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WRONGLY ACCUSED REDUX: HOW RACE CONTRIBUTES TO CONVICTING THE INNOCENT: THE INFORMANTS EXAMPLE

Andrew E. Taslitz*

I. INTRODUCTION

In an earlier article, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*,¹ I answered that question with a qualified “yes.”² My answer was qualified because the empirical data supporting my theory was limited, though far from non-existent.³ My argument was that subconscious racial biases lead decisionmakers at various key points in the processing of a criminal case to view racial minorities, especially African-Americans, as more dangerous and less credible than whites.⁴ Police therefore use more intense—and riskier—investigative techniques when having contact with black suspects.⁵ But those suspects are more likely than white ones to react to such pressure defensively.⁶ That reaction leads the officers to be still more suspicious of their subject, leading them in turn to still more

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1. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006).

2. *Id.* at 121.

3. *Id.* at 123 (“In only one area has the science proceeded far enough to support some reasonably confident conclusions [about race and innocence]—though more work still needs to be done—and that is in the area of cross-racial misidentification.”).

4. *Id.* at 125-26 (summarizing theory).

5. *Id.* at 127.

6. *Id.* at 125, 127.

aggressive policing tactics.⁷ This escalating cycle of aggression continues until a mistaken eyewitness identification, false confession, or similar source of error results.⁸ Fact-finders, in turn, are more likely to conclude that such flawed evidence is in fact credible.⁹ In short, I explained, “racial features trigger an unconscious process of stereotyping and selective inattention,” a process rooted in racial stigma and a corresponding presumption of black criminality.¹⁰ This presumption is not simply that a black suspect committed a particular crime, but rather that black character is paradigmatically criminal and deceptive.¹¹ So strong is this presumption that even black officers face substantial peer pressure to treat black suspects more harshly than white ones, generating flawed confirming evidence of black guilt.¹²

My focus in the earlier piece was primarily on what happens after a black suspect has been arrested.¹³ Furthermore, I explored only *intra*-case feedback effects—how errors at one stage of a single criminal case can cause or amplify the effect of errors at a later stage.¹⁴ Additionally, my primary examples were drawn from eyewitness identifications and interrogations, though I promised that my approach had implications for other investigative techniques, particularly the use of informants.¹⁵ In this piece I hope to broaden my inquiry to fill these gaps in my nascent theory.

More specifically, I want to examine here how race’s role, in affecting who enters the criminal justice system in the first place (the stop or arrest decision itself), magnifies the risk of racial disparities in mistaken convictions. I also plan to explore *inter*-case feedback effects—how race’s heightening the risk of error in an individual case can cumulatively heighten the risk of error and racial disparities in its distribution in *future* cases. But there is still another systemic feedback effect: the increased criminal victimization of racial minority group members who are never arrested or

7. See Taslitz, *supra* note 1, at 125, 127.

8. See, e.g., *id.* at 131-32 (illustrating this process in the context of police interrogation). For a summary of the problems with error in eyewitness identifications and confessions, see JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 77-78, 132-204 (2008) (analyzing sources of error leading to wrongful convictions).

9. See Taslitz, *supra* note 1, at 131-33.

10. *Id.* at 125.

11. See *id.* at 126-27.

12. See, e.g., *id.* at 128 (noting that a black officer was “ostracized and often work[ed] dangerous assignments without backup” after he complained about the disparate treatment black suspects and victims typically received relative to whites).

13. Taslitz, *supra* note 1, at 125-26.

14. *Id.* at 131-33.

15. *Id.* at 125.

charged with a crime. Finally, I want to keep the promise made in my earlier piece to illustrate the implications of these observations for police use of informants.

Many of the general principles on which I will rely will be familiar, but their combined effect on an individual's race raising the risk of error in convicting a suspect has, to my knowledge, never been explored. After this *Introduction*, I explore in Part II, at a high level of generality, five raced effects that cumulatively raise this risk and are articulated as follows: the selection, blinders, ratchet, procedural justice, and bystander's effects.

The "selection effect" describes how race draws police attention away from white suspects toward black ones.¹⁶ The police then suffer from the "blinders effect," closing their eyes to alternative theories about who committed the crime while searching for confirming evidence that, as everyone suspected, "the black guy did it."¹⁷ The "ratchet effect" is a feedback effect in which ever-increasing focus on blacks as suspects causes ever-increasing arrests and convictions of blacks, thus further feeding police belief in black criminality as central to black character.¹⁸ These three effects combined mean that proportionately more blacks will enter the criminal justice system, facing aggressive and unreliable investigative techniques once there. With ever-more blacks entering the system and facing riskier, error-enhancing police treatment than is true for whites, the absolute number and perhaps also the rate of blacks being falsely convicted will spiral upward.¹⁹

But high rates of error and harsh treatment undermine black trust in the police, causing a "procedural justice effect."²⁰ A community's decreased trust in police fairness leads that community's members to reduce the frequency and depth of police-citizen cooperation.²¹ Moreover, reduced community aid in combating crime leads to its expansion.²² More black crime means more black arrests and more white fear of black criminals, prompting political pressure on the police to ramp up the intensity of

16. See *infra* text accompanying notes 45-49.

17. See *infra* text accompanying notes 112-51.

18. See *infra* text accompanying notes 152-63.

19. See *infra* text accompanying notes 152-65; see also DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 1-2 (2007) (summarizing data on black-white racial disparities in incarceration).

20. See *infra* text accompanying notes 164-93. For a survey on much of the leading literature on procedural justice effects, see Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65-92 (Joseph Sanders & V. Lee Hamilton eds., 2001).

21. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 204-08 (2002).

22. See *infra* text accompanying notes 164-93.

investigative techniques and thus their error rate.²³ Furthermore, lack of community involvement denies the police the careful monitoring of their work by the community that permits it to correct police errors.²⁴ As crime rates rise, moreover, a “bystander effect results”—more blacks not even arrested, let alone prosecuted, for crime find themselves being subjected to still more criminal conduct.²⁵ Police inability to stem the flow of criminality further erodes citizen-police trust, causing still more crime and leaving ordinary citizens to cope with the rising material, social, and psychological harm of victimization.²⁶

Part III examines how each of these effects manifests itself in the informant context. This section also draws analogies between ordinary gossip and informants, examining psychological studies on gossip that shed light on further reasons why a person’s race raises that person’s chance of being falsely convicted. By “informants,” I mean any persons who are not police officers but who pass on information to law enforcement either anonymously, so that their credibility cannot easily be judged, or who are themselves apparent criminals or who otherwise receive a benefit for their efforts so that their credibility is suspect. This is a broad definition that includes: jailhouse informants claiming that they heard the defendant make incriminating statements while the two awaited trial in jail or served time together; confidential informants—largely meaning criminals who provide information to the police in exchange for some overt or implicit benefit but who do not testify at trial; “cooperators,” who may testify for the prosecution at a trial or hearing, thus revealing their identity, but again in exchange for some benefit; and anonymous tipsters, who, because they are

23. Sociologists Ronald Weitzer and Steven Tuch nicely summarize the data on perceptions of the race-crime link that exists even independently of actual crime rates:

[E]ven where crime is not a serious problem, it is *seen* as more serious in neighborhoods with a larger number of blacks, and this perception is strongest among whites. We also know that whites’ fear of crime is greater in areas with higher percentages of minorities in the population . . . and that people who associate blacks with crime are inclined to support harsh punishment of offenders The latter finding indicates that “social threat may be activated not only by the residential proximity of racial minorities, but by the conflation of race and crime that exists in the minds of many, regardless of where they live

RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 11 (2006). Actual increases in black crime might therefore merely exacerbate pre-existing biases.

24. See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221 (2003) (analyzing the value of and best means for achieving citizen and community oversight of the police).

25. See *infra* text accompanying notes 194-215.

26. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2d. ed. 2006) (extended empirical and theoretical defense of the idea that denial of procedural justice discourages obedience to the law); see *infra* text accompanying notes 164-93 (explaining why and how decreased citizen trust in the police results in an increased crime rate).

anonymous, may include both honest ordinary citizens and criminal “stoolies” who do not want to be identified (all such anonymous tipsters alert the police to criminal activity or evidence of its occurrence or to the purported perpetrator’s identity).²⁷

Each of these different types of informants raises some similar and some different reliability concerns well explained elsewhere.²⁸ Some readers may therefore object to my lumping these various informant types together, particularly concerning apparent ordinary citizen tips. I do so, however, because I believe that all these informant types create serious risks of error when strong corroboration (such as an audiotape of a defendant’s purported admissions) is lacking—error likely to arise precisely because of police difficulty in determining the veracity of an informant or the accuracy of the information upon which he relies.²⁹ Yet, I will argue, these otherwise suspect informants’ tales are most likely to be believed by the police when

27. THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 1, 5 (2007), available at <http://www.thejusticeproject.org/wp-content/uploads/snitch-lr.pdf>. (defining “jailhouse snitches” and explaining why their testimony is “widely regarded as the least reliable testimony encountered in the criminal justice system,” while acknowledging that “accomplice testimony, and even out-of-custody informant testimony, can be problematic”; jailhouse informants may or may not testify at trial) [hereinafter JAILHOUSE SNITCH TESTIMONY]; HARRY I. SUBIN, BARRY BERKE, & ERIC TIRSCHWELL, THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE 15-51, 169-73 (2006) (defining “cooperating defendants” as criminal defendants seeking a benefit from the prosecution in exchange for assistance in investigating and prosecuting third parties, an umbrella term broad enough to include jailhouse snitches, accomplices, and out-of-custody informants as defined by The Justice Project above; cooperating informants generally agree to testify, if necessary); ROBERT M. BLOOM, THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 1, 31-32, 338-42, 63-65 (2002) (defining “confidential informers” as those generally having some continuing relationship with the police over time in exchange for some perceived benefit; explaining their critical role in obtaining search and arrest warrants and the legal system’s stringent efforts to protect against revelation of such informants’ identities; comparing them to “incidental informers,” who have a single contact with law enforcement over a single incident and who may receive a one-time payment or may instead be acting from civic duty; and further comparing them to “jailhouse informants,” who seek to “buy” their freedom); ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE C. HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 197-200, 211-15, 221-22 (3d ed. 2007) (explaining the difficulties in judging the trustworthiness of anonymous tips, which can come from ordinary citizens, criminals, or other suspect sources). Confidential informants and anonymous tipsters thus rarely testify, while jailhouse snitches and cooperators often do. The definitions of these and similar terms can vary widely depending upon the source consulted, but I have chosen those definitions most appropriate for my purposes here. Terminology is less important here, however, than it might be in other contexts, for any reader who disagrees with my definitions or who would reject lumping the various types of informants together can nevertheless, I hope, see that my theory of racial effects can be helpful in understanding all these phenomena, whether viewed as belonging to a common class or to distinct classes of justice system information sources.

28. See sources cited *supra* note 27.

29. See JAILHOUSE SNITCH TESTIMONY, *supra* note 27, at 4-5 (explaining the importance of corroborating informants’ reports).

the tales are consistent with culturally-reinforced racial biases.³⁰ Those same biases may likewise lead the police to truncate investigation of alternative theories of who did the crime,³¹ and may lead jurors to the same close-mindedness suffered by the police.³² This reduced skepticism about informants' reports occurs precisely and most obviously when three of the four types—jailhouse informants, confidential informants, and cooperators—have strong motives to lie, such as by receiving a benefit from the government, perhaps by means of a reduced sentence, immunity from prosecution, or hard cash.³³ Police are thus most credulous at just the time when they should be most skeptical. But the fourth type of informant—the anonymous tipster—raises related, if less obvious concerns, too. First, without knowing the tipsters' identities, we cannot know whether they are “ordinary,” honest citizens. For example, a tipster drug dealer might phone in a tip to frame a competitor or wreak vengeance on an enemy or simply to subject him to police scrutiny, though the tipster might pose as an ordinary citizen.³⁴ Second, because these tips are anonymous, it is hard to determine whether they have a solid evidentiary basis because they will never be subjected to the crucible of cross-examination.³⁵

I will touch on each of these informant types, but only briefly—just as much as is necessary to provide the context for understanding my major concern: the use of informants' tips by the police outside of trial to justify a search, seizure, or arrest. My focus is on these circumstances partly because their relevance to convicting the innocent has been under-explored³⁶ and partly because they are just the sorts of instances where the

30. See *infra* text accompanying notes 110-11, 145-51.

31. See *infra* text accompanying notes 144-51.

32. Cf. JAILHOUSE SNITCH TESTIMONY, *supra* note 27, at 5 (noting the importance of cautionary jury instructions given jurors' tendency too readily to believe even the most obviously biased of informants—the jailhouse snitches), 144-15 (summarizing leading jurisdiction's efforts to promote adversarial safeguards against lying snitch testimony in at least certain sorts of cases).

33. See sources cited *supra* note 27.

34. Cf. BLOOM, *supra* note 27, at 81 (discussing two informants “whose major incentive for serving as informants was to promote their own criminal enterprises through the elimination of their competition.”).

35. Cf. *id.* at 36-46 (noting the protection of the identity of confidential—as opposed to anonymous—informants has even led police to fabricate the very existence of such informants because the officers know that the informants will never be subjected to adversarial scrutiny at trial).

36. In my constitutional criminal procedure casebook, for example, in writing a section on the dangers of wrongful convictions arising from search and arrest warrants issued based upon informants' tips, I was forced to rely on an analogy to the scholarship on testifying informants because so little had been written about non-testifying informants' role in convicting the innocent. See TASLITZ, ET AL., *supra* note 27, at 221-22.

risk of lies or mistakes are greatest yet least likely to be detected.³⁷ Although I thus briefly discuss “cooperators,” as I have defined the term here, they are not the focus of my analysis because they do eventually face the gauntlet of adversarial safeguards at trial; however much those safeguards fail to live up to their billing, their presence is better than their absence when seeking to protect the innocent from wrongful conviction.³⁸

The importance of informants used only at this early stage of the criminal process in contributing to wrongful convictions is often missed precisely because these early-stage informants do not testify at trial. Without their testimony, how can they contribute to a mistaken verdict? is the unspoken question. Yet they can do so because they prod the police to follow some leads rather than others and to use many of the aggressive interrogation techniques described in my first article on this subject, summarized above, that lead to the creation of deeply-flawed evidence.³⁹

That my definition of “informants,” even when narrowed to early-stage informants, is a broad one, does not mean, however, that every one of my points apply equally to each informant type. For example, my analogy of relying on everyday gossip as a basis for decision making has greatest relevance to the problem of anonymous tips—a special form of hearsay with properties arguably akin to gossip’s.⁴⁰ The police have made no express deals with such informants. On the other hand, police and prosecutor deals with informants raise special risks that the latter are lying or mistaken—risks beyond those raised by the gossip analogy alone.⁴¹

37. Perhaps a better way to phrase the point is that the risk of lies is greatest *because* they are least likely to be detected where informants’ identities are either unknown to police or known only to the police handlers because there is no serious independent scrutiny of the informant by more independent parties, such as jurors, judges, and defense counsel.

38. See JAILHOUSE SNITCH TESTIMONY, *supra* note 27, at 2 (recommending the uniform use of strengthened adversarial safeguards against informant errors or lies, such as written pretrial disclosure requirements concerning matters relevant to snitch credibility, pretrial reliability hearings, corroboration requirements for testifying informants, and cautionary jury instructions—all safeguards that presume that the informant will testify at trial and that trial safeguards are among the most important for ensuring informant reports’ trustworthiness).

39. See *infra* text accompanying notes 219-57.

40. See *infra* text accompanying notes 280-328.

41. This observation stems very simply from the additional motives to lie stemming from the non-anonymous informants’ hope of expressly obtaining a benefit from law enforcement in exchange for testifying. See *supra* text accompanying notes 219-22. Some anonymous informants have incentives to lie that may not be as obvious at the time the tip is received—for example, to frame a criminal competitor—while other anonymous informants may not be motivated to lie but may be mistaken or relying on the flawed hearsay reports of others. See *supra* text accompanying notes 26-35 (summarizing the varied nature and motives of anonymous informants); *infra* text accompanying notes 280-328 (making gossip psychology analogy to explain how even honest informants’ reports, not to mention dishonest informants’ statements, can be subject to grave error).

Indeed, such deals raise such grave problems of error that they are extraordinarily worrisome.⁴² Accordingly, I devote most of the discussion in other sections of Part III of this article to these especially troubling contexts.

Of course, my concern is not simply with error but with the risk of raising it when race enters the picture. Informants' tips fingering racial minorities play into stereotypes that give the tips unjustifiably strong persuasive power. Furthermore, two of the tip-types on which I focus (jailhouse informants and confidential informants), if made by racial minority group members, are made by those who are themselves involved in crime against other racial minority group members now being labeled as criminals—a context enhancing, for example, a subconscious black face/criminality link, further leading police to premature judgments about guilt and to excessively harsh investigative techniques.⁴³ But police abuse of informants is also widely known in the racial communities being policed. That knowledge has great potential for creating negative procedural justice effects, such as reduced community cooperation with the police in solving crime, and for fostering a wide range of other harmful community impacts. There is indeed significant reason to believe that both effects are at work.⁴⁴ Informants thus potentially serve as a particularly informative real-world illustration of the five raced effects outlined in the general theory of racial error articulated in Part II of this article. At the same time, exploration of the informant problem in light of the general model defended here reveals gaps in the data requiring further research and highlights the urgency of quick action to reduce racial bias. Although more research is needed, I will argue that the theories articulated here and converging sources of evidence from a variety of sources make the case for bias sufficiently strongly that the burden should be on those who oppose reforming the informant system to make their case. Racial bias is just one more quiver in the bow of intellectual arrows being shot at the heart of the status quo. Part IV

42. See, e.g., BLOOM, *supra* note 27, at 633 (discussing risks of lies by some classes of informants who cut deals to obtain benefits from law enforcement).

43. See *infra* text accompanying notes 216-18 (defining the types of informants); *infra* text accompanying notes 69-111 (analyzing the existence and causes of the broadly socially-understood—at least at a subconscious level—of a link between being black and being criminal). Robert Bloom explains:

Since much of the crime in America today involve willing participants, the need for informants has increased substantially. In order for law enforcement authorities to solve crimes such as drug dealing, gambling, loan-sharking, money laundering, and political corruption, they need information from individuals who are either closely aligned with the participants or are participants themselves.

BLOOM, *supra* note 27, at 7.

44. See *infra* text accompanying notes 329-91.

suggests potential solutions to the problem of informant-error based on the model outlined above, concluding by summarizing and synthesizing all that went before.

II. ENTRY AND SYSTEMIC EFFECTS OF RACE

This section of this article elaborates upon the five raced effects noted above.

A. *The Selection Effect*

The “selection effect” is but another name for the oft-explored problem of racial profiling.⁴⁵ Such profiling can, of course, occur consciously such as when an officer dislikes or distrusts racial minorities, thus focusing his surveillance efforts on them in the hope of finding evidence of wrongdoing.⁴⁶ I am, however, more interested in subconscious profiling in which even consciously well-meaning, anti-racist officers nevertheless find themselves drawn to black skin as an indicator of criminality.⁴⁷ But whether done consciously or not, the effects of racial profiling are the same: police monitor blacks more than whites, thus finding disproportionately more black crimes than white ones.⁴⁸ A disproportionate influx of black suspects leads to greater frequency of the cycle of aggression described in my first piece on race and innocence, in which the police misunderstand black irritation as an indicator of black guilt and embark on a quest for evidence that makes presumed black guilt into a self-fulfilling prophecy.⁴⁹

1. The “Other-Race” Effect

Recent research on the “other-race effect”—the fact that people of one race are more likely to misidentify a criminal suspect of another race—sheds light on these processes.⁵⁰ That research suggests that early and continued disproportionate exposure to same-race faces primes the brain to

45. See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) (presenting a thorough analysis of profiling’s causes and consequences).

46. See *id.* at 28-52 (illustrating the conscious application of racial profiling by law enforcement).

47. See, e.g., Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181, 1195-96 (2005) (exploring some of the psychological processes enabling subconscious racial profiling to occur).

48. See *infra* text accompanying notes 110-11, 170-93.

49. See Taslitz, *supra* note 1, at 125-29.

50. Symposium, *The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCHOL. PUB. POL’Y & L. 3 (2001) (collecting much of the most important research on this topic).

attend carefully to the unique facial features distinguishing one same-race face from another.⁵¹ Such differential exposure, combined with media and cultural influences, however, lead to poor encoding of the features needed to differentiate among individual faces once those faces are perceived to be of another race.⁵² This effect is largest when black faces—rather than those of any other race—are involved.⁵³ Moreover, efforts to train observers to overcome their own-race bias have met with little success,⁵⁴ some researchers maintain that greater experience with other-race faces reduces this own-race bias.⁵⁵

These raced facial encoding processes have powerful effects on the social data to which each of us attends.⁵⁶ Thus, one researcher found that

51. See Otto H. Maclin & M. Kimberly Maclin, *The Role of Racial Markers in Race Perception and Racial Categorization*, in PEOPLE WATCHING: THE SOCIAL ECOLOGY OF VISUAL PERCEPTION (R. Adams, N. Ambady, K. Nakayama & S. Shimojo eds., forthcoming 2008) (manuscript at 6, 8, on file with authors); Tim Valentine, *A Unified Account of the Effects of Distinctiveness, Inversion, and Race in Face Recognition*, 43A Q. J. EXPERIMENTAL PSYCHOL. 161 (1991) (crafting exemplar model positing that a cognitive facial representation system for some-race faces arises based on experience); Tim Valentine, Patrick Chiroro & Ruth Dixon, *An Account of the Own-Race Bias and the Contact Hypothesis Based on 'Face Space' Model of Face Recognition*, in COGNITIVE AND COMPUTATIONAL ASPECTS OF FACE RECOGNITION 69-94 (Tim Valentine ed., 1994) (applying exemplar model to own-race versus other-race recognition).

52. See Maclin & Maclin, *supra* note 51 (manuscript at 8) (discussing encoding problems); see also ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 78-93 (2000) (analyzing impact of media exposure on perceptions of race).

53. See Taslitz, *supra* note 1, at 124-30 (summarizing the relevant research on the other-race effect and its implications in the wrongful identification of black suspects).

54. See, e.g., Alvin G. Goldstein & June E. Chance, *Effects of Training on Japanese Face Recognition: Reduction of the Other-Race Effect*, 23 BULL. PSYCHONOMIC SOC'Y 211 (1985) (noting modest short term improvements in reducing other-race effect due to training); Elaine S. Elliott, Elizabeth J. Wills & Alvin G. Goldstein, *The Effects of Discrimination Training on the Recognition of White and Oriental Faces*, 2 BULL. PSYCHONOMIC SOC'Y 71 (1973) (noting certain training had no significant effect in improving other-race face recognition); Roy S. Malpass, Henry Lavigueur & David E. Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285 (1973) (noting that verbal description training had no detectable effect on other-race face recognition); Roy S. Malpass, *Training in Face Recognition*, in PERCEIVING AND REMEMBERING FACES 271-84 (Graham Davis, Hadyn Ellis & John Shepherd eds., 1981) (reviewing face recognition studies and experiments).

55. See Roy S. Malpass, *They All Look Alike to Me*, in THE UNDAUNTED PSYCHOLOGISTS: ADVENTURES IN RESEARCH (Gary Brannigan & Matthew Merrens eds., 1993) (supporting argument that experience with other-race faces matters); Saul Feinman & Doris R. Entwisle, *Children's Ability to Recognize Other Children's Faces*, 47 CHILD DEV. 506 (1976) (“[D]ifferences between own-race and other-race recognition scores are significant for all children except perhaps when the preponderance of people in the child’s neighborhood are of the other race.”); John F. Cross, Jane Cross & James Daly, *Sex, Race, Age, and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393 (1971) (“For white adolescents, however, racial segregation or integration was related to recognition ability.”).

56. See Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of*

African-American faces “popped out” when embedded in Caucasian faces used as distracters.⁵⁷ But Caucasian faces, by contrast, did not “pop out” when African-American faces were used as distracters.⁵⁸ Experimental psychologist Daniel T. Levin has suggested that this quicker and heightened attention to black faces “occurs because people code race-specifying features at the expense of individuating information.”⁵⁹ In other words, what mattered to observers was recognizing black faces as African-American rather than culling features needed to recognize that particular individual’s face again in the future.⁶⁰

The presence of even a single salient feature that serves as a racial marker can trigger the racial categorization processes.⁶¹ One method used to study the impact of racial markers is to craft ambiguous-race faces using Adobe Photoshop, then to add a clearer racial marker, examining its effect on observers.⁶² Researchers Otto and Kimberly Maclin described the results of their work using hair as a racial marker:

[By] simply changing the racial marker on the face, the perceptual processes were altered. Identical faces looked like completely different individuals. What came as a surprise was that faces with the African-American racial marker actually looked darker relative to the faces with the Hispanic racial marker. Essentially the hair feature acted as a racial marker which signaled the brain to use different perceptual processes to rate, categorize, respond to, and recognize the once ambiguous race faces. This suggests that the mechanism involved in cross racial identification is a top-down process that affects our perception of virtually identical stimuli in a manner similar to the Muller-Lyer illusion in which identical lines are perceived as being different lengths depending on which way the arrow heads are facing As with the Muller-Lyer illusion . . . the racial marker has a profound effect that forces us to view identical faces differently!⁶³

Dissent, 5 OHIO ST. J. CRIM. L. 79 (2007) (analyzing the impact of raced facial encoding processes on perception and critiquing their role in the “Facial Action Coding System” used to identify potential terrorists at airports).

57. Daniel T. Levin, *Classifying Faces by Race: The Structure of Face Categories*, 22 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1364, 1375-78 (1996).

58. *Id.*

59. See Daniel T. Levin, *Race as a Visual Feature: Using Visual Search and Perceptual Discrimination Tasks to Understand Face Categories and the Cross-Race Recognition Deficit*, 129 J. EXPERIMENTAL PSYCHOL: GEN. 559, 561 (2000); Maclin & Maclin, *supra* note 51 (manuscript at 8) (describing Levin’s research).

60. See Maclin & Maclin, *supra* note 51 (manuscript at 8-9).

61. See *id.* (manuscript at 22-23).

62. See *id.* (manuscript at 8-9).

63. See *id.* (manuscript at 23).

The Maclins argue that electro-encephalographic studies of the time needed to process other-race faces, the increased involvement of the amygdala, which plays a crucial role in the identification of threat, and other physiological studies all support the following model of cognitive brain processing: once a face is identified as that of another's race, a "cognitive gating mechanism" shifts further processing away from individual face-recognition to threat-recognition portions of the brain.⁶⁴ Simply put, white faces are more likely to be individualized as unique persons, while black faces are lumped together as generalized indicators of threat.⁶⁵ Research on race-based personality judgments supports this conclusion—African-American faces, for example, being described as more assertive and cold than Caucasian faces.⁶⁶ A host of other studies confirms observers' readiness to make negative judgments about the character traits of persons perceived to have African-American faces.⁶⁷ The Maclins summarize much of the research this way:

Thus, the brain has a propensity to detect very early in the time course of perception, the presence of threat. Threatening objects (or faces) must then be processed differently, and are processed differently for an evolutionarily adaptive purpose. Threatening objects are important information in the environment, and the . . . studies demonstrate that out-group members are perceived by the brain as threatening and thus that threat alters the information extracted from the situation.⁶⁸

2. The Race/Criminal Record Synthesis

Observations that are consistent with racial stereotyping receive more attention than those that are not and heighten the grip of those stereotypes.⁶⁹ One of the most powerful heighteners is an observer's knowledge of a suspect's criminal record.⁷⁰ African-Americans with criminal records will

64. *See id.* (manuscript at 1, 12-13, 23).

65. *See id.* (manuscript at 1, 12-13).

66. *See id.* (manuscript at 10); *see also* Daniel T. Levin & Mahzarin R. Banaji, *Distortions in the Perceived Lightness of Faces: The Role of Race Categories*, 135 J. EXPERIMENTAL PSYCHOL.: GEN 501 (2006).

67. *See, e.g.*, Herbert, *supra* note 56, at 99-108; Taslitz, *supra* note 1, at 124-25.

68. Maclin & Maclin, *supra* note 51 (manuscript at 13).

69. *See* Taslitz, *supra* note 1, at 124-28.

70. *Cf.* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 21 (1983) (offering an example illustrating that stereotypes are most likely to be reinforced and activated for persons matching on more than one dimension of the stereotype); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime?: The Role of Racial Stereotypes in Evaluation of Neighborhood Crime*, 107 AM. J. SOC. 717 (2001) (discussing a study that "supports the view that stereotypes are influencing perceptions of neighborhood crime levels[]"); Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes*

thus be perceived as especially great threats and will prove particularly resistant to being perceived as complete, unique individuals.⁷¹ This observation will prove to be particularly important in connection with informants, for the police are often likely to know or to discover the criminal record of someone fingered by a “snitch.”⁷²

Sociologists have long documented the stigmatic effects of race and the ways in which those effects arise—studies that are fully consistent with the psychological ones described above.⁷³ Indeed, sociologists increasingly incorporate into their studies the work of social psychologists.⁷⁴ The two fields combined reveal a wealth of research demonstrating a close assumed connection between race and crime.⁷⁵ An observer’s negative response to a criminal act is magnified when the offender is African-American.⁷⁶ Indeed, the offender’s race leads to an increased likelihood of interpreting a crime as especially reprehensible, meriting greater punishment.⁷⁷ Observers are also better able to recall incriminating evidence and less able to recall exculpatory evidence when the offender is a racial minority.⁷⁸ This “confirmation bias,” by making negative information more salient than

Really Fading? The Princeton Trilogy Revisited, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995) (discussing how stereotyping in American culture associates certain races with crime).

71. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 68-69 (2007).

72. Criminal history is readily available via technology today. Police are likely to know the criminal history and reputation of those persons in the neighborhood where they police—persons who in turn often have knowledge of third parties’ criminality, sometimes gaining that knowledge by their own involvement in crime. See, e.g., ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 124, app. D at 132, 134 (2002) (noting Department of Justice guidelines, which require any agent planning to use a confidential informant to collect and consider certain information in assessing the suitability of the informant, including “whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution . . .”).

73. See Taslitz, *supra* note 1, at 126-27 (summarizing literature).

74. See, e.g., PAGER, *supra* note 71, at 7-71.

75. See, e.g., *id.* at 7-71.

76. See *id.* at 70.

77. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483 (2004) (finding that police and probation officers viewing crime vignettes with the offender’s race unstated, but who were unconsciously primed with images of words associated with African-Americans, viewed the juvenile offender as more culpable, meriting harsher sanctions than without the race prime).

78. See, e.g., Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726 (1988); see Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 264, 279 (Neil J. Smelser, William Julius Wilson & Faith Mitchell eds. 2001).

positive, makes it harder to overcome racial stereotypes.⁷⁹

Another line of research has explored how the presence of a criminal record interacts with race to intensify stereotyping effects.⁸⁰ Although this research is in its early stages and may involve small sample sizes, limiting the confidence that we can place in its results, there is little, if any, work undermining these conclusions.⁸¹ Furthermore, the consistency of the evidence from various sources combined with well-accepted psychological theory lends further support to the most important conclusion made by these researchers: a criminal record amplifies racial-threat perceptions dramatically.⁸²

One recent study illustrates the phenomenon.⁸³ This study examined the efforts of testers with identical and strong resumes to obtain jobs.⁸⁴ The race of the testers and the presence or absence of their having a criminal record was varied.⁸⁵ Otherwise the members of tester teams were matched to have similar ages, physical appearance, and “general style of self-presentation.”⁸⁶

The results of this study were striking.⁸⁷ Where neither black nor white testers had criminal records, blacks were still only half as likely to receive callbacks as were whites.⁸⁸ But, even more unsettling, *whites with criminal records were just as likely to receive callbacks as blacks without criminal*

79. PAGER, *supra* note 71, at 71. Confirmation bias is defined as “the tendency to seek and interpret information that confirms existing beliefs.” ARTHUR S. REBER & EMILY S. REBER, *THE PENGUIN DICTIONARY OF PSYCHOLOGY* 145 (3d ed. 2002).

80. *See, e.g.*, PAGER, *supra* note 71, at 41-57.

81. *See id.* (summarizing and critiquing the research).

82. *See id.* Interestingly, one experimental study found that even an acquittal can harm a participant’s job prospects. Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 *SOC. PROBS.* 133 (1962). Several later studies similarly suggest that mere contact with the criminal justice system has stigmatic effects likely to alter material opportunities. *See, e.g.*, Dov Cohen & Richard E. Nisbett, *Field Experiments Examining the Culture of Honor: The Role of Institutions in Perpetuating Norms About Violence*, 23 *PERSONALITY & SOC. PSYCHOL. BULL.* 1188 (1997); R.H. Finn & Patricia A. Fontaine, *The Association Between Selected Characteristics and Perceived Employability of Offenders*, 12 *CRIM. JUST. & BEHAV.* 353 (1985); Roger Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 *BRIT. J. CRIMINOLOGY* 264 (1974); Wouter Buikhuisen & Fokke P. H. Dijksterhuis, *Research and Methodology: Delinquency and Stigmatisation*, 11 *BRIT. J. CRIMINOLOGY* 185 (1971); Theodore S. Palys, *An Assessment of Legal and Cultural Stigma Regarding Unskilled Workers*, 18 *CANADIAN J. CRIMINOLOGY & CORRECTIONS* 247 (1976).

83. PAGER, *supra* note 71, at 58-59, 90-91.

84. *Id.* at 59.

85. *Id.*

86. *Id.*

87. *Id.* at 90-91.

88. *Id.* at 90.

records.⁸⁹ This observation held even with employers comparing whites just released from prison for felony drug convictions with blacks who had completely clean criminal histories.⁹⁰ This result seems consistent with sociologist Elijah Anderson's conclusion that "the anonymous black male is usually an ambiguous figure who arouses the utmost caution and is generally considered dangerous until he proves he is not."⁹¹

The presence of a criminal record reduces a black applicant's chance of a callback still further, by more than 60%.⁹² Moreover, the ratio of callbacks for non-offenders versus offenders was 3:1 for blacks and 2:1 for whites—though this difference was not statistically significant—since the black sample size was so small, that is, so few blacks got callbacks in the first place that it is hard to judge the significance of these differentials in callback ratios.⁹³ Personal contact by black testers having criminal records with potential employers did little to improve their chances in the job market, even when these testers had opportunities for extended discussions with their interviewers.⁹⁴ But the penalty of a criminal record dropped from 70-20% for white testers who actually met with their potential employers, their callback rate becoming five times greater once they had a chance to meet the employer—and this racial differential was statistically significant.⁹⁵ Employers seemed more willing to view a white tester's single criminal conviction as a "regrettable mistake," personal contact readily convincing the employer that the white tester had "learned his lesson."⁹⁶ But knowledge of a black tester's criminal record "weaken[ed] any incentive to give a young black man the benefit of the doubt."⁹⁷ Convictions for crimes of violence and imposition of prison sentences, moreover, amplify a criminal conviction's stigmatizing effects.⁹⁸

Although this study dealt with employment decisions rather than arrest decisions, its reflection of deeper psychological processes of threat-detection is suggestive of similar processes being at work in connection with police investigation. African-Americans are disproportionately involved in the criminal justice system considering that at any given time

89. *Id.* at 90-91.

90. *Id.* at 91.

91. ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 190 (1990).

92. PAGER, *supra* note 71, at 69.

93. *Id.* at 69.

94. *Id.* at 104-06.

95. *Id.* at 104, 106.

96. *Id.* at 101-02.

97. *Id.* at 101.

98. *See id.* at 123, 126.

12% of all young black men between the ages of 25 and 29 are behind bars, while only 1.7% of whites in that age range are incarcerated.⁹⁹ Over a lifetime, nearly one-third of young black men will spend time in prison.¹⁰⁰ These percentages are likely to be highest in the low-income, racially-concentrated neighborhoods in which police focus many of their resources.¹⁰¹ Furthermore, in ambiguous or high-pressure situations, those often typical of police-citizen contact, observers' perceptions of black aggressiveness and threat are particularly powerful.¹⁰² Additionally, police are drawn from the general population and that population is in the grip of a race-crime link so strong that in one study, in which observers watched a news clip describing a murder, "over 40% of subjects falsely recalled having seen a black perpetrator."¹⁰³ In another study, subjects told to shoot at potentially armed targets in a video game "are quicker to do so when the target is African-American."¹⁰⁴ Ample studies find that police are equally and perhaps even more strongly in the grip of these threat-linked racial stereotypes than are ordinary citizens.¹⁰⁵

Simultaneously, a criminal conviction is severely stigmatizing, particularly when incarceration or violence is involved.¹⁰⁶ A conviction is viewed as an indicator of fundamental negative personality traits, a

99. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR, 2005 1 (2006); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., BULLETIN: CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997 5 (2000).

100. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., SPECIAL REPORT: LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997); *see also* Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Equality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) ("High incarceration rates led researchers to claim that prison time had become a normal part of the early adulthood for black men in poor urban neighborhoods.").

101. *See generally* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007).

102. *See* Taslitz, *supra* note 47, at 1195-96 (analyzing urgency's impact on police perceptions of black threat).

103. PAGER, *supra* note 71, at 95 (summarizing research showing racially-skewed memory recall); *see also* Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 564 (2000) (making similar point).

104. *See* PAGER, *supra* note 71, at 95.

105. *See, e.g.*, Taslitz, *supra*, note 1, at 126-29 (analyzing how subconscious racial stereotyping affects officer judgments to view blacks as embodying criminality). *But see* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 175-99 (2003) (conceding that, as to one subset of police-race studies—police use of force—the bulk of the research argues that perception of such non-racial factors as whether a suspect is armed is the primary determinant of whether force is used, but, in contradiction to the studies, arguing that race likely influences police perceptions of whether a suspect is indeed armed in the first place).

106. *See* PAGER, *supra* note 71, at 115-16.

perception affecting laymen and legal elites alike, the elite judgment even being embodied in evidence codes that mark a criminal felony record as a sign that the ex-felon is not to be trusted.¹⁰⁷ All persons, or at least all Westerners, make character judgments based on skimpy evidence allowing one negative character trait to infect perceptions of a person's entire personality (the "devil's horns effect") and often give it significantly more weight than it deserves in predicting future behavior.¹⁰⁸ Police are no different. "Round up the usual suspects" becomes their implicit battle cry.¹⁰⁹

The consequences for the raced nature of informant use may be dire. First, police are disproportionately likely to arrest black than white suspects in general. If that same pattern of disparate racial impact holds for the subset of arrests involving informants, that will mean that proportionately more blacks than whites will face the risks of an innocent man being fingered by a lying or mistaken tipster that are inherent in reliance on informants. But this raises the risk of error beyond what it would be for most tip-based arrests because being black, for example, makes police more likely to assume the suspect's guilt and to use aggressive investigation and flawed techniques.¹¹⁰ Second, when an informant turns in an African-

107. See *id.* at 71-72, 115-16; STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, *EVIDENCE LAW AND PRACTICE* 148-57 (3d ed., 2007) (analyzing the theory behind Federal Rule of Evidence 609, which permits introducing a witness' felony convictions to prove that he has a character for untruthfulness).

108. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 108-13 (1993) (analyzing lay psychology of character judgments); Herbert, *supra* note 56, at 119 (explaining the "devil's horns" effect); ROBERT E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 29-46 (2003) (arguing that some cognitive biases concerning character may be far stronger in Western than Asian cultures).

109. Cf. RICHARD THOMSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 233-45 (2008) (analyzing police use of race to round up "the usual suspects," though seeing the practice as sometimes justified); ROBERT JACKALL, *STREET STORIES: THE WORLD OF POLICE DETECTIVES* 220-21 (2005) (describing police use of a person's criminal record in assessing likely involvement in new criminality and opining that "[t]he premises of the system are that criminals break laws regularly and that sooner or later their own actions and habits of mind will lead them into legal entanglements, most often in the local area where they practice their trades . . .").

110. See HARRIS, *supra* note 45, at 48-90 (summarizing data on racial profiling). Sociologist Devah Pager effectively summarized the work of two researchers on the likelihood of racial profiling leading to wrongful convictions:

Farmer and Terrell begin with the assumption that the higher rates of criminal activity among African Americans provide useful information in evaluating the criminal propensities of an unknown African American individual. Their estimates, however, suggest that such inferences alone (without other mediating information) produce a rate of error whereby—at its logical extreme—an innocent African-American would be almost five times more likely to be wrongfully convicted of a violent crime than an innocent white individual (eight times, in the case of murder).

American suspect with a criminal record, police are particularly likely to find that tip credible.¹¹¹ This suspension of skepticism about tipsters can divert their attention from alternative, perhaps more likely, theories about who did the crime, the “blinders effect” that I now describe below.

B. Blind Loyalty

“Loyalty to petrified opinion,” said Mark Twain, “never yet broke a chain or freed a human soul.”¹¹² Yet police loyalty to an idea has enchained the innocent and freed the guilty by obscuring police vision of the true wrongdoers, for clarifying their vision by seeking a new pair of conceptual glasses would be understood by their comrades in blue as a betrayal of commitment to the idea that the initial suspect must be the right suspect.¹¹³

Loyalty involves a special kind of emotional commitment—“an identification with the object of one’s loyalty rather than with its competitors.”¹¹⁴ Our own well being thus requires that we watch out for that of a particular other.¹¹⁵ A loyal husband does not, therefore, leave his spouse after the first spat, for doing so would harm the husband himself as well as his wife.¹¹⁶ True loyalty stems less from logic than from engagement with particular others; loyalty fosters acts of commitment in the face of adversity rather than a simple weighing of the immediate costs and benefits of a relationship.¹¹⁷

The emotional sense of loyalty must, however, be distinguished from the moral duty to be loyal. That duty generally requires reciprocity—I am

PAGER, *supra* note 71, at 193 n.24 (citing Amy Farmer & Dek Terrell, *Crime versus Justice: Is There a Trade-Off?*, 44 J. L. & ECON. 345, 345-66 (2001)).

111. *Cf.* Taslitz, *supra* note 1, at 125-33 (crafting argument that most criminal justice system actors, the police included, and all else being equal, will find black suspects less credible than white ones).

112. Mark Twain, in THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 329 (Hugh Rawson & Margaret Miner eds., 2d ed. 2006).

113. *Cf.* Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006) (defending similar position but focusing more on prosecutors than on the police).

114. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 8 (1993).

115. *See* Andrew E. Taslitz, *Foreword: Loyalty and Criminal Justice*, 49 HOW. L.J. 405, 408 (2006).

116. *See id.*

117. *See id.*

This profound sense of connection to another cannot come from a mere logical sense of moral obligation. True loyalty stems from a history of engagement with particular others—from the husband and wife’s years of struggling together—rather than from a simple weighing of the benefits of staying against the costs of leaving.

Id.

loyal to you, if you are loyal to me.¹¹⁸ Once that duty is triggered and combined with the *feeling* of loyalty, avoiding breach of the duty “may be understood as an expression of self-esteem and self-acceptance. To love myself, I must respect and cherish those aspects of myself that are bound up with others.”¹¹⁹

Loyalty can be a good or bad thing, its moral quality partly turning on what is the object of one’s loyalty.¹²⁰ Loyalty to Nazis is not the same thing as loyalty to sons, daughters, or lovers.¹²¹

Loyalty can extend not only to a person, group, organization, or nation, but to an idea—for certain types of commitments to ideas are part and parcel of our loyalty to individuals or aggregations.¹²² “For example, a person who rejects the existence of Jesus Christ and the historical truth of the Book of Mormon and the teachings of Joseph Smith cannot fairly be described as a ‘loyal’ member of The Latter Day Saints.”¹²³ “Loyalty to these ideas is thus constitutive of loyalty to the church and to its members.”¹²⁴

For the police, therein lies the rub. Police have a difficult and dangerous job. Moreover, they often come to believe that they have a heightened ability as compared to laymen to sniff out the suspicious, spot the liar, and ferret out the truth.¹²⁵ Yet, studies have shown that police can sometimes do worse than laymen at spotting liars precisely because police are, in practice, no better than lay citizens at this task, but often believe otherwise, too often not having the skepticism about their own judgments needed to correct error.¹²⁶ Police are also often under intense pressure to catch the bad guys, especially in high-profile cases, and are subject to the same cognitive biases, irrational thinking, and confusion as the rest of us.¹²⁷ Simultaneously, there is often a bond of brotherhood among officers, a

118. *See id.*

119. *See* FLETCHER, *supra* note 114, at 16.

120. *Cf.* AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2006) (exploring the connections among loyalty, genocide, moral codes, self-deception, and violence).

121. *See* STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME* 100 (2006).

122. *See* Taslitz, *supra* note 115, at 409-10.

123. *Id.*; *see generally* THE BOOK OF MORMON: ANOTHER TESTAMENT OF JESUS CHRIST (Joseph Smith trans., 1981).

124. Taslitz, *supra* note 114, at 410; *cf.* RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* (2008) (analyzing what it means to be loyal to one’s racial group).

125. *See* Christian A. Meissner & Saul M. Kassin, “*You’re Guilty, So Just Confess!*” *Cognitive and Behavioral Confirmation Bias in the Interrogation Room*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT* 85, 90-93 (G. Daniel Lassiter ed., 2004).

126. *See id.* at 93-94.

127. *See* Taslitz, *supra* note 1, at 130-31.

sense of having one another's back, of "us" (law enforcement) against "them" (criminals, liberal judges, and politicians).¹²⁸ This combination of forces can lead officers to latch onto a theory of who is guilty and to work it for all it is worth, to the detriment of exploring other options.¹²⁹ Fellow officers assist, where needed, in seeking confirming over disconfirming evidence.¹³⁰ Challenges to the initial theory or to the diligent work of fellow officers breed resentment, being seen as a betrayal of the bonds of loyalty that weld officers together;¹³¹ the result is "the inability of human beings to admit mistakes."¹³²

The Commission appointed by former Illinois Governor George Ryan to recommend ways to avoid convicting the innocent in death penalty cases saw combating police tunnel vision as central to its task.¹³³ Indeed, its very first recommendation for changes in police and pre-trial investigation procedures was as follows: "After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect."¹³⁴ This recommendation was modeled after Section 23(i)(a) of England's Criminal Procedure and Investigations Act of 1996.¹³⁵ The Ryan Commission concluded that the similar British entreaty in that statute had at least some effect in broadening police minds, if only because officers feared "potentially embarrassing cross-examination at trial."¹³⁶ Likewise, the British statute caused cultural and material resources to be committed to officer education and training to

128. Taslitz, *supra* note 24 (analyzing "us" versus "them" attitude of the police); *People v. McMurty*, 314 N.Y.S.2d 194, 196 (Crim. Ct. 1970) (noting that police see themselves as in a war against liberal judges and politicians (quoting Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 546)).

129. *Cf.* Bandes, *supra* note 113, at 479-84 (making similar argument but primarily as to prosecutors).

130. *See* Taslitz, *supra* note 24 at 128 (arguing that police officers often work to support each others' judgment against what they perceive to be a hostile outside world). This "confirmation bias" is one of the heuristics by which all persons, not just the police, make their way in the world. *See, e.g.*, ANDREW NEWBERG & MARK ROBERT WALDMAN, WHY WE BELIEVE WHAT WE BELIEVE: UNCOVERING OUR BIOLOGICAL NEED FOR MEANING, SPIRITUALITY, AND TRUTH 254 (2006) (defining "confirmation bias" and explaining its significance).

131. *See, e.g.*, Taslitz, *supra* note 24, at 128.

132. SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY (2003); *see also* Barry Siegel, *Presumed Guilty: An Illinois Murder Case Became a Test of Conscience Inside the System*, L.A. TIMES MAG., Nov. 1, 1992, at 19.

133. *See* STATE OF ILLINOIS OFFICE OF THE GOVERNOR, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 20 (2002) [hereinafter *Ryan Commission Report*, after George H. Ryan, the Governor who appointed the Commission].

134. *Id.*

135. *Id.*

136. *Id.*

remove their blinders.¹³⁷ The Ryan Commission noted that Canada too, in the Morin Inquiry Report in Ontario, urged departments to foster a police culture in which admitting inevitable mistakes is encouraged,¹³⁸ and in the Sophonow Inquiry Report in Manitoba recommended mandatory annual officer training against early theory commitment,¹³⁹ for tunnel vision “results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer’s thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated.”¹⁴⁰ For the Sophonow Special Commissioner, premature theory commitment was a “virus” infecting the body politic.¹⁴¹ A similar virus, various commentators have suggested, has played a role in wrongful convictions in the United States, including in, according to the Ryan Commission, Illinois capital cases.¹⁴² The virus causes police blindness to flawed or inconsistent evidence, whether from lying informants, mistaken eyewitnesses, or a host of other warning lights that the police did not see flashing.¹⁴³

The “confirmatory bias” favoring evidence supporting our beliefs, the “selective information processing” motivating us to defend those beliefs in the face of conflicting evidence, and “belief perseverance” even in the face of discredited theories are all well-documented cognitive phenomena.¹⁴⁴ In combination they mean that “people are more likely to attend to, seek out and evaluate evidence that is consistent with their beliefs, and ignore or downplay evidence that is inconsistent with their beliefs.”¹⁴⁵ These processes act like a filter promoting “knowledge avoidance” from the very early stages of cognitive processing.¹⁴⁶ In psychologist Anthony

137. *Id.*

138. *Id.* at 21; *see also* Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, A.B.A., *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, 2006 A.B.A. CRIM. JUST. SEC. 5 (summarizing Morin Inquiry Report) [hereinafter *Achieving Justice*].

139. *Ryan Commission Report*, *supra* note 133, at 1-14 (discussing the Sophonow Inquiry Report’s relevance to the Illinois’ inquiry).

140. *Id.* at 21 (quoting Sophonow Inquiry Report); *see also* Manitoba Justice: The Inquiry Regarding Thomas Sophonow, <http://www.gov.mb.ca/justice/publications/sophonow/toc.html> (last visited Feb. 24, 2008) [hereinafter *Sophonow Inquiry Report*].

141. *See Sophonow Inquiry Report*, *supra* note 140, at 13-14.

142. *See Ryan Commission Report*, *supra* note 133, at 20-21.

143. *See id.* at 20-21; *see generally* *Achieving Justice*, *supra* note 138 (surveying the many kinds of error that can lead to wrongful convictions).

144. *See* Bandes, *supra* note 113, at 491.

145. Jonathan A. Fugelsang & Kevin N. Dunbar, *A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law*, in *LAW AND THE BRAIN* 157, 160 (Semir Zeki & Oliver Goodenough eds., 2004); *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006).

146. *See* Anthony G. Greenwald, *Self-Knowledge and Self-Deception: Further*

Greenwald's words, we "need not know specifically what is inside the envelope to judge that it should be discarded."¹⁴⁷ So long as the envelope is labeled, "disconfirming evidence," it will be ignored.¹⁴⁸ For the reasons just explained, police incentives and training too often exacerbate these cognitive biases, or at the very least do nothing to combat them.¹⁴⁹ Particularly when combined with racial biases, the results can be troubling.

The process may work as follows: selection bias leads police disproportionately to focus their attention on black suspects. Suspects' resentful reactions heighten police suspicions.¹⁵⁰ Police loyalty to this early theory of criminal liability leads them to "leap to a conclusion that the person who is a suspect is in fact the guilty party. Once that conclusion is made, investigative efforts . . . center on marshalling facts and assembling evidence which will convict that suspect, rather than continuing with the objective investigation of other possible suspects."¹⁵¹ An initial racial selection bias affecting who enters the criminal justice system thus turns into a conviction bias, compounding the ill effects of the officers' mistaken early choices.

C. *The Ratchet Effect*

The "ratchet effect" results from police misallocation of resources.¹⁵² Professor Bernard E. Harcourt has explored the operation of the ratchet effect under assumptions of "non-spurious" profiling that is, assuming that the police-targeted population in fact offends at a higher rate than other populations.¹⁵³ The ratchet works over time to ensure that the incarcerated population will contain an ever-increasing percentage of the profiled population—a percentage well above even its higher relative offending rates in the general population.¹⁵⁴ Harcourt offers a colorful analogy to

Considerations, in THE MYTHOMANIAS: THE NATURE OF DECEPTION AND SELF-DECEPTION 57 (Michael S. Mysllobodsky ed., 1997).

147. *Id.*

148. See Bandes, *supra* note 113, at 491-92 (applying Greenwald's theory to prosecutorial tunnel vision).

149. See *supra* text accompanying notes 108, 127.

150. See Taslitz, *supra* note 1, at 125-27.

151. *Ryan Commission Report, supra* note 133, at 20.

152. See BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 147 (2007).

153. *Id.*

154. Harcourt explains:

By ratchet effect, I have in mind a very specific social phenomenon that occurs in multiple stages. In simple terms, it is a disproportionality that grows over time. The disproportionality in question is between the makeup of the offending population and the make-up of the carceral population—that is, the population that has criminal justice contacts

illustrate the point:

Imagine that the fishing boats from a village in southern Spain troll at random two bodies of water—the Atlantic ocean, where cod are relatively sparse, and the Mediterranean, where sea bass are plentiful. The waters are far more dense with fish in the Mediterranean, and an average day’s catch nets twice as many bass as a day in the Atlantic nets cod. When the captains fish in an entirely uncoordinated and random manner, the catch of the day in the village includes both cod and sea bass. However, if the captains coordinate and decide to fish a lot more in the dense Mediterranean, then, at the end of the day, the catch will be larger in overall quantity and will contain proportionally far more sea bass. By shifting more fishing to the higher-density Mediterranean, the captains both increase the overall catch and skew it toward sea bass.¹⁵⁵

Of course, because the captains net more overall catch by diverting more resources to the Mediterranean, assuming that their resources are fixed, they will likely choose in the future to divert a still greater percentage of their resources to that location. That will indeed further increase their total catch, but it will also skew that catch even more disproportionately toward bass. In the extreme, the fishermen will fish only in the Mediterranean, thus catching almost only bass, to the ever-lasting joy of the unfettered cod! This is the ratchet effect at work in the fishing industry.

In the policing industry, the higher-offending group are the bass, the lower-offending group the cod.¹⁵⁶ If police are looking only to incapacitate offenders, ignoring whether police procedures themselves alter incentives concerning who offends, they will devote increasingly greater percentages of their limited resources, up to some “natural” stopping point, to the higher-offending group, raising the percentage of that group incarcerated to well above even their higher percentage of the offending population.¹⁵⁷ Moreover, police will likely use arrest and incarceration data as a proxy for true offending rates.¹⁵⁸ A self-fulfilling prophecy results: differentials in

such as arrest, conviction, fine, probation, imprisonment, parole, or other supervision. So, for instance, if drywall contractors comprise 10 percent of actual tax evaders but 40 percent of persons convicted of tax evasion, there is an imbalance between the offending population and the carceral population. If the IRS then uses the carceral population to allocate more resources to drywall contractors, that imbalance will increase. Over time, this process of increasing disproportionality represents what I call a ratchet.

Id.

155. *Id.* at 147-48.

156. *Id.* at 148.

157. *See id.* at 148-60 (illustrating the impact of this effect under a variety of assumptions).

158. In the words of Peter Verniero, the Attorney General of New Jersey: “To a large extent, these statistics have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.” PETER

police resource allocation between the two groups mean ever-more arrests and convictions of members of the higher relative to the lower offending group.¹⁵⁹ This pattern makes the higher-offending group look to have even greater an offending rate than is the case, again leading to more resources focused on incapacitating that group on apparent grounds of efficiency, effectiveness, and protecting public safety.¹⁶⁰ No racial animus is required.¹⁶¹

Consider how much worse this problem can be, however, if, because of the selection effect, the seemingly higher-offending group in fact never offended at a greater rate than lower-offending ones in the first place or at least did not offend at quite as high a rate as the police originally perceived. Furthermore, because the selection and blindness effects increase the risk of convicting the innocent by using overly-aggressive and flawed investigative techniques and ignoring alternative leads, the increased resource-shifting to incapacitating the perceived higher-offending group that results from the ratchet effect should involve a disproportionate “catch” of the innocent and, given still more energetic, resource-enriched investigative techniques, trigger a higher rate of police errors in whom they arrest and seek to prosecute.¹⁶² Additionally, police see what they believe to be increasing evidence that they are “right” to target the supposedly higher-offending group.¹⁶³ One raced procedural error compounds another.

D. *The Procedural Justice Effect*

Police behavior can also alter citizen’s perceptions of the police.¹⁶⁴ But those perceptions can in turn have concrete, often negative, impacts on both the communities policed and the broader society.¹⁶⁵ Procedural justice and

VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW REGARDING ALLEGATIONS OF RACIAL PROFILING 68 (1999), available at http://www.state.nj.us/lps/intm_419.pdf.

159. See HARCOURT, *supra* note 152, at 147-60.

160. See *id.* at 148-60.

161. See *id.* at 147-60.

162. See *supra* text accompanying notes 112-51 (explaining the impact of the selection and blindness effects).

163. See HARCOURT, *supra* note 152, at 148-60.

164. See *id.* at 119-21 (summarizing data suggesting that African-American’s “personal experiences” with profiling contributes to their disproportionately negative views of the criminal justice system); TYLER & HUO, *supra* note 21, at 196-97 (concluding, based upon a review of the empirical data, that “having had a personal experience with a legal authority changes how an individual thinks about those authorities and about the institutions associated with them . . .”).

165. See, e.g., HARRIS, *supra* note 45, at 94-128 (summarizing the individual, communal, and social ill effects of real and perceived racial profiling); LEE, *supra* note 105, at 178 (arguing that we should care about perceptions of racially-biased policing, including the use of force, because

related branches of psychological research have for decades explored these perception-based phenomena.¹⁶⁶ The primary results of this research are that procedures perceived as fair and that are administered by authorities perceived as trustworthy increase citizen willingness to obey the law and to cooperate with the police.¹⁶⁷ Crime thus falls while more offenders are apprehended.¹⁶⁸ Correspondingly, unfair procedures can *increase* crime and decrease citizen-police cooperation.¹⁶⁹

Although scholars differ on how they define fair procedures, one helpful scheme crafted by leading researchers in the field divides fair procedures into two categories: “(1) *quality of decisionmaking*[, meaning] the perceived neutrality and consistency [of authorities]—and (2) the *quality of treatment*[, meaning] being treated [by the authorities] with dignity and respect, having one’s rights acknowledged.”¹⁷⁰ Trustworthiness, the perception that the authorities are concerned about your needs, affects citizen response to legal authorities along with the

“actual or perceived unfairness and racial bias in law enforcement undermines police effectiveness[—]immerging tensions between communities of color and the police, if unaddressed, can ignite into chaos.”).

166. See Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65-92 (Joseph Sanders and V. Lee Hamilton eds., 2001) (surveying the procedural justice literature); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (synthesizing the teachings of procedural justice research); YUEN J. HUO & TOM R. TYLER, *HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY* (2000) (applying procedural justice research to police-community relations).

167. See, e.g., TOM R. TYLER, ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 6, 82-102 (1997) (cataloguing positive attitudinal and behavioral effects of according procedural justice and many of the factors affecting perceptions of such justice); TYLER & HUO, *supra* note 21, at xiv (noting importance to procedural justice of the sense of being given fair process by authorities whose motives make them seem trustworthy).

168. See HUO & TYLER, *supra* note 166, at 61 (“Previous studies have linked procedural fairness to actual behavior. A reanalysis of data from the Milwaukee Domestic Violence Experiment, for example, showed that procedural fairness perceptions actually suppressed subsequent violence among individuals who were arrested for domestic abuse.”).

169. Tyler and Huo are worth quoting extensively on this point:

Looking at these issues another way, we can say that police and court activities that offend or alienate the public are unlikely to be effective in controlling crime in the long term. Unfair or disrespectful treatment by particular police officers or judges influences people’s general evaluations of the police and the courts and their overall respect for the law. Losing respect for the law has a broad influence: both the individual and others who learn of his or her experience become less likely to obey the law in the future. As a result, the job of the legal authorities becomes more difficult. It is striking that even minor personal experiences with legal authorities—dealing with a fender-bender traffic accident, a burglary, or a street stop—have a strong general influence on people’s views about the police and courts.

TYLER & HUO, *supra* note 21, at 206.

170. See Tom R. Tyler, *Racial Profiling, Attributions of Motive, and the Acceptance of Social Authority*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES* 61, 65 (Richard L. Wiener, et al. eds., 2007).

perceived fairness of the procedures.¹⁷¹

Racial profiling violates the neutrality and consistency of the police as legal authorities, suggesting that they act instead in a biased fashion.¹⁷² Aggressive police investigation tactics resulting from racially-profiled suspects' defensive responses will be seen by those suspects as disrespectful treatment, hurtful to individual dignity, and demonstrating lack of respect for suspects' rights.¹⁷³ In an atmosphere in which police are expected to engage in racially-biased tactics, moreover, these negative perception-confirming police behaviors will lead their targets to believe that the police are thoroughly unconcerned with the targets' welfare.¹⁷⁴ Additionally, these dynamics should occur both at the individual level, meaning the profiled individual's feeling of abuse, and at the community level, meaning the broader racial group's understanding that harm to one of their members is in some sense harm to all.¹⁷⁵ Of course, it is the *perception* of racial profiling, more than its reality, that should trigger these cognitive and social processes.¹⁷⁶ But reality and perception are often linked.¹⁷⁷ Widespread racially-biased, aggressive police behavior is likely to increase the perception that it is occurring.¹⁷⁸ That perception will, in turn, bring about the ill social impacts of greater crime and reduced police-citizen cooperation discussed above.¹⁷⁹ The selection, ratchet, and blindness effects should thus cumulatively contribute to negative procedural justice effects as well.

What research that has been done specifically in the area of police racial profiling firmly supports these suggestions. One study, for example,

171. *See id.* at 65.

172. *See* HARRIS, *supra* note 45, at 94-128 (articulating extended defense of this point).

173. That such aggressive policing techniques will be used and poorly received, raising the risk of error, is the main point of Taslitz, *supra* note 1.

174. *See* TYLER & HUO, *supra* note 21, at 58-75 (analyzing the factors affecting subjects' attributions of motive-based trust, including in the context of racial profiling, and the behavioral consequences of such attributions).

175. *See* HARRIS, *supra* note 45, at 94-128 (documenting both individual and group reactions to racial profiling).

176. *See* Tyler, *supra* note 170, at 72 (“[P]olice cannot assume that eliminating the reality of profiling will [alone] eliminate the perception of profiling.”).

177. *See id.* at 67 (noting that *experience* with the police is an important factor affecting police-citizen procedural justice perceptions).

178. *See* HARRIS, *supra* note 45, at 94-128.

179. *See* Tyler, *supra* note 170, at 64 (noting that “attributions of profiling are associated with decreased support,” reduce active public cooperation with the police, voluntary deference to police decisions, and “general everyday compliance with the law,” all factors affecting “the degree to which the police are able to control crime”); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support to Policing*, 37 *LAW & SOC’Y REV.* 513, 522-24 (2003) (articulating similar argument).

revealed that personal experiences with the police led racial minority group members to believe that they had been racially profiled.¹⁸⁰ This belief leads subjects to be less willing to accept police decisions and to express more anger toward the police.¹⁸¹ Importantly, as repeated several times above, if the subjects expressed that anger toward the police, then the officers likely reacted aggressively, compounding those citizens' perceptions of being disrespectfully treated.¹⁸² Interestingly, only two percent of the variance in perceptions of being racially-profiled could be attributed to the mere fact that subjects were members of potentially stigmatizable groups, thus seeing profiling because they expected to see it.¹⁸³ By far the more important factor was the fairness of the procedures police used.¹⁸⁴ Neutral, factual decisions and polite, respectful treatment reduced perceptions of being profiled, while opposite procedures increased such perceptions.¹⁸⁵ A second study found similar results when minority group members perceived that the police generally used unfair procedures, such as profiling, rather than the members believing that they had personally been subjected to such profiling.¹⁸⁶ Explains leading procedural justice researcher Tom Tyler,

The core conclusion of the studies is that when people indicate that they have experienced fair procedures when dealing with the police and/or when they indicate that the police generally use fair procedures when dealing with members of their community, they are less likely to infer that profiling occurs. Hence, the police can manage their relationships with members of the communities they serve through their behavior when dealing with members of the public.¹⁸⁷

The flip side, Tyler also notes, of course, is that police will have more difficulty "managing" their relationships with the communities they police when they are seen as using unfair procedures.¹⁸⁸ The likely resulting increase in crime will occur in just the community that fears police abuse.¹⁸⁹ Because those communities are generally composed of racial minorities,¹⁹⁰

180. Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253, 260-62 (2004).

181. See Tyler, *supra* note 170, at 66.

182. See *supra* text accompanying notes 45-49; Taslitz, *supra* note 1, at 129.

183. Tyler, *supra* note 170, at 66.

184. *Id.*

185. *Id.*

186. *Id.* at 66-67; see Tyler & Wakslak, *supra* note 180, at 268.

187. Tyler, *supra* note 170, at 67-68.

188. See *id.* at 68.

189. See *supra* text accompanying notes 164-93 (addressing when, how, and why negative procedural justice effects can affect crime rates in the involved communities).

190. See Sunshine & Tyler, *supra* note 179, at 523.

racial profiling, therefore, probably paradoxically increases criminal victimization of racial minorities. These costs in turn harm the broader society, perhaps in the form of higher taxes, reduced social contributions by minority group members, or funds diverted from other valuable uses to policing.¹⁹¹ Moreover, increased crime in minority communities further contributes to the perceived association between race and criminality, further increasing profiling, and profiling, in turn, breeds greater minority citizen resentment, causing greater police aggression, ultimately causing a rise in the rates of error in arresting and convicting the innocent.¹⁹² Finally, even if error rates remain stable, the increase in crime, if it also results in corresponding increases in arrests, will raise the absolute number of arrests of the innocent, further compounding the problem.¹⁹³

E. The Bystander Effects

By “bystander effects,” I mean those effects of profiling on the communities policed or on the broader society other than procedural justice effects.¹⁹⁴ I distinguish these community impacts from the direct impact of profiling on specific *individuals* arrested or otherwise harmed by the deprivation of their liberty.¹⁹⁵

Here I stress three effects. First, remember that the ratchet effect means that African-Americans, particularly from lower-income

191. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6-7 (2007) (noting the ill consequences of governing through crime, including the “vast reorienting of fiscal and administrative resources . . . aptly described as a transformation from ‘welfare state’ to ‘penal state[.]’”).

192. See Cynthia Willis-Esqueda, *Racial Profiling as a Minority Issue*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 75, 80-81 (Richard L. Wiener, et al. eds., 2007) (summarizing empirical research suggesting that profiling is strengthening the perceived link between Black faces and crime, a link apparently magnified in the police relative to layperson subjects); see also *supra* Part II.A-D (summarizing the selection, blinders, and ratchet effects that contribute to the cyclical process described here); Taslitz, *supra* note 1 (summarizing the same for police race/aggressive-tactics connections).

193. In other words, the selection and other effects described here result in ever more racially skewed policing efforts, causing aggressive police tactics that ensnare the innocent. The more real or perceived overall crime, therefore, the more will be the total number of convictions of the innocent even if error rates remain constant. But they may not remain constant, for great political pressure on the police to stem a perceived “crime wave” logically might create still more pressure on police to close cases “successfully,” further heightening police use of just those aggressive tactics that lead to mistakes.

194. The term “bystander effects” is mine, but the empirical realities underlying the concept have been well-documented. See sources cited *infra* notes 194-215 and accompanying text.

195. See HARRIS, *supra* note 45, at 94-99 (documenting racial profiling’s impact on individuals).

communities, are over-represented among the population of incarcerated felons.¹⁹⁶ This over-representation can be so extreme in some localities as to devastate those communities.¹⁹⁷ Once released, felons find diminished job opportunities because of the stigma of their conviction.¹⁹⁸ They may accordingly invest less in “human capital,” in education and training, fearing that such investment will be fruitless.¹⁹⁹ But this weakens each ex-felon’s existing relationships, leading his relationship partners to depend upon him less, and leading others to be unwilling to form new relationships with him.²⁰⁰ Moreover, shattered relationships and poor employment opportunities may lead him to re-offend.²⁰¹ Widespread imprisonment and unemployment can rend the “social fabric of the community,”²⁰² fueling “a cycle of detrimental consequences for the community that then feed back on community members.”²⁰³ Fewer adults are around to supervise children, while the opportunity for the children to engage in crime rises.²⁰⁴ This combination in turn means more broken families and greater poverty.²⁰⁵ Yet another feedback effect—the one with which I began the discussion of raced effects—is magnified by this community devastation: the association between crime and the black face²⁰⁶ raising the risk of wrongful convictions.²⁰⁷ As law professor Bernard Harcourt, relying partly on the work of fellow law professor Dorothy Roberts,²⁰⁸ explains:

Roberts discusses one extremely revealing symptom of the “black face” of

196. See *supra* Part III.C.

197. See, e.g., Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206 (1998) (detailing impact on ex-felons); CLEAR, *supra* note 101, at 574 (detailing the resulting community devastation).

198. See PAGER, *supra* note 71, at 159 (“Across a wide range of occupations and industries, ex-offenders are systematically excluded from entry-level job openings on the basis of their criminal record.”).

199. See Meares, *supra* note 197, at 209.

200. See *id.* at 209.

201. See *id.* at 209-10; PAGER, *supra* note 71, at 160 (“Finding steady, quality employment is one of the strongest predictors of desistance from crime, and yet incarceration itself reduces the opportunities for ex-offenders to find work. This vicious cycle suggests that current ‘crime control’ policies may in fact exacerbate the very conditions that lead to crime in the first place.”).

202. See HARCOURT, *supra* note 152, at 161.

203. *Id.* at 161.

204. See Meares, *supra* note 197, at 206-08.

205. See *id.* at 206 (noting the devastating effects of high incarceration levels on “the vitality of families, the life chances of children left behind, and the economic circumstances of African-American communities.”).

206. See Herbert, *supra* note 56, at 99-108.

207. See Taslitz, *supra* note 1, at 130-33.

208. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 805 (1999).

crime, namely, the strong tendency of white victims and eyewitnesses to misidentify suspects in cross-racial situations. Studies show a disproportionate rate of false identifications when the person identifying is white and the person identified is black. In fact, according to Sheri Lynn Johnson, “this expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor.” The black face has become the criminal in our collective subconscious. “The unconscious association between Blacks and crime is so powerful that it supersedes reality,” Roberts observes: “it predisposes whites to literally see Black people as criminals. Their skin color marks Blacks as visibly lawless.”²⁰⁹

Second, my discussion above of the ratchet effect assumed that it had no effect on the actual relative offending rates of whites and blacks or the overall level of crime. But this assumption is not necessarily correct. If police divert more of their fixed resources to arresting blacks, and if whites know this, whites have less to fear from the police and so may offend more often.²¹⁰ Racial profiling might, over time, mean that in fact a growing proportion of crime occurs among whites while police strategies are based on just the opposite premise.²¹¹ Furthermore, although deterrent effects of focused policing on black communities might reduce black crime, this does not mean it will fall as much as white crime rises.²¹² Indeed, procedural justice and other effects described above suggest that deterrence among the black community might be strongly moderated or even overcome by these other forces.²¹³ In that case, overall crime further rises, again at least raising the absolute number of the wrongly convicted.²¹⁴ Rising crime can lead to political pressure for even more energetic policing, which will be focused on black communities, leading them to bear the brunt of tactics that yet again risk prosecuting the innocent.²¹⁵

III. INFORMANTS AND RACE

Having explained in Section II the five raced effects that can increase the chances of convicting the innocent, Section III applies those effects to the special case of informants. Specifically, Section III examines the

209. HARCOURT, *supra* note 152, at 162 (quoting in part respectively Sheri Lynn-Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 943, 949 (1984), and Roberts, *supra* note 208, at 806).

210. *See* HARCOURT, *supra* note 152, at 154-56.

211. *See id.* at 4, 154-60.

212. *See id.* at 154-60.

213. *See supra* Part II.A-D.

214. *See supra* Part II.A-D.

215. *See supra* notes 157-60 and accompanying text.

available empirical and anecdotal evidence of whether any or all of these five effects are at work in the use of informants in crime investigation. Note that the focus is on using informants in *investigating* criminal activity. This section proposes that there is good reason to believe that racially-biased errors in investigating crime based upon informants' tips are likely to raise the risk of racially-biased errors in later convictions. Moreover, other racially-biased costs will be imposed even upon those wrongly ensnared in the justice system, although never convicted, as well as upon broader racial communities.

Although I try for ease of expression, to tease out each of the five raced effects separately, under distinct headings, I necessarily mention several or all of the effects under each heading as well. I do so because these effects are interactive, often mutually reinforcing. Analyzing any one effect in complete isolation from the others can thus sometimes understate each effect's likely impact on wrongful convictions. Moreover, the data does not always clearly separate effects. Furthermore, I have more to say about some effects than others because there is more data about some effects than others. Additionally, sometimes different kinds of data are available as to different effects. My conclusions are thus made with some caution.

It is also important to remember my definitions of "informants" and of their various sub-types, and my explanation of why I rely on informants as an example, which were set forth in this article's introduction.²¹⁶ Some of my comments here are directed more to one informant sub-type than another—for example, more to confidential informants involved in crime than to citizen-informants. Other authors have made the powerful case that over-reliance on informants—regardless of the race of the persons fingered, and if done without adequate safeguards—raises undue risks of convicting the innocent.²¹⁷ My primary purpose in this section, however, is to explore converging sources of data suggesting that this risk—and the risk of collateral community harms (bystander effects)—rises further with informants' tips targeting racial minorities. I begin by exploring empirical data concerning the selection, blinders, and ratchet effects where police rely on anonymous tips (which might be from "stoolies" or from ordinary citizens—we cannot tell which because of their anonymous nature) or confidential informants. Next, I explore analogical research on rumor psychology, research having the most relevance to anonymous tips (from whatever source), though of some relevance to all types of informants' tips. I finish my discussion of the informants' example by examining a variety of

216. See *supra* text accompanying notes 27-35.

217. See *supra* text accompanying notes 28-34.

data sources—and the rise of the “Stop Snitching” protest movement—as offering insights into the procedural justice and bystander effects. The Stop Snitching Movement was likely intended to protest against the use of confidential informants and cooperators, but police feared that the movement would instead intimidate honest but anonymous citizen-informants or honest and potential testifying citizen-witnesses from coming forward to aid the police in the first place.²¹⁸ My interest is less in who is right in this debate than in the community distrust of police fostered by their excessive reliance on informants, a distrust manifested in the anti-snitching protests.

A. *Selection, Blindness, and Ratchets*

1. Empirical Data

a. *Why Non-Testifying Informants Merit Separate Attention.*

The bulk of literature about informants and innocence focuses on wrongful convictions resulting in part from perjurious informant testimony, mostly by jailhouse snitches or cooperators.²¹⁹ Indeed, dishonest informant-witnesses are a contributing factor to convicting the innocent in a significant percentage of all DNA exonerations.²²⁰ In death cases in particular, this contribution is striking, with false snitch testimony being a leading cause of error.²²¹ Although recent studies have suggested that there is significant racial disparity in likely wrongful convictions, little analysis has been separately conducted as to the role of race in causing error based primarily upon informant testimony.²²² Whatever such additional data might reveal, were it available, about the degree to which racially-biased

218. See *infra* text accompanying notes 347-91.

219. See, e.g., Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917 (1999); Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 55 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

220. See Zimmerman, *supra* note 219, at 56.

221. See *JAILHOUSE SNITCH TESTIMONY*, *supra* note 27, at 1; Brandon Garrett, *Judging Innocence*, 108 *COLUMBIA L. REV.* 55, 91-93 (2008).

222. See, e.g., Garrett, *supra* note 221, at 129 (noting that the innocence exoneration cases in his study included significantly disproportionate minority representation, and if “DNA exonerations represent the tip of the iceberg, then the base of the iceberg may also disproportionately consist of minority convicts.”); Samuel Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. CRIM. L. & CRIMINOLOGY* 523, 548 (2005) (noting racial disparities in certain categories of cases among the innocent wrongly convicted).

processes in snitch-witness-dependent cases contribute to convicting the innocent, it would likely underestimate the problem. This is because anonymous informants (those whose identity is unknown to the police) and confidential informants (those whose identity the police know but will not reveal)—two types of informants who generally do not testify due to the desire for anonymity—may, consistent with the selection effect discussed in Part IIA above, either lie more often about crimes committed by racial minorities, or pass on information implicating racial minorities that police too readily believe.²²³ The other effects discussed in this article would then lead police to focus their resources in a racially-biased manner, ignoring alternative theories of who did the crime.²²⁴ That focus might, accordingly, make it more likely that innocent racial minorities will be convicted, or, if acquitted or otherwise released, will at least suffer the stigma, temporary loss of freedom, and financial cost of defending against a wrongful prosecution.²²⁵ The empirical data on non-testifying informants and race is almost as sparse, unfortunately, as it is for testifying snitches. Nevertheless, what data is available, though presenting a mixed picture, raises cause for concern.²²⁶

b. The (Admittedly Limited) Data on Non-Testifying Informants

i. The Selection Effect

The most interesting study done in this area was by the San Diego Search Warrant Project, led by Professor Laurence A. Benner, at California Western School of Law.²²⁷ The Project collected random samples of narcotics warrants issued in 1998 from the two largest districts, 100% of the samples from the two smaller districts that compose San Diego County, and conducted a random sample of the combined databases for the County as a whole.²²⁸ Information about the race of the targets was available in at least three-fourths of the cases.²²⁹

223. See *Illinois v. Gates*, 462 U.S. 213, 284 (1983) (defining “anonymous informant”); Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 183, 200 n.60 (2002) (defining “confidential informant”). My speculation is that, if police generally focus their investigative resources more on racial minorities, then they will more often use particular investigative techniques, including informants, to convict racial minorities and will, because of the blinders effect, more often believe informants who finger racial minorities.

224. See *supra* Part II.A-D.

225. See *supra* Part II.A-D.

226. See Benner, *supra* note 223, at 184.

227. See *id.* at 183.

228. See *id.* at 185.

229. See *id.* at 185 n.17.

The police most frequently-targeted only three zip code areas in the most-frequently searched district, the San Diego Judicial District; each of these three areas respectively consisted of 88%, 95%, and 78% non-white populations and accounted for 44% of all narcotics warrants.²³⁰ The target of the search in these district zip codes was either African-American or Hispanic in 96% of the cases, even though the majority of the judicial district's *overall* population in 1998—55%—was white.²³¹ In the district as a whole, only about 20% of warrants targeted whites, while about 80% targeted racial minorities, yet Blacks and Hispanics together constituted only one-third of the district's population.²³² Asian-Americans, comprising 13% of the population, were targeted in only one case.²³³

These disparities were observed even though national data and San Diego-specific data suggest far higher percentages of total narcotics users being white than black, though each race may differ dramatically in the specific drug of choice.²³⁴ Blacks in San Diego are, for example, arguably more likely to use rock than powder cocaine, while the reverse is true for whites.²³⁵ Yet 88% of *all* cocaine warrants were for crack, with only 2% of such warrants being for the white-preferred powder.²³⁶ This targeting-preference could result from police resources being disproportionately focused on black inner-city communities and from the greater ease of

230. *See id.* at 190.

231. *See id.* at 191.

232. *See* Benner, *supra* note 223, at 194.

233. *See id.*

234. *See, e.g.*, OFFICE OF APPLIED STUDIES, DEP'T OF HEALTH AND HUMAN SERV., SUMMARY OF FINDINGS FROM THE 1998 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 13 (1999), available at <http://www.oas.samhsa.gov/nhsda/NHSDASumrpt.pdf> (finding that 72% of all drug users were white, only 15% black); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 310 (2001) (reporting that Whites represented 82% of drug sellers during 1991-93, while blacks represented 16%); Benner, *supra* note 223, at 195-96 (discussing San Diego data showing Whites far more likely than Blacks or Hispanics to be engaged in manufacturing, distributing, and using methamphetamine).

235. *See* Benner, *supra* note 223, at 195-96. I say "arguably" because the study Benner relied on drew its data from cocaine testing of *arrestees*, a population that may not necessarily accurately reflect the population of *users*. *See id.* at 195-96. Furthermore, although crack has often been labeled the "Black" drug of choice, there is data suggesting that in fact Whites may make up 65% of those reporting crack use in their lifetimes, with African-Americans and Hispanics constituting respectively 26% and 9% of the users. *See* DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 127, 129 (2007). *But see* Benner, *supra* note 223, at 197-98 (reporting data showing that 214,000 Blacks but only 147,000 Whites had recently used rock cocaine, while 1.1 million Whites used some form of cocaine recently, and that of the 18.5 million Whites who have tried cocaine at some point in their lives, only 2.8 million of them used crack).

236. *See* Benner, *supra* note 223, at 197.

catching crack users in those areas because they are more likely to use the drug in public areas than is the case with white users of powder cocaine.²³⁷ Racial profiling in auto stops might also make more information available to the police about racial minorities because racial segregation patterns suggest that blacks are more likely to know, or know about, other blacks than about whites.²³⁸ Perhaps racially-profiled drivers found to be in possession of illegal narcotics at some level recognize that police are more likely to see fingering racial minorities as drug users and sellers as more credible than pointing to their white counterparts.²³⁹

Inner-city warrant searches are also more likely to rely on confidential informants, who were involved in 80% of the searches in such areas.²⁴⁰ Thirty-six percent of the searches in the three highly-targeted inner-city zip codes noted above were initiated by anonymous tips.²⁴¹ There is reason to believe that many of the confidential informants' tips are from drug users caught in the act and seeking police incentives in exchange for information, the sort of deal often condemned by commentators as likely to produce false tips free of the fear of discovery via cross-examination precisely because the informant's identity is kept "confidential."²⁴²

What is particularly striking along these lines indeed is that only 36% of the warrants targeting Hispanics and 28% of those targeting blacks proved successful, while over half the warrants targeting whites uncovered drugs.²⁴³ This observation should direct police resources toward white suspects as a more efficient target for maximizing the success of searches, yet the bulk of police search activity is instead directed toward black neighborhoods, argues Benner.²⁴⁴

237. *See id.* at 200. For the contention that crack transactions occur more frequently in public and attract greater police attention than cocaine powder use, *see* W. Rees Davis & Bruce D. Johnson, *Criminal Justice Contacts of Users & Sellers of Hard Drugs in Harlem*, 63 ALB. L. REV. 877, 918 (2000).

238. *See* Benner, *supra* note 223, at 201 (relying on San Diego Vehicle Stop Study finding a 1 in 4 chance for Black or Hispanic drivers being stopped by the police, but only 1 in 10 chance for White drivers); HARRIS, *supra* note 45, at 102 (analyzing connection between racial profiling and racially segregated housing patterns); *cf.* Benner, *supra* note 223, at 201 ("Because every racial group has drug users and sellers among them, if Blacks and Hispanics are stopped on the street disproportionately to their percentage of the population, this could be expected to produce a disproportionate number of Black and Hispanic informants.").

239. *See supra* text accompanying notes 110-11 (explaining why police are more likely to believe claims of black over white criminality).

240. *See* Benner, *supra* note 223, at 200.

241. *See id.*

242. *See id.* (concerning incentives); Donna Coker, *Foreward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 837 (2003).

243. *See* Benner, *supra* note 223, at 199.

244. *See id.* at 203.

ii. The Blinders Effect

a. The Basic Case

An additional way to interpret this data, however, is that tips were more likely to be wrong—false or mistaken—when implicating blacks than when implicating whites, yet police are disproportionately likely to credit the latter tips.²⁴⁵ Benner has made a similar point in analyzing the project's data. "Another factor influencing the [low search] success rate," said Benner, "may also be the reliability of information provided by anonymous tipsters and confidential informants."²⁴⁶ "For example, with respect to the warrants issued in the three most frequently searched inner-city zip code areas, only around one in four (27%) of the warrants that were initiated by an anonymous tip was ultimately successful in finding its target. All of these unsuccessful searches sought cocaine."²⁴⁷ Police's greater willingness to believe more unreliable information targeting racial minorities than information targeting whites suggests that the blinders effect is at work.

These police failures, even if they do not result in prosecutions or convictions, do humiliate innocent persons, a form of bystander effect, and may contribute to the procedural justice and other feedback effects that can increase crime and decrease community safety.²⁴⁸ Moreover, such high failure rates at least raise suspicions about the truthfulness of race-targeted tips that do produce results: was the evidence planted? Did it result from entrapment?²⁴⁹ The data do not answer these questions, but the data do suggest that these inquiries are not merely speculative and require further research.²⁵⁰

245. See e-mail from Laurence A. Benner, Professor of Law, California Western School of Law, to Andrew E. Taslitz, Welsh S. White Distinguished Visiting Professor of Law, University of Pittsburgh School of Law (February 4, 2008, 10:23 PST) (on file with Southwestern University Law Review) [hereinafter Benner, *e-mail*] (expressing agreement with my alternative interpretation of his data). In particular Benner had this to say about my interpretation:

Of course, as you know, empirical evidence showing such [racial] disparity cannot "prove" that this was the result of subconscious racism, but in light of the fact that (1) there are (in absolute numbers) more white drug users than non-white users and (2) warrants were more successful if served against whites than non-whites (even when controlling for the type of drug) the data supports the hypothesis that probable cause is a less rigorous standard when applied to non-white targets.

Id.

246. See Benner, *supra* note 223, at 203.

247. *Id.* at 203.

248. See HARRIS, *supra* note 45, at 91-99 (discussing racial profiling humiliating the innocent).

249. See Zimmerman, *supra* note 219, at 62-67 (discussing instances of police fabrication of informants and informants' fabrication of evidence).

250. See *supra* text accompanying notes 227-47.

Data from the other districts studied varies in its detail but does not undermine the results just described for the largest of the four districts studied.²⁵¹ Likewise, the combined sample for San Diego County as a whole supports similar conclusions.²⁵² Although under a quarter of the County's population was Hispanic and only 6% black, they were respectively 43% and 20% of search warrant targets and 96% of crack cocaine targets.²⁵³ Furthermore, only 58% of all narcotics warrants uncovered the targeted drug, with a 69% success rate for white targets.²⁵⁴ Less than half the Hispanic-targeted warrants and less than one-third of the Black-targeted warrants succeeded.²⁵⁵ Even controlling for the effect of the different drugs largely targeted in each group, "White targets continue to be more successful than warrants for either Hispanic or Black targets," suggesting that "there is something about White suspects, or about the search warrant process when dealing with White suspects, that leads to higher success rates."²⁵⁶ That particular something may in part be that anonymous tips alone (not counting confidential informants) were the source of probable cause in 35% of Black-targeted warrants and 19% of Hispanic-targeted ones but in only 8% of White-focused warrants.²⁵⁷

b. Why Current Safeguards Likely Fail

There may sometimes, it must be noted, be safeguards that can minimize the risks from potentially false or mistaken tips. In a preliminary study of data concerning police practices in 1998, a study published in 2000, focusing on a sample of narcotics warrants issued in the San Diego Judicial District, Benner found that police rarely relied *solely* on confidential informants or anonymous tips, instead corroborating them by subsequent controlled buys (often done by the confidential informants) in 66% of all search warrant applications, or corroborating the tips by surveillance of the suspect premises and background investigation of its residents, making a total of 80% of the tip-based cases having some sort of additional corroboration.²⁵⁸ Yet these observations do not eliminate cause

251. See Benner, *supra* note 223, at 207-19.

252. See *id.* at 222-24.

253. See *id.* at 215-16.

254. See *id.* at 219-20.

255. See *id.* at 219-20.

256. *Id.* at 221.

257. See *id.* at 221.

258. See Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 243-45 (2000). This preliminary study dealt with the center city judicial district, while Benner's later study, summarized earlier in this section, examined four different judicial districts first separately,

for concern. First, that still leaves 20% of confidential-informant or anonymous-tip-dependent cases without corroboration.²⁵⁹ Second, the preliminary study does not include a key point that the later study does—the high failure rate of searches of racial minorities, suggesting that, despite the corroboration efforts reported in the preliminary study, informants targeting racial minorities have more risk of being untrustworthy.²⁶⁰ Third, as Benner notes, San Diego police, as of 1998, were considered among the most progressive in the country, with one of the strongest commitments to combating racial profiling.²⁶¹ Unreliable racial-minority-targeting informants may prove to be of far greater concern in other areas. Notably, a National Center for State Courts nationwide study found that *no* efforts whatsoever were made to corroborate the accuracy of confidential informants' tips in fully 30% of cases.²⁶² Fourth, the preliminary study did not parse out the precise percentage of controlled buys done by police versus by confidential informants but did describe the latter's efforts in a way that permits the informant to be outside police observation during the alleged "buy" itself, raising the risk that the report of a buy is phony, though police did make efforts to reduce that risk.²⁶³ Fifth, there is also a risk that police will lie about such corroboration or even about the existence of the purported informant, as has been documented by others in a number of high-profile cases.²⁶⁴ This risk may be amplified in areas like the San Diego Judicial District where the officer signing the affidavit swears under oath to what the informant said but has not himself spoken to the informant, instead relying on the word of another officer never placed under oath.²⁶⁵ Benner worries that this procedure is inconsistent with the spirit of the Fourth Amendment's oath requirement and cautions, "While we do not mean to suggest that law enforcement officers are making up fictitious CIs and insulating the search warrant affiant from possible perjury charges by this practice, *the potential for such abuse is apparent.*"²⁶⁶ Requiring the officer purporting to have personal knowledge to sign the affidavit "would at least insure that the search warrant process is not based upon blind

then using a random sample from the combined databases for the county as a whole. *See* Benner, *e-mail*, *supra* note 245.

259. *See id.*

260. *See supra* text accompanying notes 243-47.

261. *See* Benner & Samarkos, *supra* note 258, at 236.

262. *See id.* at 243-44; RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 34 tbl.16 (1985).

263. *See* Benner & Samarkos, *supra* note 258, at 243-44, 243 n.56.

264. *See* Zimmerman, *supra* note 219, at 62-65.

265. *See* Benner & Samarkos, *supra* note 258, at 241.

266. *Id.* at 241 (emphasis added).

trust.²⁶⁷

c. Current Probable Cause Conceptions Likely Fail

Officer deception or intentional discrimination is not necessary, however, for there to be a racial bias problem for the innocent raised by police use of confidential informants or anonymous tipsters.²⁶⁸ Police and judges are subject to the same subconscious biases as the rest of us.²⁶⁹ That means that, in practice, such biases alter the meaning of probable cause based upon the individual officer's or judge's preconceptions. As Benner again explains:

The standard of probable cause, which shields the citizen from unwarranted governmental intrusions, is an elusive concept that in practice (if not in legal theory) is quite subjective. As the Supreme Court has repeatedly stated, the concept of probable cause cannot be reduced to a neat set of legal rules. Instead it is based upon a common sense judgment, looking at the totality of the circumstances. Because race is part of that totality, do perceptions about race unconsciously color that determination and make probable cause appear more readily when the suspect is Hispanic or Black and lives in a high crime area? Statistical disparity standing alone, of course, does not establish unconstitutional discrimination, and indeed we do not contend or mean to imply that intentional discrimination is at work here. However, would it not be surprising to find that the police, who wear the same cultural glasses as the rest of us, are immune from their distorting influence? The locations the police choose to patrol and what drugs they choose to target are largely a function of where they perceive the work is. Those decisions are not made in isolation from the totality of our cultural beliefs, stereotypes, and perceptions. Therefore, any effort to understand this aspect of our criminal justice system will necessarily be incomplete until we begin to consider the implications of the pervasive yet subtle influence of race.²⁷⁰

Benner's 1998 study did arise after *Illinois v. Gates*,²⁷¹ in which the United States Supreme Court established a more flexible, deferential test for

267. *Id.* at 241.

268. See generally K. Hugenberg & G.V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of a Facial Threat*, 14 PSYCHOL. SCI. 640 (2003).

269. *Id.*; see also Cass R. Sustein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969-72 (2006) (arguing ample evidence shows widespread "implicit" or subconscious racial bias, with strong reason to believe that bias affects behavior); RICHARD A. POSNER, *HOW JUDGES THINK* 93 (2008) (arguing that emotions, ideologies, intuitions, preconceptions, peer pressure, personality, upbringing, and education are among the factors having a subconscious influence on judicial decisionmaking in these areas of law where ambiguity creates significant judicial discretion).

270. Benner, *supra* note 223, at 223-24.

271. 462 U.S. at 238.

probable cause based upon informants' tips than the *Aguilar-Spinelli*²⁷² test that previously governed. But there may be reason to believe that subsequent case law has further increased police and judicial discretion in the probable cause determination,²⁷³ and, as numerous scholars have documented, whenever governmental actors' discretion increases, so does the room for the play of subconscious racial biases.²⁷⁴ For this reason too, the problem today may be worse than in 1998.

iii. Speculating About Ratchets and Summary

Benner's studies are too few and leave too many unanswered questions to reach any firm conclusions.²⁷⁵ Moreover, some of his data, such as the police reports of corroborating drug buys, can be interpreted in a less skeptical fashion than suggested here.²⁷⁶ But his findings at least make plausible the worry that police use of informants reveals a selection effect in which police disproportionately focus overly aggressive investigative resources on minority communities, are insufficiently skeptical of tipsters, and remain blind to alternative theories of who are the guilty parties.²⁷⁷ Likewise, the sometimes dramatic racial disparities in warrant enforcement raise the suspicion that the ratchet principle, in which ever-increasing percentages of resources target minority communities over time, is at work.²⁷⁸ More research is needed, but empirical and theoretical work not precisely focused on criminal informants but in an analogous area of psychological research—the study of rumors—adds still more reason to be concerned.²⁷⁹ The rumor analogy is particularly helpful in understanding

272. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

273. See TASLITZ ET AL., *supra* note 27, at 189-95 (summarizing post-*Gates* case law arguably lowering the quantitative and qualitative standards for probable cause).

274. See Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 14 (2007).

275. See *infra* note 279.

276. See *supra* text accompanying notes 262-67.

277. See *supra* text accompanying notes 227-47.

278. See *supra* text accompanying notes 239-47.

279. I want to stress that my argument is that Benner's studies raise serious concerns about racial bias in the informant-use process but not that these few studies prove the point. Not only is more data needed, but there are complexities in Benner's data that make drawing clear lessons difficult. For example, the relatively low success rates of warrants executed may be due to delay in executing them, earlier-executed warrants proving more successful. See Benner & Samarkos, *supra* note 258, at 258-60. Yet it seems odd that if delay is a primary contributor to weak success rates that the lowest success rates were nevertheless distributed in a racially-skewed manner. Moreover, Benner found that 29% of the warrants were issued based upon boilerplate language that rarely revealed prior tips by confidential informants; those that did mention tips noted only that they led to arrests, none mentioning whether any convictions resulted; and that warrant affidavits routinely omitted the circumstances surrounding the informant that suggest he is

the potential risks of relying on anonymous informants but enhances understanding of most other uses of informants' tips as well. The simple idea is that relying on tips from persons whose identity is unknown—or even on tips from a known informant who himself purportedly obtained his information from one or more unidentified third parties—creates risks much like those in rumor transmission. But just as racial factors can make the dangers inherent in many rumors under-appreciated, making audiences unduly credulous about those rumors, so can anonymous tips and their cousins lead to similar outcomes. Finally, it should be noted, the rumor analogy discussion here is directed primarily at the selection and blinders effects, though it has implications for the ratchet effect as well.

2. The Rumor Analogy

a. *Defining Terms*

Rumors can be defined as unverified statements communicated among persons for instrumentally relevant purposes, that is, to achieve certain goals.²⁸⁰ Rumors help the involved persons to make sense of an ambiguous, uncertain world and to manage the risks of acting in such a world.²⁸¹ To say that a rumor is “unverified” does not mean that it has no basis in reality—it often does—but does mean that it is not yet supported by evidence that has survived careful scrutiny and testing, coming from a probably credible source and confirming the claims made.²⁸² Rumors are a species of “meme-transmission,” ideas that survive and propagate or die via a process of natural cultural selection.²⁸³ Gossip differs from rumor in that

credible and has a trustworthy basis for his tip. *See id.* at 236-42. Instead, affidavits often rely on conclusory statements based upon the officer's experience. *See id.* at 239-40. Judicial willingness in practice to defer to such statements in effect gives the police substantial and barely reviewed discretion in deciding whether there is probable cause, discretion allowing for just the sort of room for the play of subconscious racial biases that psychological theory and data predict. More importantly, I argue that converging sources of data—Benner's findings, research on rumor accuracy, anecdote, and the general theory of raced effects (which is rooted in empirical data and well-accepted psychological theory)—raise such a degree of concern about race raising the risk of convicting the innocent that opponents of that view bear the burden of persuasion for proving themselves right and that, absent their meeting such a burden, caution counsels taking whatever steps follow from the available data to reduce the risk of error.

280. *See* NICHOLAS DIFONZO & PRASHANT BORDIA, RUMOR PSYCHOLOGY: SOCIAL AND ORGANIZATIONAL APPROACHES 13-18, 229-30 (2007).

281. *See id.* at 13-15, 229-30.

282. *See id.* at 17-18, 229-30.

283. *See id.* at 16. For a more thorough discussion of memes and their role in legal reasoning, *see* Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape and Other Cases*, 16 B.U. PUB. INT. L.J. 145, 183-84 (2007).

gossip is less about the usefulness of the information in attaining certain goals than it is about building group solidarity and intimacy and enforcing group norms.²⁸⁴ Gossip usually concerns more personal and yet less weighty matters than does rumor,²⁸⁵ yet there are nebulous forms of hearsay that are hard to classify as one or another type, displaying overlapping features of both.²⁸⁶ Rumor and gossip can both spread either by serial transmission—one person telling another, usually with little discussion or deliberation—or collaboratively, by group conversation.²⁸⁷

b. Why Rumor Research Sheds Light on Informant's Tips

Informants' tips, while not identical to rumor, can profitably be analogized to the latter. A search warrant affiant, remember, usually gets his information about the tip from another officer, who in turn received the original tip.²⁸⁸ The tipster himself may be reporting what he purports to have personally seen or what someone else has told him or what he has heard from scuttlebutt in the neighborhood, a process of serial transmission similar to much of the rumor-transmission process.²⁸⁹ The tip communicates information with the hope that it will be treated as true, often to achieve a variety of instrumental goals, such as a reward or deal for the tipster and recognition for the officer who thereby catches the bad guy, rumors also often having instrumental goals, albeit different ones.²⁹⁰ The tip is designed to address ambiguity or uncertainty about whether a crime occurred or who did it and to deal with the threat to the community from criminals roaming free, two functions similar to those served by rumor as

284. See DIFONZO & BORDIA, *supra* note 280, at 14 tbl.1.1, 19-23, 230.

285. See *id.* at 14 tbl.1.1, 21-22.

286. See *id.* at 23.

287. See *id.* at 137-38. I am using DiFonzo and Bordia's terminology because I believe the terminology and their model to be the most useful for my illustrative purposes, but I do not want to leave the impression that the meaning of these terms or their significance are not contested. They often are. See, e.g., GOOD GOSSIP (Robert F. Goodman & Aaron Ben-Ze'ev eds., 1994) (collecting essays debating the meaning and social significance of "gossip"); RALPH P. ROSNOW & GARY ALAN FINE, RUMOR AND GOSSIP: THE SOCIAL PSYCHOLOGY OF HEARSAY 4-7 (1976) (defining rumor and gossip similarly to how DiFonzo and Bordia have done and distinguishing them based upon the motives for their respective uses but otherwise emphasizing the similarities of their social functions as species of "hearsay" rather than their differences).

288. See *supra* text accompanying notes 258-65 (describing the nature of search warrants and the process for obtaining them); see generally Michael Longyear, Note, *To Attach Or Not to Attach: The Continued Confusion Regarding Search Warrants and the Incorporation of Supporting Documents*, 76 FORDHAM L. REV. 387, 399-401 (2007). The assertions made in this paragraph of the text above about the similarities between rumor and informants' tips are all developed *infra* text accompanying notes 284-321.

289. See *supra* text accompanying notes 239-47.

290. See *supra* note 242 and accompanying text.

well.²⁹¹ Although a tip may be believed, it is usually at first unconfirmed, coming from questionable sources or those about whom little is known, rumors likewise starting in similarly worrisome circumstances.²⁹² As mentioned earlier, often tips are acted upon in the absence of any corroboration whatsoever, and this too is true of rumor.²⁹³ Tips, like rumors, raise a particularly important set of questions: When are they most likely to be accurate and when are they most likely to be believed (whether accurate or not)? In the case of rumor, an entire branch of psychology is devoted to studying these questions.²⁹⁴

c. Causes of Error

i. Selective Inattention and Stereotype-Congruent Interpretation

Rumor research in psychology has revealed a number of particularly relevant findings concerning rumor (and, therefore, perhaps tip) accuracy.²⁹⁵ Rumor accuracy may be altered by witnesses' selectively attending to certain information over other data to accord with cognitive biases, such as stereotypes and schemas.²⁹⁶ This filtering of information is then interpreted in ways that are consistent with those stereotypes, ignoring other equally or more plausible interpretations.²⁹⁷ Racial stereotypes, of course, can have a particularly powerful grip on these processes of evidence-gathering and analysis.²⁹⁸ Stereotypes applied to an individual circumstance raise notoriously significant risks of error.²⁹⁹

291. See *supra* text accompanying notes 239-247.

292. See *supra* note 223 and accompanying text.

293. See *supra* notes 264-69 and accompanying text.

294. See sources cited *supra* notes 258-65.

295. See DIFONZO & BORDIA, *supra* note 280 at 165-69.

296. See DIFONZO & BORDIA, *supra* note 280 at 161 tbl.7.1, 164.

297. See *id.* at 161 tbl.7.1, 164-65. For a more detailed analysis of these "epistemological filters" and related cognitive processes affecting what data we attend to and how much weight we give them, see Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L & WOMEN'S STUD. 387, 410-19, 418 n.204, 419 n.209 (1996).

298. See DIFONZO & BORDIA, *supra* note 280, at 164; see generally P.A. TURNER, I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN-AMERICAN CULTURE (1993); see generally D.R. Maines, *Information Pools and Racialized Narrative Structures*, 40 THE SOCIOLOGICAL QUARTERLY 317 (1999); see generally Y. Trope & A. Liberman, *Social Hypothesis Testing: Cognitive and Motivational Mechanisms*, in SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 239 (E.T. Higgins & A.W. Kruglanski eds., 1996); see generally Y. Trope & E.P. Thompson, *Looking for Truth in All the Wrong Places? Asymmetric Search of Individuating Information About Stereotyped Group Members*, 73 J. PERSONALITY AND SOC. PSYCH. 229 (1997).

299. See DIFONZO & BORDIA, *supra* note 280, at 164-65.

These same perceptual biases can thus lead to an initial hypothesis about guilt being based on the stereotype. But, apart from the effect of the stereotypes themselves, there is another force at work: the biasing effect of having formed an initial hypothesis at all, for, once made, we tend to look for, perceive, pay attention to, and favorably interpret evidence supporting that hypothesis while unduly discounting contradicting evidence.³⁰⁰ Indeed, we will often so readily find convincing confirming evidence that we prematurely cease evidence gathering entirely.³⁰¹ Furthermore, symbolization may occur in which stereotypes end in the selection of a scapegoat, focusing tensions and bringing the virtue of simplicity to understanding a complex situation.³⁰²

Rumor transmitters also implicitly recognize that only certain sorts of information will be readily processed by a particular audience as “understandable, plausible, and acceptable to the hearer.”³⁰³ Stereotype-inconsistent details may interfere with this goal and thus be dropped in favor of a tidier story, skewing evidence-transmission away from accuracy.³⁰⁴ Rumor content is also likely to favor messages derogating outgroups as a way for enhancing ingroup prestige.³⁰⁵ “A rumor sketching a negative characterization of *them* makes us feel better about *we*—and, by extension, *me*.”³⁰⁶ Even out-group members in certain circumstances can buy into out-group-derogating stereotypes.³⁰⁷ High individual and collective anxiety can intensify these other effects by making hearers more suggestible and dulling their critical faculties,³⁰⁸ such anxiety often accompanying police work.³⁰⁹ Group conformity pressures to fall in line with an evolving group consensus—one that may be promoted by stereotyping—can also pressure otherwise skeptical listeners to accept flawed messages.³¹⁰ Groups also vary in their “epistemic norms”—the

300. See *id.* at 164; Trope & Liberman, *supra* note 298.

301. See DIFONZO & BORDIA, *supra* note 280, at 164-65.

302. See *id.* at 164; R.H. TURNER & L. M. KILLIAN, COLLECTIVE BEHAVIOR 47-48 (2nd ed. 1972) (first articulating fully the “symbolization” concept).

303. DIFONZO & BORDIA, *supra* note 280, at 167.

304. See *id.* at 167; JANET B. RUSCHER, PREJUDICED COMMUNICATION: A SOCIAL PSYCHOLOGICAL PERSPECTIVE 68 (2001) (articulating “tidy story” idea).

305. See DIFONZO & BORDIA, *supra* note 280, at 169.

306. *Id.* at 169.

307. See, e.g., William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 350 (2005).

308. See DIFONZO & BORDIA, *supra* note 280, at 170.

309. See, e.g., VINCENT E. HENRY, DEATH WORK: POLICE, TRAUMA, AND THE PSYCHOLOGY OF SURVIVAL 3-13 (2004); PHILIP BONIFACIO, THE PSYCHOLOGICAL EFFECTS OF POLICE WORK: A PSYCHODYNAMIC APPROACH 93-125 (1991).

310. See DIFONZO & BORDIA, *supra* note 280, at 173.

standards of proof they require for certain kinds of facts³¹¹—and such norms may be lowered or more easily met by stereotype-congruent information.³¹²

ii. Inability to Verify and Illusory Correlations

Inaccuracy is also more likely where, as with most tips, serial transmission rather than group deliberation is the means for rumor-dissemination.³¹³ The inability independently to verify information or the high cost of doing so; urgency to act before verifying; lack of firm, largely indisputable information; and the difficulty of access to more credible sources³¹⁴—factors likely common in police use of informants³¹⁵—also make inaccuracy more likely. Furthermore, where the motive or ability to verify information is weak, time passage compounds inaccuracy.³¹⁶ The individual and collective need to make sense of the world can also lead observers to see illusory associations, non-existent connections between independent actions.³¹⁷ Such illusions tend to be consistent with cultural stereotypes.³¹⁸ Additionally, observers will tend to rely on character assessments to explain behavior and categorize it, ignoring base rates (how most in the relevant population behave), and thus, character assessments may again reflect stereotypes about the fundamental nature of outgroup members.³¹⁹

311. *See id.* at 174.

312. *See* Taslitz, *supra* note 237, at 410-19 (illustrating similar process at work in the context of the credibility of alleged sexual assault victims); Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1056-63 (1998) (exploring the political component affecting epistemic judgments of criminal culpability).

313. *See supra* pp. 82-83; *see e.g.*, DIFONZO & BORDIA, *supra* note 280, at 171.

314. *See* DIFONZO & BORDIA, *supra* note 280, at 171-72.

315. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions For Reform*, 22 HASTINGS CONST. L.Q. 81, 83-85, 143-46 (1994).

316. *See* DIFONZO & BORDIA, *supra* note 280, at 173. DiFonzo and Bordia define two types of accuracy “verity” (closeness to the real world) and precision (closeness of a later rumor to an earlier version). *See, id.* at 142. I have not bothered to distinguish in text between these two notions. Although verity is of greater concern in criminal justice, lack of precision, in the real world decision whether to rely on an informant as a source of rumor, raises substantial doubts about verity as well.

317. *See id.* at 118-19.

318. *See id.* at 119.

319. *See id.* Such assessments of character based upon race can have important effects in choosing the right liability rules in the substantive criminal law. *See* Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 B.C.L. REV. 739, 744-45, 758 (1999).

d. Why Rumor Audiences (and Police) are Unduly Credulous

Many of the same forces that lead to rumor inaccuracy, however, also promote belief in the rumor's truth.³²⁰ Rumors that are consistent with pre-existing attitudes, including toward racial group members, are more likely to be believed.³²¹ For example, rumors about black criminality, stupidity, and sexual aggression are more readily accepted by white audiences than the converse.³²² In the mid 1960s, a rumor circulated in Detroit, Michigan, falsely alleging that a child was castrated by a gang of teenage boys in a shopping mall restroom. "When repeated in the White community, the gang was said to be Black and the victim White. When told in the Black community, the gang was said to be White and the victim Black."³²³

Rumor-repetition also increases its acceptance. The mere re-telling of a similar story can thus encourage its spread, particularly if not rebutted by equally credible sources.³²⁴ Likewise, the various other biases recounted above that degrade rumor accuracy in the telling—information-filters, confirmation biases, in-group aggrandizement, among others—probably promote acceptance and repetition of stereotype-consistent rumors.³²⁵

In any given instance, of course, a variety of forces can be at work, some promoting rumor accuracy, others undermining it. But what this review of illustrative factors encouraging the latter does is to point out how racial stereotyping can raise the risk of inaccurate rumors being believed, particularly under certain conditions.³²⁶ If the rumor-tipster analogy holds, then informants' tips playing into racial biases will raise this very same risk.³²⁷ But, as I will briefly mention in this article's conclusion, the analogy also suggests potential remedies for reducing this risk by gaining control over at least some of the conditions, such as the absence of rebuttal evidence and skeptical criticism, that promote it.³²⁸

B. Procedural Justice and the Bystander Effect: The Stop-Snitching

320. See DIFONZO & BORDIA, *supra* note 280, at 90.

321. See DIFONZO & BORDIA, *supra* note 280, at 92-93.

322. See *id.* at 94. But see GARY ALAN FINE & PATRICIA A. TURNER, WHISPERS ON THE COLOR LINE: RUMOR AND RACE IN AMERICA 126-27 (2001) (analysis of the credibility among the African-American community of rumors, often about white anti-black conspiracies).

323. DIFONZO & BORDIA, *supra* note 280, at 96; see Marilyn Rosenthal, *Where Rumor Raged*, TRANS-ACTION February 1971, at 34, 36.

324. See DIFONZO & BORDIA, *supra* note 280, at 101-03, 111.

325. See *id.* at 111.

326. See *supra* pp. 84-86; see Rosenthal, *supra* note 323, at 34.

327. See *supra* text accompanying notes 288-96.

328. See *infra* text accompanying note 398.

Movement

1. Bystander Effects

a. Increasing Crime

Professor Alexandra Natapoff has written extensively about the negative impact of widespread snitching on poorer, inner-city, often African-American communities.³²⁹ Natapoff offers this scenario of a “typical” use of drug informants in actual cases:

Drew, a low-level drug dealer who is also an addict, is confronted by [federal Drug Enforcement Agency (DEA)] agents and local police on his way to make a deal. They offer to refrain from pressing charges at that moment in exchange for information and the active pursuit of new suspects. Drew agrees, immediately provides the name of one of his suppliers to whom he owes money, and is released. As an informant, Drew’s investigative activities require him to meet with his police officer handler every two weeks to provide information and make a controlled buy every month or so. In the meantime, with his handler’s knowledge, Drew continues to consume drugs and carries a gun illegally. Unbeknownst to (but suspected by) his handler, he skims drugs from his controlled buys and continues to deal drugs on the side. In the course of his cooperation he also provides the police with truthful incriminating information about a competing drug dealer, his landlord to whom he owes rent, and his girlfriend’s ex-boyfriend whom he dislikes. The police arrest all three. When Drew is arrested in another jurisdiction for simple drug possession, his handler calls the prosecutor and those charges are dropped.³³⁰

Drew’s story illustrates a number of the community or “bystander” harms caused by an informant culture. Drew continues to engage in crime, some of it at his handler’s urging (controlled buys), other crimes with the handler’s tolerance or willful blindness. Drew escapes prosecution for his crimes not only by law enforcement’s looking the other way, but by its active protection, as shown by the prosecutor’s efforts to get Drew released and get the charges dropped when he was arrested in another jurisdiction. Drew does help to prevent crimes by turning in other dealers, but he does so as a way to incapacitate his competitors, avoid his creditors, and fulfill his

329. See, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004) [hereinafter Natapoff, *Snitching*]; Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107-09 (2006).

330. Natapoff, *Snitching*, *supra* note 329, at 647.

personal vendettas. Moreover, the dealers he fingers seem to be low-level drug dealers, easily replaced, rather than the high level dealers in charge of major distribution schemes. There is insufficient data to judge whether Drew commits more crimes than he prevents, but there is reason to worry that he does, partly because he is reaching only low-level dealers, partly because there are so many Drew-counterparts that their cumulative contribution to criminal activity is substantial, and partly because the resulting likely procedural justice effects erode the willingness to obey the law in the community more generally.³³¹

Drug informants are, moreover, not the only sort, for “snitching can reduce or eliminate liability for crimes as diverse as kidnapping, arson, gambling, and murder.”³³² Indeed, explains Natapoff, “there is no reason to assume that a given informant, even if he is useful to law enforcement in a particular case, is producing a net benefit to his community,” for “he may be a neighborhood scourge, a source of violence and fear, and a bad influence on local youth, fueled by his personal knowledge that as long as he remains useful to the authorities, his collateral bad behavior will remain essentially unchecked.”³³³

b. Fostering a Culture of Distrust

The many Drews in poor inner-city neighborhoods do more than potentially add to the total quantity of serious crime in the area. These communities are often already wounded by a hyper-active criminal justice system resulting in most community members being related to or friends with someone who is incarcerated, parentless, drug-addicted, unemployed, or depressed.³³⁴ High unemployment and substandard housing means that people spend more time on the streets, making it easier for police to arrest or hassle them³³⁵ or for undercover narcotics officers to “penetrate networks of friends and acquaintances”³³⁶ This limited privacy and the fluid,

331. *See id.* at 647-48 (offering similar analysis of the Drew example, albeit without referring to the procedural justice effects discussed earlier in this article).

332. *See id.* at 653; BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 435 (Ann L. Pastore & Kathleen Maguire eds., 2001) (showing over 20% federal cooperation rates for kidnapping, bribery, money laundering, racketeering, antitrust, gambling, arson, and national defense offenses).

333. Natapoff, *Snitching*, *supra* note 329, at 661.

334. *See id.* at 685-86; Carol S. Aneshensel & Clea A. Sucoff, *The Neighborhood Context of Adolescent Mental Health*, 37 J. HEALTH & SOC. BEH. 293-94 (1996) (describing ill mental health effects from living in crime and poverty).

335. *See* Natapoff, *Snitching*, *supra* note 329, at 686. For a powerful analysis of the effect of *crime control* on impoverished communities, *see* CLEAR, *supra* note 101, at 5.

336. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 106

insecure relationships resulting from harsh living conditions and high imprisonment levels mean that many community members can readily gain access to information about their neighbors.³³⁷ This state of affairs makes large numbers of inner-city males subject to pressures to snitch, yet, as Natapoff notes, if anywhere near eight percent of the male neighborhood population is snitching, that percentage will approach the level of East Germans living under Communism who informed the Stasi, the secret police.³³⁸ Natapoff is not, of course, comparing American police to the Stasi, but she is pointing out the sort of distrust that such wide-spreading snitching fosters.³³⁹ As one East German citizen of the time put it, “These informers determined my life, changed my life over those ten years. In one way or another—because they poisoned us with mistrust. They caused damage simply because I suspected there could be informants in my vicinity.”³⁴⁰ An East German citizen need not be guilty of any wrong to be plagued by mistrust, for informants might lie, misunderstand, mislead, or confuse the words and actions of the innocent.³⁴¹ Alternatively, an innocent person might fear his words being used against his admittedly guilty loved ones.³⁴² One East German intellectual again put the point well:

In the defeated system, we lived in deformed interpersonal relationships and conditions. We did not act freely in casual encounters with others—like with the neighbours. We automatically blocked our reactions, we turned away as soon as a look seemed too curious to us, a question too probing, an interest in us not sufficiently justified. We lived in many respects like oysters.³⁴³

The American snitch culture, worries Natapoff, is creating inner-city versions of human oysters as well: closed and isolated, protecting themselves with a hard shell shielding each person from open interaction with others.³⁴⁴ Already vulnerable people find their life difficulties exacerbated, being treated less like humans than shellfish.³⁴⁵ This distrust, of course, infects not only the innocent but the guilty too. Fear makes them jumpy and proactive, especially encouraging gang members to use more

(1995); see MARC MAUER, RACE TO INCARCERATE 133-36 (1999) (making similar point).

337. See Natapoff, *Snitching*, *supra* note 329, at 686-87.

338. See *id.* at 692.

339. See *id.* at 691-92.

340. BARBRA MILLER, NARRATIVES OF GUILT AND COMPLIANCE IN UNIFIED GERMANY: STASI INFORMERS AND THEIR IMPACT ON SOCIETY 101 (1999) (quoting Irena Kukutz).

341. See Natapoff, *Snitching*, *supra* note 329, at 691-92.

342. See *id.*

343. MILLER, *supra* note 340, at 127 (quoting Gunter Kunert).

344. See Natapoff, *Snitching*, *supra* note 329, at 692.

345. See *id.* at 691-92.

and harsher violence, including preemptive violence, “to prevent snitching and punish informants.”³⁴⁶ Again, it is the innocent who suffer from this heightened violence and fear.

2. Procedural Justice Effects

a. *Undermining Law Enforcement Legitimacy*

Apart from potentially increasing crime and undermining social relationships, the forces just described also undermine law enforcement legitimacy.³⁴⁷ Community members see the guilty (the informers) go unpunished for past crimes, while their future crimes are seemingly encouraged by the police.³⁴⁸ Moreover, the police seem simply to be favoring some illegal “business” interests over others, putting some criminals out of business while allowing other equally guilty ones to thrive.³⁴⁹ Nor do community members feel protected by the police, indeed sensing underenforcement of the laws that are needed to preserve community safety.³⁵⁰ These are hardly messages of the objective, rational, equal treatment that the rule of law promises.³⁵¹ Moreover, these perceived abuses generate community resentment at maltreatment that marks them as less worthy than others, and despair as they see their children learn the lesson that betrayal has its advantages.³⁵²

b. *Weakening Adversarial Safeguards and Police Objectivity*

Other features of the informant-handling process amplify these

346. *See id.* at 689.

347. *Cf.* HARRIS, *supra* note 45, at 117-28 (explaining how racial profiling undermines the legitimacy of law enforcement and of the state more generally).

348. *See* Natapoff, *Snitching*, *supra* note 329, at 680-82.

349. *See id.* at 648-49, 681-82, 694.

350. *See id.* at 688-89; Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717-18 (2006) (more generally analyzing the reality and consequences of underenforcement of the criminal law in poor inner-city communities).

351. Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1499-1500 (1988) (defining the “rule of law”); *see* JOHN MCGOWAN, *AMERICAN LIBERALISM: AN INTERPRETATION FOR OUR TIME* 19-40 (2007) (explaining the “rule of law” as a means for making law the servant of, rather than a tyrant over, the people); RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 149-51 (2001) (defending the idea of the rule of law against its critics).

352. *See* Natapoff, *Snitching*, *supra* note 329, at 681-83 (informant culture teaches betrayal); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crime Legislation Are Wrong*, 40 *B.C. L. REV.* 739, 749-50 (1999).

negative procedural justice effects. For example, police or prosecutor agreements with informants are often made entirely in secret, without ever even being reduced to writing.³⁵³ The usual safeguards involved in guilty pleas, such as judicial review and publicity for the deal, are missing,³⁵⁴ and the deals themselves may be vague and malleable.³⁵⁵ Nor is defense counsel involved, eliminating the safeguards of adversarialism.³⁵⁶

Law enforcement may also become dependent on the use of informants rather than on vigorous, reliable, independent investigation.³⁵⁷ Indeed, informers and handlers can work so closely together as to distort handler judgment, the phenomenon of “falling in love with your rat.”³⁵⁸ One prosecutor explains:

[Y]ou spend time with this guy, you get to know him and his family. You like him . . . [T]he reality is that the cooperator’s information often becomes your mind set . . . It’s a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don’t. Once you become chummy with your cooperator, there is a real danger that you lose your objectivity.³⁵⁹

This loss of objectivity can mean that unreliable tips are not adequately screened, while encouraging disrespect for law enforcement because the public has good reason to suspect such chumminess as to identify law enforcement with the criminals they handle.³⁶⁰ Eroding the line between the prosecutor as a neutral, independent enforcer of the law and the criminal underworld thus taints prosecutors in the public mind.³⁶¹

Perhaps even worse, however, is that most informants are handled by the police, largely or entirely free of prosecutorial monitoring.³⁶² This police dominance and lack of accountability encourages the intentional or unintentional fostering of perjury or false reports.³⁶³ Thus law Professor Ellen Yaroshefsky, based upon her interviews with defense counsel, who

353. See Natapoff, *Snitching*, *supra* note 329, at 665.

354. See *id.*

355. See *id.* at 665-66.

356. See *id.* at 667.

357. See, e.g., *id.* at 671.

358. Yaroshefsky, *supra* note 219, at 944.

359. *Id.*

360. See Natapoff, *Snitching*, *supra* note 329, at 672.

361. See *id.*

362. See *id.* at 674-75; but see ABA Standards for Criminal Justice: Prosecutorial Investigations 4, 12-17 (adopted by the ABA House of Delegates February, 2008) (suggesting some degree of prosecutorial oversight of police investigations in the pre-arrest or pre-indictment investigative phase of a criminal case).

363. See *id.*

are among the few actually involved in confidential proffer sessions, writes of a “typical scenario” in which a cooperator first denies that a Mr. Jones, eagerly sought by the police, was involved in a crime, then suddenly remembers Jones’ involvement to placate the agent’s unhappiness with the initial denial.³⁶⁴ Such sessions are likely to be much worse in the more common cooperation agreement in which counsel is not involved. Additionally, the secrecy and informality of the process enhances police discretion, a nightmare for neighborhood residents who already distrust the police.³⁶⁵ Justice also seems to be for sale, for the way a wrongdoer escapes liability is by selling information, and this willingness to sell out another determines who tastes freedom and who languishes behind bars.³⁶⁶ This commodification of justice “suggests that we live in a government of men, not laws.”³⁶⁷

While logic and general principles of psychology suggest that the informant culture undermines perceived procedural justice, thus fostering crime while discouraging citizen cooperation with the police in solving crime, I know of no significant empirical work directly addressing this question.³⁶⁸ But there is one cultural development that can be seen as significant evidence of negative procedural justice effects: The “Stop Snitching” Movement.³⁶⁹

c. Stop Snitching as Evidence of Procedural Justice Effects

This movement began with the distribution of a DVD called *Stop Fucking Snitching, Vol.1*.³⁷⁰ The DVD includes interviews with residents of a Baltimore inner-city neighborhood who lamented the presence of snitches and threatened them with retribution.³⁷¹ The video also named some cooperators.³⁷² Police and prosecutors immediately condemned the video as conveying threats to intimidate witnesses from testifying.³⁷³ But the DVD’s producer claimed to have a different goal—to revive an older street culture in which criminals who get caught do the time for their crime,

364. See Yaroshefsky, *supra* note 219, at 959.

365. See Natapoff, *Snitching*, *supra* note at 329, at 677-78.

366. See *id.* at 651-52, 692.

367. *Id.* at 682.

368. See *supra* text accompanying notes 20, 164-93 (discussing the nature of procedural justice).

369. See ETHAN BROWN, SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE 10-11, 16 (2007).

370. See *id.* at 170.

371. See *id.*

372. See *id.* at 171.

373. See *id.* at 171-72, 177.

instead of evading moral and penal responsibilities for their actions by turning on, perhaps lying about, other persons.³⁷⁴

Whatever were the true intentions of the producer or the likely impact of the video on its audience, the DVD sparked a curious phenomenon. T-shirts sporting a stop sign emblazoned with the words “STOP SNITCHING” hit the market, selling like hotcakes!³⁷⁵ The video itself sold by the thousands, the shortness of supply relative to demand resulting in pirated copies being auctioned on eBay for over \$100.³⁷⁶ Police worried that a massive form of witness intimidation was at work that needed to be stopped.³⁷⁷ Fearing just that outcome, some police have created “Start Snitching” programs to counter this perceived threat to witnesses’ testifying about gang violence.³⁷⁸

But there is another interpretation of the Stop Snitching movement, namely, as a protest against a racially-discriminatory and community-destroying snitch culture.³⁷⁹ Just as even rap music about violence has numerous fans who praise its message of protest but would never dream of committing a violent crime,³⁸⁰ so has Stop Snitching captured the imagination of youth eager to rail against a system they do not trust.³⁸¹ Crime reporter and analyst Ethan Brown agrees, declaring that the movement is “propelled not by a reflexive anti-law enforcement mentality but a ‘real sense that the federal system is out of whack and that people are being put away for the rest of their lives based on [testimony from] informants.’”³⁸² Professor Marc Lamont distinguishes between witnesses—who act out of civic duty—and informants, who seek leniency, money, or self-advancement.³⁸³ The movement, he maintains, is only about stopping the informants, for the civic-minded witnesses to crime are sorely

374. *See id.* at 172.

375. *See* BROWN, *supra* note 369, at 172.

376. *See id.* at 171-72.

377. *See id.* at 172.

378. *See* American Civil Liberties Union, Drug Law Reform Project, *Summary of Proceeding from a Roundtable Discussion, Undercover, Unreliable and Unaddressed: Reconsidering The Use of Informants in Drug Law Enforcement*, ACLU Drug Law Reform Project’s *Informant Roundtable*, 7 (Mar. 15, 2007) [hereinafter *Roundtable*].

379. *See* BROWN, *supra* note 369, at 15-17, 177.

380. *See generally* KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES 35-54 (2004); Robert Firester & Kendall T. Jones, *Catchin’ the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1, 18-25 (2000).

381. *See supra* text accompanying note 329.

382. *See* BROWN, *supra* note 369, at 11.

383. *See Roundtable*, *supra* note 378, at 8.

needed.³⁸⁴ Lamont expands upon this point, also offering comments on how to address it, its likely roots, and the real message behind the movement:

In communicating to the public, we need to have a deep and thorough, rich and nuanced conversation about what we mean by snitching. Nobody wants to see grandma get knocked on the head and nobody says anything—we're on the same page as far as that goes. But the discourse has become so impoverished that when we talk about snitching, we are talking about two different things

. . . .

We've divorced the conversation about the police from a conversation about the state systematically oppressing people. Part of our job is to engage in political education that includes, in fact begins with, a theory of the state. I'm not talking about some highbrow theory. I'm talking about, "The state does not work. The law does not have the capacity to yield equality to people." There are people in our communities who do not believe that the law could ever be just and fair and there are others who do. We should start to engage with this conversation about the role of the state in criminal informant policy.³⁸⁵

Hill is clear that part of what he means by inequality in this quote is racial inequality.³⁸⁶ Snitches snitch on those they know, and since the police disproportionately focus on racial minorities as the pool from which to recruit snitches, snitches tend to snitch on other persons who belong to similar racial minorities.³⁸⁷ Says Lamont, "The role of snitches on everything from the plantation and through the Black Freedom struggle . . . is a critical part of public and collective memory."³⁸⁸ This remembered suspicion is stoked when inner-city Blacks see informants corrupting their own communities rather than white ones.³⁸⁹ Distrust is stoked further as apparently true stories circulate about a mother whose mentally ill son, with a previously spotless criminal record, serves time "on the false word of an informant"; a 92-year-old woman is killed in a fruitless police SWAT-team

384. *See id.* That such civic-minded witnesses' cooperation with the police is needed seems uncontroversial. But it is worth remembering that even civic-minded tips can be mistaken and can be distorted by subconscious racial bias.

385. *See id.* at 7-8.

386. *See id.*

387. *See id.*; Natapoff, *Snitching*, *supra* note 329, at 673 (making similar point).

388. American Civil Liberties Union Drug Law Reform Project, *Appendix A, Speaker Summaries, Proceedings from a Roundtable Discussion, Undercover, Unreliable, and Unaddressed: Reconsidering the Use of Informants in Drug Law Enforcement, ACLU Drug Law Reform Project's Informant Roundtable, Testimony of Lamont Hill* [hereinafter *Appendix A*].

389. *See id.*

raid of her home, based upon a “tip” later discovered to have been fabricated by the police as the sole evidence of her wrongdoing; and another mother is temporarily jailed on the false word of an informant whom the prosecutor knew to be drug-addicted and mentally unstable.³⁹⁰ The results are predictable: innocent citizens in need of protection shutting their mouths as much from fear of the police as fear of the thugs.³⁹¹

IV. CONCLUSION

This article has had two goals: first, to articulate a theoretical model of the role that race can play in convicting the innocent; second, to apply that model to the illustrative situation of informant abuse. The general model postulated five inter-related raced effects: the selection, blinders, ratchet, procedural justice, and bystander effects. The evidence for these effects being at work in the context of informants is admittedly sparse and sometimes equivocal. Nevertheless, the evidence is sufficient to raise cause for concern that race does raise the risks in certain communities of arresting and convicting the factually innocent while also imposing widespread harms on the “morally innocent”—those “innocent” bystanders among us who are never arrested but suffer from an abusive error-prone informant system just the same.³⁹²

The story of Kathryn Johnston illustrates the plight of the morally innocent in a stark way, for the unregulated, secretive nature of the informant system allows police sloppiness or outright lies told to support their preconceived notions of guilt— notions fostered by an initial weak informant’s tip—to magnify the ill raced effects discussed here.³⁹³ The consequences can be tragic.

390. *See id.*

391. *See id.*

392. *See supra* text accompanying notes 1-3.

393. *See* Alexandra Natapoff, *Kathryn Johnston Paid Price for Police Reliance on Snitches*, S.F. CHRON., August 16, 2007, at B7, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/08/16/EDK7RJ2G3.DTL> [hereinafter Natapoff, *Johnston*] (concisely summarizing the Johnston case and its legal and social implications); e-mail from Alexandra Natapoff, Professor of Law, Loyola Law School Los Angeles, to Andrew E. Taslitz, Welsh S. White Distinguished Visiting Professor of Law, University of Pittsburgh School of Law (Jan. 24, 2008, 12:33 PST) (on file with author) [hereinafter Natapoff, *e-mail*] (discussing Johnston’s race); Alexandra Natapoff, *Written Testimony For The U.S. House Of Representatives Committee On The Judiciary Subcommittee On Crime, Terrorism And Homeland Security, And The Subcommittee On The Constitution, Civil Rights And Civil Liberties, Joint Oversight Hearing On Law Enforcement Confidential Informant Practices* 110th Cong. 1-7 (July 19, 2007) available at <http://judiciary.house.gov/media/pdfs/Natapoff070719.pdf> [hereinafter Natapoff, *Joint Oversight Hearing*] (detailing the Johnston case facts and their significance for improving systems for regulating informants).

Johnston was an innocent 92-year-old African-American grandmother killed in November 2006 by the police, who rested their fears of her violent nature and their suspicions of her criminality on a flawed tip.³⁹⁴ Explains informants' scholar Alexandra Natapoff,

The police targeted Johnston's Atlanta home based on a bad tip from a suspected drug dealer; they then fabricated an imaginary informant to get a warrant; and after Johnston's death, the police tried to pressure a long-time snitch, Alex White, to lie and say that he'd bought drugs in the elderly woman's home.³⁹⁵

The killing of this unarmed elder sparked July 2007 hearings before the Judiciary Committee of the United States House of Representatives on law enforcement's confidential informant practices.³⁹⁶ After reviewing the data summarized in this article, I find it hard not to suspect that Johnston's race was an important contributing factor to the officer's misguided actions, and Natapoff agrees.³⁹⁷

Observations made through this piece counsel further empirical research, both as to the general model hypothesized here and as to its operation in an informant culture. But these observations also lend further support to the growing set of reforms of the snitch system that have been advocated by other commentators.³⁹⁸ If race raises the risk of error about who did the crime or whether one even happened, that is all the more reason to insist on corroboration as one prerequisite for relying on an informant's tip.³⁹⁹ If secrecy and police domination of the informant process limit police and prosecutor accountability, and if the resulting absence of the self-correcting measures of wider scrutiny endanger the innocent, then more formal processes with court supervision, or at least active prosecutorial

394. See Natapoff, *Johnston*, *supra* note 393.

395. *Id.*

396. See Natapoff, *Joint Oversight Hearing*, *supra* note 393, at 1-7.

397. See Natapoff, *e-mail*, *supra* note 393.

398. See, e.g., BROWN, *supra* note 369, at 223-24; Clifford Zimmerman, *Back from the Courtroom: Corrective Measures to Address the Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 199, 200-04, 210-16 (Saundra D. Westerrelt & John A. Humphrey eds., 2001) (summarizing possible cures for informant abuse, including cautionary jury instructions, judicial screening of proposed informants' testimony for reliability, encouraging corroboration of informant testimony before permitting its use, broader prosecutorial disclosure obligations, wider discovery, prohibitions on any rewards or benefits for informing, placing the burden of justifying informant use on the prosecution, presuming that all actions by an informant once an informant-handler relationship exists are state action, severely punishing misconduct where it is discovered, and drafting ethical guidelines for law enforcement handling of informants).

399. See Zimmerman, *supra* note 398, at 204 (discussing corroboration).

monitoring, should be required.⁴⁰⁰ I see no point in recounting here the many sorts of wise reforms counseled by others, which often recognize that some use of informants is sometimes necessary.⁴⁰¹ But that use must be channeled, controlled, filtered, and limited, and the likely racially biasing effects of the current system offer new and perhaps stronger reason for change. Moreover, most of the literature has cautioned against using many sorts of informants as *trial* witnesses.⁴⁰² But I have tried to argue here that even confidential or anonymous informants pose dangers of racial bias and error. The need for reform thus reaches a much wider universe than most of the innocence literature has recognized, and the need for reform is urgent. Although more empirical research is needed, the risks of harm are sufficiently great that reform cannot await further study. The burden should be on those opposed to reform to prove their case for delay (given the grievous risks of tardiness)—a burden they simply have not met. The time to act is now.

400. *See id.* at 201-04, 210-15.

401. *See id.* at 200-04, 210-16; Natapoff, *Snitching*, *supra* note 329, at 697-703 (recommending wider discovery, depositions of informants themselves, reliability hearings, public revelations of relevant data, retraction of informant rewards, community protection, and public debate as remedies).

402. *See supra* text accompanying notes 223-26.