty and property without due process of law,” which referred to a trial in a court of law. The sixth amendment spells out the meaning of due process and the specifics of trial: it has to be speedy and public; an impartial jury chosen from the local citizenry; defendant must be informed of the crime he is accused of; has the right to confront witness against him; and can compel “obtaining witnesses in his favor”; and be assisted by defense counsel. The seventh amendment affirms the right to trial by jury according to the “rules of common law”. The eighth bars excessive bail, and punishment that is “cruel and unusual”, as well as excessive fines. These rights confer a formidable
protection to the citizenry in matters of justice, and specify the rules and procedures for investigation, arrest, prosecution, and punishment that must be complied with by the government. Other norms and roles not specifically covered in the constitutional amendments, such as the role of the judge, how the jury is chosen and functions, what evidence is pertinent and allowed in the trial record, the right of appeal, the mechanics of symmetry between prosecution and defense for a fair trial and so on fall under the “rules of common law” in amendment seven.

The adversarial method for establishing the pertinent facts about crime and determining the guilt of the accused rests on the conviction that for getting at truth in human affairs the strongest case for both sides should be made by advocates to a third, non-interested party that decides the truth beyond reasonable doubt (but not total certainty, which is unlikely in human affairs). According to the American Bar Association [Law and the Courts: A Handbook of Courtroom Procedures with a Glossary of Terms, 1987, Chicago, p. 12], “The best way to get to the truth is to allow all the competing parties to present their views to an impartial third party as adversaries, or opponents, under rules that permit the evidence to be presented fairly and in an orderly fashion.” For fairness, there is a presumption of innocence until guilt is proven beyond reasonable doubt. The advocates for both sides should have access to the same and all pertinent facts, should be bound by the same rules for presenting their case, and the same rules on evidence and trial procedure should be enforced by an impartial judge. Truth emerges by the vigorous scrutiny and cross examination of the material facts and human testimony, with false, unreliable, contradictory, and ambiguous evidence sorted out, conjectures based on such material becoming implausible, and the remaining robust evidence then allowing judgment on truth to be made by the jury. The interest of the prosecution to convict, and the tools it has for swaying the jury with a selective and biased presentation and arguments is balanced by the interest of the defense for an acquittal and the tools it has to point to omissions and weaknesses in the prosecution’s case.
The justice system deals with the flaws of social testing for knowledge and truth. It resists authority, i.e. the power of the state, against dictating what is the truth and compels the authorities to prove their claims in a fair match between themselves and the defendant. It creates a limited forum for decision about the truth according to specific norms that counters the biases and preconceptions of public opinion, i.e. it resists the consensus tendencies of majority opinion. Trial norms counter selection and confirmation bias because of the presumption of innocence and the symmetric presentation of both sides to the jury. Cognitive dissonance operates in the perception and evaluation of the evidence, as it does in everyday life, but it is the responsibility of the prosecutor and the defense counsel to explain to the jury about ambiguities and contradictions in the evidence and how to deal with them. Framing is set by the specific charges against the defendant, the rules of evidence interpreted by the judge and her instructions to the jury, and isolating the jury from other frames promoted in the media and by rumor and speculation. The justice system does not conform perfectly to its blueprint – no human institution does – but it has procedures for neutralizing the flaws and problems of social testing in getting at truth.

The justice system differs from the scientific method in important respects – science probes laws of nature that hold for all instances of a certain kind whereas truth about guilt has to be arrived at for a specific case; in a scientific inquiry the question is how, not why since nature has no intentions and motives, whereas in a trial, the most important issue may not be who did it, which may be known in kin and acquaintances type homicides, but why the perpetrator did it (self defense, accident, intentional homicide, etc.). Science and law nevertheless share some common dimensions when it comes to getting at knowledge and truth.

Both professions have a great deal of autonomy, i.e. scientists and the legal and judicial profession do their own internal policing, though the political appointment of federal judges, especially to the Supreme Court, has no equivalent in science. The judges however have tenure, which protects them from political and popular pressures. The state licenses lawyers who have to demonstrate competence by passing a bar exam, but the
examination and licensing process is managed within the profession itself. Scientists often work for universities where they too enjoy tenure. In some fields of science huge research funds are required which are provided by the political masters, i.e. the government through the appropriations process. The executive and legislative branch can influence the direction of research and influence the chances of success by control of the purse. That is less likely in matters of justice where changes in legal thinking and practice require modest financing: innocence projects at law schools and non-governmental organizations, Amnesty International, groups that advocate abolition of capital punishment, and the like are low budget operations compared to big science in physics and molecular biology. Within modest constraints, both science and the law enjoy a great deal of autonomy for running their own affairs.

Both institutions have norms, procedures and traditions for improving their quest for truth. Among these are objectivity, integrity, public responsibility for seeking truth, and conformity to a code of professional ethics. And both have the power and responsibility to correct errors and improve their methodology for knowledge and truth. On methods of proof – what is the truth – it is true that the justice system does not possess experimental design and replication by independent researchers in the strict sense, yet there are similarities. The facts of the case and discovery rules that make them available to both sides for probing, testing and evaluation, perform the same function as replication. The adversarial system allows the prosecution and defense both to develop a different scenario and theory about crime causation for a specific case, which is similar to alternative hypotheses about causation being tested in scientific inquiry. Finally, in a trial, the case being decided falls within a category of other similar cases that constitute what are precedents, and thus the law as argued by the attorneys and determined by the judge sets the rules based on precedent, e.g. what evidence is admissible or ruled out, and not interest, emotion, and idiosyncratic factors. Precedent is similar to replication under controlled conditions in as much as crime and prosecution for instances differing from one another in important respects, e.g. an adult and a juvenile offender, are dealt with under different rules, whereas those that are similar, e.g. a rich person and a poor person,
are dealt with under the same rules. Fairness in justice depends crucially on applying the appropriate precedents.

**Dealing with error**

In the law the major mechanism for correcting error in justice is the appeals process within the judiciary. Brian Forst [Errors in Justice. Nature, Sources, Remedies. 2004, Cambridge UP, p. 4-5] writes that “legal error is the business of appeals courts,” e.g. whether a search or a confession was proper. For improving the methodology itself, in common law, there is a tradition for changing trial procedures to changes in the wider society in order to eliminate new sources of error, e.g. what are conflicts of interest in complex corporate settings, and new modes for discovering the truth, e.g. DNA evidence. DNA evidence has been the most recent and publicized change for exonerating falsely convicted persons for murder and/or rape, but adaptation and change has been at the core of the common law for centuries. The law of evidence in eighteenth and nineteenth century in English courts kept being adapted to societal changes in order to match “manifestation of truth and exclusion of falsehood…in the system of evidence” [Christopher Allen, The Law of Evidence in Victorian England, 1997, Cambridge, p. 17]. To be more specific, at an earlier time, persons excluded from giving testimony were convicted criminals, defendants and their spouses, those having a ‘pecuniary interest’ in the outcome and those not taking a Christian oath. The Victorian judges however started excluding hearsay evidence by other witnesses “because “it would be productive of very considerable error and inconvenience …when testimony could not be tested under cross-examination.” [Allen, p. 17]. The judges also found that the practice of plea bargaining by an accomplice who was incriminating his comrades in crime led to abuses, and they created new rules of evidence requiring “corroborration of an accomplice testimony before admitting it as evidence against the accused” [Allen pp.43-46]. Still other rules dealt with the competence of witnesses, in particular whether the accused should risk cross-examination by testifying on his own behalf rather than exercising the right to silence. Based on their trial experiences, judges concluded that for discovering the truth, “without the opportunity to give evidence, an accused stood in danger of wrongful
conviction” and they accordingly changed the rules for competency [Allen, chapter 4]. What these examples show is that within the criminal justice system there was persistent concern and effort for getting at the truth by improving trial procedures.

In our own time, in the U.S., there is persistent scrutiny and legal challenges to police search and investigation of suspects, the rights of detainees, the evaluation of eyewitness identification of suspects, the government’s right to monitor information about and communication between citizens who are suspects in a variety of situations, and some of these cases percolate up to the Supreme Court where new norms are set for constraining or on the contrary increasing the authority of government and the power of its agents. These decisions balance opposite tendencies. Increasing the authority and power of government increases the likelihood of apprehending and prosecuting an offender successfully, but it also increases the chances that an innocent citizen will be prosecuted for crime and found guilty. True positives increase in crime detection, but so do false positives. The citizenry will experience diminished freedom and opportunities for holding public officials accountable. Thus protection and security from crime increase in some aspects, but malpractice and abuse in the justice system do likewise.

In conclusion, as in scientific inquiry, the justice system has a built in dynamic for detecting and correcting error and for reform of its procedures for discovering truth with a higher probability. Such an institution is a remarkable achievement in human affairs. How well the justice system performs for getting at truth and for correcting miscarriages in justice is the topic of the following sections.

How criminal justice works

Errors and abuses in justice can occur from the start of a crime investigation to the final disposition of a case with a judgment and sentence and an appeals process. A flow chart of the criminal justice system pinpoints the risks of error and abuse at each step and juncture of how a crime and suspects progress through the system [President’s Commission on Law Enforcement and the Administration of Justice, The Challenge of
Crime in a Free Society, Washington D.C., Government Printing Office, 1967, pp. 262-263]. Of one thousand felonies reported to the police, 739 result in no arrest of an offender, and 261 do result in arrest. Crimes that result in no arrest tend to be property crimes for which there are no clues. Because the police devote their energy on crimes that can be cleared and the citizenry knows the low success rate for recovering property, some property crime goes unreported unless the victim can make a claim to an insurance company. Forst [2004, p.3] calls these flaws of justice “errors of impunity” when a “culpable offender remains at large.” It usually happens because policing is ineffective, but in a few celebrity cases, one thinks of O.J. Simpson’s murder trial, the prosecution may be overwhelmed by the defense’s vast resources deployed for creating “reasonable doubt” of guilt for the jury.

The public has a distorted view of the role of police in crime prevention and detection. The police devote most of their time to maintaining orderly public places. According to a police foundation study, officers on patrol spend about half their time writing traffic tickets, investigating traffic accidents, waiting for tow trucks, investigating traffic accidents, arresting drunks, traveling to and from the police station to their “beats” and the courthouse. Another fourth of duty time is spent relieving boredom and tension – eating, resting, talking on the radio, girl watching. The remaining time the police cruise the streets and respond to calls. Police deployed in high crime places does however reduce the crime rate [Wilson and Petersilia, p.387-8]. Most of the calls about crime the police get there are no witnesses and clues, such as burglary of a house whose residents have been away. In involvement crimes where the victim has been in direct contact with the offender, a robbery, the victims or witnesses call the police too late because they are in shock or traumatized, and the trail then is cold in a matter of minutes. The police seldom actually see a crime in progress. A study in Los Angeles estimated that a patrolman could expect to witness a robbery in progress once every 14 years. Over the years police departments have tried various methods of using police more effectively in crime deterrence and detection, with but modest results. Despite public belief that the system is soft on crime and criminals, fewer than one percent of all felony arrests are dropped on legal technicalities related to the 4th Amendment exclusionary rule violations
(probable cause and unreasonable search); most of these are drug cases and involve questionable searches [Wilson and Petersilia, p.512].

The crimes that lead to an arrest tend to be so-called non-stranger (kin, friends and acquaintance) crimes, much of it violent crime. The most likely clue for arrest of the offender is identification by the victim or by witnesses, and not crime investigation by crafty detectives who diligently pursue clues and follow up interviews, as popularized in television drama. The identity of the offended is known because of the prior relationship of the victim and offender. A study of the detailed circumstances of seventy non-stranger homicides in a California city [David Luckenbill, “Criminal Homicide as a Situated Transaction” Social Problems 25 (2) 1977 pp.176-186.] found that most were escalating fights that occurred before multiple witnesses, that some knew about the problematic history of the offender to the victim, that until the final act it wasn’t clear to bystanders whether the violence would result in death and who would actually be the offender and who the victim, and that instead of restraining the adversaries some bystanders helped or verbally egged them on to more violence. In these cases, what was problematic for justice was not the identity of the offender and the victim, but the circumstances and motives (intention, self-defense), e.g. did the offender interrupt a fight (physical and or verbal) to fetch a lethal weapon from his auto for use subsequently during the final homicide act? Frank Zimring has shown that there is a great deal of overlap between fatal and non-fatal attacks, between homicide and aggravated assault. Most assailants lack a clear intent to kill, and whether and who survives a fight depends on the lethality of weapons and who strikes first [Wilson and Petersilia, p.297-8].

Of the 261 arrests out of one thousand reported felonies, 93 are juveniles sent to the juvenile system, which I am not concerned with here although it too merits scrutiny on errors and abuse. One hundred and four cases at this juncture result in no complaint or the charge is reduced from a felony to a misdemeanor. Why? In non-stranger crimes, the victim changes her mind and wants to repair or maintain relationship to the offender after the immediate danger is past, e.g. a wife who is physically abused by her husband. Or, the victim does not want the offender to do much prison time, and by plea bargaining to a
lesser offense, this goal is achieved while the police and prosecutor are satisfied for clearing the crime and saving scarce resources.

The police tends to reactive rather than pro-active in making arrests. They respond to the wishes of the community, the victims and witnesses. A study of police encounters with juveniles in the black neighborhoods of big cities [Donald Black and Albert Reiss, Police Control of Juveniles” Am. Rev. Soc. 35 (1) February 1970] found that most encounters are in response to citizen calls, that the probability of arrest is low but increases with the seriousness of the offense and direct evidence of illegal and anti-social behavior, and with the insistence of bystanders that an arrest be made by the police. It also found that juveniles who are hostile and disrespectful of the police in these encounters have a higher chance of being arrested.

The goal of criminal justice is certainty, severity and swiftness of punishment. Before formal accusation and detention for felony occur, certainty has been defeated by the high proportion of unreported and un-cleared crimes, and severity has been compromised by plea bargains and victims’ reluctance to press charges against kin, peers, friends and acquaintances. Even with the remaining cases, 64 out of 261 felony arrest that lead to a formal accusation and detention, the court system is overwhelmed and swiftness of justice becomes the third casualty.

Of these 64 felonies, 47 result in a guilty plea, which also may entail a plea bargain during which some charges are dropped in return for a less severe sentence. According to Forst [2004, p. 57] 85-90% of felony convictions are by plea bargains. The accused actually admits to crime, though to fewer or lesser than he is charged with. The criminal justice system functions to an extraordinary degree by relying on confession of crime, however it is obtained, to clear cases. Some murder and rape cases, however, are contested and at this point feed into jury trials, but only four occur out of the one thousand felony offenses reported police and the 261 that led to an arrest. An additional seven are “bench trials” when the right to a jury is waived by the defendant and the case is heard before a sitting judge. The rules of evidence are the same as in a jury trial, but
the trial is faster and less expensive and the defense believes it can make a more persuasive case to the judge than to a jury.

My examination of errors, abuses and miscarriages of justice deals only with this microcosm of jury trials for felonies in the vast criminal justice system, for which there is abundant information. For these cases miscarriages of justice can result in wrongful executions and life-long imprisonment of an innocent person. Errors and abuses of justice may be caused in a variety of ways by all the agents of the justice system. The investigation by police and detectives can be flawed by improper methods for witnesses’ identification of suspects, witness error due to faulty memory, coercive interrogation and pressures that lead to false confessions, faulty forensic techniques and sloppy laboratory work, police fabricating evidence (e.g. to make conviction likely when police are sure they have identified the offender but the case is circumstantial), prosecutorial misconduct (e.g. withholding exculpatory evidence, motivated by prosecutorial zeal and career advancement), incompetent and biased behavior by judges (e.g. about what evidence to admit and to withhold and what instructions to give to the jury), incompetence and negligence by the defense attorney, jury biases, and other causes. Of these errors, mainly errors of due process concerning interpretation, procedure and execution of the law which may result in the conviction of an innocent person, committed by the judge, become the business of the appeals court to review and overturn when an error has been made. Much less information is available on other than due process errors, even for the microcosm of death row murder convictions and wrongful executions that have been carefully researched and/or reconsidered by the courts.

The amount of error is considerable, even allowing for inevitable error and flaws in all human institutions. One study looked at all the exonerations for those sentenced to death from 1973 to 1989, and found that these 124 cases are 2.3% of all death sentences. Another study examined false rape and false murder convictions that were exonerated between 1983 and 2003. Of the 205 murder exonerations, there was eyewitness misidentification in 50% of cases, false confessions in about 20%, and police and prosecutorial misconduct (e.g. perjury about the evidence) in another 56%. [Samuel
Gross and Barbara O’Brien “Frequency and prediction of False Conviction: Why We Know so Little, and New Data on Capital Cases” Social Science Research Network, September 2007]. A study of the forensic evidence from the State of Virginia police laboratory found one lab analyst had misidentified 6% of his cases which then resulted in wrongful convictions. A two year National Academy of Sciences study on forensic evidence that helped convict defendants found that forensic methods the police and prosecutors rely on use shoddy and questionable scientific practices for finger printing, firearm identification, analysis of blood spatter, hair and handwriting, among other deficiencies [NYT, 2/5/09, “Science found wanting in nation’s crime labs”].

On sources of error, offenders, juries, witnesses and police on patrol have been far more studied than judges, prosecutors and detectives who investigate crime. The Chicago Jury Project at the University of Chicago, funded by the Ford foundation, has researched and written about jury perceptions and behavior for several decades. Much of the findings are summarized in Harry Kalven and Hans Zeisel The American Jury (1966). There now exists a thriving jury research services industry that conducts mock jury trials and informs about how age, race, gender, education, and other factors influence jurors on partiality to various types of defendants, arguments, size of awards for damages, disposition to convict, actively participate in jury deliberation, and many other findings that have a bearing on jury selection. The more senior and powerful the agent within the criminal justice system, the less information exists about their behavior, including incompetence and malfeasance, and the greater the obstacles to rectifying error and assigning responsibility. That is also the case for other large organizations, be they business, governmental, military, educational, or religious. For the criminal justice system, the agents whose actions and interactions are likely to be responsible for a miscarriage of justice – detectives, forensic scientists and technicians, prosecutors, defense attorneys, are not much researched, nor scrutinized and held accountable for some of their actions, compared to enormous research on crime and criminals. For the public, crime dramas in the mass media and from high profile court cases create the illusion that they know how the system operates. There is more research on making the
criminal justice system more efficient than on reducing miscarriages by reforms rather than simply appealing cases of error and injustice one at a time in the appeals process.

**Miscarriage of Justice: the Norfolk Four**

For understanding how the constitutional and legal protections of citizens against the state’s power can be circumvented in actual crime prosecution resulting in wrongful convictions for murder, there is no better case to examine than that of the Norfolk Four. Every conceivable factor that contributes to miscarriages of justice has been richly documented for Norfolk by police and court records, research by experts, and numerous investigations by news people in all the media [Tom Wells and Richard Leo, *The Wrong Guys. Murder, False Confessions, and the Norfolk Four*, 2008, New York, New Press; Alan Berlow, “What Happened in Norfolk” *NYT Magazine*, August 19, 2007]. After a lot of information had surfaced over the years, on November 10, 2008, thirty FBI agents stated that their careful review of the evidence led to the conclusion that the Norfolk Four were innocent and had been wrongfully convicted, and called for the Virginia governor to grant immediate pardons. Earlier, in January 2006, 13 jurors from two trials signed letters and affidavits saying they now believed the men were innocent. Others who supported a pardon for the four convicted sailors were four former Virginia attorneys general, twelve former state and federal judges and prosecutors and a past president of the Virginia Bar Association [“Retired FBI Agents Join Cause of 4 Sailors Convicted in ’97 Rape-Murder” *NYT*, 11/11/08]. On August 6, 2009, Governor Tim Kaine issued a conditional pardon to the three sailors who were serving life sentences. They were released from prison [NYT, 8/7/2009] because “they had raised substantial doubts about their convictions and the propriety of their continued detention.” How can this be?

The bare facts of the case are the following. The principal actors in this drama were the victim, Michelle Bosko, recent bride of a sailor, raped and murdered with multiple knife stabs one night in 1997 in her apartment in Norfolk while he was at sea on his ship; a number of Norfolk police detectives, and foremost Robert Glenn Ford, a 29 year police veteran; Virginia Commonwealth prosecutors D.J. Hansen and Valerie Bowen; Circuit
Court Judge Charles Poston; seven young white sailors arrested sequentially for the crime when there was no DNA match to the prior arrested suspects, and none having prior crime records (Daniel Williams, Joe Dick, Eric Wilson, Derek Tice, Geoffrey Farris, Rick Pauling, John Danser), and a black man, Omar Ballard, already serving a prison sentence, who had a violent crime record including assaults on women. Except for Ballard, there was no DNA match to the accused on semen found on the victim or any other physical evidence such as blood stains and fingerprints at the crime scene.

After lengthy interrogations, Williams, Dick, Wilson and Tice confessed to the murder and rape (Wilson only to rape), which they later insisted were coerced and tried to withdraw. Yet Williams and Dick were persuaded by their defense attorneys and the prosecution to accept a plea bargain and avoid the possibility of death penalty in return for admitting the crimes and serving life sentences. Dick had an airtight alibi. Wilson was found guilty of rape in a jury trial. Tice withdrew his earlier plea bargain, went to trial and was found guilty by a jury. He appealed, the Court of Appeals granted it, but he was convicted again in the retrial by a jury. Farris, Pauling, and Danser had airtight alibis, but were nevertheless arrested and kept in detention. Though their cases were eventually dropped by the prosecution, it was not on account of the alibis, but because the prosecution did not think Dick’s testimony about their participation in the crime would be plausible to a jury [Tom Jackman, The Washington Post, November 10, 2005].

Except for Farris, the detectives persuaded the suspects to waive their right to remain silent and have a lawyer present. The confessions were obtained and signed after seven to fourteen hours of grueling interrogations during which the detectives deceived and lied about incriminating evidence they made up and polygraph tests that the suspects had flunked when in fact they hadn’t. They bullied and threatened the suspects about avoiding the death penalty by confessing and plea bargaining for a life sentence. The confessions did not agree with one another on who was present at the crime and how it was done. Despite a lot of coaching and coaxing by the prosecution to change their stories, the suspects final confessions did not fit the physical evidence of the crime scene (where the killing occurred, where the knife was found, absence of blood stains, etc.). There was
only one match of all incriminating evidence to a suspect: Ballard, his DNA, and his confession. Ballard never mentioned any of the other seven as accomplices, and insisted he had acted alone. Ballard’s admission did not stop or slow or suspend the prosecutions and convictions against the others. The police and prosecution had a theory about the crime that kept being contradicted by facts such as DNA evidence. Instead of entertaining alternative theories, they amended and supplemented their theory with ever more unlikely contingencies: thus one original perpetrator and suspect grew into eight accomplices to murder.

In subsequent interviews by researchers and journalists, the detectives and prosecutors denied any wrongdoing and have insisted all along that they had arrested and prosecuted the actual offenders. To others, the Norfolk Four is a massive failure of the criminal justice system. The accused were ordinary sailors without an arrest record. The Bill of Rights safeguards did not work for them [Lawrence Friedman, A History of American Law, 1973, New York Simon Schuster, pp 131-134]. Amendment 4 about the right of people to be secure in their persons…against unreasonable searches and seizures was repeatedly violated, as was the probable cause requirement for a warrant describing the person to be seized. The detectives had no probable cause for interrogating any of the seven sailors and for arresting them; each time they went on a fishing expedition, and each time the incriminating evidence was fabricated during coercive interrogation. The detectives brought the sailors to a voluntary interview for seeking information on another suspect. They got them to sign waivers of their Miranda rights on remaining silent and on the presence of legal counsel by treating it as a minor bureaucratic formality and without the sailors knowing they were a suspect. The police then transformed the interview into a coercive interrogation to extract a confession.

To make the suspect sign the confession, the detectives led the sailors to believe they would avoid the death penalty in return for a life sentence. They actually structured the future plea bargain that would be formally negotiated in the preliminary hearing. The interrogations made a mockery of a suspect not being compelled to be a witness against himself in Amendment 5. A coerced false confession is precisely making the accused
testify against and incriminate himself. Prohibitions against coercive interrogations and sleep deprivation did not stop the detectives. Prohibitions for threatening the death penalty and promising lenient treatment to suspects by police during interrogation for making them confess in the expectation of a plea bargain were ignored. Amendment 5 on indictment by a grand jury was bypassed, with a preliminary hearing between the accused, the prosecution and the defense counsel consolidating the plea bargain the detectives structured. This is not unusual. According to Brian Forst [Wilson and Petersilia, 2002, p.51], “For every felony case that a judge presides over in a trial, the prosecutor decides the fate of fourteen adult felony cases brought by police.” A flow chart of the disposition of felony arrests in the U.S in 1996 omits a grand jury stage altogether. Thus a grand jury and trial jury who protect the accused in Amendments 5 and 7 against being railroaded by the state into a conviction were bypassed, except for Tice. Lack of DNA match and airtight alibis did not stop the prosecution. Lack of evidence actually worked against the suspects because, to make up for it, detectives fabricated evidence through false confessions and charging additional accomplices. Lack of evidence actually increased prosecutorial zeal for pressing the cases rather than slow them down.

Pertinent information about coercive interrogation and false confessions was not made available to the Tice jury (e.g. detective Ford’s prior record of obtaining false confessions was excluded by Judge Poston). As can be inferred from their actions, research findings on coercive interrogations and false confessions were irrelevant for or ignored by the principal stakeholder and bystanders, prosecutors, judge, jury, reporters, public opinion, even the defense counsels, until after the entire case for the prosecution unraveled.

**Why Safeguards against Miscarriages of Justice didn’t Prevent It**

Let’s be specific about the major safeguards for protecting the innocent in a trial. How did the interrogating detectives get the sailors to waive their Miranda rights? The officers pretended that the sailor would be questioned briefly about what they knew about other suspects and did not realize they were themselves suspects being questioned. Williams was told that he simply had to give some information, he was not guilty, and did not need
a lawyer. Signing the waiver was just a minor bureaucratic detail for questioning him at the police station. He said later “I was there under the pretense that they just wanted to get information… I had nothing to hide and had done nothing wrong.” [Wells and Leo, p.19]. The deception worked, and worked for the other sailors as well. A major safeguard is circumvented. None of the sailors had a lawyer present when they were interrogated and made the false confessions.

Was there probable cause for questioning and arresting suspects? A confidant of the victim mentioned that Williams, a neighbor, was “sweet on Michelle.” There was no physical and any other evidence. Five month later, the DNA from the crime scene does not match Williams. The prosecution looks for an accomplice. Dick was Williams’ roommate and must have known something about the crime. He is brought in for questioning and becomes a second confessed murder. Aside the subsequent false confession there was no probable cause. Dick’s DNA also is a no-match. The detectives go on another fishing expedition. They get a jailhouse snitch to be Dick’s cell mate. He reports to police that Dick is angry at another sailor, Wilson, but can’t tell why. Wilson is brought in for questioning, and the same interrogation techniques produce a false confession. Prior to his confession, there was no probable cause for questioning Wilson. Wilson’s DNA does not match either. The police pressure Dick for the names of other accomplices. He now admits six accomplices but is vague about who they are. Police draw a sketch of a hypothetical fourth killer, and the detectives make Dick look through the photos of crew members of the U.S.S. George Washington. Dick picks out Tice, a fellow sailor whom he had known. That is all there is to probable cause for Tice, who lives in Orlando and is extradited from Florida [Wells and Leo, pp.66-71, 92-102, 125-130]. And so it goes for the other suspects.

How were the false confessions obtained? Williams was interrogated from 6 pm to 6 am the next day, almost continuously by a team of detectives. He suffered from sleep deprivation, felt isolated and exhausted and trapped, and ended doubting his memory when the police deceived and lied to him repeatedly: an eyewitness saw him leave the victim’s apartment, he had flunked the lie detector test, his fingerprints were found on the
scene, etc. None of that was true. In turn he was reasoned with, yelled at, bullied, subject to a good cop, bad cop routine, and other techniques for getting admissions described in police manuals. The trap was set. Detective Ford convinced him there was only one way to avoid the death penalty, and that is to confess to the murder and rape in exchange for a life term in prison. By and large a similar interrogation routine was used to obtain all the false confessions. Joseph Dick later told a reporter “I know you’re not going to believe this, it did not cross my mind that I was lying (about the false confession); I believed what I was saying was true…They messed up my mind and made me believe something that wasn’t true” [Berlow, NYT, 8/19/2007].

Alan Berlow [NYT 8/19/07] writes about police interrogations that “[it] is designed to be stressful and disorienting and to keep the suspect off-balance. Guilt is frequently presumed. Police may legally pressure suspects using fabricated evidence, phony witnesses, and lies about DNA and polygraph results.” Research on false confessions [Richard Leo and Steven Drizin, “The Problem of False Confessions in the Post-DNA World” North Carolina Law Review 82 2004]] indicates that in exonerated murder cases in which false confessions were obtained, the police seek incriminating statements from suspects they think are guilty, and not evidence about the entire truth. Police techniques induce isolation, fear, powerlessness and hopelessness in the suspect. They manipulate the suspect by deception and lies, e.g. by telling the suspect the evidence against them is overwhelming, when in fact it is not so. They try to obtain a confession by telling the suspect his fate is sealed, and there are advantages to confessing, e.g. the killing may be framed by his lawyer as “self-defense.” All of it is untrue. In 20% of exonerated murder (205 cases from 1989 to 2003) researched, false confessions were made. Leo and Drizin (p.921) write that “With the exception of capture during commission of crime, a confession is the most incriminating and compelling evidence the state can bring against a defendant.” Other research on exonerated murder convictions indicates that false confessions, eyewitness misidentification, and perjury by police officers, forensic scientists, informants (snitches), and co-defendants causes of wrongful conviction. They estimate that 2.3% of death sentences are wrong [Samuel Gross and Barbara O’Brien
“Frequency and Prediction of false Conviction: Why We Know So Little, and New Data on Capital Cases” SSRN, Sept. 2007].

The Norfolk Four is but one of many notorious convictions based on false confessions. In Six men and a woman confessed to the murder and rape of a 68 year old woman in 1985 in Beatrix, Nebraska. Five defendants pleaded guilty, and four falsely confessed. Some years after an aborted initial investigation, the county sheriff reopened the investigation and came up with a fantastic theory about six accomplices whose original motive was robbery, although $1000 in cash was found on the premises. There was no physical evidence and no DNA matches to the suspects. The police threatened them with the death penalty unless they confessed, and got them to plea bargain. The police fed details of the murder and rape to the suspects to make the confessions credible. In a deception technique known as “evidence ploy”, the suspects were falsely told that the others had implicated them. A female suspect who did not remember being at the crime scene was “helped” by a psychiatrist to “recover” her memory about being present. The police obtained four confessions, six convictions, five of them by plea bargains. The lone defendant who took his case to trial lost. For the jury, confession overruled the rest of the shaky case. The FBI at the time believed the offender was a lone male who had perpetrated similar attacks in the same neighborhood, and that proved to be correct. In 2002, a successful DNA match was made to an Oklahoma man who had meanwhile died. The lower courts denied the six convicts a DNA test to prove their innocence, but the Nebraska Supreme Court overruled that decision. DNA evidence exonerated all of them. Five were pardoned by the State Board of Pardons and the sixth was exonerated [http://standdown.typepad.com/weblog/2009/01/the-beatrix-six.html].

In the Central Park jogger case, a female jogger in April 1989 was raped, sodomized, beaten, severely wounded, and lost her memory of the assualt. The police got five members of a teenage gang, aged 14 to 16, who had a previous record in Central Park assaults, to falsely confess and five were convicted. There was no DNA match from suspects to the victim, nor was there any physical evidence such as blood or pieces of clothing, even though was gang assaulted and raped in a muddy park ravine by the five
suspects. There were inconsistencies in the suspects’ confessions. The prosecution claimed that the DNA tests had been inconclusive because the samples were of poor quality. An FBI expert testified however that the tests were absolutely conclusive in ruling out the suspects. They confessed to the crime on video, but later claimed that they had been coerced and deceived into confessing, e.g. they were falsely told that the other suspects had implicated them and that their fingerprints had been found at the crime scene. As in Norfolk, only the confessions were videotaped, and not the interrogations. In the racially charged New York City atmosphere, the news media and public opinion were convinced of the defendants’ guilt and backed a rush to judgment. In January 2002, a notorious serial rapist in the Upper East Side admitted he alone had been the rapist, and his semen had a DNA match to the victim that confirmed his confession. According to reporter Sydney Schanberg, District Attorney Robert Morgenthau recommended vacating the sentences, which was done by Justice Tejada of the New York State Supreme Court. For rectifying a miscarriage of justice on his watch, Morgenthau got criticized by prosecutors in his own office, New York City detectives, the Police Commissioner, and others within the criminal justice system [www.villagevoice.com/2002-11-19/news].

The Norfolk Four prosecution fits into the same pattern of miscarriage of justice as occurred in the Beatrix Six and the Central Park Jogger. In Norfolk, the detectives had an explanation for the discrepancies between the confession story and the crime scene evidence. Williams was lying about how he had killed Michelle [Wells and Leo, pp. 30-37]. There were complications with the subsequent sailors because those previously arrested did not mention them as accomplices, and with every confession more and more discrepancies surfaced about who was present at the crime and how the crime occurred [“Confession and Evidence Comparison Chart”, www.norfolkfour.com, pp. 1-7]. The detectives however kept going back to the sailors and pressured them to modify their confessions for greater agreement, by threatening to withdraw the plea bargain and thus also reopening the possibility of death penalty, unless the sailors told “the truth”, which actually was the prosecution’s version of the truth. Nevertheless glaring discrepancies remained and police never succeeded in fully coordinating the confessions.
Just as important for lack of accountability of the police, the interrogations were not recorded, audio or video, except for the final version of the confession that was signed by the sailors. The only evidence of the interrogations were the detectives’ notes, which the prosecution kept withholding from the defense for the longest possible time. Detective Ford’s past record for obtaining false confessions was kept from the Tice jury by Judge Poston’s exclusionary ruling: it was an “extraneous” issue. The judge also refused expert testimony on police interrogations and false confessions that the defense wanted the jury to know [Wells and Leo, p.226-228]. He also excluded such expert testimony in the Tice retrial [Wells and Leo, p.237-242].

There was thus no accountability for the interrogations used by the detectives for obtaining confessions, nor for other methods for conducting their investigation. Two Freedom of Information requests for police records on the Norfolk Four were turned down by Norfolk’s assistant city attorney [Berlow, NYT, 8/19/2007]. The lack of DNA evidence puzzled the prosecution. Rather than rethinking their views about how the crime occurred, they kept adding other suspects until they had eight accomplices perpetrating a gang-style rape and murder. The later suspects were arrested on the flimsiest link to the others, e.g. they had been shipmates or drinking companions. The larger the number of suspects, the more impossible it became to match the crime scene evidence to the different stories and the physical facts. But the prosecution managed to deal with such mismatches thanks to a ruling by Judge Poston in the Tice trial that excluded a wooden model of the bedroom and hallway and various photographs of the crime scene layout. The jury was thus kept from visualizing the implausibility of eight accomplices perpetrating the violent crimes and moving the body of the victim around in a small apartment with narrow hallways without disturbing anything and leaving fingerprints, saliva, blood stains, and shoe prints on a recently polished floor [Wells and Leo, p.224-228].

Airtight alibis are supposed to be a safeguard against arrest and indictment. In the Norfolk case it did not work out that way. Dick told his interrogators that he was on board of the U.S.S. Saipan at the time of the crime. Navy Petty Officer Ziegler had
assigned him to duty on the ship from 7:30 am of the day of the crime to 7:30 the following day. Several roll calls were made. Ziegler said that there is “no doubt in my mind he was on duty that night”; it was “virtually impossible for Dick to sneak off, commit the crime and sneak back on board” [Wells and Leo, pp. 70-77; Berlow]. Ziegler was astonished about Dick’s confession and concerned that Dick had been railroaded. He reported it to his commander, but was told it was a civilian matter. Ziegler followed the chain of military command, and Dick’s alibi got stuck. The police never checked the alibi with Ziegler and the Navy. Prosecutor Hansen did not investigate the alibi either: “We don’t go out and research people’s alibis and where they possibly could have been…” [Berlow]. Incredible as it may seem, Dick’s lawyer did not check the alibi either. Because of the confession, he believed his client was guilty, and that was that: “It was clear he (Dick) was not on duty,” he later told a newsman [Berlow]. The Navy does not keep indefinitely “muster” records which recorded Dick’s roll call. As the case progressed over the months, they were no longer available. Because Dick was never tried – he plea bargained – the prosecution did not have to produce documentation about its claim that Dick was not on board the ship. Ziegler later told a reporter “My biggest mistake was I trusted that the justice system was going to do the right thing. I couldn’t conceive that someone who was obviously innocent was going to go to jail. That is where I was wrong” [Berlow].

What of the other alibis? Tice had fingered Pauley as an accomplice. Pauley had placed a phone call to his girlfriend in Australia from his parents’ phone starting at 11:05 the night of the murder lasting three hours, confirmed by phone records, and then went to his night job at a motel six miles from the victim’s apartment. Prosecutor Hansen reacted by changing the time of the attacks – could have been as late as 2 am – and conjectured that the attackers came and went throughout the night. As for the phone call Hansen speculated that Tice could have dialed and left the phone off the hook [Wells and Leo, pp. 159-160]. Danser, also fingered by Tice, was arrested by detective Ford in Pennsylvania. He was not in Norfolk at the time of the murder. He had a worksheet from his employer showing he finished a job at precisely the time Tice claimed him at the victim’s apartment, and he also had an ATM receipt from a bank in Warminster PA – three
hundred miles from Norfolk - showing a withdrawal ten minutes after Tice claimed he had left Michelle’s apartment. At Danser’s indictment in Norfolk, Hansen argued that time sheets and credit card records are “hearsay” documents. Even for Judge Poston this claim was incredible: “You don’t believe this man was there (at the crime scene), do you?” Hansen replied “The commonwealth takes the position that he was there.” [Wells and Leo, p. 177]. Credible or not, the prosecutions against the three sailors who had airtight alibis went ahead. Had Hansen credited Pauling’s and later Danser’s alibi, Tice’s confession would have been in doubt and the case against all the defendants would unravel. There were no DNA matches, no physical evidence, only the confessions that the defendants claimed had been coerced and were false.

A final safeguard, one would think, is when the actual offender (Ballard) is identified, confesses, and there is a DNA match and the crime scene agrees with his confession, and he claims he acted alone, the prosecution would halt, drop or at least reexamine its case against the other defendants. In fact nothing of the sort occurred. The prosecution added Ballard to their theory as an accomplice, pressured some of the defendants to change their confession about Ballard being their accomplice (by threatening to withdraw their plea bargains, which reopened the risk of the death penalty), claimed that Ballard did not mention the others because he was protecting them, pressured Ballard to change his confession to include some of the others as accomplices (again, to escape the death penalty), and would have three juries believe that a convicted black felon with a history of violent crime and of attacking women somehow persuaded seven white law abiding sailors who did not know him to join him as accomplices in the rape murder.

Hard to believe, three separate juries bought the prosecution theory. Equally hard to believe, some pertinent facts that might make a juror skeptical of the prosecution’s case were not brought to the jury’s attention. One juror on the Tice jury followed the Norfolk Four as they became publicized and concluded that most of the facts that would throw a reasonable doubt on Tice’s guilt were not presented to the jury at his trial. She later stated in an affidavit that “many people who were entrusted with investigating and finding the truth…apparently went out of their way to cover up the truth, interfere with witness
testimony and mislead the jury.”


Deeper Causes for the Miscarriage of Justice

Analysts of the Norfolk miscarriage of justice concluded that ruling out the possibility of false confessions was critical for the prosecution’s case: “a confession is usually the kiss of death for a criminal suspect” [Wells and Leo, p. 151]. Confession spells guilt for the jurors, judicial officials, the public, the media, and in the Norfolk Four prosecutions, even for the defense attorneys and the judge, whose actions assumed that the defendants were guilty or would be found guilty. When the suspect confesses, unless he is mentally retarded or a juvenile, the justice system operates under the assumption of guilt, not innocence until guilt is proven. The bill of rights protections assuring a vigorous adversarial confrontation of the defendant with the state in a fair trial gets sidetracked as the police, prosecution, defense counsels, judge, and in the end the defendants themselves collude in constructing a legally acceptable conviction that is in the interest of all. That process is at the heart of miscarriages of justice.

The Norfolk case is the very negation of how the scientific method and the adversarial system protect their integrity in order to get to knowledge and truth. Instead, the flaws of social testing fully penetrated and polluted the criminal justice system. Social testing is characterized by consensus seeking among the stakeholders rather than truth seeking. There are career and advancement interests for the stakeholders to cooperate instead of being adversarial, to the detriment of the defendant. Group think prevails rather than different theories and explanations debated by adversaries confronting evidence. Selective use of evidence and confirmation bias create false positives; negative evidence is omitted and ruled out. The suspect is framed “guilty” from the start rather than assumed to be innocent until guilt is proved. Accountability is problematic. Shoddy performance is overlooked and malfeasance remains undetected. The top officials protect the lower ranks, or else exercise “benign neglect” rather than “due diligence” over the organization. The insiders fend off outsider scrutiny and criticism. Those are the flaws of
social testing for getting at knowledge and truth, and these flaws penetrated the justice system in Norfolk.

The Norfolk prosecutor D.J. Hansen remarked that “[Confession] is the most overwhelming piece of evidence in any case; everybody lives for a confession…That is the best evidence that a prosecutor presents” [Wells and Leo, p.45]. A coerced confession is not necessarily a false confession, but confessions should be confirmed by other independent evidence. There was none in the Norfolk Four. That is why the prosecution desperately kept looking for more evidence, and the only source was more false confessions from more suspects. Defense lawyers knew how compelling confessions were. They joined the prosecution in pressuring the sailors to accept plea bargains, as it turns out for crimes they did not commit. “It is very difficult even for lawyers to understand why you falsely confess” explained one of the lawyers for Williams [Wells and Leo, p.43].

Mock jury trial research found that confessions have a greater impact on jurors than eyewitness and character testimony. Other research found that jury’s convict 81% of false confession defendants [Wells and Leo 152-53]. Prosecutor Hansen told jurors in Tice’s retrial “that people just don’t confess to something of this magnitude, this heinous, this vicious, without having participated in it. It’s just not natural; it’s just not reasonable.” [Berlow]. Judge Poston disregarded the possibility of false confessions in the Norfolk case. When Williams’ attorney motioned to withdraw Williams’ plea after Ballard had confessed to being the lone murder rapist and because he had confessed believing it was the only way for him to avoid the death penalty, the judge refused the motion because “I don’t see this new evidence as a defense to his case…Williams’ plea ‘had been voluntarily and intelligently made.’” [Wells and Leo, p.206].

Research shows that for competent adults, a confession closes the investigation for police. It clears the case, period. No effort is made to pursue other leads, even if the confession is inconsistent and contradicted by other evidence [Richard Leo and Steven Drizin, “The Problem of False Confession in the Post-DNA World” North Carolina Law Review 82
(2004)]. To overturn a false confession, the defense has to prove the crime did not happen; the defendant physically could not have been at the crime e.g. airtight alibi; the true perpetrator is found guilty (e.g. a DNA match); and scientific evidence, e.g. DNA, establishes the false confessor’s innocence. In the Norfolk, three out of four reasons were discounted because of the hold of the “confession frame” on judicial officials, police and the public, who typically don’t believe or don’t know the research on coercive interrogation and false confessions [Daniel Medwed, “Up the River Without a Procedure: Innocent Prisoners and Newly Discovered non-DNA evidence in State Courts” 47 Arizona Law Review 655 (2005)]. That research shows that sleeplessness, confusion, isolation, feeling trapped, fear, manipulation, deception, lying, threats, and memory confusion during hours of relentless interrogation breaks down some people and makes them falsely confess [Richard Ofshe and Richard Leo, “Psychology of False Confessions” and “Social Psychology of Police Interrogations” Studies in Law, Politics, and Society 16 (1997)]. In Norfolk, the detectives scored four out of seven. The public and the jurors’ frame about police interrogation is “interviewing” so long as no physical torture has taken place. The benign view of the investigation of suspects is accepted because coercive interrogation is hidden from view, as in Norfolk where no visual or audio records were kept. Without a video record, the prosecution contests coercive interrogation with “he said, she said” contradicting testimony for the jury, with the detectives insisting they did it lawfully and the defendant claiming coercion.

Miscarriage of justice occurs when the culture of criminal justice is contaminated by social testing. Despite the adversarial process that ought to give the suspect the benefit of doubt – innocent until proven guilty, and proof beyond reasonable doubt - police, prosecutors, defense attorneys, even the judge, believe that the suspects are likely to be guilty, based on their long experience in the criminal justice system dealing with low class, violent, young, minority, male criminals who fight, assault, rob, rape and murder. What if the detectives cut corners in interrogations? They do it for a good cause, i.e. getting yet one more dangerous offender behind bars in this crime riddled society. The defense counsels are quick to advise a plea bargain to their clients because they believe they are in fact guilty. The whole criminal justice system operates on plea bargains for
felons, and not on jury trials. Plea bargaining makes no sense unless one assumes the suspect is guilty of crimes, though not necessarily all those that are charged nor those that can be proven beyond reasonable doubt. Some courts become basically a conviction factory by plea bargain.

In the permanent and relatively closed community that is the criminal justice system in a particular locality, the stakeholders know each other intimately over the years and have an interest in cooperation and reciprocity rather than adversary conflict: the detectives clear cases, which makes their performance look good; the prosecutors get many convictions, which advances their careers; the judge gets reelected because he protects the public; the defense attorneys play along and get to make advantageous plea bargains for their clients; the defendant gets a lenient sentence and will be out on probation before long. The state saves huge expenditures it would need to invest in criminal justice with fewer miscarriages of justice. The stakeholders operate in trust relationships. Each does her role and assumes the others by and large do the same. Informal favors that are reciprocated simplify and speed everyone’s work and makes them look better. Probing, prying and criticizing one another creates more problems and work for all. If the prosecutor leans too heavily on how the detectives get evidence, they can make his work more difficult and his record for success will suffer. If defense counsels don’t play ball, information they need for the defense which they are entitled to obtain becomes harder and more expensive, depending as it does on the discretion of other stakeholders. Judges are supposed to be the vigilant gatekeepers who ensure that none of this happens, yet experience shows that judges too can be co-opted into the culture.

There did not have to be a conspiracy and cover up by the stakeholders to perpetrate and mask the miscarriage of justice in the Norfolk Four cases. The stakeholders simply had to perform their roles as they routinely did, with mistakes, omissions, negligence, partiality, incompetence, and other common flaws cumulatively churning out the wrongful arrests, coercive interrogations, false confessions, plea bargains and wrongful convictions. There was nothing to prevent it.
Accountability could have stopped the miscarriage of justice, but there was little accountability in the criminal justice culture. According to Brian Forst [Wilson and Petersilia, p. 520, p. 526, p. 535] “The prosecutor is insulated by the virtual absence of a system of measured public accountability in most states… the prosecution culture remains resistant to accountability and fundamental reform… Prosecutors’ day-to-day operations remain absent from public view. Much of the prosecutor’s work remains subject to abuses of discretion.” That was the case for the Norfolk Four prosecutions. The detectives and especially the senior detective Ford could got away with coercive interrogation and extracting false confessions with impunity. He has since retired. The prosecutors entertained fantastic and convoluted theories about the crime and no one stopped them, not even common sense and the lack of evidence. D.J. Hansen still serves in the Chesapeake Commonwealth Attorneys Office and is Special Assistant U.S Attorney. Citing recent instances of prosecutorial abuse and overreach, including obstruction of justice and deliberately withholding exculpatory evidence, a former attorney general of New Jersey called for the vigorous enforcement of statutes against prosecutorial excesses [John Farmer, NYT 4/3/2009].

Judge Poston made quite damaging exclusions in the trials that would have helped the defendants, and approved plea bargains that looked untruthful, yet he is still a judge on the Norfolk Circuit Court. Poston was reversed on appeal for Tice for errors by the Virginia Appeals Court, but was then assigned to the Tice retrial where he again excluded evidence damaging to the prosecution (e.g. detective Ford’s record on extracting false confessions). The Virginia attorney general, Charles Griffith, did not intervene in the Norfolk cases, except in one important instance when he told Hansen to prosecute Danser despite his airtight alibi. In other organizations, such as the military, superior officers have command responsibility for their subordinates’ actions. Griffith apparently did not labor under such a burden. He has since become a circuit court judge. The Virginia Supreme Court, on January 11, 2008, reversed Appeal Court Judge Everett Martin’s ruling vacating Tice’s conviction, because they didn’t believe that the accumulated new evidence from Ballard’s confession and conviction and contradictions in the other confessions had invalidated Tice’s conviction [Wells and Leo, p. 273]. By this time, the
Norfolk Four had achieved national notoriety and FBI agents, jurors, and Virginia judicial officials had all expressed their deep concerns about wrongful convictions.

**Remedy and Reform**

Unlike Nebraska and New York where remedy for the miscarriage of justice eventually came from within the justice system, this was not to be for the Norfolk Four in Virginia. Remedy had to come from without: a vigorous innocence project and petitions to the governor for pardons. On August 6, 2009, Governor Tim Kaine gave the three sailors serving life sentences a “conditional pardon.” Kaine stated that “the petitioners have not conclusively established their innocence, and therefore an absolute pardon is not appropriate.” [NYT 8/7/2009]. An absolute pardon would blemish the entire Virginia justice system, from bottom to top, from police and detectives to sitting judges, due to incompetent, irresponsible, and quite possibly negligent, unethical, unprofessional and illegal behavior.

As for legal remedies, George Kendall, the head of the innocence project in the Norfolk case and a very experienced criminal lawyer, stated after his team scrutinized every aspect and detail of these cases that in Virginia “there is no judicial remedy…once you get convicted, the legal remedies are nearly nonexistent” [Wells and Leo, pp.259-261]. Virginia’s innocence statute is very narrow: newly discovered evidence has to be biological, which ruled out Williams and Dick. The prosecution is more concerned with making the conviction stick than uncovering the truth. Correcting errors takes time, hurts reputations and “resisting post conviction claims of innocence…is the cultural norm.” Pardon is a possibility for remedying a miscarriage of justice, but governors do not want to be soft on crime. Law professor Daniel Medwed [“Up the River without a Procedure: Innocent Prisoners and Newly Discovered non-DNA Evidence in State Courts” 47 Arizona Law Review 655 (2005)] agrees that post conviction remedies are designed to address only legal errors and constitutional issues, and that newly discovered evidence based on fact does not fit post-conviction relief. States offer some options on habeas corpus and “writ of error” grounds, but such evidence has to meet many tests, procedures
are burdensome, access to the courts are difficult. In the Tice case, the Virginia Supreme Court held that the test was not met. Kendall holds that innocence projects need huge attorney time by very competent lawyers huge resources, much determination, and patience for success. Realistically only a small fraction of wrongful convictions will have access to them.

The dilemma of how to correct mistakes in justice is clearly stated by Robert Ferguson [The Trial in American Life, 2007, Chicago, p.131: “the problem of appeal is how to avoid doing everything over again, yet correct the mistakes of lower courts.” There must be finality in the appeals process. The remedy for miscarriages of justice is to stop the chain of errors and abuses at the very start before the error occurs. Several suggestions have been made [ Daniel Medwed, “Innocentism” U. of Illinois Law Review, 2008; Brandon Garrett “Claiming Innocent” Minnesota Law Review June 2008]. A defense attorney has to be assigned before the start of interrogation: the police should be blocked from getting around the right to counsel and right to remain silent. The entire interrogation has to be video recorded, and the full record made available to the defense. Some hearings on motions and petitions should be before judges other than the trial judge. Appellate review should be allowed not just for legal errors but for newly discovered evidence. The judicial process ought to enable the defense attorneys and jury access to all pertinent information about how the investigation was done, warts and all, rather than a sanitized version they usually get and got in Norfolk. With more disclosure, the jury would have found out that Ballard had been fingered as a suspect by a friend of the victim at the start of the investigation, and that the police simply had not follow up since they were convinced that Williams was guilty. If the defense gets a full record of interrogation of suspects, the risk of error and abuse at later stages of the justice process is much reduced because disclosure is a deterrent to malfeasance. Finally, there has to be more accountability within the system: there should be penalties for circumventing constitutional rights, for malfeasance, for obstruction of fairness and symmetry in the adversarial process without which truth can not be determined. Accountability has to involve more than the light touch of the law upon its own practitioners and the benign neglect of the ‘up stairs’ authorities for what the lower ranks are doing in the basement.
Reforms would add to the safeguards, though not a firewall, to keep social testing contaminating justice with its constitutional protections and the adversarial method for getting at guilt and innocence. Fortunately, because of the high profile DNA cases that have captured the imagination of the public and the media, and the many innocence projects created by law professors and students and other troubled professionals, there is both professional and public demand for rectifying miscarriages of justice and for reform in the justice system. States have created Innocence Commissions. The Supreme Court has laid down requirements for cross examining experts in person, and not just their reports and conclusion [Haack, 2003, chapter 9]. On June 25, 2009, the Supreme Court ruled that crime laboratory reports may not be used unless the analysts responsible for them are subject to cross-examination [NYT 6/26/2009]. It is an important decision for preventing and deterring miscarriages of justice because a blue ribbon National Academy of Sciences study found that forensic evidence used to convict defendants is often the product of “shoddy scientific practices that should be upgraded and standardized” [NYT 2/5/2009]. Important books have been written on the miscarriages of justice examining it from all angles [Barry Scheck, Peter Neufeld, and Jim Dwyer, Actual Innocence: When Justice Goes Wrong and How to Make it Right, 2001, New York Penguin]. On the internet one can find many websites on the topic and on specific wrongful convictions that have found advocates for rectification.

At the same time it is unrealistic to expect zero errors in the criminal justice system, as it unrealistic to expect it in other institutions. The O.J. Simpson defense capitalized on just such expectations in Los Angeles to create reasonable doubt for a defendant who had murdered his ex-wife. Vincent Bugliosi, an experienced prosecutor and criminal defense attorney, wrote that [Outrage. The Five Reasons why O.J. Simpson Got Away with Murder, 1996, New York, Norton, p.216] “if you put virtually any criminal case under the high-powered microscope, you are going to find a few discrepancies here and there, inconsistencies, slip-ups, unanswered questions, incompetence…they don’t add up to anything…that is why the prosecution has to prove guilt beyond a reasonable doubt, not beyond all doubt.” Such discrepancies allowed the so-called “Dream Team” defense to
conjure up a mysterious murderer for whom there was no evidence at all. In a celebrity trial, in the full glare of publicity, every detail no matter how trivial was examined, debated and rehashed. In addition, Bugliosi argues that the prosecution was incompetent on jury selection, on dealing with expert testimony and on countering the defense conjectures about another murderer. The judge was overwhelmed by the media publicity and permitted the defense to play the race card when a lead detective’s record of race prejudice was exposed. In the U.S., the race factor increases the risk of social testing contaminating the justice system starting with arrest and interrogation through jury selection and jury verdict [James Q. Wilson and Joan Petersillia, eds., Crime, Public Policies for Crime Control, 2002, Oakland, ICS Press, pp.400-405]. Defense attorney Johnny Cochran managed to equate police brutality against blacks, which is not uncommon, with police frame-up, which is rare, and which the prosecution did not expose as pure speculation in the Simpson case [Bugliosi, p.260]. The conjunction of celebrity trial, maximum media exposure, the race dimension in perpetrator-victim relation, and prosecutorial errors does not bode well for truth and justice.

Reform has to overcome barriers that the police and prosecution try to erect against accountability. Law students in an innocence project at Northwestern University uncovered several cases of wrongful conviction in the Cook County justice system and petitioned the Circuit Court for a hearing on behalf of one of them. Cook County prosecutors challenged the new evidence and issued a sweeping subpoena ordering the professor who runs the innocence project to hand over all of the materials from the project including students’ private memoirs and grades [NYT, 10/25/2009]. Such a move was clearly designed to stop accountability by intimidation. It is unlikely to succeed because in many states the elite of the state bar has come out in favor of Innocence Commissions for dealing with claims of innocence due to miscarriage of justice. North Carolina in 2006 has established an Innocence Inquiry Commission advocated by a former chief justice and several respected members of the bar, and the commission has not been afraid to take on cases that might damage the reputation of powerful district attorneys and police officials [Raleigh News and Observer 2/10/2010].
Reform movements and efforts are obstructed by political, media and public pressures to be tough on criminals and to be secure from crime, especially violent crime. When those pressures mount, the tendency for an underfunded and understaffed justice system is to loosen the barriers against the penetration of social testing into the judicial process, with detrimental consequences for truth and justice. This was true for the highly publicized anthrax attacks that killed five people and sickened another seventeen shortly after the 9/11 terrorist attack. The FBI investigation spent years pursuing the wrong man, Steven Hatfill, PhD, who was later exonerated and received a $4.6 million settlement in 2008 [NYT 11/26/2008]. The search warrant material shows “how an accumulation of claims from acquaintances can cast an innocent person in a suspicious light…search warrants often use hearsay and unconfirmed information to convince a judge that a suspect is worthy of further investigation.” Government leaks identified him as the leading suspect; he lost a university teaching job; he was hounded by the media and for months FBI surveillance teams followed him when he left his home. In the anthrax case, there was tremendous public pressure on law enforcement and the justice system to deal effectively with terrorism after the systemic failures to prevent the terrorist air attacks.

Truth and Justice in the Shadow of Threat and Fear

Research on the effects of mass communications and propaganda indicates that threat messages are particularly persuasive and raise the public’s anxiety level and fear. Fear arousing appeals are persuasive and create a public demand for removing the source of threat [Hovland et al., 1963, Communication and Persuasion]. A textbook of mass communications states that [Pratkanis and Aronson, Art of Propaganda, 2001. pp. 210, 215] :“Experimental evidence overwhelmingly suggests that…the more frightened a person is by a communication, the more likely he or she is to take positive preventive action…Given the power of fear to motivate and direct out thoughts, there is much potential for abuse. Illegitimate fears can always be invented for any given propaganda purpose.” Fear entrepreneurs can manipulate public emotions to promote their causes and careers. The Encyclopedia of Propaganda [Robert Cole, ed., 1996, p.566] states that in its
extreme form a fear campaign “fosters delusions of danger from external enemies and traitors at home,” i.e. bears the character of paranoia.

Nowhere is the grip of fear greater on the attitudes and beliefs of the public than they perceive threats to national security and social stability from mass violence, external aggression and war, terrorism, and internal subversion. Many believe that the criminal justice system is not capable of bringing terrorists to justice, will jeopardize national security, and will not deter the terrorist threat. Instead they demand extraordinary measures [John Yoo, War by Other Means. An Insider’s Account of the War on Terror, 2006, New York, Atlantic Monthly; Richard Posner, Not a Suicide Pact, 2006, Cambridge UP]. The latest security scare in twentieth century U.S. history, following the Bolshevist scare after World War I and the communist subversion crisis at the start of the cold war referred to as the McCarthy era, is the Bush administration “the war on terror” following the 9/11 al Qaeda terrorist attacks on the homeland. There were and are real dangers to national security, but they were and have been magnified out of proportion by zealots, many politicians, and fear entrepreneurs in the mass media.

Fear impacts on all the stakeholders in the justice system. Defending its integrity in a national crisis risks careers and reputations and takes a great deal of courage. When fear grips the public, the news media and political leaders, suspects are presumed guilty for heinous crimes and are demonized. The stakeholders perceive the constitutional and procedural protections as standing in the way of justice and punishment for horrible crimes against the entire nation in a security crisis, and support changes in criminal justice that will make punishment certain, severe, and swift. These changes increase the likelihood of false positives, i.e. innocent people found guilty. Public discussion and justice become dominated by social testing for truth: what is accepted as true is what the authorities and the majority claim is true; information is selected for proving guilt, and contrary information is omitted or downplayed; there is confirmation bias; the guilty frame organizes the discussion and debate on how to deal with the dangers.
Fear is not simply a response to the objective risk of danger and threat. When it comes to the risks stemming from war and terrorism, the public has a distorted view of their magnitude, and their fear is correspondingly distorted. For thirty years preceding the demise of the Soviet Union, during the cold war, the American people lived in the shadow of MAD, mutual assured destruction to an expected forty million initial dead within thirty minutes from a salvo of thermonuclear tipped Soviet ICBMs hitting the U.S. Despite much reporting about these weapons and dangers, about the need for defenses like Star Wars, about negotiations and treaties in the news media and warnings by the anti-nuclear weapons movement, people learned to live with the threat and put it out of their minds as people do who live on earthquake faults and near volcanoes. Current fears about victimization from terror attacks are greater and politically more salient than fears about nuclear weapons in the cold war. Experts believe that chemical and biological weapons likely to be used by terrorists, as well as so-called dirty bombs that release some radiation, are less lethal than the explosives packed into a truck by suicide bombers [discussed by several authors in A. Trevor Thrall and Jane K. Cramer, eds., American Foreign Policy and the Politics of Fear. Threat Inflation Since 9/11, 2008, …].

The relationship of fear to an objective assessment of the danger posed by threats is mediated by social testing. Fear of crime has been most studied. Elderly in the U.S. are less likely to be crime victims than young people, but are more afraid of becoming victims [James Q. Wilson and Joan Petersilia, eds., Crime. Public Policies and Crime Control, 2002, Oakland, ICS Press, p.19]. This could be due to their more frequent television watching, because television –from news to crime and drama– is saturated with violence, and those who watch a lot of television succumb to the what George Gerbner referred to as “the mean-world symptom.” [www.context.org/ICLIB/IC38/Gerbner.htm]. They believe their neighborhood is unsafe and has higher crime rates than other places that in fact do have high crime rates. These folks are also more likely to buy locks and alarms and own guns. The best data available from the National Crime Victimization Survey shows that only 3% of victims were able to deploy a gun against someone who broke in or attempted to do so while they were at home [ibid, p.295], which indicates that gun owners overestimate its deterrent effect.
Other research on estimates of the danger or risk of victimization for other crimes (e.g. child abuse) and non-crime events (e.g. vaccination side effects, drug abuse, getting cancer) and associated fears also do not match the objective probabilities, bearing in mind the demographics. [Barry Glasser, *The Culture of Fear*, chapter one]. Some responses to danger that are far out of proportion to actual risk and the fears they raise are associated with highly publicized but atypical events, some rumored and not real, that persist as urban legends [Gary Allen Fine, Veronique Vincent and Chip Heath eds, *Rumor Mills: Social Impact of Rumor and Legend*, 2005, New Brunswick, NJ, Transaction]. Other responses appear to be widely accepted denials and rationalizations. Research of what the responses are, for whom, and under what circumstances has been unsystematic. We know a great deal about specific instances but don’t possess a general theory. We do know that threat messages get attention and are persuasive, raise fears, and stimulate demand for action by the authorities to reduce or eliminate them.

A notorious miscarriage of justice due to fears of revolutionary violence was the wrongful conviction of eight radical labor leaders for responsibility for the bomb that killed several policemen at the Haymarket rally in 1886 to protest police brutality in labor strikes [Henry Christian, ed. *The Mind and Spirit of John Peter Altgeld*, 1960. Introduction]. Seven were sentenced to death, four were executed, one committed suicide, and the others served life sentences. The socio-political context was a decade of violent labor relations and strikes during which the authorities backed business leaders’ resistance against unionization and demands for higher wages and better work conditions. It was not unusual at this time for police to open fire on demonstrators and for state militia and even federal troops to be deployed by the President of the U.S. and governors to restore order and break strikes, as in the Pullman strike in 1994.

Business and newspapers whipped up mass panic and fear about security and stability in the U.S. which was threatened by anarchism, socialism, communism, labor protests and strikes, and that was true for the Haymarket rally in Chicago. It was a peaceful rally until the police moved in to break it up. An unknown assailant threw a bomb that killed several policemen; the police opened fire and killed several non-violent participants. The labor
leaders arrested were tried for murder, although some were not at the rally. In the trial, the police and judges admitted the defendants hadn’t thrown the bomb, or made the bombs, nor was the bomb thrower ever identified and arrested. The prosecution contended that their earlier speeches and writings had incited the unknown perpetrator to acts of violence. The jury found them guilty, and the appeals sustained the verdicts.

John Peter Altgeld had been a successful businessman, civic reformer, populaitst and Democratic political leader, superior court and Illinois supreme court judge when he was elected to governor. In a landmark legal document titled “Reasons for pardoning Fielden, Neebe and Schwab, the so-called anarchists” [Christian, 1960, pp. 63-104], he explained why he issued an executive pardon on June 26, 1893. Much of the evidence given at the trial was “pure fabrication”. The police coerced witnesses to “swear to anything they desired”; other witnesses were offered bribes and promises of employment. The chief of police actually confirmed the handling of witnesses in an interview with the Chicago Daily News [5/10/1889]. The police alleged that Fielden made threats to kill, drew a gun, and fired at police. Other witnesses including newsmen standing near Fielden denied it. The judge and prosecutor expressed doubts about the police claim. The Attorney General of Illinois had doubts about Noebe’s guilt because there was no incriminating evidence against him and wanted to dismiss, but his associate attorney feared that such a step would influence the jury in favor of the other defendants, and the charges against Noebe were not dismissed. The use of “sedition and incendiary language” for which they were convicted had been in small meetings only, and in pamphlets that few had read. The trial judge, Judge Gary, was biased against the defendants. He had ruled that “men who candidly declared that they believed the defendants to be guilty…were competent jurors… the proceedings lost all semblance of a fair trial.” [Christian p.84] In a scathing indictment of the court, Altgeld wrote that “No matter what the defendants were charged with, they were entitled to a fair trial, and no greater danger could possibly threaten our institutions than to have the courts of justice run wild or give away to popular clamor.”

Instead of exercising “mercy” which would have ducked the issue of miscarriage of justice, Altgeld gave the three convicted defendants still alive unconditional pardons.
Altgeld well knew that challenging a law decision is not like challenging a scientific experiment. It was doubting the fairness and competence of respected judges, appeals court judges, news editors, prominent citizens, in fact most of the establishment that is in charge of authority and legitimacy. He paid the price of defeat in his re-election bid for governor in 1896. In rectifying injustice and standing up for truth, in defying fear-ridden public opinion, in standing up for constitutional rights and legal norms that had been sidelined by social testing, he joined a handful of courageous men in other landmark trials – one thinks of the Dreyfus case in France – where the majority approved subversion of justice for the sake of national security and social stability as defined by majority opinion and powerful institutions.

The war on terror: justice in the maximum security state

Based on history and the social psychology of fear, I hypothesize that the following conditions increase the chances of miscarriage of justice: 1. there is a national security threat  2. public attitudes are gripped by fear and support extraordinary emergency measures  3. behaviors and practices by social control agencies usually banned are authorized  4. a category of persons associated with the threat is demonized and becomes a legitimate target  5. accountability for security operations is weakened, e.g. it is cloaked in secrecy  6. command responsibility is suspended, i.e. every agent in the chain of command, from the very top down, claims that they are carrying out lawful orders. All of these conditions were met in the 9/11 security crisis.

After the 9/11 suicide airplane attack on the New York World Trade Center and the Pentagon in 2001, in the midst of a crisis atmosphere, the Bush administration undertook a series of military, political and legal steps against al Qaeda terrorists and their allies for the purpose of bringing the perpetrators to justice, deterring and preventing terrorism, depriving terrorists of safe bases, and shutting off their sources of finance. It was called “the war on terrorism.” Before 9/11, despite a number of terrorist attacks such as the 1993 bombing of the World Trade Center, the Khobar Towers bombing in Saudi Arabia, the suicide bombing of the U.S.S. Cole in Yemen in 2000, the bombing of the U.S.
embassies in Kenya and Tanzania in 1998, and the thwarted millennium bomb plots. Much useful information about al Qaeda and allied terrorist groups was learned from these attacks and from captured al Qaeda operators during interrogations [9/11 Commission Report, 2004, Washington D.C.].

The measures taken by the U.S. conformed to accepted intelligence surveillance and counter-terror practices, and the use of the criminal justice system to detect, arrest, interrogate, prosecute and convict terrorist suspects. No changes in the criminal justice system were made. It worked well. The perpetrators of the first World Trade Center (WTC) bombing in 1993 were tracked down, arrested, prosecuted and convicted in New York Federal Court. The case involved collaboration with several foreign intelligence agencies. Leads obtained led to thwarting further planned terrorist attacks on New York City tunnels and landmarks [Clarke, p.78.] The 9/11 Commission Report (pp.72-73) called it a “superb investigative and prosecutorial use of criminal justice in the Federal Courts.” Other successful terrorist arrests and prosecutions occurred, e.g. Ramzi Yousef who had initially eluded identification and capture in the WTC bombing, but was apprehended after plans for bombing U.S. airlines over the Pacific Ocean were thwarted. Critics feared that important secrets on intelligence sources would be compromised and help terrorists in the future, but they were mistaken because under the Classified Information Procedures Act, federal judges granted the government to withhold classified information and produce summaries and redacted versions, or to show information only to defense lawyers with security clearances. Preventive measures for the 1996 Olympic games in Atlanta thwarted al Qaeda plans for attacks, and al Al Qaeda Millenium attacks in December 1999-January 2000 were either thwarted, as in the Pacific airliners case, or caught, as for the planned bombings of Los Angeles airport, in Jordan, and U.S. military facilities in Germany [Clarke, p.133-139, p.190]. President Clinton retaliated against the suicide attack on the USS Cole in Aden with seventy five cruise missiles targeting al Qaeda leaders in Afghanistan training camps. Because of insufficient intelligence or leaks, the camps were hit when the leaders had departed. The U.S. president had authority under domestic and international law to retaliate against those responsible for terrorist attack against the U.S., as did the Israelis with a targeted assassination campaign against
Palestinians who had murdered Israeli athletes at the 1968 Munich Olympics. Under the International Emergency Economics Powers Act, President Clinton authorized the treasury department to search for and freeze Bin Laden, al Qaeda and Taliban assets that reached the U.S. financial system [9/11 Commission Report, p.185-6]. Other measures were taken to stop funds flowing to terrorist organizations and the Taliban through Islamic charities, wealthy donors and profits from the heroin trade.

When the Bush administration assumed office in January 2001, anti-terrorism was downgraded as a priority and took a backseat to policies other than those of President Clinton and the Democrats, such as the anti-ballistic missile treaty, the Kyoto agreement and initiatives on Iraq and Saddam Hussein [Clarke, p.231-234]. According to the 9/11 Commission Report [pp.260, 339, and 355], due to a failure of imagination, policy, and management of the anti-terrorist measures, between January 2000 and September 11, 2001, there were ten missed “operational opportunities” to thwart the 9/11 plot by connecting warning dots, including the August 6, 2001 Presidential Daily Brief “Bin Laden Determined to Strike in U.S.”

In the aftermath of 9/11, with the nation rallying around the Bush administration in a crisis atmosphere – the initial panic was about the possibility of additional imminent suicide attacks by sleeper cells, and subsequently about new cells in the U.S. and foreign plots – the administration implemented a series of formidable anti-terrorist emergency powers that were passed in Congress and applauded by the public and referred to as “the war on terror.” The war on terror was based on the assumption that a military type crisis response and measures were necessary to combat terrorism, and that traditional counter-terrorism and criminal justice as the Clinton administration had employed would not provide security [John Yoo, War by Other Means, 2006, New York, Atlantic Monthly]. The core of the crisis response was to claim for the President unilateral authority to initiate wars without congressional approval and to terminate and violate international treaties at will, all based on the constitutionality of the president’s war powers. They would enable him to designate enemy combatant not covered by the Geneva Conventions for combatants, create military tribunals, authorize indefinite preventive detention,
surveillance, coercive interrogation, torture for terrorist suspects with minimal checks from Congress and federal courts.

Yoo [2006] argued that international treaties and conventions tied the hands of the U.S. interrogation of terrorist suspects under criminal justice and would not get actionable intelligence for thwarting terrorists, would obstruct search for evidence and surveillance, and that prosecution in federal court would jeopardize intelligence secrets and would not make conviction difficult because of excessive constitutional protection for the defendants. For instance he wrote that (p.141) “proof sufficient to meet the probable cause standard would have to be collected before they (terrorist suspects) can be arrested.” The examples Yoo discussed were hypothetical cases, the Padilla (shoe bomber) and the Moussaoui cases. In the Padilla trial, he and two accomplices were convicted on terrorist related crimes in Miami Federal Court, without a “treasure trove of intelligence secrets revealed to the public” (pp.152-3) or al Qaeda finding out what part of its network had become “compromised,” as Yoo feared. In the Moussaoui case, Yoo wrote (p.229) “that civilian courts with juries, maximum civil rights protections, and the luxury of time cannot handle enemy combatants in wartime,” and that the trial showed clearly the need for military commissions. To the contrary, the judge in the trial sensibly agreed to have summary evidence admitted in lieu of al Qaeda witness testimony and no secrets were revealed. In May 2006, a Virginia jury sentenced Moussaoui to life in prison. Yoo also ignored the Clinton administration record of fighting al Qaeda and terrorists successfully without suspending the criminal justice system and internationally accepted measures for anti-terrorism.

Britain had used a military model against Republicans terrorists in Northern Ireland and Israel against Palestinian terrorists, but U.S. problem was and is not analogous [Anthony Oberschall, “How democracies fight insurgents and terrorists” 2008, Dynamics of Asymmetric Conflict, 1 (2) 107-142]. Northern Ireland had a thirty year insurgency supported by a large segment of the Catholic population. Terrorists methods included bombings, assassinations, rioting, hunger strikes of prisoners, hiding in no-go safe areas,
and vanishing across the border in the Republic of Ireland. To combat it, the British Parliament enacted several anti-terrorism acts that authorized preventive detention, searches of homes and seizures of weapons and suspects, surveillance, coercive interrogation, and special non-jury courts for terrorists. Israel thwarted suicide bombers and other attacks on both military and civilians in Israel and in the Occupied Territories with emergency measures under a military occupation controlling a hostile people. In both these cases, governments faced a combined insurgency and terrorism. In the U.S. there was no risk of an Arab-American or Muslim-American armed uprising, seizing nuclear plant near US city and threatening to sabotage it (like John Brown did in 1860 seizing the arsenal at Harper’s Ferry). The terrorist problem in the U.S. was and is to detect and apprehend al Qaeda sleeper cells, prevent penetration by individual terrorists and small groups from outside the U.S., and protection of bases and embassies abroad. In addition, cooperation with other governments is necessary to disrupt transnational terrorists and deny them safe bases for training. Ironically, Osama bin Laden and the al Qaeda leadership escaped from the Tora-Bora encirclement not because the constitution and the Geneva Convention had tied the hands of the U.S. government, but because the type of military operation in the war on terror advocated by Yoo and the Bush administration was executed in an ineffective, haphazard manner. Regardless, the Bush administration chose a war model of fighting terrorism.

According to Senator Patrick Leahy, chairman of the Senate Judiciary Committee, “the Congressional opposition melted in the face of opinion polls showing strong support for the president’s measures against terrorism” [NYT 10/24/2004]. They lifted some of the checks on executive power by the legislative and judicial branches, and voided constraints in international conventions and treaties. First and foremost was the war against the Taliban regime that had sheltered the al Qaeda terror operations. The U.S. Patriot Act defined terrorism and associated criminal actions, expanded the authority of U.S. law enforcement to fight terrorists, increased the authority to detain and deport immigrants suspected of terrorist related-acts, and vastly expanded the powers of the
The federal government in phone and electronic searches and searches for many types of
records in national security cases, with weakened or no judicial oversight, and a
permissive standard for probable cause. The NSA was enabled to engage in vast data
mining of communications, and a secret Terrorist Watch List was established by
presidential directive. To implement these measures, the administration created a huge
bureaucracy for homeland security [J. Beckman, Comparative Legal Approaches to
Homeland Security and Anti-terrorism, 2007, Burlington VT, Ashgate].

The architects who improvised the “war on terror” from November 2001 to January 2002
were a small group of trusted advisers, officials and lawyers in the White House, the
Justice Department and the Pentagon. They knew little about terrorism. Jack Goldsmith,
former head of the Office of Legal Counsel in the Department of Justice and an insider
participant in these decisions, writes that [Goldsmith, 2007, p.130] “lawyers weren’t
necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or
international diplomacy, or even the requirements of national security... (but lawyers)
dominated the discussion on detention, military commissions, interrogation, Guantanamo,
and other controversial terrorism policies.” They scrutinized treaties and laws and judicial
precedents with a view of circumventing obstacles legally. They debated atypical cases
such as the “ticking bomb scenario” with which fear mongers in the media and politics
framed national security issues, despite the fact that Jack Coonan, the FBI special agent
heading the “Osama bin Laden unit” in 1996-2002 referred to the ticking bomb as a “red
herring”, an “improbable event” and not a “real-world event” [ABC News, 16 September
2006; NPR News Hour, 2 December 2005]. Caught unprepared and having failed to act
vigorously against al Qaeda before 9/11 despite urgent warnings [Richard Clarke,
Against All Enemies, 2004, New York, Free Press, chapter one; R. Suskind, The One
Percent Doctrine, 2006, New York, Simon and Schuster], the Bush administration was
under tremendous pressure to protect the nation effectively against terrorists.

The legal and factual justification for a war on terror and conflating al Qaeda with the
Taliban in Afghanistan was arbitrary and erroneous. Yoo (pp.21-45) describes the
arguments in the Bush administration for stripping the Taliban army and fighters of the
right to prisoner of war status and for the president’s designation of them as “illegal enemy combatants.” The assertion was made that Afghanistan has no functioning government and was a failed state, that a non-viable failed state cannot enter into international treaties, and other states dealing with it are not bound by prior treaties. An authoritative book written by veteran Afghanistan observer and analyst Ahmed Rashid before 9/11 [Taliban, 2000, Yale UP] contradicts these assertions. Rashid writes that (p.1) “Since the dramatic and sudden appearance at the end of 1994, the Taliban had brought relative peace and security to Kandahar and neighboring provinces.” In fact, four million Afghan refugees in Pakistan and Iran returned home in 1992-1999. To be sure, the Taliban were an oppressive government, especially for women, but they established order after the chaos and lawlessness of decades of civil war. In the areas they controlled they restored peace, disarmed the population, and brutally enforced sharia law. They had an organized military force and law courts (p.100-102). In the civil war they committed war crimes, but so did their opponents in the Northern Alliance: both sides executed prisoners of war in tit-for-tat revenge, and preyed on civilians. The Taliban state was not a failed state. Three U.S. administrations, Reagan, Bush senior, and Clinton, had insisted that the mujahedeen in the war against the Soviet backed Afghan communist government be treated in conformity with the Geneva Conventions. The Taliban fighters were similar to the mujahedeen and to the Northern Alliance forces (that became U.S. allies after 9/11) and were not, as Yoo would describe them (p.45), “brigands, spies, bushwackers, rebels, and assassins” (who were not recognized as combatants in the U.S. Civil War). The State Department and the JAG objected to voiding the Geneva Conventions for the Taliban, but were overruled by the White House and Justice Department architects of the war on terror [Yoo, pp.34; Wilkerson, 2009].

The Guantanamo prisoners

The legality and implementation of counter-terror in the war on terror is a huge topic. My focus is on justice for the Guantanamo detainees. How were terrorist suspects identified, detained, interrogated, classified, and prosecuted, and ultimately disposed of through an administrative or judicial proceeding. The President assumed the power to designate
foreign soldiers in the Afghan war, as well as anyone not captured in battle but suspect of being a member of the Taliban or of a terrorist organization, as an “illegal enemy combatant,” making them subject to preventive detention, harsh interrogation and treatment, and prosecution in military tribunals with fewer rights than in federal courts, e.g. suspension of habeas corpus, and denial to some exculpatory evidence, and right to confront witnesses. It is under this authority that 774 detainees ended up in the Guantanamo military prison. Much of the counter-terror program operated under a veil of secrecy, like the CIA rendition program in which 100-150 high-profiled suspects were transferred to foreign governments for coercive interrogation and torture in secret, according to CIA chief Porter Goss [NYT, 3/18/2005]. Despite opposition by military lawyers and the FBI [NYT, 4/3/2008; NYT, 3/22/2005] and some set backs in the federal and the Supreme Court, despite world wide criticism after the Abu Ghraib prisoner abuses were revealed on video and other evidence of violations of the Uniform Code of Military Justice and the Geneva Conventions surfaced, the Congress backed substitution of normal justice for crisis justice by passing the Patriot Act and Military Commissions Act.

The harsh treatment and coercive interrogation of terror suspects at Guantanamo and elsewhere and indefinite detention without trial did not become a topic in the television debates by the presidential candidates during the 2004 elections. The Pew Research Center for People and the Press reported from its June 13, 2005 survey that 54% of respondents believed that the Guantanamo prisoner mistreatments were isolated incidents, versus 34% who said they form a wider pattern of abuse. Rush Limbaugh, the right wing broadcaster heard on six hundred radio stations dismissed the Abu Ghrab abuse as no worse than typical college hazing. The Democrats did not raise abuse and torture as an issue because they feared that any criticism of the military in wartime would be turned against them as unpatriotic and “not supporting our troops.” Prisoner abuse does not fit that frame.

Harsh treatment of detainees and coercive interrogation pervaded both the Afghan and the Iraqi war. Field interrogation of suspects for actionable intelligence about ambushes,
IEDs, hidden weapons, collaborators, etc., tends to be rough, regardless of international conventions and army manuals. One investigation of the 82nd Airborne Division documented “severe beatings, kicks, stress positions sleep deprivation, extreme hot and cold treatment, food and water deprivation, and other techniques for making suspects talk” during three days before screeners would hand the suspect over to an Iraqi judge. Coercive interrogations were known to commanders and rarely punished. To avoid the Geneva Conventions, the field interrogators invented a new status for prisoners called Persons Under Control (PUC), who were not POWs. About half the detainees were released because they were not combatants, terrorist or auxiliaries [Bing and Owen West, NYT, 6/15/2007; www.hrw.org/reports/2005/us0905/; Bing West “Iraqi Trip Report 2” 29April2007, www.smallwarsjournal.com/blog/2007/05.]

Anthony Lagouris who served in the Army four years wrote that “From January 2004 to January 2005, I served in various places in Iraq (including Abu Ghraib) as an Army interrogator. Following orders that I believed were legal, I used military working dogs during interrogations. I terrified my interrogation subjects, but I never got intelligence (mostly because 90% of them were probably innocent…) The dogs were muzzled and held by a handler. The prisoners did not know that …because they were blindfolded…About halfway through my tour, I stopped using dogs and other “enhancements” like hypothermia that qualify as torture even under the most nonchalant readings of international law. I couldn’t handle being so routinely brutal” [NYT 2/28/2008]. Whistleblowers were threatened and punished. Joseph Darby, the Abu Ghraib whistleblower, had to be put into protective custody because he and his family received death threats [www.jfklibrary.org/profileincourageaward/2005]. The Guantanamo prison whistleblower on prisoner abuse, Army Captain James Yee, the Muslim chaplain, suffered a worse fate. He was arrested and imprisoned on charges of espionage and also accused of adultery and possession of pornography. Later all charges were dropped, and he was given an honorable discharge.

The investigations about how such abuse occurred and who was responsible highlights the lack of accountability in the chain of command (conditions 5 and 6 above for
miscarriage of justice). In the words of Senator Mark Dayton, a member of the Armed Services Committee, “We’ve now had fifteen of the highest level officials involved in this operation, from the secretary of defense to the generals in command, and nobody knew that anything was amiss, nobody approved anything amiss, nobody did anything amiss. We have a general acceptance of responsibility, but there is no one to blame, except for the people at the very bottom in one prison “quoted in Mark Danner, “The Logic of Torture” 2004, New York Review of Books, June 24]. When Major General Anthony Taguba completed the investigation of Abu Ghraib abuses, he had a hard time getting anyone in the Pentagon to read it [News and Observer, 6/22/2007]. He was later forced to retire from the army. The Department of Defense, the Justice Department and the White House were determined to push responsibility down to guards with rank of staff sergeant or lower.

The Guantanamo prisoners were referred to by Defense Secretary Rumsfeld as “the most dangerous, the best trained, vicious killers on the face of the earth” and as “the worst of the worst.” How were they captured, identified, interrogated, treated; what is their legal status; how have they been disposed of; what prosecution awaits them. According to the Geneva Conventions, lawful combatants have to be members of an armed force, wear a uniform of identifying insignia, carry weapons openly, and be subject to an organization that enforces compliance with the rules of war. When captured, they become prisoners of war and may not be subject to physical or mental torture. Whether and to what extent fighters in clandestine organizations, be they insurgents, guerillas or terrorists, meet the criteria for combatants and should be protected by the Geneva Conventions is a matter of controversy [Kenneth Anderson, 2003, “Who owns the rules of war?” Crimes of War Project www.crimesofwar.org/special/Iraq, April 24]. The same is true for the civilian auxiliaries of insurgents and terrorist who hide, transport, supply, finance, provide explosives and weapons, act as lookouts and spy for the insurgents.

Insurgents against an oppressive government who are armed fighters and target the army and police have been considered combatants under the Geneva Conventions, thus having prisoner of war rights. Additional Protocol 1 (1977) “grants combatant rights including
the vital right to be treated as a P.O.W. on the basis of certain motives of fighting, referring specifically to racist regimes or alien occupation...so long as they distinguish themselves from civilians by a uniform or other distinguishable marker.” [Anderson 2003]. Most of the Taliban soldiers and fighters in the Afghan civil wars fall into this category. Terrorist are clandestine armed fighters who target civilians in addition to the military and the police. They are not protected by the Geneva Conventions, but they can be arrested and prosecuted under the criminal law. Most of the Arab jihadists affiliated with al Qaeda fall into the terrorist category. To deal with terrorists through the criminal law, membership in named terrorist organizations has to be criminalized, as also support activities, e.g. hiding terrorists and their weapons, raising funds, training terrorists, forging passports, and so on. Suspects can then be arrested and prosecuted under the criminal law. As I will suggest below, some additions for terrorist cases should be made, which the British government in fact has made since 2000 and the London underground bombing attacks. The Bush administration however decided that both the criminal justice system and the Geneva Conventions tied its hands for getting actionable intelligence through interrogations and for prosecuting terrorist suspects [Yoo, p.39-40, p.106, 151,162]. It created instead the category “illegal enemy combatant” and defined their diminished legal status and rights in its national crisis legislation and procedures. As it turned out, many who were neither insurgents nor terrorists were caught in the post 9/11 dragnet and imprisoned in Guantanamo as enemy combatants.

How the prisoners and detainees from the Afghan war ended up in the Guantanamo prison and who they were is described by Chris Mackey, the pseudonym for a senior U.S. army interrogator in Afghanistan in 2002-2003 [Chris Mackey with Greg Miller, The Interrogators War. Inside the Secret War Against al Qaeda, 2004, London, John Murray]. Task Force 500, a U.S. Army interrogation unit, was hastily put together and trained. Only a few spoke Arabic and Pashto, the native language of most of the prisoners taken in Afghanistan. As the Taliban collapsed after the U.S. intervention in the Afghan civil war following 9/11, hundreds of Taliban prisoners held by the Northern Alliance were dumped on the quickly built U.S. detention complex in Kandahar, followed by Arabs captured by Pakistan Intelligence and sweeps by Special Forces, Rangers and Green
Berets who were chasing Taliban and al Qaeda fighters, including Osama bin Laden and his top team, fleeing into the mountains on the Pakistan-Afghan border. Mackey [p.115] writes that “it took us a while for us to realize not all prisoners being delivered to us were the enemy. We figured that if Special Forces brought them, there had to be a good reason. But the truth was that the special operators couldn’t distinguish the bad from the good in the raids, so they dropped them all on our doorstep to let us sort them out. They were bringing back a lot of fighters, but they were also bringing back a lot of famers.”

After some time Task Force 500 became more effective interrogators and distinguished several categories of prisoners. They did not have any direct incriminating evidence to go on. The detainees who had al Qaeda and jihadist ties had by the time of their capture thrown away their weapons and cell phones, and destroyed any incriminating documents like passports and addresses, phone numbers, letters etc. that could link them to an organization. Some who had schooling pretended to be illiterate. Admission by the prisoner of his true identity and history of involvement, if any, in the fighting and in terrorism, and actionable intelligence, was the goal of the interrogators. Some prisoners turned out to be farmers and ordinary people who were not fighters but just happened to be at the wrong place at the wrong time in a combat zone. They should have been released, and some actually were. Some were Taliban soldiers in the Afghan civil war. They had been fighters before 9/11 and had not attacked any U.S. troops. They should have become prisoners of war, not enemy combatants. A senior intelligence officer stated that defining them as “illegal enemy combatants” overturned three U.S. Presidents – Jimmy Carter, Ronald Reagan, and George W. H. Bush – who had insisted that the Afghan mujahadeen insurgents the U.S. backed against the Soviets be treated under the Geneva Conventions [NYT 11/4/2005]. Another category was Arab jihadists who had come to fight with the Taliban. They too had joined before 9/11 and hadn’t targeted the U.S. They were similar to the International Brigade in the Spanish Civil War and should have been treated as prisoners of war under the Geneva Conventions. Next were Arab jihadists who were more closely linked with Al Qaeda: they had received training in al Qaeda camps, and they intended to return to their home countries for insurgency and terrorism and for overthrowing their government. These prisoners did not intend to target
the U.S.; nevertheless there was justification for charging them as terrorists under
criminal statutes because of the treaties and cooperation between states and intelligence
services against transnational terrorists. Finally, a small number appeared to be al Qaeda
operators and leaders engaged in recruiting, indoctrinating, training, financing, and
supplying terrorists who might be launched against the U.S. and Europe.

Because of lack of hard evidence on how to classify the prisoners, the interrogators
worked with making sense of suspicious stories and circumstantial evidence.
Task Force 500 was overworked, with too few interrogators and interpreters, and
exhausted by the sheer numbers and resistance of the prisoners who fabricated stories,
lied, or refused to talk. In return the interrogators deceived them, lied, threatened, and
“monstered” the prisoners, i.e. scare, yell and threaten them right to their faces. Sleep
derprivation turned out to break down some prisoners, but it also left the interrogators less
than alert and thinking clearly because they too became sleep deprived. Very little
actionable intelligence was gotten, and hardly anything about the identity and location of
top al Qaeda leaders. Mackey writes that [p.428] “Interrogations are supposed to get the
truth, to be concerned above all with clarity and accuracy. We were always so
exasperated by how messy, inconsistent, and incomplete prisoners’ accounts were… It’s
a reminder of just how elusive truth can be when you are a collector of what the army
likes to call ‘human intelligence.’” The higher up brass kept pressuring Task Force 500 to
get more useful information, but it could not be gotten from such small fish. At the start,
Task Force held onto all Afghans, and most were shipped to Guantanamo. In the middle,
half the Afghans were released. By the end, 8 of 10 Afghans were released. The default
option on Afghans was Guantanamo. All Arabs had to be sent to Guantanamo [Mackay
p.458].

When other interrogators took over in Guantanamo, as one told Jane Mayer [“The
Experiment” 2005, The New Yorker, 7/11/ and 7/18, pp.60-70] 2005, p.60), they were
equally baffled: “At the time we didn’t even understand what al Qaeda was. We thought
the detainees were all masterminds. It wasn’t the case. Most of them were just dirt
farmers in Afghanistan.” The pressure on interrogators to get actionable intelligence and
useful information on al Qaeda operators and operations was intense. A military 
intelligence officer told Jane Meyer [2005, p.70] that “the order from above was ‘get me 
results’…there was huge frustration. General Miller really unleashed a lot of aggressive 
tactics.” Guantanamo prison was set up by the administration as a place not bound by 
national and international laws for the treatment of prisoners. The Pentagon gave 
permission for harsh interrogation techniques. Secretary Rumsfeld approved 16 harsh 
techniques for use on uncooperative detainees that went beyond the Army Field Manual 
authorization for intelligence interrogation [Mayer 2005, p.68].

The results were soon obvious. An FBI memorandum dated May 10, 2004 dismissed 
intelligence obtained by the military at Guantanamo with coercive methods as ‘suspect at 
best’ [NYT 3/22/2005]. The FBI complained about coercive interrogations and 26 FBI 
agents reported “aggressive mistreatment” at Guantanamo [Worthington, p. 203 ff.] The 
Navy’s General Counsel in the Naval Criminal Intelligence Service, Alberto Mora, 
unsuccessfully confronted William Hayes II, the Pentagon General Counsel, over harsh 
treatment and torture. Jack Coonan, the FBI special agent who headed the Osama bin 
Laden unit, said about the interrogation of detainees at Guantanamo that “there was 
nothing coming out of there of value, nothing…Anybody that I knew there thought it was a complete waste of time” [Frontline 7/13/2005]. About coercive interrogation there, he 
said “to the extent that you are going to find out …a lot of critical stuff about what al 
Qaeda is doing, the chances of that happening are minimal…most of these people are not 
the brains…(the brains) are not what is in Guantanamo.” The administration knew early 
on that Guantanamo was a mistake. Retired army Colonel Lawrence Wilkerson, chief of 
staff of Secretary of State Colin Powell, said that “The U.S. knew early on (the 
Guantanamo prisoners) were innocent and had little intelligence value, but nevertheless 
held them in the hope they would provide information for a “mosaic” of intelligence: the 
detainee must know something of importance since he lived in Afghanistan and was captured near or in the battle area [CBC News 3/19/2009]. Wilkerson also said that 
Donald Rumsfeld and Vice President Cheney fought all efforts to remedy because “to 
have admitted this reality would have been a black mark on their leadership…There are 
still innocent people there…some have been locked up six or seven years.”
Because the Department of Defense was successfully sued by attorneys representing some detainees, it released some heavily redacted status review documents on some prisoners. An in-depth analysis of 132 prisoners shows that most are not accused of hostilities against the U.S. It shows that a majority were not picked up by U.S. forces in Afghanistan but by Pakistani authorities in Pakistan, for which the U.S. paid them a five thousand dollar bounty. Andy Worthington [The Guantanamo Files, The Stories of the 774 Detainees in America’s Illegal Prison, 2007, London, Pluto Press, pp.130ff] confirms that the second wave of prisoners from Pakistan was bounty driven by the Pakistani police. Corinne Hegland [“Who is at Guantanamo?” National Journal, 2/8/2006] concluded that “Many (of the prisoners held at Guantanamo) are accused of hostility against the United States and its allies. Most, when captured, were innocent of terrorist activity, were Taliban foot soldiers at worst, and were often less than that. And some, perhaps many, are guilty of being foreigners in Afghanistan and Pakistan at the wrong time. And much of the evidence, even the classified evidence, gathered by the Defense Department, is flimsy…largely based on admissions by the detainees themselves, or on coerced, or worse, interrogation of their fellow inmates, some of whom have been proved liars.” In one instance, prisoner al Qahtani became a snitch against sixty fellow prisoners before his denunciations were exposed [Worthington p.209]. The government was obsessed with getting intelligence. Justice became a low priority. 

Of the 774 detainees all but 198 have been released by the end of 2009, most repatriated to their home country or another country that would accept them. Others could not be released because the Refugee Convention barred the repatriation of refugees who were at risk of being persecuted and tortured in their homeland. For those released, there was no evidence of terrorist activity that would stand up in a court or a military commission tribunal. Putting them on trial would expose the U.S. government harsh and abusive treatment of prisoners, and torture in some cases. The major problem for the U.S. government is how to dispose of all but the two dozen “high value” detainees, like Khalid Sheikh Mohammed and Abu Zubaydah, who have been transferred from various secret
CIA prisons. The Obama administration has not yet decided to put these twenty on trial in federal courts in the U.S. or in military commission tribunals.

Rumsfeld’s “worst of the worst” turned out to be nothing of the sort, not even common “low value” terrorists. Taliban fighters could have been dealt with as prisoners of war under the Geneva Conventions and by the criminal law. It would have saved the U.S. military and government international embarrassment and condemnation. Combat Status Review Tribunals nevertheless judged that all but 38 of 558 prisoners reviewed had been properly designated as ‘enemy combatants” [Worthington, p.265]. Be that as it may, much of the public believes the Guantanamo prisoners were and are dangerous terrorists, deserve the treatment they got, and denies miscarriage of justice. In a poll of a thousand adults, June 2005, seven of ten believed prisoners in Guantanamo are treated “better than they deserve” (36%) and “about right’ (34%), compared to 20% “treated unfairly” [http://legacy.rasmussenreports.com/2005/gitmo]. Miscarriage of justice does have political payoffs, at least for a time.

Checks and balances?

Democratic controls on the political and military sources for the miscarriage of justice in a national security crisis all failed for a time in the Afghan and Iraqi wars. Four restraints exist: 1. professionalism within the military; 2. treaties and conventions that regulate war and justice; 3. checks from within the polity due to the separation of powers, an independent judiciary, limits on the authority of the executive, and competitive political parties; 4. a vigorous civil society, an independent news media, and public opinion.

1. Within the armed forces and U.S. security agencies, hundreds if not thousands knew about the abuses of prisoners in Abu Ghraib, Bagram, Guantanamo and other places, though fewer about torture at the CIA secret bases. Whistleblowers who went public were defamed, threatened and punished. Internal inquiries were stonewalled. Internal critics, like the military lawyers in the JAG and Colonel Wilkerson who became privy to what was going on, were listened to but over-ruled by their superiors. The choices were stark.
Resign and go public, and that for practical purposes would mean the end of one’s career and lasting ostracism by valued peers. In large organizations and for much of the public, loyalty counts for more than truth and justice. Resigning on the quiet does not remedy injustice. The simple way to assume responsibility is through the chain of command. Bring the problem to the attention of one’s superiors, and make it their responsibility to react. Even when they don’t, one has fulfilled one’s responsibility.

2. Treaties and conventions about treatment and justice for detainees and prisoners suspected of insurgency and terrorism were declared non-binding by the Bush administration through an expansion presidential powers. The federal courts went back and forth on some specific powers, such as a legal redefinition of what torture is and the legitimacy of its use. But the fundamental new category of “illegal enemy combatant” and the Military Commission Tribunals which are the lynchpin of the crisis justice system for detainees still stand. On January 6, 2010, a federal appeals court backed the powers of the government to hold Guantanamo detainees and other noncitizen terrorist suspects, and found that presidential war power on these matters is not limited by international law [NYT 1/6/2010].

3. Checks on abuses and miscarriage of justice from within the polity in a national security crisis exercised but a light touch on executive power. The Bush administration created an enormous security apparatus for homeland security and in the global war on terror amounting to an emergency national security state. The president created the category “illegal enemy combatant” making terrorist suspects subject to indefinite preventive detention, harsh interrogation and treatment, and prosecution in military tribunals with fewer rights than in federal courts (e.g. access to exculpatory evidence, suspension of habeas corpus). When the Supreme Court invalidated the military commission system in *Hamden vs Rumsfeld* in 2006, the Bush administration and the Congress responded with the Military Commissions Act which allowed reliable hearsay evidence, denied counsel access to and cross-examination about classified evidence, allowed evidence obtained in coercive interrogations, and other limitations of defendants’ rights. The U.S. Patriot Act defined terrorism and associated criminal actions, expanded
the authority of U.S. law enforcement to fight terrorists, increased the authority to detain and deport immigrants, authorized domestic search of telephone, email, medical and financial records and of electronic intercepts of foreign suspects’ communications with U.S. citizens in national security cases, under judicial oversight by FISA. The record of the FISA Court shows that from 9/11 to 2005, it approved 6650 surveillance requests and refused only four [NYT 2/5/2006]. Despite FISA’s compliance record, President Bush authorized a secret, warrantless wiretap and intercept program that authorized data mining on the scale of an estimated three billion communications each day [R. Suskind, The One Percent Solution, 2006, New York, Simon Schuster, pp.85-87]. When the unauthorized wiretap program became known, Congress passed a new warrantless wiretap law and a Federal Appeals Court upheld it [NYT, 7/7/2007 and 8/6/2007]. The separation of powers did not check crisis justice.

Shortly after 9/11 an intense debate started within the Bush administration by a small circle of political appointees and legal advisers on how the terrorist suspects should be held and questioned. The administration adopted new harsh measures without public debate and Congressional vote. Within the Justice Department, the Office of Legal Counsel is the gatekeeper for holding executive branch decisions to the law and the constitution. After the president declared that Common Article 3 of the Geneva Conventions on “mutilation, cruel treatment and torture” and on “humiliating and degrading treatment” of detainees does not apply to al Qaeda captives, the White House, the Defense Department and the Justice Department hammered out policies and practices that did not stop abuses and miscarriage of justice, although they did limit and cushion some harsh practices. The Office of Legal Counsel (OLC) under Jay Bybee agreed with John Yoo’s 2002 definition of torture as pain equivalent to organ failure, impairment of bodily function, or even death, under which harsh CIA interrogation was authorized. When the Yoo memo was leaked, Jack Goldsmith, Bybee’s replacement, rescinded the memo, but promptly submitted his resignation in June 2004. He well knew that rescinding that memo was the end of his legal and political career in a Republican administration [Jack Goldsmith, The Terror Presidency, 2007, New York, Norton]. His
successor at OLC, Steven Bradbury, under the new attorney general Alberto Gonzales, opened the door again on coercive interrogation and torture.

According to investigative reporters, “Associates at the Justice Department said that Mr. Gonzales seldom resisted pressure from Vice President Cheney and David Addington, Mr. Cheney’s counsel, to endorse policies that they saw as effective in safeguarding Americans, even though the practice brought condemnation by other governments, human rights groups, and Democrats in Congress. Critics say Mr. Gonzales turned his agency into an arm of the Bush White House, undermining the department’s independence” [NYT 10/4/2007]. Congress then passed the Detainee Treatment Act, but the CIA had already been exempt from it in secret; The Supreme Court ruled that Common Article 3 did apply to all detainees; the Congress passed the Military Commissions Act in 2006 with restrictions on detainee abuse but leaving it to the president to specify permissible interrogation techniques, and the president signed an order in 2007 allowing the CIA to use some interrogation methods banned for military interrogators like water boarding under the label “enhanced interrogation techniques” [NYT 6/18/ 2008].

4. The convoluted story of detention and interrogation of terrorist suspects, involving as it does the White House, several executive departments and agencies, the Congress and the judiciary shows just how feebly the much praised checks and balances in U.S. democracy actually works during a national security crisis. The civil society did only marginally better. The news media engaged in war time “patriotic journalism”, though there were some notable exceptions, like Dexter Filkins’ first hand account of what counter-insurgency and counter-terror were like in real life [Dexter Filkins, “The Fall of the Warrior King” 2005, New York Times Magazine, October 23]. The public swallowed the Rumsfeld “bad apples” explanation for abuses. It was not the checks and balances of democratic government and the institutional supports for law and justice, but mounting U.S. casualties and lack of success in Iraq that turned the public against the Bush administration [Christopher Gelpi, “the cost of war: how many casualties will America tolerate” 2006, Foreign Affairs, Jan/Feb. 139-142]. Shifting public support opened a
window of opportunity for opponents of the maximum security state. Lawyers pressed the federal courts on behalf of their detainee clients. News reporters became emboldened and exposed fear mongering, secrecy and lack of accountability. Members of the political and governmental establishment with insider information made their views known and revealed damaging facts that had been kept secret. The Congress started to stand up to the executive branch. The federal courts and the Supreme Court grew skeptical of and rejected in part the legal architecture of the Bush security state. The public voiced its displeasure with the vote in the 2006 elections.

The prosecution of terrorist suspects

By releasing over five hundred of the Guantanamo detainees, the Bush administration tacitly acknowledged its hyperbole about “the worst of the worst” though it denied miscarriage of justice. There is much unfinished business on how democracies should deal with terrorists. The current issue is specifically about the prosecution of terrorist suspects: should it be in federal courts or in the military commissions authorized in the 2009 Military Commissions Act? A second issue is coercive interrogation of terrorist suspects. The two are linked because confession extracted under torture is not admissible in federal court. These issues are embedded in a wider question. There are three models for fighting terrorists: the maximum security state of the Bush administration, civil libertarian business-as-usual, and the realist democratic model developed in the United Kingdom since the late 1990’s. The first two are shaped by legal minds and analyze legal principles and hypothetical situations rather than real terrorists and operations. The realist model rests on knowledge of what terrorists actually do and what security forces and the criminal justice system are actually capable of delivering.

The two models of advocates and opponents of emergency measures share some basic assumptions about terrorism, security and justice. 1. Worst case and doomsday scenarios about “ticking bombers” and weapons of mass destruction. These distract focus on the most likely sources, targets and modes of terrorist attacks. 2. Excessive and ill-informed fears about the power and cleverness of terrorists and the vulnerabilities of an open
They ignore many instances of terrorist bungling and incompetence, and favor security overkill and excessive curbs on civil liberties. An alarmist view of the abuse of civil liberties by government, e.g. the notion that rights curtailed in an emergency are never regained. It ties the hands of security agencies due to exaggerated fears. 4. Faith in technology, such as data mining and indiscriminate electronic surveillance. It leads to neglect of human intelligence that has a proven record. 5. The necessity for total secrecy in counterterrorism, based on unsubstantiated claims about “lives saved, plots uncovered, and help to the enemy.” It ignores how suspects actually provide actionable intelligence. 6. Reliance on legal and constitutional precedent rather than contemporary real life terrorism, e.g. debate about how President George Washington dealt with the Whiskey Rebellion, President Lincoln acted in the Civil War and President Roosevelt in World War II, as a model for what current presidents should or shouldn’t do. Chairing a discussion by a distinguished panel of lawyers and historians at the Brookings Institution [CSPAN, March 17, 2006] on the “president’s war powers,” legal writer and journalist Stuart Taylor was moved to ask “What has all this to do with nuclear terrorism?” 7. Firm convictions that torture and coercive interrogation always gets useful intelligence, versus an equally firm conviction that it always gets useless information. Both contentions are contradicted by empirical data.

The maximum security state is defended by Richard Posner [Not a Suicide Pact, 2006, Oxford UP], a judge on the US Court of Appeals for the Seventh Circuit and prolific legal scholar and author, and by University of California (Berkeley) law professor John Yoo [2006], who was also one of its architects. It is also supported by Jack Goldsmith, Alan Dershowitz, and others. Posner advocates preventive detention, warrantless wiretaps, data mining of domestic communications, coercive interrogation for intelligence purposes, military tribunals and much executive branch authority for dealing with terrorist threats, with some qualifications. The business-as-usual civil libertarians believe the criminal law, the Geneva Conventions, the Bill of Rights framework of protecting citizens against a potentially oppressive state are the appropriate and sufficient framework for dealing with terrorism. In different variations, this position is advocated by the journalist Anthony
Lewis, law professor David Cole, Kenneth Roth and NGOs like Human Rights Watch. These advocates of incompatible models live in a legal world with limited behavioral anchors. For instance, Posner [pp. 93-98] has a comprehensive discussion of the legal obstacles to detection and surveillance of terrorists in the FISA law of 1978 and the FISA court. Yoo (p.106) has Yet the record of the FISA Court for 1978-2000 is 19,000 warrant applications approved and only five rejected, and after 9/11, 6,650 approved and only four rejected. From a behavioral standpoint, the FISA actions look more like “rubber stamp” than “obstacle” [NYT, 2/5/2006]. Anthony Lewis [Freedom for the Thought We Hate: a Biography of the First Amendment, 2008, New York, Basic Books] worries that hate speech codes against Islamist extremists are a menace to freedom of thought and that vigorous political dissent might be stifled. Yet Canada, Britain, France, Germany, the Netherlands , South Africa, India and Australia have such laws or have signed conventions banning hate speech, and their democracies have not suffered [NYT, 6/12/2008].

Posner [pp.97-100] has great faith in electronic surveillance to thwart terrorists and maintains that “the government could, in the present emergency, intercept all communications inside and outside the U.S.” but gives no examples. Yoo [pp. 107-108] has similar faith and discusses hypothetical examples of intercepts. As opposed to targeted electronic surveillance, data mining has not uncovered any planned terrorist attacks. The FBI reported that “in the months after 9/11, NSA (National Security Agency) sent a steady stream of telephone numbers, email addresses and names to the FBI in search of terrorists. The stream became a flood, requiring hundreds of agents to check thousands of tips a month. But virtually all of them led to dead ends or innocent Americans [NYT, 1/17/2006 “Spy Agency Data after Sept. 11 led FBI to Dead Ends]. On July 10, 2009, the inspectors general from five federal agencies released the unclassified version of their report on the President’s Surveillance Program (PSP), the warrantless (secret) wiretapping that bypassed the FISA court, and found its effectiveness in fighting terrorists “unclear”. Neither the CIA nor the FBI could link the PSP directly to counterterrorism successes, i.e. arrests and thwarted plots [NYT “U.S. Wiretapping of Limited Value, Officials Report” 7/10/2010]. In October 2006, President Bush claimed
the U.S. and its partners have disrupted at least 10 serious al Qaeda plots since 9/11, including attacks inside the U.S. [www.whitehouse.gov/news/releases]. In a follow-up, New York University legal researchers found that in eight instances listed by the president there was no public record of detention and legal proceedings [Center on Law and Security, New York University, “Terrorist trial report card Sept. 11 2001 to Sept 11, 2006, n.d]. The single conviction was a tasking case in which an Ohio truck driver with al Qaeda links scouted the possibility of collapsing the Brooklyn Bridge by cutting suspension cables with a gas torch and concluded it could not be done. An analysis of data mining at the Cato Institute think tank concludes that “though data mining has many valuable uses, it is not well suited to terrorist discovery…the possible benefits for finding planning or preparation for terrorism are minimal. The financial costs, wasted effort, and threats to privacy and civil liberties are potentially vast” [J. Jonas and Harper J., “Effective counterterrorism and the limited role of predictive data mining” 2006, Policy Analysis no.584, The Cato Institute].

Neither the maximum security state nor the business-as-usual models are suitable weapons against terrorists in a democracy. Maximum security is a civil liberties overkill that is not effective against terrorists, and business-as-usual ignores real problems of suppressing terrorism. Both have been critiqued by Michael Ignatieff in a series of thoughtful essays [The Lesser Evil. Political Ethics in an Age of Terror, 2004, Princeton UP]. There is no lack of suggestions, debates, and justifications for emergency measures, much of it in law, civil liberties and national security publications and forums. The topics cover preventive detention, special courts for terrorists, electronic monitoring, profiling, lowering the standards for probable cause and reasonable doubt, restrictions on incendiary speech, to name but some. Much of the debate is on the constitutionality and legality of these measures, and how far they diminish civil liberties. Advocates assume without evidence that the proposed measures are necessary for national security, and are effective, or, on the contrary, undermine cherished liberties and freedoms. There is little evidence presented by them about real-world terrorist events and the actual operation of security forces, law enforcement and the courts.
A realist democratic strategy against terrorists

The third model, a realist democratic response to terrorism, rests on knowledge gotten by security forces and agencies about terrorists and terrorism. The goal is successful prevention prior to terrorist acts and prosecution when prevention fails, in a justice system that is fair and impartial. Marc Sageman [Understanding Suicide Networks, 2004, Philadelphia, Pennsylvania UP] has studied a large data set on four hundred al Qaeda terrorists who have targeted the U.S. They tend to be professionals and engineers, highly educated, ethnic Arabs. They shared on the Internet with others, or in chat rooms, their personal experience of a moral violation or the humiliation of their country or religion. They linked with others like themselves and congregated in the same mosques, student associations, neighborhood clubs and Islamic bookshops, and often lived together. In these local Muslim communities, they became radicalized by militants, often Islamist clergy, who advocated the violent overthrow of corrupt Arab regimes and other Islamist causes targeting Western Europe and the U.S. For example, the terrorist Raed Hijazi, the mastermind for a thwarted attack on a 400 room hotel in Amman, Jordan, with five thousand pounds of acids and agrochemicals mixed into explosives, was born in California to Jordanian-American parents and was converted to the jihadi cause in a mosque community and the Islamic Assistance Organization while studying at California State University in Sacramento [9/11 Commission Report, pp. 174-175]. Infiltrating radical mosque communities by undercover agents and informants, and employing other modes of surveillance when suspicious activity is found, makes sense as a preventive counter-terrorist strategy. Objections to religious and ethnic profiling makes no sense from a realist point of view. There is overwhelming evidence from around the world that radical Islamist imams and mosque communities breed terrorists against the United States and that other religious groups have not been a threat. Recruitment and indoctrination of terrorists have to be disrupted, and cannot be by targeting everyone equally, as in airport searches.

For prevention, the causal sequence for terrorist acts cannot start with suppliers of weapons and financing. Prior to that, recruitment has to be disrupted by authorizing
surveillance and search with realistic probable cause standards. The vehicle for indoctrination about terrorist causes and justification for killing civilians is the mind of the terrorist. The driver is the imam or militant glorifying terrorism with incendiary speech. Both take cover behind freedom of religious speech. Incendiary hate speech advocating terrorist acts has to be criminalized, as many states have done. Civil libertarians object to any abridgement of free speech unless there is expectation of immediate violence. The justification of the imminent danger of violence principle was framed on an angry mob about to attack and riot. A far greater risk to life and property is the bomb attack on crowded public transportation or passenger airplanes by a covert group or individual biding their time. It should be prevented, even if the angry mob about to riot standard is not met.

For identification of terrorists, a vast amount of information is obtained by the security forces in searches and seizures from address books, computer hard drives and discs, and other materials found in safe houses. Such information allows international cooperation among security agencies to follow up links that lead to further names and arrests of terrorists. In July 2004 an email intercept got a hit on Musaad Aruchi who had been linked to other terrorists. Information passed to Pakistani intelligence led to Aruchi’s arrest in Karachi. His computer had casing photos of New York landmarks, Heathrow airport and other sites, plus names, phone numbers and addresses. One of these was for Khan, a computer techie, who operated an Internet hub for al Qaeda. From Khan emails were sent to accomplices from Indonesia to Britain. Their replies revealed them, and led to a global manhunt with dozens of arrests [Suskind, 2006, pp.317-8]. One Khan link was to Dhien Barot who was an al Qaeda suspect in Britain but had eluded the police until then. The British police arrested 13, including Barot, on suspicion of terrorism-related offenses [The Observer 8/8/2004]. Police sized compact discs and computer plans for gas cylinder explosives and plans for a radioactive “dirty” bomb. All these plans were successfully thwarted by searches and pursuing links in the terrorist structure. This is how counter-terrorism operates effectively. To get at such a treasure trove, the probable cause standard for these searches has to be lowered. Targeted electronic surveillance, which was used in the capture of Abu Zabaydah, in Faisalabad, is already legal under FISA rules.
Zibaydah revealed little under coercive interrogation, but his note-books, diary, phone numbers and visitor list yielded names, passport numbers and nationalities of other terrorist suspects [Suskind, pp. 114-5; 165]. All these measures on searches and probable cause have to be carefully crafted and implemented to avoid miscarriage of justice.

Terrorism investigations are labor-intensive and lengthy, and can range over several states and continents. That is a justification for preventive detention of suspects for longer than 48 hours before they are charged in a court, although it does not justify indefinite detention when there is insufficient evidence for prosecution. In Ulm, Germany, a group of three in an “Islamic Information Center and Multicultural House” targeted U.S. military installations and Frankfurt airport. After a tipoff from U.S. intelligence, three hundred German law enforcement personnel worked the case full time for months, and, on the day of the arrests forty-one buildings were raided [NYT, 11/9/2007]. In “Operation Crevice” in London, seven hundred officers thwarted a plot by eight ethnic Pakistani UK citizens to construct a large bomb with ammonium nitrate intended for a London site [NYT, 8/1/2005]. When terrorist suspects are identified and arrested, incriminating data are discovered, collated, and connected, more accomplices are discovered and further evidence for charging them as well with crimes are sought. It is unrealistic to expect the police to complete questioning and checking on suspects and further leads within the limited time span of 48 hours.

If recruitment of terrorists is disrupted, and identification, detection and surveillance are given ample leeway, as in the above examples of counter-terror operations, coercive interrogation and torture are not needed for obtaining intelligence or evidence against a suspect. Actionable intelligence is not likely gotten because terrorists, spies and criminal groups change their codes, plans and hiding places when a team member has been captured on the assumption that the captors will force them to talk. That was the experience of Task Force 500 in the Afghan war. For intelligence on terrorist organization and operation routines, the rank-and-file will know little of the entire operation: an arms cashe, a few names, a safe house. Middle ranks, as we have seen above, have information on computer discs and in other records, but only the top
terrorists can tell about the command structure and strategy. Artful interrogation of captured suspects by skilled interrogators can weave together an understanding of a terrorist network when combined with information from communications intercepts, cell phones, notebooks and computer hard discs.

The most insightful information about al Qaeda and terrorist operations was not from data mining nor from coercive interrogation of “high valued” detainees such as Khalid Sheikh Mohammed (KSM) and Abu Zubaydah, but from human intelligence (HUMINT), contrary to what Yoo (p.190) maintains. Jamal al Fadl, an al Qaeda operative who sought U.S. protection in 1996 when he feared for his life for embezzling al Qaeda funds, helped identify and locate al Qaeda sleeper cells in several countries [Clarke, 2004, pp. 147-148]. Ali Mohamed was a double agent involved in several terrorist plots and attacks. When he was charged for lying to a grand jury in New York about his role in the East Africa embassy bombings, he turned FBI informant in a plea bargain [9/11 Commission Report, p.68]. Abdullah Anas, an Algerian who had been an Afghan war fighter and close associate of top al Qaeda leaders, became the leader of an Algerian Islamic party, broke with bin Laden over the killing of civilians as a terror tactic, and described the al Qaeda organization structure in the news media [www.cooperativeresearch.org/profiles].

Coercive interrogation and torture

There is surprisingly little published evidence on whether what prisoners and detainees tell captors under coercive interrogation – sleep deprivation, rough treatment, isolation, hooding, shackling, sensory deprivation, exposure to hot and cold, deafening noise, painful noise, water boarding – is truthful and of intelligence value, or more truthful and valuable than what is obtained in non-coercive interrogation [Mark Bowden, “The Dark Art of Interrogation” The Atlantic Monthly, October 2003]. In the aftermath of 9/11, The CIA had no competence and experience for interrogating hostile detainees. It discovered the SERE (Survival, Evasion, Resistance, and Escape) program run by the military to expose U.S. pilots and soldiers to methods used by the Chinese communists in the Korean War to wring false confessions from American POWs [NYT 4/22/2009]. The
two military psychologists promoting coercive interrogation to the CIA had never conducted a real interrogation, yet George Tenet, CIA director, and top aides didn’t question their competence and ignored other SERE trainers’ warnings. When the two recommended it for interrogation of Guantanamo prisoners, as the pressure by the Pentagon to get tougher on prisoners for obtaining actionable intelligence was mounting, coercive interrogation looked like the answer. Top CIA and national security officials have maintained that valuable intelligence was obtained using harsh methods, though they refrained from citing specifics “for national security reasons.” Others disagreed. When FBI director Mueller was asked by Vanity Fair in 2008 whether any terrorist attacks had been disrupted because of intelligence obtained through coercive methods, he answered “I don’t believe that has been the case” [NYT 4/3/2009].

The liberal convention wisdom on coercive interrogation and torture is expressed by a critic who writes that: “Almost anyone, under the right circumstances, can be persuaded to confess to a crime they did not commit…intelligence officers in search of information can easily make detention and questioning so intolerable that their subjects will say anything for a way out.”[“Being made to confess to something, anything” www.NewScientist.com November 20, 2004]. Top security officials and interrogators however do believe that coercive interrogation and torture have value under some circumstances [Mark Bowden, “The Dark Art of Interrogation” 2003, Atlantic Monthly, October, pp 51-74]. Mackay [2004, p.477], the leader of the Task Force 500 interrogators, writes that “Our experience in Afghanistan showed that the harsher the methods used – though they never contravened the (Geneva) Convention, let alone crossed into torture – the better the information we got and the sooner we got it.” Research on torture comparing democratic with non-democratic states indicates that although democracies reduce the probability of torture, when there is violent dissent or terrorism, the probability of at least some torture increases to 97%, even in democratic states [Christian Davenport et al, “The puzzle of Abu Ghraib: are Democratic Institutions a Palliative of a Panacea?” paper read at the 2007 meetings of the International Studies Association]. The authors find that governments “cheat behind closed doors” and the watchdogs don’t watch. Citizens want the government to repress violence for the sake of security, and
governments oblige. The public believes that coercive methods against terrorist suspects “keep us safe.” Democracies with special “torture warrants” for exceptional cases have a problem: ”How can we ensure that the practice does not become commonplace – not just a tool for extracting vital, life-saving information in rare cases, but a routine tool of oppression?” [Bowden, p.74].

The British security forces in Northern Ireland used wall standing, hoodying, painful noise, sleep, food and drink deprivation against Provisional Irish Republican Army detainees (Provos) to make them talk. Most confessed within two days, named other Provos, and were convicted on the basis of their confession alone [Graham Ellison and Jim Smyth, The Crowned Harp, 2000, London, Pluto, chapter six]. The European Court of Human Rights [December 13, 1977, paragraph 98] found that these five inhumane and degrading techniques of interrogation had led to the identification of seven hundred Provos and the discovery of individual responsibility for 85 unexplained shootings. The Israelis used torture against Palestinian terrorist suspects in exceptional cases. In January 1977, in a case of alleged torture brought by a Palestinian against the General Security Service (GSS, also known as Shin Beth) in the Israeli Supreme Court, the GSS argued that violent “shaking”, enough to cause death, was necessary for interrogating terrorist suspects who might have information about a planned terrorist attack on Israel. The GSS provided evidence to the court that in the past two years it had thwarted some ninety terrorist attacks on Israel, including ten suicide bombings, seven car bombings, fifteen kidnappings, and sixty shootings, stabbings and placement of explosives [http://home.att.net/~slomansonb/Israel.html, paragraphs 18 and 24]. There was only a single case of a ”ticking bomb” when a terrorist admitted two suicide bombings by accomplices and a third bomb that had been prepared but not yet used. Shaking the suspect got him to reveal the third bomb’s hiding place before it could be used in a planned suicide attack. A ticking bomber is extremely rare for the intelligence services to arrest, and even to know whether the bomb is ticking. An experienced Israeli security official said “I have no doubt that a ‘ticking bomb’ justifies interrogation that employs physical pressure…the question is whether this is a ticking bomb, how do you know when…maybe it will go on ticking for two more months and you have a whole month to

In both Northern Ireland and in Israel and the Occupied Territories, the insurgents against the government had mounted a campaign of domestic terrorist attacks lasting several years with hundreds of bombings and shootings. That is not the threat the U.S. is under from al Qaeda and affiliated terrorists. The British and Israeli situations are not appropriate precedents for the U.S. Regardless of the law, Supreme Court decisions, and international treaties, it is inconceivable that in a genuine ticking WMD bomber incident there would be inhibition to torture an accomplice for actionable intelligence, and punishment for doing so. It is inconceivable in the U.S. and it is inconceivable in any other state. A meaningful debate has to focus on al Qaeda terror suspects, those at the higher levels who possess useful information, and not hypothetical ticking bombers or the Afghan and Arab foot soldiers captured and imprisoned in Guantanamo.

In 2002 the CIA and the FBI had an inconclusive debate on the effectiveness of torture for “high-value suspects.” The CIA was authorized to torture in secret prisons under the rendition program. Two captured high-value al Qaeda suspects were Abu Zubaydah and Khalid Sheikh Mohammed (KSM), the self-confessed 9/11 mastermind.

Abu Zibaydah at first would not talk. Then he was repeatedly water boarded and subject to deafening noise and intense light and slammed against the wall [NYT, 4/18/2009]. He told the interrogators just about anything they wanted him to admit: al Qaeda targeted shopping malls, banks, supermarkets, water systems, nuclear plants, apartment buildings, the Statue of Liberty, and so on [Suskind, p.115]. It was worthless information, and nothing could be verified. Under benign questioning before he was tortured , he identified Jose Padilla, who was later arrested, and gave up minor logistics information on al Qaeda. Interrogators thought he was mentally unstable.

KSM was water boarded 100 times in two weeks, and produced obvious fabrications and disinformation. He knew bin Laden and Zawahiri’s whereabouts (the two top leaders of
al Qaeda), but refused to disclose under torture. He yielded little on plans for terrorist operations, though he provided information about past plots and activities. He did identify the head of an al Qaeda cell in Britain, which contributed to the thwarting of a terror plot by the British police [“Inside the interrogation of a 9/11 mastermind” NYT 6/22/2008]. Yoo (pp. 166-191) claims that KSM gave valuable information about a “second wave of al Qaeda attacks” in the U.S., but the 9/11 Commission Report (pp235) does not support such an interpretation of what KSM had actually told the CIA. Yoo (p.192) also claimed that the high value terrorist Kahtani – the “missing” twentieth suicide attacker from 9/11 -gave up important information under torture. A March 20, 2006 Time Magazine news story based on a secret log of 49 days, 20 hours a day, interrogation of Kahtani revealed that he had been subjected to sleep deprivation, loud noise, hot and cold treatment, forced nudity, threats to family members, drugs, fluids (to keep his body functioning), beatings. According to his Combatant Status Review at Guantanamo, he named thirty fellow prisoners as Osama bin Laden’s personal body guards, but then recanted in March 2006 because he had been forced to falsely confess. “Buzzy” Krongrad, the no. 3 at the CIA, said about these coercive interrogations: “They went through hell and gave up very, very little” [Suskind, pp. 228, 327]. All three are awaiting trial. Whether torture will hurt the government’s chances to convict remains to be seen. The Justice Department has other evidence of terrorist activity against them beyond confessions obtained by coercive interrogation and torture.

The news media do not probe false claims about the effectiveness of torture. In an exchange on CNN (March 15, 2009), John King asked former Vice-President Cheney about his charges that President Obama is making the country less safe by banning torture and coercive interrogation (called “enhanced” interrogation) like water boarding. King :” Because of a tactic like water boarding or a black site, can you say with certainty you stopped another attempt to do something on that level (like 9/11 attack)?” Cheney first pleads national security reasons for declining to give specific instances, but then adds “…the one that has been public was the potential attack out of Heathrow (in London) when they were going to have several American planes with terrorist on board, with
liquid explosives, and they were going to blow the planes up over the United States. Now, that we intercepted and stopped, partly because of those programs we put into place.”

King did not challenge Cheney, but Cheney did not speak truthfully or was misinformed. The plot was uncovered by Scotland Yard, not the FBI and other U.S. agencies. Scotland Yard used conventional police methods, not enhanced interrogation, to disrupt the plot. British home secretary Jackie Smith said on the BBC “I am indebted to the police and security services …who saved countless lives.” The news stories from the July 2008 trial noted that the prosecution evidence came from “several months of human police surveillance, thousands of items in 69 searches, phone taps, DNA and chemical analyses, the internet, email, travel records and video monitoring [NYT 7/15/2008]. The head of the UK chief prosecution service said that “the trials have been absolutely grounded in due process and pursued with full respect for our historical norms and our liberal constitution” [NYT 10/22/2008].

In 2007, a John Kiriakou, a former CIA agent who had participated in Abu Zibaydah’s capture, claimed on ABC World News that water boarding worked very quickly to make Abu Zibaydah talk (30-35 seconds), and that the information gotten had “disrupted a number of attacks” [NYT 4/28/09]. On closer scrutiny, Kiriakou had no first-hand knowledge of water boarding and what he told ABC was hearsay. Nevertheless, the stream of such news stories fed the notion that harsh interrogation could quickly disclose terrorist plots and “had kept us safe for seven years.”

A realist democratic model for U.S. counter-terror in a natural security emergency does not require coercive interrogation, indefinite preventive detention, and special courts (military or civilian). They do not increase security and they do abridge civil liberties and undermine justice. The British government has abandoned the PIRA maximum security counter-terror model of the Northern Ireland “Troubles” because it was not appropriate against the new wave of Islamist terror attacks and contravened the justice norms of the European Union. Recent antiterrorist legislation in the UK defines new terrorist crimes and measures: assisting or supporting the principal, called ‘accomplice liability’; funding
terrorist activities; attending terrorist training places; membership in proscribed organizations; glorification of terrorism with the intention of provoking attack; authorizing the government to close places of worship that are centers of incitement to terrorism; deportation of foreign clerics who incite terror acts; extending the time of detention before charging a suspect; and other measures for identification, surveillance and search [James Beckman, Comparative Legal Approaches to Homeland Security and Anti-Terrorism, 2007, Ashgate, Burlington VT, chapter 2]. These measures represent a formidable addition to the criminal law but have not been intrusive nor threatened the civil liberties of the citizenry. Jonathan Evans, chief of MI5 (domestic intelligence) reported in a 2007 interview that “two thousand people” are thought to pose a threat, and the police are “currently working on 30 suspected plots and on 200 terrorist related groups and networks.” [NYT 11/ 5and 6/ 2007]. These figures indicate about 2000 suspects are being monitored in a population of 61 million.

**Prosecution and Trials**

The final question and unfinished business in counter-terror is whether to try terrorist suspects in the federal courts or in military commissions authorized by the Military Commissions Act of 2009 or in some other special civilian courts yet to be created that deprive the defendants of some of the rights they have in federal court. In military commissions, evidence from coercive interrogation and hearsay is permissible, evidence based on classified sources can be exempt from cross examination, discovery standards favor the prosecution, witnesses for the defense are not compelled to participate, and there is no jury from the civilian population. The media and the public would have limited access to the trial. Moreover, if acquitted of crimes, the defendant could be returned to detainee status indefinitely, as an enemy combatant, until the government declares an end to the war on terrorism. Jack Goldsmith and Neal Katyal [“The terrorist court” 2007, NYT 7/11], two law professors, propose a “comprehensive system of preventive detention…overseen by a national security court” because it would handle classified evidence in a sensible way, without compromising intelligence sources, and because of the complexity of terrorist trials, such as translations from foreign languages,
use of interpreters, inability to subpoena a witness who lives in another country, and so on. However, a former federal prosecutor who prosecuted terrorists in federal court described specific ways that complexity and classified information were handled there, and argues that neither a special court nor a special detention system are necessary [K.A. Moore “Take al Qaeda to court” 2007, NYT 8/21]. The U.S. Attorney for the Southern District of New York prosecuted and convicted many terrorists, including Ajaj, Salameh, Ayyad Abouhalima, the Blind Sheikh mastermind, and Ramzi Yousef for crimes related to the first World Trade Center bombings and other plots [9/11 Commission Report, p.72].

Some modifications of trial procedure should be made in terrorist cases similar to what international war crimes tribunals do, e.g. the International Criminal Tribunal for the Former Yugoslavia (ICTY) that sits in The Hague and has brought 159 war crimes cases to trial from 1993 to 2008 [www.ICTY.org. link to legal library, statute of the ICTY] Because some witnesses are afraid to testify – intimidation and threats, and even some acts of violence, by accomplices of the defendants have taken place against witnesses and their families- the court vacates spectators and the media when they testify and their faces and voices are distorted for television. Their testimony is redacted from the public record but not the court record. The defense knows who they are, and can prepare its cross examination, but if it reveals the witnesses’ identity it will be held in contempt of court. Classified information and informants in terrorist trials in U.S. federal courts could be handled in the same fashion.

The ICTY allows hearsay evidence under some circumstances. Many of the victims in war crimes trials are dead; in fact they have been killed so that they wouldn’t become witnesses. In these cases, some hearsay is allowed, e.g. a witness overheard soldiers boasting that they had tortured and killed the victims. Similarly, some hearsay evidence could be allowed under specific rules in terrorist cases, e.g. in cases where the plot was thwarted or aborted and the police had made electronic intercepts about plans, or statements by an undercover agent. The ICTY faces difficulties in getting access to hostile witnesses who were members of war crimes organizations, as well as
documentation from these sources, because it has no legal powers to compel these people to appear or subpoena such material. Cooperation with the ICTY depends on sovereign states that may be hostile to the prosecution. In these instances, some hearsay evidence may be permitted by the court. Similarly, a U.S. federal court cannot compel a witness from another country to appear, and neither can the defense. In these and other instances, the ICTY, which is a civilian court, has made adjustments to evidence and procedure rules enabling justice to be done. The U.S. courts could to the same. As for the defendants grandstanding to the media and to supporters during the trial, the judges of the ICTY have curbed excesses without infringing on free speech. For instance if the defendant or his counsel make wild charges for the benefit of the TV cameras, the ICTY judges tell them that unless they can prove them, they will be stricken from the record, stopped from making them, or held in contempt.

These issues of evidence and prosecution of terrorists can be handled in the criminal law and the Federal Courts. Under the Classified Information Procedures Act, the government can request permission to withhold information, produce summaries or redacted versions, or to reveal information only to defense lawyers with security clearances [Ali Soufan, “Tribunal and Error” NYT 2/2/2010]. Federal judges have the power to gag or remove defendants who disrupt a trial. The problem of circumstantial evidence requires attention. Because successful prevention of terrorists takes place before the final violent act, there is less evidence than in the usual criminal prosecutions and most of it tends to be circumstantial. The nature of the crime destroys evidence of the criminal, as in suicide bombing. Usually, there remain no fingerprints or other markers that can be traced on vehicles or airplane that are blown up and burn. Some analysts therefore believe that to keep dangerous terror suspects in custody when there is only circumstantial evidence requires administrative or preventive detention because the suspect cannot be convicted in a trial. I believe that they can be convicted and that detention is not necessary.

In the interrogation of Rahim al Nashiri, the alleged al Qaeda operation chief in the Persian Gulf and mastermind of the USS Cole suicide bomb attack in 2000 [Verbatim Transcript of Open Session Combatant Status Review Tribunal Hearing, for ISN 10015,
14 March 2007], the tribunal officers asked him to respond to the evidence against him (selected from a longer list):

(1) Explosives training in Afghanistan and presence at various insurgencies – Nashiri denies training; he visited battlefields as a newperson; in Chechnya he was part of an Islamic charity

(2) He bought 50 kg. of explosives for the two suicide bombers of the USS Cole – Nashiri admits to buying explosives, but claims they told him it was for digging wells

(3) Alias signature used by Nashiri found on contract for purchase of the vehicle used in the Cole operation – Nashiri claims his identification papers with his alias was stolen; someone else purchased it with the stolen papers.

(4) He purchased the boat for the Cole operation – true, but it was tourism and fishing in a business with the two bombers, who did not tell him about their Cole plans

(5) He met with Osama bin Laden, took money for distributing it to various people in the Middle East i.e. he was a paymaster for al Qaeda – Nashiri admits to distributing money for bin Laden but he claims it was not for terrorism. Bin Laden is a generous man who helps people when they get married and want to start a business.

Such stories and denials are standard spin by terrorist suspects. Nothing can be checked. The two accomplices blew themselves up in the suicide attack. The recipients of Obama’s generosity in Yemen and Saudi Arabia are not about to testify in Federal Court and can’t be compelled to appear. The car thieves are anonymous. Can a Chechen witness be located from twenty years ago to testify whether Nashiri was carrying an AK47 or a camera and notepad for recording news? Taken singly, his explanation may be true for each of a dozen items, but in toto, based on knowledge of terrorist organizations and practices, are jurors going to believe these stories of innocence? If one assumes that an item of circumstantial evidence has a probability of 0.3 for incriminating the suspect,
that leaves reasonable doubt of guilt. Suppose there are ten independent items, as in Nashiri’s case, then one would expect, based on probability theory, that the he has only a 3 out 100 chance of not being incriminated by the circumstantial evidence, which gets to “beyond reasonable doubt.” The answer to circumstantial evidence is not torture to extract a confession, indefinite preventive detention or special courts that abridge the justice rights. The answer is for the prosecutor to educate the jury how terrorist operate and to distinguish which explanations for circumstantial evidence are reasonable and which are tall tales.

Among suspect actions are having several aliases and possessing forged passports under several names; claiming to be in business but having no fixed place of business, no financial records, no names of clients, no business income, and business partners whose names one can’t remember; claiming to be in Afghanistan because it has unparalleled business opportunities – a poor country devastated by thirty years of civil war; attending flight school but uninterested in learning how to land airplanes; going to Afghanistan to find a bride because they are cheaper there than in Yemen or Algeria; going to Afghanistan and other sites for insurgency in order to “observe fighting” (guerilla tourism); and so on.

Nevertheless, Attorney General Eric Holder Jr. decided to try Nashiri before a military commission for the death of seventeen American sailors in the Cole attack because “it was an attack on a U.S. warship and that is appropriately placed into a military commission setting” [NYT 12/1/2009]. Other officials however say that “concerns about the (circumstantial) evidence…were an overriding factor.” It should not be, if the Justice Department were to adopt a realist instead a legalist frame on terrorist actions, as the British have in their terrorist trials against the London underground bombers and thwarted attackers of transatlantic air flights.

The realist democratic counter-terror strategy I advocate is grounded on an empirical analysis of what terrorist do and on effective law enforcement experience for containing and incapacitating them. Its cornerstones are “good intelligence and the rule of law.”
Criminalize recruitment of terrorists and advocacy for terrorism, authorize robust detection, identification, surveillance and search by police and security agencies, i.e. provide “good intelligence.” Leave much of the rest of the criminal justice system and the rule of law unchanged: arrest, detention, interrogation, prosecution, jury trial, and defendants’ rights like habeas corpus. Most of the concerns of Posner, Yoo, and the maximum state security advocates would be dealt with in a satisfactory manner, as would the civil libertarians’ concerns and fears about an oppressive state. Unfortunately, just about everything about counter-terrorism and justice for suspected terrorists has become politicized in the current political climate [Jane Meyer, “The Trial” 2010, The New Yorker Magazine, February 15 and 22]. Rational argument and good sense based on facts may not overcome fears, opinions, misinformation and interest in the court of public opinion where flawed social testing for knowledge and truth prevail.

These measures are more limited than the Bush administration post-9/11 maximum security state, but do diminish some civil liberties for the duration of a national emergency. There is a huge trade-off. Criminalizing recruitment of terrorist and advocacy of terrorism, and granting more authority for detection, identification, surveillance and search will enable security agencies to assemble evidence and thwart terrorists before attack, but it will also safe-keep the integrity of the rest of the law and justice system. Failure to expand the state’s authority for “good intelligence” opens the road to preventive detention, coercive interrogation, and prosecution in special courts, which weaken the rule of law. Sir David Omand, security and intelligence chief in Prime Minister Blair’s cabinet, explained the trade-off when he stated that good intelligence “takes the pressure off tinkering with the rule of law” [quoted in David Cole, “The British do it better” 2008, New York Review of Books, June 12].

Conclusion

The adversary system for truth and justice in crime matters is a remarkable human achievement. It necessitates nurturing and accountability to stay on its intended path. There are two principal risks for miscarriages of justice. The first comes from human
flaws and organizational routines that become embedded and displace legal norms in an
underfunded, inefficient factory-like operation for convicting lower class and minority
felons. It is a risk to justice from neglect. The citizenry, media and elected officials are
untroubled with the routine operations of criminal justice, except in so far crime stories
confirm that “bad guys” get caught, are tried and put away in prison, or on the contrary,
the justice system releases “bad guys” who will resume their crime spree. The elite of the
legal profession tends to keep away from criminal law. Through neglect, there was
miscarriage of justice for the Norfolk Four. The legal profession is powerful, enjoys a
great deal of autonomy and is capable of resisting demands for change from outsiders.
Within its own ranks, there are many individuals and groups who are deeply committed
to the ideals of justice, as Altgeld was. Individual whistleblowers are not powerful
enough to overcome organizational inertia and group interests against accountability. It
takes high visibility cases, as with the DNA exonerations and the Norfolk Four, to get
them organized as a coalition– law school innocence projects, justice NGOs, elite
professionals acting pro bono –for rectifying miscarriages of justice. If they persevere
despite much opposition, and catch the public’s and the media’s attention, they make a
difference on overturning particular miscarriages of justice and even on achieving
reforms.

The second risk to justice is the politicization of justice in national security emergencies.
The public and elected officials are susceptible to threat and fear, and to overreaction and
manipulation by zealots and fear entrepreneurs. The authors of American Foreign Policy
and the Politics of Fear. Threat Inflation since 9/11. [A. Trevor Thrall and Jane K.
Cramer eds. 2009] argue that the threat of terrorism by non-state entities, WMDs in the
hands of rogue states and the risk of them falling into the hands of terrorists, and rogue
states sheltering terrorists, cannot be denied nor deterred. There are no one hundred
percent effective measures. Grassroots threat perception, though exaggerated, is realistic,
and it can be manipulated by overselling the threat. A great temptation for politicians is to
become fear entrepreneurs because it gets them elected. There is a political match
between bottom up fears and top down expediency politics. Republican Scott Brown, running for the vacant Kennedy seat in Democratic Massachusetts, was much helped by the fear of terrorism: the voters, by 63% to 26%, agreed with him that terrorist suspects should be charged as enemy combatants in a military tribunal, whereas his opponent was in favor of giving them constitutional rights and a civilian trial [NYT 2/8/2010]. The maximum security state of the Bush administration has resonance with the electorate, and also within the political and legal establishment. “Business as usual” advocates in the civil libertarian camp are unrealistic in their assessment of threats and of the complexities in fighting terrorists and bringing them to justice. Denial and unrealism makes the public feel vulnerable and susceptible to a panic response that infringes civil liberties even further than the maximum security state. My prescription for preventing miscarriages of justice stemming from maximum security overkill and for effective protection of the public is to base anti-terrorism on behavioral knowledge of what terrorist do, what the security forces do, and what the justice system can accomplish. I call it a realist democratic response. It is meant for the duration of a national security emergency, and not a day longer. Its core is “good intelligence and the rule of law.” Give the authorities more tools on detection, identification, surveillance, arrest, search and detention of terrorist suspects, before they actually strike, and making sure these measures remain targeted on genuine suspects. But prosecute terrorists in the criminal justice system. The realist democratic response to terrorism is effective and conforms by and large to the democratic tradition on civil liberties. It is good at avoiding miscarriages of justice.

Because checks and balances are weak in a national security emergency, the realist democratic justice mode for fighting terrorists has to be made into law, as was done in Britain. It creates accountability, command responsibility and lawful behavior by government and national security agencies, the military and justice system officials. To be sure, incompetence, zealotry, poor judgment, avoidance of responsibility and other perennial agency problems of bureaucracy are not crimes. Command responsibility does create incentives for higher executives to ensure these things do not happen on their watch. Effectiveness and the rule of law get terrorists arrested and convicted. Public fears
will then subside and a reasonable rather than a panicked or alarmist view of national security threats will shape public discourse.