

Stanford Law Review

Miscarriages of Justice in Potentially Capital Cases

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Source: *Stanford Law Review*, Vol. 40, No. 1 (Nov., 1987), pp. 21-179

Published by: Stanford Law Review

Stable URL: <http://www.jstor.org/stable/1228828>

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Miscarriages of Justice in Potentially Capital Cases

Hugo Adam Bedau* and
Michael L. Radelet**

Till the infallibility of human judgments shall have been proved to me,
I shall demand the abolition of the penalty of death.

—Marquis de Lafayette¹

Our procedure has been always haunted by the ghost of the innocent
man convicted. It is an unreal dream.

—Judge Learned Hand²

Can it happen? Can an innocent person be executed? *Can it happen?* It
has happened!

—Judge Michael Musmanno³

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This research was supported in part by a grant from the North Shore Unitarian Universalist Veatch Program, for which we thank Dr. Edward Lawrence of the Veatch Program and Rev. Joe Ingle of the Southern Coalition of Jails and Prisons. Research assistance was provided in Boston by Diane Minogue and in Gainesville by Danny Goldstein, David J. Tarbert, and Margaret Vandiver. Paul Keve of Virginia Commonwealth University and Watt Espy of Headland, Alabama, provided many hours of exceptional assistance in identifying and documenting cases. We wish to acknowledge also the assistance received from many librarians, attorneys, civil servants, friends, and others throughout the country, without whose help this project could not have been carried out. We also thank Anthony G. Amsterdam, Samuel Gross, Michael Mello, Michael G. Millman, Henry Schwarzschild, and Elizabeth Vandiver for their help and advice, and Constance Putnam for her editorial assistance. Finally, we gratefully acknowledge the exceptional assistance of Michael Cheever and his colleagues at the *Stanford Law Review*.

The initial version of this research was made public in November 1985 at the annual meeting of the American Society of Criminology in San Diego. See N.Y. Times, Nov. 14, 1985, at 13, col. 1; Wash. Post, Nov. 14, 1985, at 14A, col. 4; Chi. Tribune, Nov. 14, 1985, at 25, col. 5; Boston Globe, Nov. 17, 1985, at 9, col. 1. Although this publicity was arranged by the American Civil Liberties Union in New York, the ACLU did not initiate, sponsor, fund, or review the research. Thus it is incorrect to describe the authors as “researchers of the American Civil Liberties Union,” Int’l Herald Tribune, Nov. 16-17, 1985, at 3, col. 1, or “ACLU researchers,” Daily Telegraph (London), Nov. 15, 1985, at 5, col. 1.

The 1985 version of this Article was the subject of an unpublished internal Department of Justice memorandum. See Response to Bedau-Radelet Death Penalty Study, Memorandum submitted by Stephen J. Markman, Assistant Attorney General, to Edwin Meese III, Attorney General (Jan. 13, 1986) (on file with the *Stanford Law Review*). No changes were made in this

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Few errors made by government officials can compare with the horror of executing a person wrongly convicted of a capital crime. At least since 1762, when it was established that Jean Calas was innocent of the murder for which he was put to death in Toulouse, France,⁴ opponents of the death penalty have cited the possibility of executing the innocent as a compelling reason to abolish the death penalty. In 1775, Jeremy Bentham offered as his chief objection against capital punishment its "irremissibility," citing in support of this objection "the melancholy affair of Calas."⁵ In 1956, during the parliamentary debate in England over a bill to abolish the death penalty, the risk of executing the innocent was argued at some length.⁶ Speaking against the bill for the gov-

Article as a result of this memorandum, a copy of which was obtained by the authors from Mr. Markman's office in 1987.

Between initial release and final publication, we continued our research on identified cases and investigated new cases as well, with the result that the final version of this paper differs slightly from the version made public in 1985; some cases included earlier have been deleted, *see, e.g.* note 67 *infra*, other cases have been added, and some cases originally included have been recoded.

Two brief summaries of this project have been published elsewhere. *See* Radelet, *The Condemnation of the Innocent*, DEFENDER, July-Aug. 1986, at 23; Radelet & Bedau, *Fallibility and Finality: Type II Error and Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES (K. Haas & J. Inciardi eds.) (forthcoming).

1. C. LUCAS, RECUEIL DES DÉBATS DES ASSEMBLÉES LÉGISLATIVES DE LA FRANCE SUR LA QUESTION DE LA PEINE DE MORT, pt. 2, at 42 (1831), *cited in* P. MACKEY, VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975, at 98 (1976).

2. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

3. M. MUSMANNO, IS IT POSSIBLE TO EXECUTE INNOCENT MEN?, 1 (1940) (pamphlet published by the American League to Abolish Capital Punishment) (referring to the execution of Sacco and Vanzetti) (on file with the *Stanford Law Review*).

4. *See generally* D. BIEN, THE CALAS AFFAIR: PERSECUTION, TOLERATION, AND HERESY IN EIGHTEENTH-CENTURY TOULOUSE (1960); E. NIXON, VOLTAIRE AND THE CALAS CASE (1961).

5. 1 THE WORKS OF JEREMY BENTHAM 447 (J. Bowring ed. 1843).

6. E. TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 106-20 (1961).

ernment, the Home Secretary, Gwilym Lloyd George, observed confidently: "I do not believe that in recent times there is any case in which an innocent man has been hanged."⁷ A decade later, after exhaustive reinvestigation of the circumstances surrounding the murder for which Timothy John Evans had been executed in 1950,⁸ a posthumous royal pardon was granted to Evans when the British government belatedly agreed with most informed observers that Evans had been innocent.⁹ Today in this country, death penalty proponents are readier to acknowledge that the possibility of such errors can never be eliminated as long as we continue to use the death penalty. They go on to claim, however, that the "moral advantages" of capital punishment outweigh the "moral drawbacks," and thus that society is rationally "warranted" in taking this risk.¹⁰

Yet the risk of executing the innocent is largely unknown. Few empirical studies have addressed the issue of wrongful convictions. In the eighteenth and nineteenth centuries, when the death penalty was first widely challenged, little empirical research had been conducted on any aspect of the administration and consequences of executions, let alone on these scattered but alarming errors. In recent years, some death penalty proponents have asked its critics to make "a credible effort to assign a probability to the risk of executing an innocent person."¹¹ A necessary condition of such an estimate is an accurate and comprehensive study of erroneous convictions in which the defendant was, or might have been, sentenced to death.¹² As a contribution to this task, we present 350 cases¹³ in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to

7. 548 PARL. DEB., H.C. (5th ser.) 2542-43 (1956).

8. See generally L. KENNEDY, *TEN RILLINGTON PLACE* (1961).

9. *Britain Pardons Man Hanged in '50*, N.Y. Times, Oct. 19, 1966, at 19, col. 3.

10. "Unless the moral drawbacks of an activity or practice, which include the possible death of innocent bystanders, outweigh the moral advantages, which include the innocent lives that might be saved by it, the activity is warranted." E. VAN DEN HAAG & J.P. CONRAD, *THE DEATH PENALTY: A DEBATE* 226 (1983). Compare Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177, 180-85 (1984) (reply to van den Haag) with van den Haag, *Comment on John Kaplan's "Administering Capital Punishment,"* 36 U. FLA. L. REV. 193, 195 (1984) (rejoinder).

Ernest van den Haag maintains that the benefits of capital punishment are substantial. Upon learning the preliminary results of this study, he described the 25 wrongful executions reported at that stage of our research as, "if true, a very acceptable number. All human activities—building houses, driving a car, playing golf or football—cause innocent people to suffer wrongful death, but we don't give them up because on the whole we feel there's a net gain. Here, a net gain in justice is being done." *25 Wrongfully Executed in U.S. Study Finds*, N.Y. Times, Nov. 14, 1985, at 13, col. 1; cf. van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1664 (1986) ("I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.").

11. Little, *Another View*, 36 U. FLA. L. REV. 200 (1984).

12. A recent attempt has been made to estimate the percentage of erroneous felony convictions. See Huff, Rattner & Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 520-23 (1986). The authors provide data consisting only of estimates made by others, without giving the basis for these estimates or indicating any way of testing their accuracy.

13. As will be clear from the vignettes in Appendix A and from Appendix B and the

death, have later been found to be innocent. Our findings prompt us to echo the words of an earlier investigator who noted that the catalogue of erroneous convictions "could be extended, but if what has already been presented fails to convince the reader of the fallibility of human judgment then nothing will."¹⁴

The earliest effort in this country to identify cases in which the innocent were executed (or almost executed) was conducted in 1912 by the American Prison Congress.¹⁵ The Congress announced that it would "carefully investigate every reported case of unjust conviction and [would] try to discover if the death penalty has ever been inflicted upon an innocent man."¹⁶ After devoting almost a year to this task, it concluded that there were no such cases. The methodology of this study, however, was quite primitive. A letter of inquiry was sent to the warden of each prison in the United States and Canada, asking whether he had "personal knowledge" of any such errors. The response rate was not reported; all responses received were in the negative. The one exception was from the warden of the Leavenworth prison in Kansas, who reported "one or two [persons] who may, in my opinion, have been executed wrongfully."¹⁷ There is no evidence that the Congress investigated this response.

That study, coupled with the lack of publicity given to most cases of identified error, lends support to what many believe already: Miscarriages of justice in capital cases rarely occur, and if they do, the error is discovered through normal judicial procedures before the execution actually takes place.¹⁸ Occasionally an experienced voice is heard, urging caution against complacency, on the ground that "[t]he improbability of a miscarriage of justice coming to light in a capital crime makes an investigation of the subject admittedly difficult . . ."¹⁹ No investigator

tables, *infra*, a "case" is an individual defendant; in some instances several defendants are involved in the same prosecution.

14. G. SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 262 (1950).

15. Gault, *Find No Unjust Hangings*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 131 (1912-1913).

16. *Id.* at 131.

17. *Id.*

18. The following comments are typical: "[U]nder present conditions, wrongful convictions have become so rare as to justify no argument [against the death penalty on that ground]. Out of the half million who have entered our prisons during the past ten years not ten were later proved innocent." 33 CURRENT HIST. 356, 361 (1930) (statement of Marcus A. Kavanagh, Judge of the Superior Court, Cook County, Ill.), *cited in* CAPITAL PUNISHMENT 179 (J. Johnsen ed. 1939). "[T]he danger of convicting a person for a crime which he did not commit, while not absolutely negligible is, in existing circumstances, extremely remote." MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS 72 (1958) [hereinafter MASSACHUSETTS SPECIAL COMMISSION] (minority report). "[O]ur legal system examines capital convictions with such an intense scrutiny that . . . when there is the slightest doubt of guilt (even after conviction), a commutation will usually result, or the individual will otherwise be spared, thus lessening the chance of executing the innocent." F. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL* 123 (1978).

19. E. CALVERT, *CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY* 123 (1936); *see also* G.

has ever undertaken systematic investigation into all cases where errors were alleged, or examined all known executions for evidence of error.²⁰ We do not find it surprising that we have found no instance in which the government has officially acknowledged that an execution carried out under lawful authority was in error.²¹ As we shall see, failure by the authorities to acknowledge error is not very convincing evidence that errors have not occurred.

Cases involving miscarriages of justice in which the death penalty was or might have been imposed have been noted in scattered publications throughout the century, but the first list of such cases was not published until 1964.²² There, one of the present authors briefly noted and described the cases of eighty-five defendants who had been wrongly arrested, tried, or convicted for homicide since 1893. Seven of the twentieth century cases (and one nineteenth century case) reported were judged to have resulted in a wrongful execution. No systematic effort was undertaken to obtain confirming evidence on the cases cited. No attempt was made to search for other cases that had not received major publicity. Thus, that essay included only examples of the best known miscarriages, particularly those previously discovered by other investigators.²³

Even so, that essay²⁴ remains to date the only published attempt to

SCOTT, *supra* note 14, at 251 ("As a rule, when anyone has been executed, it is extremely unlikely that any fresh evidence will come to light establishing his innocence.").

20. For the first systematic research devoted to the general topic of miscarriage of justice, see E. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (Yale University Press 1932). Borchard described sixty-two American and three British cases in which innocent defendants had been convicted of felonies; twenty-nine of these defendants had been convicted of homicide. *Id.* at viii.

For later research in this area, see E. CALVERT, *supra* note 19, at 123-34; A. KOESTLER, *REFLECTIONS ON HANGING* 109-38 (1956) (in 1937, Koestler himself lived for three months under a death sentence as a suspected spy during the Spanish Civil War); Donnelly, *Unconvicting the Innocent*, 6 *VAND. L. REV.* 20 (1952); Hirschberg, *Wrongful Convictions*, 13 *ROCKY MTN. L. REV.* 20 (1940); Pollak, *The Errors of Justice*, 284 *ANNALS* 115 (1952). On the British experience, see generally R. BRANDON & C. DAVIES, *WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES* (1973); L. HALE, *HANGED IN ERROR* (1961); P. HILL & M. YOUNG, *ROUGH JUSTICE* (1983); P. HILL, M. YOUNG & T. SARGANT, *MORE ROUGH JUSTICE* (1985); L. KENNEDY, *A PRESUMPTION OF INNOCENCE* (1976); L. KENNEDY, *WICKED BEYOND BELIEF* (1980).

For research published from 1950 through 1970, see J. FRANK & B. FRANK, *NOT GUILTY* (1957); E. GARDNER, *THE COURT OF LAST RESORT* (1952); E. RADIN, *THE INNOCENTS* (1964); Ehrmann, *For Whom the Chair Waits*, *FED. PROBATION*, Mar. 1962, at 14; Gardner, *The Court of Last Resort*, 44 *CORNELL L.Q.* 27 (1958); Gardner, *Helping the Innocent*, 17 *UCLA L. REV.* 535 (1970); Gardner, *Speaking as a Citizen*, *FED. PROBATION*, Mar. 1959, at 3; MacNamara, *Convicting the Innocent*, 15 *CRIME & DELINQ.* 57 (1969). For a recent survey, but one that does not identify new cases by defendant's name and describe them systematically, see Huff, Rattner & Sagarin, *supra* note 12.

21. *But see* note 274 *infra*.

22. See Bedau, *Murder, Errors of Justice, and Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 434-52 (H.A. Bedau ed. 1964).

23. See note 20 *supra*.

24. The essay was reprinted, with minor revisions, in 1967. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 434-52 (H.A. Bedau 2d ed. 1967).

collect capital cases in which innocent people were arrested, tried, or convicted of capital crimes.²⁵ A few years later, its author, acknowledging the paucity of research on this general topic, admonished other opponents of the death penalty not to exaggerate claims of error, on the ground that it was "false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed."²⁶ During the past decade this comment has often been misrepresented by defenders of the death penalty as though it were an admission that there are no cases where the innocent are known to have been executed and that the risk of executing the innocent is zero.²⁷ The publication of the present research shows the reality of such mistakes to be a virtual certainty.

The primary aim of this article is to reach a better understanding of the miscarriages of justice in capital or potentially capital cases that have occurred in the United States during this century. To this end, we undertook as our main task the construction, on uniform principles, of a catalogue of cases in which such grave errors occurred. The complete list of these cases, arranged alphabetically by defendant's last name, appears in Appendix A. Construction of this catalogue required us first to formulate and apply several different criteria and then to assess the quality of evidence at our disposal for each case. In this manner we decided whether to include or exclude in our inventory each of the cases that came to our attention. In order to convey to the reader the full scope and variety of the cases we have examined, we shall explain our criteria, the rationale behind their choice, and the consequences that adoption and application of these criteria had in shaping our catalogue.

A word of caution is important at the outset. The cases included in our catalogue of miscarriages as published here are far fewer than all the cases we investigated and evaluated for possible inclusion. Some of these excluded cases do appear in the text to illustrate our inclusion criteria (or alternative criteria that we rejected) and the problems in applying them to the facts of the cases before us. In a few other in-

25. So far as we know, there have been no published criticisms of any cases listed in Bedau, *supra* note 22, or Bedau, *supra* note 24. But our current research has led us to several revisions and deletions. We have removed the 1908 case of McGrath, the 1949 case of Smith, and the 1956 case of Brice because of insufficient proof of innocence. We have removed the 1927 case of Gallo and the 1945 case of Richie because our later research indicates these defendants probably were guilty. Our criteria adopted for the present research have led to the removal of three other cases from those listed in Bedau, *supra* note 24: the 1943 case of Keys, because he killed in self-defense, and the 1908 cases of Vaught and Stiles, erroneously listed as convictions. We also removed the 1924 case of Israel, the 1934 cases of Berrett and Molway, and the 1962 case of Anderson, because their convictions were averted.

26. Bedau, *The Death Penalty in America: Review and Forecast*, FED. PROBATION, June 1971, at 32, 36. The sentence following this comment reads: "But one may justifiably reply that the social advantages obtained from capital punishment are too elusive to warrant its preservation, given the unimpeachable record of our failure to convict only the guilty." *Id.*

27. Some of these sources are cited in H.A. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* at xvi n.4 (1977).

stances, where previous investigators or commentators had alleged that the convicted defendant was innocent, we excluded the case because we concluded that we lacked sufficient evidence to agree. In the vast majority of the excluded cases we simply could not obtain or could not sufficiently investigate the facts to permit us to reach a satisfactory conclusion. We have neither attempted to list all these excluded cases nor attempted to provide our reasons in each instance for excluding them, lest we thereby foster an illusion of authority and finality for our work that we believe is unwarranted.²⁸

I. METHODOLOGY

This article grew out of an effort that was initiated twenty-five years ago, as mentioned above,²⁹ by one of the present authors. In that research, as revised three years later, seventy-four cases involving eighty-five defendants were reported,³⁰ including eighty-one defendants erroneously convicted between 1883 and 1962. Of these defendants, thirty had been sentenced to death and eight were executed. Between 1964, when that research was published, and 1982, the informal collection of information on erroneous convictions in potentially capital cases continued. By 1982, about fifty or so additional miscarriages in potentially capital cases had been identified.³¹

We began our collaboration on this project in late 1983. Our intent was to transform the project from one of casual collection into a sustained and systematic attempt to identify as many cases as possible. We used several search procedures. We examined the *New York Times Index* for every year since 1900. In 1984, we placed announcements of our research project in three national newsletters: one for criminologists,³²

28. When a preliminary version of the present research was released in November 1985, one commentator observed that our "report shows that more than 99 percent of [those executed] were rightfully executed . . ." N.Y. Times, Nov. 23, 1985, at 26, col. 4. For two reasons, this is an incorrect interpretation of our findings. First, the right person may be convicted and sentenced to death without being "rightfully executed"; violations of due process of law may destroy whatever was "rightful" in the procedures culminating in the execution. Second, one cannot infer from the absence of a case in our catalogue that we believe no error occurred in it. We examined and chose to exclude perhaps only two dozen cases where persons had been executed whose claims of innocence we investigated and rejected. See note 270 *infra* and accompanying text.

We also know of unverified claims of erroneous execution. For example, the late Don Reid, a Texas newsman who witnessed scores of executions, has been quoted as saying: "I'm sure there have been at least six or seven executed [in Texas] for crimes they did not commit, and Lord only knows how many . . . died for crimes they did commit but whose punishment was too severe." TIME, June 8, 1959, at 60. In Table 10, *infra*, we list no erroneous Texas executions, but not because we investigated Reid's claim and disconfirmed it.

29. See Bedau, *supra* note 22.

30. See Bedau, *supra* note 24.

31. See Bedau, *Miscarriages of Justice and the Death Penalty*, in THE DEATH PENALTY IN AMERICA 234, 235 n.1 (H.A. Bedau 3d ed. 1982).

32. See The Criminologist, Mar. 1984, at 7 (published by the American Society of Criminology).

one for litigating defense attorneys in capital cases,³³ and one for opponents of the death penalty.³⁴ These announcements invited readers who knew about relevant cases to contact us; a dozen or so new cases were brought to our attention in this way.³⁵ We also undertook to re-read most of the social science literature and government documents on the death penalty in America that have been published in this century; we investigated many relevant cases mentioned in these sources but that had been previously overlooked. We also examined the capital punishment holdings of the New York Public Library, the Ehrmann archive at Northeastern University, the Espy archive (formerly at the University of Alabama Law School and now in Headland, Alabama), and the papers of Marion Wright (the former head of North Carolinians Against the Death Penalty) in the library of the University of North Carolina in Chapel Hill. In addition, we made special efforts to examine the personal papers of those who had done previous systematic research on this subject.³⁶

In January 1984, we sent letters to forty-seven governors and to the mayor of the District of Columbia. Each letter explained the project and included summaries of the cases (if any) already in our files from the jurisdiction in question. We asked that our inquiry be referred to the appropriate office. In eight instances, we were informed that our inquiry had been so forwarded, but we received no further response. We received official replies of varying use in twenty-eight instances, and from the remaining twelve jurisdictions we received no acknowledgment. Overall, these efforts resulted in the discovery of very few additional cases.

This experience taught us that no jurisdiction keeps a public list of its erroneous convictions, even in murder cases. Moreover, most state officials are apparently not eager to assist investigators in identifying such cases from whatever records they might have available. In no state, for example, were we able to obtain a list of defendants who had

33. See *Death Penalty Update*, Jan. 20, 1984, at 10 (published by the California State Public Defender).

34. See *Lifelines*, Mar. 1984, at 6 (published by the National Coalition Against the Death Penalty).

35. Through these announcements and other publicity about this project, many current prisoners (and their families and supporters) have learned about our research. We have received several dozen letters from such persons claiming that their case or a case they know of involving a currently incarcerated inmate should be included. Many of these letters have detailed (and in some cases documented) what appear to be grave miscarriages of justice. In this article we include no cases in which the final disposition is still pending.

36. We examined the papers of Judge Jerome Frank and Professor Edwin Borchard, donated after their deaths to the Yale University Library. Although we found no new leads in the Frank papers, the Borchard papers contained several leads that we pursued. We also examined the extensive collection of Erle Stanley Gardner's papers at the University of Texas in Austin, although more leads no doubt remain hidden in the uncatalogued boxes of this collection. The papers of Edward Radin, still in the hands of his family, were unavailable for our examination.

been pardoned after conviction of homicide or after a sentence of death.

When a possible case was brought to our attention, we almost always needed to consult additional sources for more information. We attempted to locate any published appellate decisions in the case and occasionally we obtained unpublished decisions. In some cases, we wrote to the prosecutor, the defense attorney, the victim of the alleged miscarriage, or the victim's family for further information. Other sources of information included local newspapers and local or state historical societies and archives. Indeed, except for the most widely publicized cases, each alleged miscarriage required slightly different investigative tactics to obtain documentation for an adequate description and evaluation of the case.

Those inexperienced with this kind of research may find it difficult to appreciate how accidental and unsystematic the discovery of relevant cases actually is. In our experience, a friend, colleague, or correspondent who happens to have heard of our research project might bring a case to our attention, thereby providing a lead that yielded a case we included. Alternately, as in our discovery of the 1951 California case of Leonard Kirkes,³⁷ a stray reference in an obscure publication may provide a slender clue to a relevant case. Apparently, the Kirkes case has been completely ignored except for brief mention in only one secondary source.³⁸ Only after many hours of research in which several leads were fruitlessly explored were we able to identify the jurisdiction and other important details of this case. Similarly, we stumbled on the 1925 North Carolina case of Alvin Mansell³⁹ while we were searching old newspapers for information on another case. Mansell happened to be mentioned in the newspaper in a column adjacent to the story we were looking for. Many similar tales could be told. Consequently, after four years of sustained investigation, we do not know whether we have more than scratched the surface of the whole subject. In fact, we discovered new cases and leads even as this article was being prepared for publication.⁴⁰ Some are still pending in our files, and there are several others

37. See notes 657-659 *infra* and accompanying text. Our first lead in the case came from a 1958 Massachusetts House Report. See MASSACHUSETTS SPECIAL COMMISSION, *supra* note 18.

38. *Id.* In several other cases, our first lead was supplied by death penalty historian Watt Espy, which he found in his collection of old detective magazines.

39. See notes 721-723 *infra* and accompanying text.

40. Our efforts to identify and document relevant cases ended in December 1986, though we continue to learn of new possible cases. For example, in 1924 in Virginia, Governor Trinkle pardoned Aubrey Barrett, a black man convicted of murder and sentenced to death in 1916. Barrett's father, who apparently committed the crime, was executed in 1917. Richmond News Leader, July 22, 1924, at 1, col. 5. In 1967, David Ronald Wilson was convicted of second-degree murder in Miami. He was freed in 1971 when the state admitted that the eyewitness testimony against him had been perjured. Miami Herald, July 1, 1971, at C1, col. 5. In November 1986 in Arkansas, James Dean Walker pleaded guilty to vicarious criminal liability and all other charges against him were dropped; he had originally been convicted of murder in 1963, but won a new trial on the grounds of judicial bias and prosecutorial suppression of exculpatory evidence. Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985). In

where we have lost hope of ever having enough of the story to decide

Maryland in 1987, Guy Gordon Marsh was released on his own recognizance after a key witness admitted that she had lied at his 1973 murder trial. Baltimore Sun, May 9, 1987, at 7A, col. 1. Finally, in Philadelphia in 1987, Miguel Rivera was acquitted at retrial for a 1973 murder. He was originally convicted with five others for the crime, and one of the co-defendants, Paul Valderamma, had been released in 1979 after he proved that he was in Puerto Rico at the time of the crime. The convictions were based solely on the testimony of a participant in the crime. The fates of the remaining co-defendants, who are still in prison, are pending. Philadelphia Inquirer, June 27, 1987, at 1, col. 1.

Nine other cases involve death sentences imposed in the last 15 years. Charles Ray Giddens was released from death row in Oklahoma in 1982 after his conviction was vacated on the ground of insufficient evidence. *Giddens v. Benson*, No. 0-82-128 (Okla. Crim. App. filed June 30, 1982).

The other eight recent capital cases involve inmates released in the first six months of 1987 from death rows in five states because of evidence raising doubts about their guilt. On January 17 in Florida, Anthony Peek was acquitted in his third trial for a 1977 murder. Tampa Tribune, Jan. 18, 1987, at 2B, col. 1. His first two trials had ended in death sentences; the first was overturned because the trial judge admitted into evidence erroneous expert testimony. *Peek v. State*, 395 So. 2d 492 (Fla. 1980). The second was reversed because testimony about an unrelated rape conviction was improperly admitted. During that trial, the judge had referred to the defendant's parents as "niggers." *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986).

On January 20 in Chicago, Perry Cobb and Darby Williams were acquitted in their fifth trial for a 1977 double murder. They had been convicted and sentenced to death in 1979 (after two hung juries). Following reversal by the Illinois Supreme Court, *People v. Cobb*, 97 Ill. 2d 465, 455 N.E.2d 31 (1983), a fourth jury also hung. The defendants were acquitted in a fifth trial when a state's attorney came forward with evidence that destroyed the credibility of the chief prosecution witness. Chicago Tribune, Jan. 21, 1987, § 2, at 3, col. 1; *Two Men—Probably Innocent—Face Their Fifth Trial in a Capital Case*, CHI. LAWYER, Oct. 1986, at 6; Skelley, *Death Divided: Supreme Court Halts Railroad to Chair*, CHI. LAWYER, Nov. 1983, at 5.

On January 21 in Texas, charges were dropped against Vernon McManus, who had been sentenced to death in 1977. His conviction had been reversed in 1983. The state decided against retrial because of insufficient evidence when the key witness at the 1977 trial refused to testify again. Houston Post, Jan. 22, 1987, at 1, col. 2. The case involved a possible conflict of interest in that after the 1977 conviction (but before sentencing), McManus' attorney filed a divorce petition for the defendant's wife, and later married her.

On March 5 in Florida, charges against Joseph Green Brown were dropped and he was released after spending nearly 13 years on death row, and once coming to within 15 hours of execution. The state had made a secret deal with its chief witness to testify at Brown's 1974 trial. Eight months after this trial this witness admitted that he lied, but it was not until 1986 that the Eleventh Circuit Court of Appeals voided the conviction, ruling that the prosecutor had knowingly allowed the witness to lie and mislead the jurors in his closing argument. *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986); L.A. Times, May 10, 1987, at 1, col. 1; Florida Times Union, Mar. 14, 1987, at 1, col. 1; Orlando Sentinel, Mar. 7, 1987, at 1, col. 5.

On March 11 in Arizona, John Henry Knapp was freed after 12 years on death row. USA Today, Mar. 12, 1987, at 8A, col. 3. As one journalist wrote three years earlier, "Having read the trial record and having found new evidence, I am convinced that he is innocent and that the Knapp case should remind us that a legal system—even our best of all legal systems—is too plain mortal to play God with life and death." Brill, *An Innocent Man on Death Row*, AM. LAW., Dec. 1983, at 1.

In Florida on April 24, Juan Ramos was acquitted at retrial for a 1983 rape-murder. Orlando Sentinel, Apr. 25, 1987, at D1, col. 1. His original conviction and death sentence had been reversed by the Florida Supreme Court in 1986. *Ramos v. State*, 496 So. 2d 121 (Fla. 1986).

Also in Florida, James Hill was released on bail in May 1987 after his conviction and death sentence were reversed by the Florida Supreme Court. *Hill v. State*, 473 So. 2d 1253 (Fla. 1987); Letter from B.V. Dannheisser to Michael Radelet (July 7, 1987) (on file with the *Stanford Law Review*). Hill, who is mentally retarded, had confessed to the crime, but did so because his mental status led him to express agreement with whatever others told him.

The death penalty was abolished in 1972. *Furman v. Georgia*, 408 U.S. 238 (1972). There are 15 cases in our catalogue which involve a death sentence levied after that 1972

whether there was a miscarriage of justice of the sort we are concerned with.⁴¹

II. THE CONCEPT OF A POTENTIALLY CAPITAL CASE

This study focuses on those cases in which the defendant was erroneously convicted of a capital crime and sentenced to death. But we do not confine our catalogue to the central core of cases in which an innocent person was sentenced to death, much less to the few cases in which we believe an innocent defendant was executed. To do so would exclude several types of cases, involving defendants also convicted "beyond a reasonable doubt," that shed light on how our criminal justice system has treated the most serious felony defendants during this century. Thus, we extended our examination to include what we call "potentially capital" cases.

The first extension that we make beyond the central core of cases is to include those in which the sentencer, empowered by statute to impose a punishment of imprisonment rather than of death, imposed this lesser sentence. The great majority of the defendants included in our catalogue who were convicted of first-degree murder in death penalty

decision: Adams (who was executed), Gladish, Greer, Keine, C. Smith, Tibbs, Treadway, Ross, Charles, Banks, Beeman, Hicks, Jaramillo, Ferber, and A. Brown. While we have not checked as thoroughly the nine new capital cases described above as we have these other 15, and thus are not in a position to claim that all would have entered our catalogue if freed earlier, we can say that we now know of 24 defendants sentenced to death since the *Furman* decision, of whom 23 were later freed because of doubts about their guilt and one executed despite such doubts.

Finally, substantial doubts remain about the guilt of Earl Johnson, who was executed in Mississippi on May 20, 1987. Johnson was convicted of killing a police officer, who was in the process of investigating an assault. The victim of the assault initially said that Johnson was not the man who assaulted her, but Johnson confessed to the murder. He immediately claimed that the confession had been given only after the police had threatened him and his grandparents with physical violence. The assault victim then changed her story and implicated Johnson. *New York Times*, May 16, 1987, at 15, col. 6.

41. For example, during the Parliamentary debate on the death penalty in Great Britain, Sir Reginald Paget stated: "There were two citizens, one of Brooklyn and one of Massachusetts, charged in their respective States with the same murder. They were both convicted. It was common ground that that murder had been committed by one man." 449 *PARL. DEB.*, H.C. (5th ser.) 1092 (1948). We have been unable to identify this case. See also note 153 *infra* and accompanying text.

Another case, probably from North Carolina, was mentioned in a political speech given on August 31, 1934, in Greensboro, North Carolina, during the 1934 gubernatorial campaign. One of the candidates, Judge Pittman, was accused of favoritism in sentencing an alleged Negro rapist.

[T]he Judge, not to be outdone, assured the audience . . . that he had helped secure a prison sentence instead of the death penalty only because he was convinced of the Negro's innocence. "I shall have the blood of no innocent man on my hand; he was not guilty of rape, if he had been the case need not have come into my court." The . . . open suggestion of lynch law elicited . . . the most enthusiastic applause of the afternoon.

A. RAPER, PREFACE TO *PEASANTRY: A TALE OF TWO BLACK BELT COUNTIES* 167-68 (1936). We have not been able to trace this case further.

jurisdictions fall into this category. We include such cases because the trial court could have sentenced the convicted defendant to death.

The second extension beyond the death-sentence cases is to include those in which the trial court convicted the defendant of a noncapital version of a crime that has both capital and noncapital forms. The classic example is the decision to convict a defendant of second-degree murder rather than first-degree murder. Not only is it typically within a trial court's authority to choose to convict the defendant of second- rather than first-degree murder, it is also true that trial courts are often inconsistent and unpredictable in their decisions of this sort.⁴² Such cases include, for example, defendants who pleaded guilty in order to avoid the risk of a death sentence, but who were later exonerated when it was shown that the guilty plea was falsely given. In some of these cases, the evidence indicates that the defendant feared that insisting on innocence would increase the likelihood of a death sentence if convicted.⁴³

Consider, for example, the 1954 case of Dr. Samuel Sheppard, convicted of murder in Ohio for the brutal slaying of his pregnant wife.⁴⁴ In a trial that has been described as "a circus, with the judge as ringmaster,"⁴⁵ the evidence against Sheppard was entirely "circumstantial and open to diverse interpretation."⁴⁶ The victim's death was apparently the result of willful and deliberate acts: She was battered to death in her own bed by dozens of blows to her head and upper body. But was the killing premeditated? If the jury had decided that it was not, then the killing would not have been first-degree murder. The judge instructed the jury that it could convict Sheppard of first-degree murder, second-degree murder, or manslaughter—or they could acquit.⁴⁷ After "one of the longest deliberations in a twentieth-century criminal trial,"⁴⁸ the jury returned a verdict of guilty of murder in the second degree, "intentional but not premeditated murder."⁴⁹ Years later, after a successful appeal, Sheppard walked out of prison, his innocence established. Seen in the full context of the trial and its cyclone of publicity, the initial verdict was apparently a compromise between those jurors who wanted an outright acquittal and those who thought the defendant should be convicted of first-degree murder.⁵⁰ Because a differ-

42. See, e.g., Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292 (1969); Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976).

43. See note 197 *infra* and accompanying text.

44. P. HOLMES, *THE SHEPPARD MURDER CASE* (1961); J. POLLACK, *DR. SAM: AN AMERICAN TRAGEDY* (1972); see also notes 836-839 *infra* and accompanying text.

45. C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 92 (2d ed. 1981).

46. P. HOLMES, *supra* note 44, at 146.

47. See J. POLLACK, *supra* note 44, at 61.

48. *Id.* at 62.

49. *Id.* at 63.

50. See C. BLACK, *supra* note 45, at 93 ("obviously a compromise verdict").

ent jury might have returned a death sentence in cases such as these, we treat cases where the wrong person was convicted—even if only of second-degree murder or of voluntary manslaughter—as miscarriages of justice in potentially capital cases.

The third extension is more debatable; it is to include some cases in which the defendant was tried and convicted of a crime that is not punishable by the death penalty only because it had been previously abolished for that crime in the defendant's jurisdiction. Because murder has been a capital crime in most American jurisdictions during this century, we have included in our catalogue of potentially capital crimes all wrongful homicide convictions in abolition states, such as Michigan and Wisconsin, which do not punish any form of homicide with the death penalty.⁵¹ Of the 350 cases in our catalogue, twenty-four were contributed by jurisdictions that had abolished the death penalty.⁵²

The most unusual case included in this category is that of Buzz Fay.⁵³ Fay was indicted for a capital offense, but not tried and convicted until shortly after the Supreme Court struck down Ohio's capital punishment statute as a violation of the eighth amendment.⁵⁴ Simply as a matter of timing, Fay could not have been sentenced to death.

In general, then, our inclusion of *potentially* capital cases draws attention to the way in which each case did culminate in a death sentence, or might have, except for some relatively adventitious factor: the verdict of the trial court (second-degree rather than first-degree murder), the sentencing decision of the trial court (life imprisonment rather than death), or the jurisdiction in which the crime occurred (an abolition state rather than a death penalty state).

Although our concept of a potentially capital crime extends the notion of a capital crime beyond the narrowest sense of the term, our practice also restricts its possible extension in two ways. First, we have confined the jurisdiction-without-capital-punishment category to crimes of criminal homicide, even though roughly ten percent of all the persons executed (and an uncalculated larger percentage of all those sentenced to death) in this century were convicted of capital crimes other than homicide.⁵⁵ Rape, robbery, kidnapping, and burglary have all been statutory capital crimes in several jurisdictions in this country

51. Michigan and Wisconsin abolished the death penalty for murder in 1847 and 1853, respectively. *THE DEATH PENALTY IN AMERICA*, *supra* note 31, at 23.

52. Two cases came from Maine, sixteen from Michigan, one from Minnesota, and five from Wisconsin. See Table 3, *infra*. Nine other jurisdictions in which the death penalty has been abolished for homicide during some but not all of the years, 1900-1986—the District of Columbia, Iowa, Kansas, Missouri, New Mexico, New York, Oregon, Washington, and West Virginia—contributed a few additional wrongful convictions of homicide during their years of abolition.

53. See notes 500-505 *infra* and accompanying text.

54. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

55. For example, of 3,865 executions between 1930 and 1982, 455 (12%) were for the crime of rape. See U.S. DEPT. OF JUSTICE, *CAPITAL PUNISHMENT 1982: NATIONAL PRISONER STATISTICS 198-214* (1984).

at various times during this century.⁵⁶ Since 1900 at least one defendant has been executed for each of these crimes.⁵⁷ But only kidnapping has been a capital crime in a majority of the nation's jurisdictions.⁵⁸ Moreover, these serious felonies are no longer typically thought of as capital crimes; within the past decade, the death penalty for rape⁵⁹ and for kidnapping⁶⁰ has been ruled unconstitutional. It would be unreasonable to treat the conviction of an innocent person for rape at any time in this century in New York or Massachusetts, for example, as a potentially capital crime just because all the southern states authorized the death penalty for this crime during most of this century prior to the 1972 decision of *Furman v. Georgia*.⁶¹ Thus, we do not extend the concept of potential capital crime to include such crimes.⁶²

Second, we have restricted our catalogue by excluding all wrongful convictions for capital or potentially capital crimes other than homicide and rape. Stressing the central role of homicide convictions hardly needs comment; criminal homicide is the paradigm capital crime. We also included rape (but only if the defendant was sentenced to death) because nearly all of the executions in the United States in this century other than for murder have been for rape, and because there have been some flagrant cases of wrongful conviction for this crime.⁶³ Nevertheless, we include the rape cases with some misgivings, because we have made no systematic attempt to search for miscarriages of justice involving this or any other crime other than homicide.⁶⁴ We suspect that

56. For state-by-state surveys of capital statutes prior to 1972, see THE DEATH PENALTY IN AMERICA, *supra* note 31, at 39-52 (citing sources).

57. See U.S. DEPT. OF JUSTICE, *supra* note 55, at 14.

58. Savitz, *Capital Crimes as Defined in American Statutory Law*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 355, 358 (1955) ("Kidnapping, variously defined is a capital crime in 36 jurisdictions.")

59. See *Coker v. Georgia*, 433 U.S. 584 (1977).

60. Cf. *Eberheart v. Georgia*, 433 U.S. 917 (1977) (mem.), *vacating sentence*, 232 Ga. 247, 206 S.E.2d 12 (1974) (death penalty imposed for kidnapping and rape).

61. 408 U.S. 238 (1972).

62. Some might argue that we should include cases involving erroneous conviction for rape in a state that at one time in this century did provide the death penalty for rape, even if the capital rape statute had been repealed before the erroneous conviction occurred. Tennessee is one such state, and one such case is that of Douglas Forbes: "[He] spent five years in prison for two rapes before another man confessed to them . . . [T]he Tennessee Court of Criminal Appeals awarded him \$250,000 for the mistake." Quade, *Innocents in Jail*, A.B.A. J., June 1984, at 34, 35.

63. E. RADIN, *supra* note 20, at 45-48, 95-97, 243, 246, gives two good examples. In 1924 in Illinois, James Montgomery (black) was convicted of rape and sentenced to life imprisonment. He was freed 26 years later when a volunteer attorney demonstrated that the victim (a mental incompetent) had never been raped and that the prosecutor, a member of the Ku Klux Klan, had framed Montgomery. In 1942, also in Illinois, George Bray was convicted of rape and sentenced to 99 years. He was freed 16 years later when the victim's eyewitness identification was proven to be erroneous. A third example involves the conviction of William Bernard Jackson on two counts of rape in Ohio in 1978. Jackson, who was sentenced to 14 to 50 years, was freed in 1982 when the rapes were traced to a physician, Dr. Edward Jackson (no relation), whom he closely resembled. Florida Times Union, Sept. 24, 1982, at 12, col. 1.

64. For an outstanding example of the kind of case we omit, see C. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE (1976). In 1933, Herndon (black) was convicted in

systematic research would certainly uncover more cases of wrongful conviction of potentially capital crimes (as we have defined that concept) not involving homicide, especially for crimes of rape.

One consequence of the adoption of these criteria is that we reach no judgment on two of the most hotly contested capital cases of this century. Caryl Chessman (executed in 1960) was convicted under a California statute that authorized a discretionary death penalty for the crime of kidnapping.⁶⁵ Julius and Ethel Rosenberg (executed in 1953) were convicted under a federal statute that authorized a discretionary death penalty for espionage during wartime.⁶⁶ Neither homicide nor rape was involved in these cases (though Chessman was convicted of sexual assaults), and therefore they are not eligible for inclusion in our catalogue.⁶⁷ We also confess to considerable uncertainty about both these cases, especially the latter; they remain, in our judgment, classic examples of the difficulty of definitively resolving the fundamental question of guilt or innocence of the executed.

The methodological choices discussed above result in a mixed set of actual and possible capital cases: all defendants wrongly convicted of homicide, whatever their sentence, and all defendants wrongly convicted of rape, provided the sentence was death.⁶⁸ Given the evidence at our disposal and the appropriate criteria of error, these decisions yield a set of 350 cases. They are distributed by type of conviction in Table 1.⁶⁹

The final dispositions by the trial court after the erroneous convictions for the 350 defendants are reported in Table 2, and divided into four categories: death sentences, life terms of imprisonment, less-than-life terms, and no sentence imposed. Only in five cases was the error

Georgia of "incitement to insurrection," then an offense optionally punishable by death. He was sentenced to 18 to 20 years in prison. No evidence was introduced at the trial that Herndon had ever incited a riot; the literature taken by the police from his lodgings (which they had entered without a warrant) had lawfully passed through the United States mail. The Communist Party, for whom Herndon worked, was not illegal in Georgia. See also *Herndon v. Lowry*, 301 U.S. 242 (1937).

65. See Act approved Aug. 2, 1933, ch. 1025, 1933 Cal. Stat. 2617 (current version at CAL. PENAL CODE § 209 (Deering 1985)). See generally M. MACHLIN & W. WOODFIELD, *NINTH LIFE* (1961); F. PARKER, *CARYL CHESSMAN, THE RED LIGHT BANDIT* 93-117 (1975).

66. See W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST* 168, 238, 246 (2d ed. 1983). See generally R. RADOSH & J. MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* (1983).

67. In the initial release of this research, we included the executions of Julius and Ethel Rosenberg as among those cases where the innocent had been executed. See, e.g., van den Haag, *The Ultimate Punishment*, *supra* note 10, at 1664; N.Y. Times, Nov. 14, 1985, at 13, col. 1.

68. We have included two cases involving life sentences for rape in this study. One is the 1931 Alabama case of Roy White, the only one of the "Scottsboro Boys" who was convicted but not sentenced to death. The other is the 1949 Florida case of Charles Greenlee, whose co-defendants were sentenced to death; he was sentenced to life imprisonment because of his youth. See notes 758-760 & 547-553 *infra* and accompanying texts.

69. For the coding of the tables, see Appendix B, *infra*. This appendix lists the defendants in chronological order, and thus serves as an index for those interested in categorizing or locating cases by year.

TABLE 1
MISCARRIAGES OF JUSTICE IN POTENTIALLY CAPITAL CASES
(N=350)

<u>Type of Crime</u>	<u>Number of Cases</u>
Homicide*	326
First-degree murder (1)**	200
Second-degree murder (2)	73
Other homicide (3)	14
Unspecified (4)	39
Rape (R)	24

* Where the homicide is not otherwise specified, and the punishment is death, the crime is classified as first-degree murder. "Felony murder" and "aggravated murder" are classified as first-degree murder.

** Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

TABLE 2
FINAL DISPOSITION BY TYPE OF SENTENCE (N=350)

<u>Type of Sentence</u>	<u>Number of Cases</u>
Error corrected before sentencing (1)*	5
Prison term less than life (2)	67
Life term (25 years or more) (3)	139
Death	139
Not executed (4)	116
Executed (5)	23

* Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

discovered prior to sentencing. In 40 percent of the cases an innocent person was sentenced to death. This is error in capital cases in the strictest sense of the term, at an average rate of three such errors every two years. In twenty-three of these cases, the execution was carried out.⁷⁰

The jurisdictional distribution of the 350 cases is shown in Table 3. No region of the nation is immune to the occurrence of these errors, although our research uncovered no relevant cases in thirteen⁷¹ of fifty-three American jurisdictions. The state with the greatest number of errors (fifty-two) was Arkansas. All but one of these fifty-two errors occurred in 1919, in the aftermath of a race riot near Elaine, Arkansas, in which dozens of innocent black defendants were arrested in a virtual dragnet and convicted without evidence.⁷² Although several states enter the annals of error with only one or two cases, eight states have

70. See Table 10, *infra*.

71. Alaska, Colorado, Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, Wyoming, and federal military.

72. See notes 369-374 *infra* and accompanying text (Alf Banks).

TABLE 3
 ERRORS BY JURISDICTION

<u>Jurisdiction (N=53)</u>	<u>Total Errors (N=350)</u>	<u>Death Sentences (N=139)</u>
Alabama	23	12
Alaska	0	0
Arizona	1	1
Arkansas	52	12
California	29	9
Colorado	0	0
Connecticut	3	0
Delaware	0	0
District of Columbia	3	2
Florida	24	19
Georgia	13	4
Hawaii	0	0
Idaho	0	0
Illinois	15	6
Indiana	2	2
Iowa	1	0
Kansas	1	0
Kentucky	3	1
Louisiana	5	3
Maine	2	0
Maryland	5	3
Massachusetts	11	5
Michigan	16	0
Minnesota	1	0
Mississippi	4	1
Missouri	5	0
Montana	0	0
Nebraska	1	1
Nevada	1	0
New Hampshire	0	0
New Jersey	15	10
New Mexico	7	4
New York	29	16
North Carolina	12	8
North Dakota	0	0
Ohio	16	4
Oklahoma	3	1
Oregon	5	4
Pennsylvania	11	2
Rhode Island	0	0
South Carolina	3	0
South Dakota	0	0
Tennessee	2	2
Texas	5	2
Utah	2	1
Vermont	0	0
Virginia	8	2
Washington	2	0
West Virginia	3	2
Wisconsin	5	0
Wyoming	0	0
Federal Government		
Civil	1	0
Military	0	0

between ten and sixteen such cases, and another four states (Alabama, California, Florida, and New York) have twenty or more such errors. The average frequency in these four states is one such error every four years during this century. Since these four states have also been among the most active in using the death penalty,⁷³ one might be tempted to infer that the risk of executing the innocent increases with the rate of execution—a risk seemingly confirmed by the actual record of those executed in error.⁷⁴ But such estimates of risk depend on assumptions that cannot be confirmed, as we explain below.⁷⁵

The distribution of our 350 cases by decade is shown in Table 4. With the exception of the decade 1910-1919, with its conspicuous

TABLE 4
ERRORS BY DECADE

<u>Decade</u>	<u>Total Errors (N=350)</u>	<u>Death Sentences (N=139)</u>
1900-1909	22	14
1910-1919	80	27
1920-1929	44	19
1930-1939	52	29
1940-1949	31	16
1950-1959	27	8
1960-1969	19	9
1970-1979	55	14
1980-1985	20	3

bulge of 80 cases (consisting largely of the fifty-one defendants in the 1919 Arkansas case), the frequency of error over time shows surprising stability. Disturbingly, the decade with the second highest number of errors (fifty-five cases) was the 1970s. During most of those years the death penalty was not in use because of litigation over its constitutionality in the aftermath of *Furman*.⁷⁶ Given the lag between conviction and exoneration, we can expect that in future years the innocence of additional defendants erroneously convicted during the current decade will be established.⁷⁷

A closer inspection of the annual distribution of our cases (not presented in a table) shows that in virtually every year in this century, in some jurisdiction or other, at least one person has been under death sentence who was later proved to be innocent. Based on this evidence, it is virtually certain that at least some of the nearly two thousand men and women currently under sentence of death in this country⁷⁸ are

73. See U.S. DEPT. OF JUSTICE, *supra* note 55, at 15.

74. See Table 10 *infra*.

75. See text accompanying notes 315-324 *infra*.

76. *Furman v. Georgia*, 408 U.S. 238 (1972).

77. See note 40, *supra*.

78. As of August 1, 1987, there were 1,911 persons under death sentences in the United

innocent.

The racial distribution of our 350 defendants (not presented in a table)⁷⁹ shows that 151, or 43 percent, are known to be black.⁸⁰ Since the proportion of blacks in the general population in this century has been about ten percent,⁸¹ the data suggest that blacks are much more likely than whites to be erroneously convicted of a potentially capital crime. Because black Americans are more likely than whites to be arrested and indicted for felony offenses,⁸² it appears that the risk of a miscarriage of justice falls disproportionately on blacks when compared to their representation in the population, but not in comparison to their arrest rates.

III. THE CONCEPT OF A MISCARRIAGE OF JUSTICE

"Miscarriage of justice" is a concept open to various definitions and applications. Because it has no standard or preferred use, we need to explain as precisely as possible how we define and use the concept in this article.

A. *Criminal Intent*

Some years ago, Charles Black argued that the death penalty, no matter how it is actually administered, inherently encounters the possibility of mistake in its application.⁸³ He pointed out that "[i]f we resume use of the death penalty"—as, indeed, the nation has subsequently done—"we will be killing some people by mistake"⁸⁴ As Black observed, the "range of possible 'mistake' is much broader than [is usually supposed]."⁸⁵ He identified three sorts of error—mistake of *law* and two types of mistake of *fact*. Black bifurcated the latter category into what he called mistake of "gross *physical* facts" and mistake of "*psychological* facts."⁸⁶ As the term is used in this article, miscarriage of justice excludes Black's "mistake of law" and "psychological" errors. This results from our decision to adopt a very broad criterion for exclusion of cases that might otherwise be considered miscarriages

States. See NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. (Aug. 1, 1987) (unpublished document).

79. Appendix A identifies each defendant as either white, black, Hispanic, or Asian.

80. The data indicate that the 350 defendants in Appendix A include 182 whites, 151 blacks, 13 Hispanics, and 4 Asians. Twenty-two cases involved two defendants (14 involved two whites, 7 involved two blacks, and 1 involved two Hispanics). Four cases involved three whites and three cases involved three blacks, while one case involved four whites and two cases involved four blacks. One 6-defendant case involved blacks, a 7-defendant case involved whites, and one 9-defendant case and one 51-defendant case involved blacks.

81. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, at 25, Table 27 (106th ed. 1985).

82. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 117-65 (1978).

83. See C. BLACK, *supra* note 45, at 17-18.

84. *Id.* at 18.

85. *Id.* at 24.

86. *Id.*

of justice, as follows: If person *A* is convicted of killing person *B*, and *A* did in fact kill *B*, then *A* is not a victim of a miscarriage of justice, even though it is later discovered that *A* was insane, acted in self-defense, or had some other legally valid excuse or justification.

Consider the following case in this light. In 1907, on a picket line outside a restaurant in Nevada, Morrie R. Preston shot and killed the restaurant owner, who had approached Preston with a gun. Preston was convicted of second-degree murder and sentenced to twenty-five years in prison. Seven years later, however, the parole board released Preston, conceding that the testimony of a star witness had been perjured and that Preston had acted in self-defense.⁸⁷ If we accept as correct the judgment on which the parole board based its decision, then the error in originally convicting Preston involved what Black has called "the psychological facts." The conviction rested on imputing to the defendant a "psychological" condition—namely, an intention to kill another, or the *mens rea* of murder—that he did not have. Although a comprehensive discussion of the topic of miscarriage of justice in capital cases would, ideally, include consideration of such errors, we decided to exclude all such cases. One reason is that our limited resources fell far short of what would be needed to investigate the many cases of this sort that undoubtedly await systematic inquiry.⁸⁸ Another and more fundamental reason, relating to the criteria for "due process," will be explained below.⁸⁹

Killing in self-defense is, of course, only one of several subcategories of homicide in which the *mens rea* of murder is absent.⁹⁰ The defendant may in fact have been incapable of forming criminal intent, even though the trial court erroneously found otherwise. For example, in the 1976 Arizona case of Joe Cota Morales, the defendant was convicted of first-degree murder and sentenced to death. On appeal, the

87. For more information on the Preston case, see S. ZANJANI & G. ROCHA, *THE IGNOBLE CONSPIRACY: RADICALISM ON TRIAL IN NEVADA* (1986), and Rocha, *Radical Labor Struggles in the Tonopah-Goldfield Mining District, 1901-1922*, 20 *NEV. HIST. SOC'Y Q.* 3, 12-14 (1977). Also see note 125 *infra*.

88. The case of Johnny Coleman has been cited elsewhere as an example of a grave miscarriage of justice in a capital case. See M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 16-18 (1973); Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 31, at 346, 350. We excluded this case because it appears that all parties agree that Coleman shot and killed the victim; what is in dispute is whether he did this in self-defense.

We exclude such cases even though they may constitute extremely serious miscarriages of justice. For example, in June 1987, Robert Lewis Wallace was acquitted of the 1979 shooting death of a police officer. At first he had been sentenced to death for the killing. His conviction and death sentence for this act were reversed in federal court because of questions concerning competency to stand trial. *Wallace v. Kemp*, 581 F. Supp. 1471 (M.D. Ga. 1984), *rev'd*, 757 F.2d 1102 (11th Cir. 1985). Wallace did shoot the victim, but apparently did so in self-defense after having been beaten by the officer. *Atlanta Const.*, June 5, 1987, at D1, col. 4.

89. See notes 111-118 *infra* and accompanying text.

90. For a recent discussion of *mens rea*, see G. FLETCHER, *RETHINKING THE CRIMINAL LAW* 398-400 (1978), and the sources cited therein.

conviction was reversed because the trial judge had erred in instructing the jury to exclude from its consideration the effect of the defendant's intoxication on his ability to form criminal intent.⁹¹ At retrial, Morales was acquitted.⁹² The original conviction was no doubt a miscarriage of justice; nevertheless, we did not include this case and others like it.

In some excluded cases, the factual situation is much more complex. One such case is the 1921 shoot-out in Centralia, Washington, between local I.W.W. union members and parading American Legionnaires.⁹³ A somewhat similar shoot-out took place in 1929 between striking workers and the police in the mill town of Gastonia, North Carolina.⁹⁴ On each occasion, the victims were shot and killed by persons unknown. Nonetheless, the police arrested several workers, juries convicted them of murder (and in the Gastonia case, sentenced several to death), and later events vindicated the defendants. The violations of due process in each case were massive and incontestable. But whether the defendants, rather than some of the others associated with them, fired the fatal shots was never established; furthermore, whoever did shoot probably did so in self-defense in the face of provocative and life-threatening behavior by the authorities. If this is the correct interpretation of the events, then exclusion of these cases from our catalogue is appropriate.

Consider also the 1976 Nebraska case of Erwin Simants. He was convicted on six counts of first-degree murder and sentenced to death. On appeal, the convictions were overturned on the technicality that the sheriff had improperly visited the sequestered jurors.⁹⁵ But at retrial Simants was acquitted on the ground of insanity.⁹⁶ Simants' conviction was without doubt another miscarriage of justice in a capital case, but not the type with which we are concerned.

Finally, consider the 1975 Maryland case of Sylvester Morris, which we also exclude. Morris was convicted of first-degree murder and sentenced to life imprisonment. After losing his appeals in the state

91. *State v. Morales*, 120 Ariz. 517, 587 P.2d 236 (1978).

92. *State v. Morales*, No. CR92625 (Maricopa County Super. Ct. filed Oct. 16, 1981) (court journal entry of not guilty verdict).

93. In the Centralia case, seven members of the Industrial Workers of the World (IWW) were convicted of second-degree murder. Members of a local American Legion Post had attacked the Centralia IWW headquarters, and four Legionnaires were killed in the cross-fire. The defense claimed the IWW members had the right to shoot to protect their lives and property. In 1932, Governor Martin pledged to release the five from this group who still remained in prison, and he did so in 1933 (although one of the convicted defendants refused parole). See A. HAYS, *TRIAL BY PREJUDICE* 252-69 (1933); J. LOFTON, *JUSTICE AND THE PRESS* 93-94 (1966); N.Y. Times, Nov. 11, 1962, at 123, col. 1.

94. See *State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930). See generally L. POPE, *MILLHANDS AND PREACHERS* 268-306 (1942); *The Gastonia Strikers' Case*, 44 HARV. L. REV. 1118 (1934) (student author).

95. *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979).

96. *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983); see also N.Y. Times, Oct. 18, 1979, at A16, col. 9; Friendly, *A Crime and Its Aftershock*, N.Y. Times, Mar. 21, 1976, § 6 (Magazine), at 16; cf. Bedau, *supra* note 31, at 236 (the Mullooly case).

courts, Morris sought a federal writ of habeas corpus, and was granted a new trial because the judge had improperly instructed the jury that the burden was on the accused to prove that the killing was (as Morris claimed) accidental.⁹⁷ At retrial, Morris was acquitted after the state failed to convince the trial court that the killing was *not* accidental.⁹⁸

The above cases illustrate several kinds of grave errors that appellate courts have identified and rectified. Not in dispute in any of the foregoing is "the gross *physical fact*" as to *who* killed the victim. Preston, Morales, Simants, and Morris pleaded not guilty, and on the facts before us, none was legally guilty as charged. Yet there is little doubt that each defendant killed the person of whose murder he was convicted. Nonetheless, these cases and the many others like them are excluded from our catalogue of miscarriages of justice, because they embody primarily what we will call "due process" errors, rather than the more fundamental error of convicting the wrong person.

B. *The Criminal Act*

In light of the foregoing discussion, it might appear that all miscarriages of justice, as the term is used in this article, must involve a *conviction of the wrong person* and not merely the conviction of someone unfairly tried. This is not quite correct, because it is also necessary in some cases to reject the presupposition that *someone* is guilty of the crime in question. Miscarriages also arise whenever the criminal act resulting in conviction was *never* committed.

The California case of Antonio Rivera and Merla Walpole illustrates this point.⁹⁹ In 1974, they were convicted in San Bernardino of the murder of their infant daughter. Nearly two years after their conviction, however, the young girl was found alive in San Francisco. Her parents had abandoned her there in 1965, distraught by their poverty and inability to care for the sick child.¹⁰⁰ In this case, there was no homicide even if there was a crime of child abandonment. Rivera and Walpole were not the wrong persons to convict of the alleged homicide: No one should have been convicted of homicide because no homicide occurred. Accordingly, to establish that a miscarriage of justice has occurred, it is sufficient for our purposes to show that someone has been convicted of a potentially capital crime when no such crime actually occurred.¹⁰¹

97. *Morris v. Maryland*, 715 F.2d 106 (3d Cir. 1983).

98. See *Wash. Post*, May 21, 1984, at B5, col. 2.

99. See note 803 *infra* and accompanying text.

100. See *N.Y. Times*, Nov. 23, 1975, at 42, col. 3; *L.A. Times*, Nov. 23, 1975, at 2, col. 6.

101. A parallel kind of error occurs in the crime of rape when the act of sexual intercourse is consensual. See notes 598-604 *infra* and accompanying text (Hollins); notes 461-462 *infra* and accompanying text (Collins); notes 738-742 *infra* and accompanying text (McGee); notes 354-355 *infra* and accompanying text (Anderson).

C. *Accomplices*

We also do not consider a defendant innocent simply because he can demonstrate that, in a case of homicide, it was not he but a co-defendant who fired the fatal shot. For example, in 1941 Edward Kiernan was convicted of first-degree murder in the killing by his accomplices of a Sing Sing prison guard and a police officer during an escape attempt. His conviction was vacated in 1961 on the ground that his confession was coerced. Evidence submitted at trial showed that, at the time of the killings, Kiernan was outside the prison walls, ready with a car to help the escaping prisoners.¹⁰² Because no evidence exists that Kiernan killed, tried to kill, or intended to kill anyone, and there is no dispute as to the cause or the location of the killings, it is arguable that he should be regarded as guilty of the murders. But because the law does not nullify Kiernan's culpability merely because he was not the triggerman, we do not treat him as innocent.

Another example, even more unusual, is the case of David Almeida in Pennsylvania in 1947. Almeida and his co-defendants were engaged in the armed robbery of a supermarket. A police officer was killed while attempting to apprehend them. Later evidence proved that the fatal bullet was not fired by Almeida, or even by one of his co-felons, but by another police officer. Nevertheless, Almeida was convicted of murder and sentenced to death. On appeal, his conviction was overturned.¹⁰³ Although his conviction was in error, we do not regard him as innocent under our criteria. Of course, for other purposes, such as those of concern to Black and many other critics of the death penalty, cases such as Kiernan's and Almeida's may be quite legitimately counted as miscarriages of justice in capital cases.¹⁰⁴

D. *Conviction Averted*

We could also have cast our net more inclusively than we did by including several other kinds of cases, such as those in which a conviction was fortuitously averted. There are many potentially capital cases of this sort. One frequently cited is the 1924 Connecticut case of Harold Israel. Israel confessed to murder, and a ballistics expert testified at trial that Israel's gun was the murder weapon. Homer S. Cummings, the prosecuting attorney (later Attorney General of the United States), nevertheless decided to drop the prosecution after discovering that the witness was unreliable and that the defendant's confession was coerced. It was later said of this case that "[w]ithout question, Israel would have

102. See *United States ex rel. Wade v. Jackson*, 256 F.2d 7, 11 (2d Cir.), cert. denied, 357 U.S. 908 (1958); *United States ex rel. Kiernan v. La Vallee*, 191 F. Supp. 455 (N.D.N.Y. 1961).

103. *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904 (1953); see also Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

104. See *Kagebein v. State*, 254 Ark. 904, 496 S.W.2d 435 (1983), cited in Bedau, *supra* note 31, at 235-36; see also note 763 *infra* and accompanying text (Norwood).

hanged if it had not been for the conscientiousness of the Connecticut prosecutor."¹⁰⁵

In a 1934 Massachusetts case, Louis Berrett and Clement Molway were identified by eight eyewitnesses as the men who killed a theater employee. Just prior to the final arguments at their trial, the actual killers confessed. The jury foreman was later quoted as saying, "This trial has taught me one thing. Before it I was a firm believer in capital punishment. I'm not now."¹⁰⁶

In 1962 in Idaho, Gerald Anderson confessed to the murders of two neighbors. Anderson was in jail for ten months, although his confession was the only evidence against him. It later became evident that the confession had been obtained by coercion. Meanwhile, another man confessed and was tried and convicted of the crimes.¹⁰⁷

The 1964 New York case of George Whitmore, Jr., received considerable publicity. Whitmore, a semi-literate youth, confessed under coercion to three murders and was convicted of an assault and attempted rape in a fourth case. A 1965 trial on one of the homicide charges ended in a hung jury, and his conviction for the assault was reversed on appeal. He was retried twice and reconvicted on the assault charge. Eventually, another person was arrested and convicted for the two murders. In 1973, when new evidence conclusively established Whitmore's innocence, the third assault conviction was reversed and the charges dropped.¹⁰⁸

One of the most widely publicized recent cases of this sort occurred in Georgia. In 1977, five young black men—"the Dawson Five"—were arrested and charged with the murder of a white man and threatened with the death penalty. The sole evidence against the five youths was an allegedly coerced confession by one of them. Under considerable pressure from local and national publicity, the prosecution dropped any interest in the death sentence and eventually dropped the indictments as well. No one else confessed or was arrested, but the five Dawson youths have been widely regarded as entirely innocent.¹⁰⁹

On the facts before us, Israel, Berrett and Molway, Anderson, Whit-

105. L. LAWES, MEET THE MURDERER 336-37 (1940), quoted in Bedau, *supra* note 24, at 445-46; see also SELECTED PAPERS OF HOMER CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES 1933-1939, at xi (C. Swisher ed. 1939).

106. Ehrmann, *supra* note 20, at 19 (quoting Boston Globe, Mar. 1, 1934).

107. See Bedau, *supra* note 24, at 451-52.

108. See N.Y. Times, Apr. 11, 1973, at 1, col. 4; see also S. RAAB, JUSTICE IN THE BACK ROOM (1967). Raab also mentions the 1964 New York case of Santos Sanchez as another narrowly averted erroneous conviction in a homicide case. *Id.* at 240-41.

109. See Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L.J. 7 (1983). In 1985, also in Georgia, Hen Van Nguyen stood trial for two days on a murder charge and was identified in court by two witnesses as the killer before it was realized that the jailers had brought the wrong man to trial. Ngoc Nguyen Tieu, the man actually charged with the crime, had been left in his jail cell. See N.Y. Times, Nov. 3, 1985, at 26, col. 1. Another such case involved Enrique Davilia Suarez in New York. See N.Y. Times, Sept. 12, 1986, at B1, col. 1.

more, and the Dawson Five were undoubtedly innocent. In each case someone else was guilty and in some of these cases, the guilty person was eventually found. But in each case the criminal process was interrupted before any of the most fateful official steps ending in death—sentence, denial of clemency, execution—ever took place. All these steps were mooted because the crucial first step, conviction, was fortunately averted.

We exclude all such cases. Our chief reason for doing so is that when a trial is interrupted (whether because of new-found evidence that the defendant is innocent or for other reasons), the criminal justice system is arguably shown to have been nearly as effective as it could be. No conceivable system of criminal justice can be expected to arrest, indict, and try only the guilty; some risk of error must always be embraced at the decision points of whether to arrest the suspect, try the accused, and convict the defendant. Accordingly, when one of the innocent is tried but not convicted (or, as in the Anderson case, not even brought to trial), no fundamental flaw in the system is revealed that could be easily remedied by any plausible alternative system.

It is, of course, useful in the broad context to recognize that many such cases of incipient error do occur. No doubt the risk of executing the innocent grows as the risks of arresting, indicting, and trying the innocent also rise. The Israel case and others more recent prove that these latter risks continue to be greater than zero. But the risk that really matters is the risk of erroneous conviction. It is also true that the risk of convicting the innocent is increased so long as due process errors are committed and uncorrected. But involuntary confessions, perjured testimony, “planted” circumstantial evidence, and other errors and mistakes are irrelevant for the purposes of our study except when they play a role in securing the conviction of an innocent defendant.

E. *Operational Definition*

In this article, we use the term “miscarriage of justice” to refer only to those cases in which: (a) The defendant was convicted of homicide or sentenced to death for rape; *and* (b) when either (i) no such crime actually occurred, *or* (ii) the defendant was legally and physically uninvolved in the crime. We have three main reasons for adopting these relatively strict criteria.

First, we are primarily concerned with *wrong-person mistakes*—the conviction and execution of the *factually* “innocent”—and not with the erroneous conviction of those who are *legally* innocent (as in cases of killing in self-defense). Second, in holding to the narrower criteria, we are continuing in the tradition pioneered by Borchard. For him, “convicting the innocent” meant convicting the wrong person, someone not

involved in the crime (if, indeed, the crime even occurred).¹¹⁰ The errors he documented did not include convicting the right person for the wrong reasons or by unfair means or with violations of constitutional due process. Nor did they include convicting a mere accessory or an accomplice to a crime committed by a co-felon. If we can show—as, indeed, we can—that the number of erroneous convictions is substantial in potentially capital cases in which the central (even if not the only) error was convicting the wholly innocent, that will suffice to reinforce an important lesson: Our criminal justice system is fallible and the gravest possible errors in its administration can be documented.

Finally, and most importantly, if the concept of miscarriage of justice in capital cases is extended to include all those cases in which errors and mistakes accompany the arrest, trial, conviction, or sentencing of someone who indeed is involved in the crime (whether or not the error or mistake is negligent, rather than deliberate), then it is unclear whether *any* capital case can be regarded as free of mistake. A central thesis of the modern critique of capital punishment, which our research supports, is that mistake in death penalty cases, once mistake is taken in its broadest sense, is “not [one of those] fringe-problems, susceptible to being mopped up by minor refinements in concept and technique.”¹¹¹ Rather, it is “ineradicable in the administration of the death penalty.”¹¹² Moreover, it has been aggravated by the complex structure of contemporary capital punishment statutory and constitutional law and by the way its daily use in trial and appellate courts gives rise to errors narrowly describable as “mistake of law.”¹¹³

The problem of adequately defining a capital crime—a crime in which the guilty defendant “deserves” the death penalty—is not new; it is virtually as old as the history of the death penalty itself. The issue is also much more general than our discussion so far indicates.¹¹⁴ Attempts to solve it began most conspicuously in this country at the end of the eighteenth century with the enactment of statutes defining a special class of homicide cases suitable for the death penalty and designated as “first-degree murder.”¹¹⁵ Critics have long indicated the difficulties in defining and applying the distinction between “degrees” of murder,¹¹⁶ as well as in other attempts to carve out by statute a class

110. E. BORCHARD, *supra* note 20, at viii.

111. C. BLACK, *supra* note 45, at 17.

112. *Id.* at 22.

113. See Bedau, Gregg v. Georgia and the “New” Death Penalty, 4 CRIM. JUST. ETHICS 3 (1985); Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

114. The troubling concept of a capital crime also complicates empirical research. See, e.g., Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 CRIM. L. & CRIMINOLOGY 827, 831-32 (1983); Bedau, *Volume and Rate of Capital Crimes*, in THE DEATH PENALTY IN AMERICA, *supra* note 22, at 56.

115. See, e.g., Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

116. Judge (later, Justice) Cardozo once remarked, “I think the distinction is much too vague to be continued in our law. . . . It is so obscure that no jury hearing it for the first time

of crimes appropriately punished by death.¹¹⁷ The result of these and other related difficulties is that “[t]he concept of *mistake* fades out as the *standard*”—that is, the standard distinguishing the legally permissible from the legally impermissible procedures at each stage of the criminal process—“grows more and more vague and unintelligible.”¹¹⁸ No empirical research, such as ours, could hope to investigate all the kinds of “mistakes” that occur, once it is granted that the very concept of a mistake has become blurred beyond recognition. We reduce this problem, if we do not entirely avoid it, by excluding all cases in which, so far as we can tell, the errors do not include the conviction of a person both legally and factually innocent.

IV. THE EVIDENCE FOR MISCARRIAGES OF JUSTICE

Having specified the criteria used to delimit the class of cases discussed in Tables 1 through 4 that involve the miscarriages of justice of concern to us, we now review the kinds of evidence we have relied upon to decide whether a given case should be included in our catalogue.¹¹⁹ Apart from those few cases where it was later established that no capital crime was committed, or that the defendant had an ironclad alibi, or that someone else was incontrovertibly guilty, there is no quantity or quality of evidence that could be produced that would definitively prove innocence. The most one can hope to obtain is a consensus of investigators after the case reaches its final disposition. Consensus can be measured in degrees, and the cases that we have included in our catalogue are those in which we believe a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent. This belief is largely untested because, in the great majority of our cases (apart from those in which the state has in some manner acknowledged its error), no previous scholarly investigator has weighed the evidence or reported any evaluation of it.

As our catalogue of cases shows, we have drawn upon a wide variety of types of evidence. In no case was every conceivable factor tending to establish innocence present or even possibly present. In some, the evidence that suffices to convince us may not convince others; indeed, as we will illustrate below, our decision to include rather than to exclude a few borderline cases may look to other investigators to be not only debatable but even incorrect. The most we can hope is that the vast majority of impartial reviewers of a given case in our catalogue will agree

can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books.” B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 99-101 (1931).

117. “[T]he history of capital punishment . . . reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.” *McGautha v. California*, 402 U.S. 183, 197 (1971) (Harlan, J.).

118. C. BLACK, *supra* note 45, at 27.

119. See Appendix A, notes 350-923 *infra* and accompanying text.

with our judgment. Not surprisingly, some variation in the strength of the evidence for innocence exists within the set of 350 cases. As will be evident, the cases form a continuum, from those where the evidence for innocence is conclusive to those where the evidence is slight. Critics who seize on the weakest cases and generalize from them to the whole set will miss the forest for a few trees. In any event, if new evidence were to show that we have erroneously included a case in which the defendant was truly guilty, we would of course have no objection to deleting it from our catalogue.

To illustrate the range of evidence that we have used in deciding whether a given defendant was indeed innocent, consider two 1942 convictions, both from North Carolina. They demarcate the opposite extremes. William Wellman, a black man convicted of the rape of a white woman, was sentenced to death but luckily spared when the governor became convinced that Wellman's alibi claim was really true. After Wellman's conviction, evidence was obtained that proved he was hundreds of miles from the scene of the crime and that the conviction was based on mistaken identity. Wellman proved his innocence, and thus his case is included in our catalogue.¹²⁰ But the day after Wellman walked out of prison, another man in the same prison, John Henry Lee—also black, also convicted of the rape of a white woman, and also sentenced to death—was executed. Lee went to his death insisting on his innocence.¹²¹ Was Lee indeed innocent, as he claimed? The most precise answer that we can give today is "possibly." We have not, nor so far as we know has anyone else, reinvestigated this case. It is conceivable that Lee (like an unknown number of other black men convicted of rape) was railroaded to his death, but the only suggestion we have of his innocence is his own protestations. That is not enough. There are scores of other twentieth century capital defendants who have been convicted and executed despite their claims of innocence; today it is virtually impossible for anyone to verify many of these claims.¹²²

The evidence of innocence falls broadly into two main categories, as Table 5 indicates. First, decisions by actors in the criminal justice system or in one of the branches of state government may indicate a belief that the conviction was in error. Second, indications from others not acting in any official role, or by persons acting outside their official

120. See note 896 *infra* and accompanying text.

121. See *Negro, in Death Chamber, Repeats Innocence Claim*, Raleigh News & Observer, Apr. 17, 1943, at 10, col. 4.

122. One recent case of this sort involves James Dupree Henry. The headline in the *New York Times* that announced his execution read: "Asserting Innocence, Convict Dies in Florida Electric Chair." N.Y. Times, Sept. 21, 1984, at A17, col. 1. We have little evidence to support the contention that Henry was in fact innocent; instead, the evidence tends to suggest his guilt, though possibly only of second-degree murder. See Radelet & Mello, *Executing Those Who Kill Blacks: An Unusual Case Study*, 37 MERCER L. REV. 911 (1986). Also see the case of Edward Earl Johnson, *supra* note 40.

TABLE 5
PRIMARY EVIDENCE FOR JUDGMENT OF ERROR (N=350)*

	<u>Number of Cases</u>
I. State decisions indicating error	309
A. Legislative indemnity (1)**	20
B. Executive	129
1. Pardon (2)	64
2. Other action (3)	65
C. Judicial	160
1. Indemnity (4)	9
2. Reversal (by trial or appellate court)	151
a. No retrial; conviction set aside or <i>nolle prosequi</i> entered (5)	113
b. Acquitted by retrial or directed verdict (6)	38
II. Other (unofficial) actions indicating error	41
A. Confession of another person (7)	13
B. Another person implicated (8)	7
C. Opinion of state official (9)	6
D. Subsequent scholarly judgment (10)	15

* Note: Each case is counted only once even though in many cases, there is more than one type of evidence.

** Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

roles, may point to an erroneous conviction. Eighty-eight percent of our cases fall into the first category; thus, in the vast majority of cases, we can point to one or more government actions that demonstrate an official recognition that the conviction was in error. Although it would be going too far to regard such action as equivalent to *official admission* of error in all cases—and especially as the admission that a wholly innocent person had been convicted—it is reasonable to regard most of these cases in this manner, and to try to distinguish all the cases in which at least some official action has been recorded from those in which no such action has occurred.

Probably the most persuasive form that official admission of error can take is the award of *indemnity*. Indemnity usually takes the form of a special act by the state legislature to award a sum of money to the wrongly convicted person. Sometimes it is the result of a successful (and perhaps vigorously contested) suit brought by the released convict against the state for wrongful conviction. As Table 5 shows, indemnity of either sort is rarely obtained; we find it in only twenty-nine of our cases.¹²³ In many other cases, indemnity was sought but not granted.

123. As recently as 1976, "only the federal government and four states have statutes that in certain circumstances provide for compensation to a person imprisoned after conviction for a crime that he did not commit." Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705 (1976). For earlier years, see Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201 (1941).

We regard indemnity as a sufficient basis for inclusion of a case in our catalogue.

A defendant who has obtained indemnity has usually received a prior award of executive *pardon*. Conversely, far more defendants are pardoned than are ever indemnified. Unindemnified defendants in sixty-four of our cases received a pardon, which amounts to slightly more than two pardons for every indemnification. By itself, of course, a pardon is not a wholly reliable sign that an innocent person was convicted. In 1911, for example, John Dietz was convicted of murder in Wisconsin, and in 1921 he was pardoned. We do not include this case in our catalogue. Dietz' good fortune may be attributable as much to Populist fervor on behalf of "the little man" who fought the lumber interests as to any convincing evidence in favor of his complete innocence.¹²⁴ Similarly, the recent posthumous pardon in Nevada awarded to Preston and Smith for their wrongful convictions of criminal homicide in 1907 was due entirely to the belated conclusion that these defendants lacked the requisite *mens rea*, and not that someone else had killed the deceased.¹²⁵ We therefore regard a pardon, standing alone, as a good indicator of innocence, but neither a necessary nor a sufficient ground for including a case in our catalogue.¹²⁶

Sometimes the executive branch takes official action in a form *other than pardon*. Indeed, in sixty-five of our cases, a convicted defendant was released without a formal pardon, even though it is clear that the reason for release was the belief by the governor or his advisors that the prisoner was innocent. The release decision in these cases typically takes one of two forms: commutation of sentence to time served, followed by outright release, as in the 1961 Hampton case,¹²⁷ or parole, as in the 1953 Morris case.¹²⁸

Other cases not involving pardon may yet have as conclusive an admission by the state of error as one could want. By far the oddest case of this sort is that of Robert Williams in California. He was sentenced to prison in 1956 after confessing to a murder he had not committed (he later said his false confession was to "impress" his girlfriend). He

124. See Hass, *The Suppression of John F. Dietz: An Episode of the Progressive Era in Wisconsin*, 57 WIS. MAG. HIST. 255 (1974).

125. See N.Y. Times, May 15, 1987, at B9, col. 1.

126. We did not include in our catalogue several cases in which a person was pardoned after conviction of a potentially capital crime. For example, President Coolidge pardoned Vuco Perovich in 1927 for a murder in Alaska in 1905, but we have been unable to learn whether the pardon was granted because of questions about his guilt. See *President Pardons Convict Perovich* [sic], N.Y. Times, Aug. 7, 1927, at 20, col. 1. In 1917 in Pennsylvania, Roger Smith was convicted of voluntary manslaughter; he was pardoned in 1923, but we do not know why. See *Commonwealth v. Smith*, 324 Pa. 73, 187 A. 387 (1936). In 1964 in Texas, Edwin Bertsch was convicted of murder and sentenced to death; he was paroled ten years later and pardoned in 1978. See Smith, *Freedom From Death Row*, Houston Chron., June 19, 1980. We cannot assume that these pardons were granted because new information exonerated the defendant.

127. See notes 571-572 *infra* and accompanying text.

128. See note 762 *infra* and accompanying text.

spent almost twenty years in prison for his folly and was not vindicated until his former prosecuting attorney admitted error, testified on his behalf, and convinced a judge of Williams' innocence.¹²⁹

Far more difficult to evaluate is *reversal* of the conviction. We include no cases in our catalogue solely on this ground. In the absence of any additional evidence, we regard all such cases as involving no more than "due process" errors. But when the reversal is based on grounds of insufficiency of evidence or coerced confession or corruption by the police or prosecutor in securing the conviction, then it may well be that more than a due process error is involved. This is especially true when the *only* evidence supporting or even suggesting the judgment of guilt is a coerced confession, as in the 1935 Horn case.¹³⁰

For our purposes, a reversal is a significant indication of serious error either when the defendant is *acquitted* following retrial or when the indictment is dismissed (under an entry of *nolle prosequi*). The former occurred in a third of our cases, and the latter in a tenth. (Cases of false, but uncoerced, confessions that led to erroneous convictions but that an appellate court recognized as grounds for reversal, as in the 1944 Bertrand case,¹³¹ are also included in this category.) Disappearance or death of key prosecution witnesses, of course, rather than the innocence of the defendant, may well explain why the prosecutor failed to bring the defendant to retrial. But acquittal or dismissal of the indictment may be regarded as an official recognition of the defendant's innocence when it is based on incontrovertible evidence that no crime occurred or on other strong evidence that the defendant was indeed innocent.

The 1966 case of George Reissfelder in Massachusetts¹³² is an excellent example of a *nolle prosequi* after a conviction of an innocent person. Reissfelder's life sentence for first-degree murder was never reversed on appeal, nor was he ever pardoned or indemnified for wrongful conviction (a bill to indemnify him was defeated in the state legislature). Nevertheless, his co-defendant confessed on his deathbed that Reissfelder was innocent despite having been identified by eyewitnesses. After a special hearing in 1982, at which five police officers, an FBI agent, and two others all testified that Reissfelder should not have been implicated in the crime because the co-defendant never knew Reissfelder, a new trial was ordered; the prosecution then dropped all charges.

The 1963 case of Robert Domer in Ohio¹³³ is a clear instance of acquittal at retrial that amounts to official recognition of an erroneous conviction. Domer was convicted of murder and sentenced to death;

129. See notes 904-906 *infra* and accompanying text.

130. See notes 605-607 *infra* and accompanying text.

131. See note 396 *infra* and accompanying text.

132. See note 797 *infra* and accompanying text.

133. See notes 485-486 *infra* and accompanying text.

on appeal a new trial was ordered. The facts of the case emerged as follows: Domer, frightened that he might be accused of killing the deceased (who had died of a heart attack), started a fire to dispose of the body. Pathologists for both the prosecution and defense agreed the fire could not have been the cause of death. When this emerged at his second trial, Domer was acquitted.

But not all the evidence on which we have relied has been provided by government officials who have corrected their errors or those of other officials. Just as the government can err in the first instance by convicting the innocent, the government can also err in failing to pardon, retry, or grant acquittal to a deserving defendant.¹³⁴ Few if any public figures like to admit errors publicly, especially if it is thought that such an admission might threaten their careers. When we cannot point to any government official or body that has examined the evidence, reached a decision that error occurred, and intervened on behalf of justice for the defendant, we rely on any of four other kinds of evidence.

On several occasions (in thirteen of the cases), *another person confessed*. Not uncommonly, such confessions failed to lead to an arrest and conviction of the real culprit. Many such confessions are false or dubious, and thus they must be evaluated with extreme caution.¹³⁵ The typical "deathbed" confession falls into this category, as do many others that for various reasons fail to generate an official reinvestigation of the original case. An extreme example of this sort involved Maurice Mays, a black defendant.¹³⁶ In 1919 in Tennessee, Mays was convicted of murdering a white woman and sentenced to death. He was executed three years later. In 1926, a white woman confessed in a written statement that she had dressed up as a black man and killed the woman with whom her husband was having an affair. We know of no official action taken against the confessed killer.

Even when the state does act against the person who makes a be-

134. *Cf.* Moss v. State, 166 Ga. 517, 143 S.E. 900 (1928); Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928). Both Clifford Thompson and Jim Hugh Moss were convicted in Georgia in 1927 of first-degree murder, sentenced to death, and executed. On the eve of the executions, Thompson's wife gave a sworn confession that she and another man had committed the murder and framed the two defendants. *See* Atlanta Const., Aug. 3, 1928, at 1, col. 8. But Governor Hardman refused to intervene: After examining the newspaper photographs of Thompson and his wife, "and reading as best I can their physiognomy and phrenology, I feel the courts rendered a righteous verdict." *See* Atlanta Const., Aug. 4, 1928, at 1, col. 3; *id.*, Aug. 2, 1928, at 8, col. 2. We do not include Thompson and Moss in our catalogue.

135. An example involves Milover Kovovic, executed in Pennsylvania in 1904 and described by Teeters as later exonerated by the confession of another prisoner. N. TEETERS, SCAFFOLD AND CHAIR: A COMPILATION OF THEIR USE IN PENNSYLVANIA 1682-1962, at 97 (1963). Teeters cites to an article in the *Washington Star*; the correct cite should be to the *Washington Post*, Jan. 4, 1910, at 1, col. 6. That article states that officials never took the confession very seriously; indeed an account of the case written two decades later, in a book reviewing the county's history, fails to mention any suspicion that Kovovic was not guilty. E. FORREST, HISTORY OF WASHINGTON COUNTY 394-97 (1926).

136. *See* notes 734-736 *infra* and accompanying text.

lated confession, it sometimes fails to benefit the defendant wrongly convicted. In 1980 in Georgia, Walter McIntosh was confined to a mental institution following a conviction for a double murder.¹³⁷ In 1982, his niece (a suspect from the start) was also indicted, but she was not arrested or brought to trial because of insufficient evidence. Two years later she and a friend confessed and were promptly arrested and convicted. Meanwhile, McIntosh had died.

In a few cases, however, there was little or no evidence of guilt, and *another person was implicated* by evidence other than a confession. No doubt the strongest cases of this sort occur when the second person was not only implicated, but was tried and convicted on persuasive evidence, and the wrongly convicted defendant was set free. In 1937, Paul Dwyer, whose home was in Maine, was arrested in New Jersey after a routine search of his car revealed the bodies of two murder victims.¹³⁸ He was held incommunicado, pleaded guilty, and was convicted. In prison Dwyer protested his innocence, claiming that a deputy sheriff in Maine had threatened to murder his mother unless he secretly disposed of the two bodies. A year later, after investigation of Dwyer's charges, the sheriff was indicted, convicted, and sentenced to prison. Dwyer, although cleared, was not released from prison until 1959.

An unusual example is the 1931 Ohio case of Julius Krause.¹³⁹ In 1940, Krause escaped from prison and found the real killer, who had been implicated in a deathbed confession by Krause's co-defendant. This man was tried and convicted. Unfortunately, Krause, who had voluntarily returned to prison in the expectation of a prompt release, was not released for several years despite his innocence. In some other cases, the person implicated was never identified, or was identified but never located, or was located but never investigated and indicted.¹⁴⁰

In six cases, we base our judgment on *the opinion of a state official*, usually the warden of the prison in which the prisoner was serving time or awaiting execution. Most of these cases come from New York; those that do rest on the judgment of Thomas Mott Osborne or Lewis E. Lawes during the years each served as the warden of Sing Sing Prison.¹⁴¹

Finally, in some fifteen cases we have only *the weight of the evidence*. Sometimes this includes the unshaken conviction by the defense attorney and others who studied the case that the convicted defendant was innocent. The 1932 New Jersey case of Bruno Richard Hauptmann is

137. See note 743 *infra* and accompanying text.

138. See notes 492-494 *infra* and accompanying text.

139. See note 660 *infra* and accompanying text.

140. See, e.g., notes 700-701 *infra* and accompanying text (Lindley); note 350 *infra* and accompanying text (Adams).

141. See note 388 *infra* and accompanying text (Becker & Cirofici); notes 367-368 *infra* and accompanying text (Bambrick); notes 914-915 *infra* and accompanying text (Wing); notes 821-824 *infra* and accompanying text (Sberna).

the most famous of this sort: No official admission of error has yet been made, but widespread belief in the innocence of the executed defendant persists.¹⁴² The plausibility of such belief in innocence can be strengthened in several ways. In many cases, especially those in which the defendant was executed, the best evidence often emerges from extensive private investigation in which a wide variety of defects in the prosecution's case are uncovered but usually never fully placed before any official court or tribunal. Such investigations may uncover evidence of corruption by the police or prosecutor, perjured testimony, strong evidence favoring the defendant's alibi, intimidation of defense witnesses, or concealment of evidence favorable to the defense. This type of exculpatory evidence has been assembled in the two recent investigations that concluded Hauptmann was innocent.¹⁴³ But such massive extra-judicial research undertaken in a few notorious cases like this one is atypical. Far more usual are the less thorough, and thus less persuasive, inquiries of local newspaper reporters, who often manage to do little more than reopen old doubts, as in the 1960 Dawson case.¹⁴⁴

In some of the cases we have examined, the evidence supporting the defendant's innocence is inconclusive. Different investigators may well divide the cases to be included in the class of miscarriages from those to be excluded at slightly different points on the continuum. It is useful, therefore, to illustrate and explain our reasoning in a sample of the admittedly borderline cases.

First, consider the California case of Barbara Graham, dramatized in the 1958 movie, *I Want To Live*, starring Susan Hayward. Graham was convicted of first-degree murder, sentenced to death, and executed in 1955. At her trial, utterly conflicting testimony was given. A self-confessed co-defendant, the chief prosecution witness, claimed Graham was the one who, during a burglary, pistol-whipped to death an elderly, physically handicapped woman. Graham claimed she was at home with her husband and infant child, and was in no way involved in the crime. While awaiting trial, however, she conspired with a friend of another prisoner (who turned out to be an undercover police officer) to fraudulently support her alibi. When this was revealed at her trial, along with the facts that at the time of the murder she was on probation for a conviction of perjury and that her husband (a drug addict) was unable to corroborate her alibi, it is hardly surprising that her protestations of innocence and her uncorroborated alibi failed to convince the jury.¹⁴⁵ Although Graham eventually told a plausible story supporting her in-

142. See note 582 *infra* and accompanying text.

143. See L. KENNEDY, *THE AIRMAN AND THE CARPENTER* (1985); A. SCADUTO, *SCAPEGOAT: THE LONESOME DEATH OF BRUNO RICHARD HAUPTMANN* (1976); see also note 582 *infra* and accompanying text.

144. See Bedau, *supra* note 31, at 236-37; see also notes 476-478 *infra* and accompanying text.

145. See B. ESHELMAN, *DEATH ROW CHAPLAIN* 172-86 (1962); J. LESLIE, *DECATHLON OF DEATH* (1979); T. RAWSON, *I WANT TO LIVE: THE ANALYSIS OF A MURDER* (1958).

nocence, nothing has transpired in the thirty years since her death that establishes her innocence. We cannot count her death as the execution of an innocent person without more evidence than we have, and so her case is excluded from our catalogue.

Second, between 1945 and 1958 in Pennsylvania, Aaron "Treetop" Turner was tried on a charge of first-degree murder five times for the same crime; four times he was found guilty and sentenced to death. At his fifth trial he was again convicted, but sentenced to life in prison. Once again the Pennsylvania Supreme Court reversed, acknowledging that Turner's long ordeal was a "near tragedy of errors."¹⁴⁶ But was Turner the wrong man, not involved in the two murders for which he was found guilty five times? Were his confessions not only improperly admitted, but actually false? We do not know, and thus do not regard this case as one in which the wrong person was convicted—even though we do not question the appropriateness of the *nolle prosequi* that ended Turner's long bout with the law.

Third, two pairs of cases are among the most vexatious we have confronted. In one pair,¹⁴⁷ the defendants were acquitted at retrial after a murder conviction. Taken as a whole, the appellate opinions reversing these convictions raise strong doubts about the defendants' guilt. These opinions plus the subsequent acquittals at retrial lead us to include the cases in our inventory. But in one case the acquittal was followed by a marriage between the ex-defendant and the murder victim's widow; and in the other case the acquittal was followed by a marriage between the ex-defendant and the woman he allegedly killed his wife to marry. These facts will raise the suspicion in some minds that the defendants were guilty after all, but we nevertheless include the cases in our catalogue. In the other pair of cases,¹⁴⁸ the final disposition was release from prison.¹⁴⁹ But these releases were obtained by plea bargains in which the defendants (whose convictions had been reversed on appeal and who were about to be retried) pleaded guilty in exchange for a sentence to time served. We have excluded the latter pair of cases, and others like them, even though the plea bargain could easily be explained in a manner consistent with the defendants' true innocence.

Fourth, consider the 1981 case of Luis Marin, convicted of twenty-

146. *Commonwealth v. Turner*, 389 Pa. 239, 242, 133 A.2d 187, 188 (1957). The Turner case has been used to illustrate the outrageous lengths to which the courts will go in reviewing and reversing convictions in serious criminal cases. See W. SEAGLE, *ACQUITTED OF MURDER* 222-29 (1958). Our study of the Turner case does not lead us to agree that it shows that the courts have hampered the police and the prosecution in doing their jobs.

147. See notes 710-711 *infra* and accompanying text (MacFarland); notes 596-597 *infra* and accompanying text (Holland).

148. See *Klein v. Harris*, 667 F.2d 274 (2d Cir. 1981); *Whitmore v. State*, 570 S.W.2d 889 (Tex. Crim. App. 1976).

149. *N.Y. Times*, Oct. 6, 1980, at B3, col. 3 (Klein); letter from Brantley Pringle to Michael Radelet (Apr. 23, 1984) (Whitmore) (on file with the *Stanford Law Review*).

six counts of second-degree murder for deaths caused by arson. Three appellate courts agreed that the evidence submitted at trial was insufficient to sustain the verdict.¹⁵⁰ But are these reversals merely a striking case of what we have called the recognition of due process errors? Or is it that the evidence was insufficient in part because Marin was the wrong man? We cannot say, and so this case remains a good example of the essential impossibility of resolving borderline cases in a conclusive manner. In the end, we excluded the Marin case.

Finally, in many cases, the evidence of error at our disposal is so slight and our research so unproductive that we cannot include them. For example, in 1912 in Florida, Elijah Bellamy and James Platt were convicted of murder and sentenced to death. The Florida Supreme Court, in reversing the convictions, observed that "the testimony [against the defendants], taken as a whole, is far from being satisfactory or convincing."¹⁵¹ A year later, *nolle prosequi* was entered in the case.¹⁵² Our research turned up no further information, and so whether it involved convictions of persons erroneously accused or only due process error, we do not know.¹⁵³

V. THE CAUSES OF ERROR

Miscarriages of justice are caused by a wide variety of factors. Some involve the decision by the police and prosecution to seek a conviction of the defendant despite lack of firm belief that he is guilty. Some are the result of negligence on the part of the authorities. Others are the product of well-intentioned error that anyone might make. In many cases of each type, we probably would have voted to find the defendant guilty had we been on the jury and seen only the evidence introduced at trial.

In Table 6, we have organized our set of cases into four main categories: (1) errors caused by the police prior to trial; (2) errors created by the prosecution before or during trial; (3) errors caused by witnesses giving depositions or testifying against the defendant; and (4) sundry other causes that enter in the proceedings against the defendant. In nearly 10 percent of our cases, at least three of these types of error can be found in the record. In a few cases,¹⁵⁴ where the record has been thoroughly evaluated and reported, the full texture of how these errors occurred and of their effect on the trial court's verdict can be studied.

150. See *People v. Marin*, 102 A.D.2d 14, 16, 478 N.Y.S.2d 650, 652 (1984) ("[W]e are in agreement . . . that the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt."), *aff'd*, 65 N.Y.2d 741, 481 N.E.2d 556, 492 N.Y.S.2d 16 (1985).

151. *Platt v. State*, 65 Fla. 253, 253, 61 So. 502, 503 (1913).

152. See *Records of Clay County, Florida* 498 (Apr. 17, 1913) (relevant copies on file with the *Stanford Law Review*).

153. See also *Watson v. State*, 85 Fla. 383, 95 So. 861 (1923); *Thomas v. Commonwealth*, 187 Va. 265, 46 S.E.2d 388 (1948).

154. See, e.g., notes 754-757 *infra* and accompanying text (Miller).

TABLE 6
CAUSES OF ERRONEOUS CONVICTION

<u>Type of Error</u>	<u>Number of Cases</u>
I. Police error	82
A. Coerced or other false confession (1)*	49
B. Negligence (2)	11
C. Other overzealous police work (3)	22
II. Prosecutor error	50
A. Suppression of exculpatory evidence (4)	35
B. Other overzealous prosecution (5)	15
III. Witness error	193
A. Mistaken eyewitness identification (6)	56
B. Perjury by prosecution witness (7)	117
C. Unreliable or erroneous prosecution testimony (8)	20
IV. Other error	209
A. Misleading circumstantial evidence (9)	30
B. Incompetence of defense counsel (10)	10
C. Judicial denial of admissibility of exculpatory evidence (11)	7
D. Inadequate consideration of alibi evidence (12)	45
E. Erroneous judgment on cause of death (13)	16
F. Fraudulent alibi or false guilty plea made by defendant (14)	17
G. Conviction demanded by community outrage (15)	70
H. Unknown (16)	14

Number of cases counted once: 198 (including all "unknown" cases)

Number of cases counted twice: 120

Number of cases counted three times: 32

* Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

We will not attempt to provide that kind of detailed information here. Instead, we think it sufficient to illustrate briefly each of the main causes identified in our catalogue of cases.

In a few instances, a convincing record indicates that the defendants were victims of what can only be described as a "frame up." Some of the most notorious—such as the 1915 case of Joe Hill,¹⁵⁵ and the 1916 Mooney-Billings case¹⁵⁶—were part of the pitched battles fought by employers earlier this century against union organizers. Mooney and Billings were eventually cleared and released, but Hill was executed. In two other famous cases already mentioned—the Sacco-Vanzetti case¹⁵⁷

155. See notes 585-588 *infra* and accompanying text.

156. See notes 400-403 *infra* and accompanying text.

157. See note 3 *supra*; notes 176, 274 & 817-818 *infra* and accompanying texts.

and the Hauptmann case¹⁵⁸—the convictions, death sentences, and executions were achieved by a large cast of characters, probably never systematically orchestrated into a “frame up” in quite the manner that was done in the Hill and Mooney-Billings cases. In other lesser-known cases where error was knowingly perpetrated by the police or the prosecutors, or both working together, the magnitude of the corruption of justice may have been as great as in the Hill and Mooney-Billings cases.

Clear injustices perpetrated by the police compose nearly a quarter of the errors we have identified, and perhaps not surprisingly they were usually coerced confessions. In forty-nine of the cases (14 percent), the defendant’s confession played an important role in his or her conviction, even though the confession was later shown to have been coerced. The cases in which we believe an innocent person was convicted on the basis of a false confession range from those in which the police used “third degree” methods to others where less brutal tactics were employed.

The 1976 Wilkinson case is an example of the worst sort of tactics.¹⁵⁹ Several Philadelphia police officers were eventually convicted of “brutal and unlawful” mistreatment of the defendant, who had been convicted of multiple murders by arson but was fortunately freed prior to sentencing, when the guilty person confessed. Another example is the 1958 Kassim case,¹⁶⁰ in which the defendant was released after seven years in prison when it was established that the prosecutor had misunderstood Kassim’s broken English. (Meanwhile, another man had confessed to the crime.) Somewhat more typical is the 1954 Walker case.¹⁶¹ After Walker received a life sentence for first-degree murder, his conviction was appealed on the ground that his confession had been involuntary. After a hearing, the court ruled that it was not. But several years later, a newspaper investigation proved otherwise, and Walker was released—after spending eighteen years in prison. And in the 1959 Shea case,¹⁶² suicidal urges plus lies told to Shea by the police and their refusal to let him obtain legal counsel produced a false confession and a murder conviction of the wrong man.

There are other ways, of course, for the police to exert undue influence to secure the conviction of an innocent person. Typically, it is through improper influence on a key witness. In 1924, Hardy was convicted largely on the basis of testimony against him that was later proved to have been provided by a witness who had tried to testify in his favor, only to be discouraged from doing so by police threats.¹⁶³ In

158. See notes 142-143 *supra* and accompanying text; notes 324 & 582 *infra* and accompanying texts.

159. See notes 900-901 *infra* and accompanying text.

160. See notes 651-652 *infra* and accompanying text.

161. See notes 883-887 *infra* and accompanying text.

162. See notes 834-835 *infra* and accompanying text.

163. See note 579 *infra* and accompanying text.

1961, Clark, Hall, and Kuykendall were convicted of murder and sentenced to life imprisonment.¹⁶⁴ A year later, the chief witness against them admitted she had lied at the trial because the police had promised her lenient treatment for another crime if she would implicate these three defendants. In twenty-two of our cases, this type of improper conduct by the police helped to bring about a wrongful conviction.

Police failures can lead to catastrophic results in other ways, without police engagement in corrupt practices. In New York in 1971, Edmond Jackson was convicted of two murders and sentenced to life in prison; the courts later ordered him released on the ground that no evidence was offered at the trial apart from unreliable eyewitness testimony. In addition, the appellate court condemned the whole investigation of the crime by the police as "incomplete and negligent."¹⁶⁵ In ordering Jackson freed, the judge said, "I shudder to think . . . what the situation would have been in this case if there had been a mandatory death penalty."¹⁶⁶ Twenty years earlier, also in New York, Camilo Leyra had also been convicted on the basis of a failure of the police (in the words of the court that ordered the defendant released) "to do the essential careful and intensive investigatory work that should be done before a defendant is charged with crime, certainly with one as serious as murder."¹⁶⁷

In some cases, more than mere negligence can be imputed to the police; we reach this conclusion, for example, about the 1974 case of Delbert Tibbs.¹⁶⁸ In 1982, the former prosecutor in the case denounced the Florida police who arrested Tibbs for relying on evidence that they knew "was tainted from the beginning."¹⁶⁹ A particularly disturbing example of the abuse of police authority occurred in an earlier Florida case. In 1945, William Anderson, a black man, was convicted of the rape of a white woman and was executed without appellate review.¹⁷⁰ The governor's file on the case includes a letter from the local sheriff, pleading for a prompt execution and saying in part: "I would appreciate special attention in this case before some sympathizing organization gets hold of it."¹⁷¹ In all likelihood, no felony had been committed in the first place; the sexual relations between the victim and the defendant were apparently consensual.

Sometimes the prosecutors, whether from negligence or corruption, are responsible for the error. In our catalogue, fifty errors of this sort

164. See notes 458-459 *infra* and accompanying text.

165. N.Y. Times, Dec. 23, 1978, at 24, col. 3.

166. *Id.*; see also notes 612-616 *infra* and accompanying text.

167. *People v. Leyra*, 1 N.Y.2d 199, 210, 134 N.E.2d 475, 481, 151 N.Y.S.2d 658, 666 (1956); see also notes 696-699 *infra* and accompanying text.

168. See notes 860-864 *infra* and accompanying text.

169. McClory, *Justice for Mr. Tibbs*, Reader (Chicago), Feb. 11, 1983, at 25, col. 3.

170. See notes 354-355 *infra* and accompanying text.

171. Letter from W. Clark, Sheriff, Broward County, to J. Wigginton (Apr. 9, 1945) (available in the Florida State Archives, Tallahassee).

played a crucial role in convicting the innocent—and in some cases, securing a death sentence and its execution as well. Typically, the record shows prosecutorial suppression of exculpatory evidence. Sometimes this takes the form of not revealing to the defense the knowledge that a witness can corroborate part of the defense's theory of the crime, as in the cases of Thomas Kapatos in 1938¹⁷² and Louis Hoffner in 1941.¹⁷³ In other cases, the suppression takes the form of withholding from the court evidence that would undermine or impeach the testimony of the prosecution's own star witness, as in the 1971 Maynard case¹⁷⁴ and the 1975 De Los Santos case.¹⁷⁵ Some of the most notorious capital cases in this century—the Mooney-Billings, Sacco-Vanzetti, and Hauptmann cases—are dramatic examples of systematic suppression of evidence; book-length scholarship on these cases fortunately tells the stories in detail.¹⁷⁶

Overzealous prosecutorial tactics are not limited to suppression of exculpatory evidence. Sometimes the prosecutor will stoop to the introduction of fraudulent incriminating evidence, as in the 1933 Fisher case.¹⁷⁷ Fisher was convicted and sentenced to prison largely on the basis of a gun offered in evidence—a gun the prosecutor knew had not been fired by the defendant. Other times the police and prosecutor may manage to discredit unfairly a witness who might otherwise have come to the aid of the defense, as in the 1981 Robinson case.¹⁷⁸

By far the most frequent cause of erroneous convictions in our catalogue of 350 cases was error by witnesses; more than half of the cases (193) involved errors of this sort. Sometimes such errors occurred in conjunction with other errors, but often they were the primary or even the sole cause of the wrongful conviction. In one-third of the cases (117), the erroneous witness testimony was in fact perjured.¹⁷⁹ This type of corruption spans the years and the jurisdictions; it is too frequent and too familiar to need detailed illustration here. In the 1980 Robertson case,¹⁸⁰ the defendant was convicted on perjured testimony by a co-defendant who agreed to give the false evidence to avoid being

172. See notes 649-650 *infra* and accompanying text.

173. See notes 592-594 *infra* and accompanying text.

174. See notes 731-733 *infra* and accompanying text.

175. See notes 482-483 *infra* and accompanying text.

176. See, e.g., L. KENNEDY, *supra* note 143; A. SCADUTO, *supra* note 143. Compare F. RUSSELL, SACCO AND VANZETTI: THE CASE RESOLVED (1986) with W. YOUNG & D. KAISER, POST-MORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI (1985).

177. See notes 511-515 *infra* and accompanying text.

178. See notes 806-807 *infra* and accompanying text.

179. Earlier in this century, several states (Arizona, California, Idaho, Montana, Texas, and Vermont) provided the death penalty for anyone convicted of perjury in a capital case where an innocent defendant was convicted and executed. See Savitz, *supra* note 58, at 358. Of the 117 cases we cite in Table 6 as involving perjury in a capital or potentially capital case, all but nine occurred in states without such a capital statute. The nine exceptions were all from California (1916 Mooney and Billings; 1928 Garvey, Leshner, and Rohen; 1933 Dulin; 1936 Brite and Brite; and 1947 Woodmansee).

180. See notes 804-805 *infra* and accompanying text.

tried under the death penalty statute. Sometimes the real killer turned out to be the chief witness against the innocent defendant, who then was convicted and sentenced to death.¹⁸¹ In the 1982 Carter case,¹⁸² an innocent man was convicted on the testimony of his former wife, who (it was later established) was the real killer. Two years later, when he was released, his lawyer remarked: "If New York State had the death penalty, God knows what would have happened to this poor man."¹⁸³ Mistaken eyewitness identification, tendered in good faith, also played a significant role in fifty-six of our cases.¹⁸⁴ In one of these cases, the victim's wife testified (wrongly, as it turned out) that she saw the defendant kill her husband at night in their bedroom.¹⁸⁵ The innocent defendant narrowly escaped the executioner.

But the cause of a wrongful conviction is not always corruption or negligence on the part of the authorities, or the good-faith error of eyewitnesses. Confusing circumstantial evidence often misleads the prose-

181. See notes 428-429 *infra* and accompanying text (Bundy).

182. See note 437 *infra* and accompanying text.

183. N.Y. Times, Jan. 19, 1984, at B9, col. 1.

184. Huff, Rattner, and Sagarin argue that "the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification." Huff, Rattner & Sagarin, *supra* note 12, at 524; see also Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987); E. BORCHARD, *supra* note 20, at xiii. For a discussion of the general problems of eyewitness testimony, see *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (G. Wells & E. Loftus eds. 1984).

Proving that erroneous eyewitness identification (or any other factor) is the most common cause of wrongful convictions requires evidence not available to us. For such a proof, one would need to categorize the varieties of evidence on which convictions were based in a representative sample of cases, and then establish how often erroneous identification alone, or in conjunction with other factors, caused the jury to convict the defendant. An error rate could then be established by dividing the number of erroneous identifications by the number of times eyewitness identification was a crucial factor in obtaining a conviction. Our data give us only the dividend, not the divisor, for this rate.

In our cases, as Table 6 shows, perjury by prosecution witnesses (117 cases) is *twice* as frequent a cause of error as are the next most important factors (eyewitness testimony, in 56 cases, and coerced or false confessions, in 49 cases). Borchard reports that in 45 percent of his cases eyewitness error was a factor. E. BORCHARD, *supra* note 20 at xiii. In our set of cases, it is a factor in only 16 percent. Why our findings do not accord with those of other investigators, for whom eyewitness error is the most important factor in miscarriages of justice, is not immediately clear. One possibility is ordinary sampling differences. The cases reported by Borchard, for example, overlap only slightly with our catalogue of cases. Since neither his set nor ours is very large and neither set is known to be truly representative of the total population of all miscarriages, it is quite possible that simple sampling differences account for the findings. A second possibility is that potentially capital cases tend, more than other felony cases, to lack eyewitnesses except for those who are or might be regarded as accomplices. The arrest of accomplices creates a greater incentive for perjury in this type of crime than does the arrest of accomplices in other felony cases, for in the latter the accomplice is not at risk for a death or life sentence. See notes 769-773 *infra* and accompanying text (Parker). Falsely incriminating testimony also serves to divert suspicion from the truly guilty person, as in the 1982 Carter case. See note 437 *infra* and accompanying text. The third and most important possibility stems from Borchard's observation that the major source of the eyewitness misidentification in his sample is the victim of the crime. This form of misidentification, of course, is rarely possible when the crime is homicide, as it is in 326, or 93 percent, of our cases. It is possible in homicide cases only when the victim gives an identification before dying. See, e.g., notes 500-505 *infra* and accompanying text (Fay).

185. See notes 516-517 *infra* and accompanying text (Foster).

cution and the court. This was a factor in thirty cases. Probably the most notorious case, based largely on circumstantial evidence (in conjunction with an unconvincing defense alibi), was the 1954 Sheppard case.¹⁸⁶ But circumstantial evidence was a factor in many lesser known cases as well. In the 1919 Ripan case,¹⁸⁷ the defendant was eventually freed when ballistics tests proved that the fatal bullet could not have come from the gun in his possession. In two other cases,¹⁸⁸ the defendant reported to the police the murder of his wife only to find himself the prime suspect, based on the circumstances of the crime. In 1974, Sergeant Jackson was convicted of murder when it was erroneously believed that a wallet in his possession had belonged to the victim.¹⁸⁹ In the same year, Antonio Rivera and Merla Walpole were convicted of the murder of their daughter: The child was missing and the skeletal remains of a girl had been found in a grave near their former home.¹⁹⁰ In 1979, Shelia Wilson was convicted of murder in Kentucky because she was present when the victim was killed, and she was foolish enough to try to conceal this fact from the police.¹⁹¹ In each of these cases the circumstantial evidence was damning, and innocent persons were convicted on its strength.

In sixteen cases, erroneous diagnosis of the cause of death was the prime factor in convicting an innocent person of murder. What in fact was a suicide or an accident was sometimes misunderstood, and an innocent defendant (typically a spouse or a child of the deceased) was convicted on a murder charge. This happened in 1945 to Grace Smith¹⁹² as well as in several earlier cases (the first of which in our catalogue is the 1912 MacFarland case¹⁹³). In another case,¹⁹⁴ the defendant was convicted of murdering his wife; later evidence showed that the cause of death was accidental—the gun went off as he struggled to keep her from shooting herself. Sometimes the cause of death was natural, but the death occurred in the aftermath of a quarrel or a crime, the survivor landed in court on a murder charge, and the jury then convicted him.¹⁹⁵

In an equally small but no less disturbing number of cases (seventeen), the innocent defendant confessed voluntarily, even eagerly, but

186. See note 44 *supra* and accompanying text; notes 836-839 *infra* and accompanying text.

187. See note 802 *infra* and accompanying text.

188. See note 460 *infra* and accompanying text (Coleman); notes 672-676 *infra* and accompanying text (Lamson).

189. See notes 617-618 *infra* and accompanying text.

190. See note 803 *infra* and accompanying text.

191. See notes 912-913 *infra* and accompanying text.

192. See notes 847-849 *infra* and accompanying text.

193. See notes 710-711 *infra* and accompanying text.

194. See notes 637-639 *infra* and accompanying text (Tom Jones).

195. As happened in 1951 to Emma Jo Johnson, see notes 627-628 *infra* and accompanying text, and a year later to Antoniewicz, Hallowell, and Parks, see notes 356-358 *infra* and accompanying text.

falsely. The false confession was, in some cases, the result of mental illness.¹⁹⁶ In other cases, the defendant appears to have falsely confessed or pleaded guilty to avoid the risk of a death sentence.¹⁹⁷ In two instances the defendant was too intoxicated to remember what he did and readily confessed under the inquiries of the police.¹⁹⁸ In a few cases, the explanations are almost too bizarre to believe: One defendant falsely confessed to the police as a joke;¹⁹⁹ another falsely confessed to murder because she did not want to be known as a fornicator;²⁰⁰ and another falsely confessed to impress his girlfriend and then, after being convicted for that murder, falsely confessed to another murder just to prove that a person's false confession could get him convicted—which it did, for the *second* time!²⁰¹

Sometimes community outrage over a crime turns the criminal proceeding against the defendant in a capital case into a near-lynching, as the trial degenerates into a kangaroo court. This was true, for example, in the 1919 race riot case in Elaine, Arkansas.²⁰² So far as we can tell, there was no evidence against any of the fifty-one defendants convicted of murder, twelve of whom were sentenced to death. Another notorious example is one of the most famous capital cases of the century, in which nine youths, "the Scottsboro Boys," were convicted of rape in Alabama in 1931 and all save one sentenced to death.²⁰³ Concurrently in Oklahoma the same thing happened to Jess Hollins;²⁰⁴ it happened again in 1949 in Florida in the so-called "Groveland" case involving Charles Greenlee, Walter Irvin, and Samuel Shepherd.²⁰⁵ In every in-

196. See notes 702-703 *infra* and accompanying text (Lobaugh); note 743 *infra* and accompanying text (McIntosh).

197. See note 484 *infra* and accompanying text (DeMore); notes 810-812 *infra* and accompanying text (Courtney Rogers); notes 390-391 *infra* and accompanying text (Bennett); notes 571-572 *infra* and accompanying text (Hampton); note 436 *infra* and accompanying text (Carmen).

Huff, Rattner, and Sagarin cite the 1982 case of Harry Seigler in Virginia in a context that implies they believe he was innocent of the robbery-murder with which he was charged, and that his guilty plea was a result of a plea bargain to avoid the death penalty. Huff, Rattner & Sagarin, *supra* note 12, at 529. The case is a classic because shortly after the defendant changed his plea from innocent to guilty, the jury returned a verdict of acquittal, and the judge sentenced him to a 60-year prison term for the crime. See Gainesville Sun, Aug. 22, 1982, at 6F, col. 1. But we found no evidence to indicate that Seigler was in fact innocent. *Id.*

In general, our research on actual capital defendants does not confirm the results of research on simulated defendants, viz., that liability to severe punishment has little effect on innocent defendants in inducing them to plead guilty to a lesser charge. See Gregory, Mowen & Linder, *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1521, 1525, 1528 (1978).

198. See note 524 *infra* and accompanying text (Fry); note 481 *infra* and accompanying text (Dedmond).

199. See note 484 *infra* and accompanying text (DeMore).

200. See note 396 *infra* and accompanying text (Bertrand).

201. See notes 904-906 *infra* and accompanying text (Robert Williams).

202. See notes 369-374 *infra* and accompanying text (Alf Banks).

203. See notes 758-760 *infra* and accompanying text (Montgomery).

204. See notes 598-604 *infra* and accompanying text.

205. See notes 547-553 *infra* and accompanying text.

stance, white victims and white racism, in conjunction with white control of the criminal justice system, produced the convictions and death sentences of black defendants who were innocent.

Finally, in a handful of cases (fourteen), the record is so slender as to provide no basis for any conjecture as to the cause of the miscarriage of justice.

VI. THE DISCOVERY OF ERROR

In each of these cases where error was eventually exposed after the defendant was convicted, who was primarily responsible for the discovery? In no case was it the defendant alone;²⁰⁶ without exception the defendant needed the help of others. As to the identity of the helpers, the data indicate that the people whose intervention led to the exposure of the miscarriage occupied no common role in the criminal justice system or in the community at large.

As Table 7 shows, in seven cases the supposed victim turned up

TABLE 7
INDIVIDUAL(S) RESPONSIBLE FOR UNCOVERING ERROR

<u>Status of the Individual(s)</u>	<u>Number of Cases</u>
Supposed victim (1)*	7
Real culprit (2)	47
Witness(es) (3)	17
Police or prosecutor (4)	16
Judge (5)	6
State administrative official (6)	15
Defense attorney (7)	57
Family or friend (8)	8
Citizen (9)	16
Journalist or author (10)	37
"Court of Last Resort" (11)	12
Unknown, apparently irrelevant, or no identifiable intervenor (12)	134

Number of cases counted once: 328 (including all "unknown" cases)

Number of cases counted twice: 22

* Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

alive. More precisely, the "victim" was located alive accidentally or by someone who knew that another person had been convicted of a murder that had never been committed. In the 1909 Lyons case,²⁰⁷ a friend's persistence and resourcefulness led to the discovery of the "victim." In the 1914 Bill Wilson case,²⁰⁸ the defendant's attorney

206. The 1931 Krause case comes closest. See note 660 *infra* and accompanying text.

207. See note 709 *infra* and accompanying text.

208. See notes 910-911 *infra* and accompanying text.

found the "victim" alive in another state. In the 1928 cases of Louise Butler and George Yelder,²⁰⁹ the "victim" was located two months after the defendants had been convicted of murder and sentenced to life in prison. Note that cases of this sort are not only rare; they are also antiques. Except for two in 1974,²¹⁰ the rest come from the earliest decades of the century.

Not shown in Table 7 is the number of cases (twenty) where no crime occurred, and where the discovery of this fact led to the release of the wrongly convicted defendant. In this regard, the murder and rape cases sharply divide. In thirteen of our twenty-four rape cases, there was, as later evidence showed, no "victim" because the crime of rape was not committed. The 1931 Scottsboro case involved nine of these defendants.²¹¹ They were exonerated partly because one of the "victims" admitted, after the original trial, that no sexual contact, with or without consent, had occurred. In the remaining four cases,²¹² each—like Scottsboro—involving a black defendant and a white prosecutrix, the evidence indicates that there was indeed a sexual relationship, albeit consensual. In each of these thirteen pseudo-rape cases, the defendant's original conviction depended on crucial testimony from the "victim."

Next to establishing that no crime occurred, perhaps the most convincing disclosure of error occurs in cases where the actual perpetrator intervenes. This happened in forty-seven of our cases. In a handful, ranging from our earliest²¹³ to one of the more recent,²¹⁴ the true offender confessed on his or her deathbed. In a few cases, the true offender was the innocent man's co-defendant, and exoneration came when the co-defendant confessed.²¹⁵ In a few others,²¹⁶ a person already in prison for another crime confessed his guilt to a previous crime for which the wrong man had been convicted, and this confession was verified. In some cases, the actual perpetrator was under arrest for another crime when his confession freed an innocent man.²¹⁷ And in at least one case the true story is quite bizarre: A white woman blackened her face before killing her husband's lover, a black man was executed

209. See note 433 *infra* and accompanying text.

210. See note 803 *infra* and accompanying text (Rivera and Walpole).

211. See notes 758-760 *infra* and accompanying text (Montgomery).

212. See notes 598-604 *infra* and accompanying text (Hollins); notes 461-462 *infra* and accompanying text (Collins); notes 738-742 *infra* and accompanying text (McGee); notes 354-355 *infra* and accompanying text (Anderson).

213. See notes 426-427 *infra* and accompanying text (1901, J.B. Brown).

214. See note 797 *infra* and accompanying text (1966, Reissfelder).

215. See notes 819-820 *infra* and accompanying text (Sanders); note 488 *infra* and accompanying text (Dove).

216. See note 460 *infra* and accompanying text (Coleman); notes 516-517 *infra* and accompanying text (Foster).

217. See, e.g., notes 782-783 *infra* and accompanying text (Pfeffer); note 524 *infra* and accompanying text (Fry); note 737 *infra* and accompanying text (McDonald).

for the murder, and four years later she confessed.²¹⁸

In a small fraction of the cases (seventeen), a witness recanted or revised testimony at a later point, as in the 1982 Holbrook and Rucker cases.²¹⁹ Similarly, in other cases, a previously silent witness came forward and either implicated others,²²⁰ identified the real killer,²²¹ or admitted that it was her own husband, not the man convicted, who committed the murder.²²² In some cases, a witness later admitted to perjury or a defendant admitted to falsely implicating a co-defendant.²²³ In other cases, a witness' belated support of the defendant's alibi²²⁴ or testimony showing it was not the convicted defendant's gun that was used in the murder²²⁵ provided crucial new information that exonerated the defendant. One case involved a witness who had been prevented from testifying at the original trial gave evidence at a later trial that led to the defendant's acquittal and exoneration.²²⁶

In twenty-two cases, someone connected with the criminal justice system played the crucial role in establishing the defendant's innocence. In a few of these, the trial judge acted on his own initiative, as in the 1911 John Johnson case,²²⁷ the 1926 Vargas case,²²⁸ and the 1973 Broady case.²²⁹ In sixteen others, the innocent defendant owed his release to exculpatory evidence obtained by the police force that had originally arrested him²³⁰ or by the prosecutor who had obtained his conviction.²³¹ These efforts by the authorities to vindicate the innocent deserve special notice and commendation. They occur in our 350 cases about as frequently as the cases, at the other end of the spectrum, in which officials conspire to convict the innocent. These commendable cases should not be overlooked in the haste to criticize the authorities for their occasional readiness to "frame" an innocent defendant.

In another fifteen cases, all of them older ones, a state official—the warden, the governor, or members of the parole board—played the decisive role. In the 1906 cases of Kendall and Vickers,²³² the governor

218. See notes 734-736 *infra* and accompanying text (Mays).

219. See note 595 *infra* and accompanying text.

220. See note 619 *infra* and accompanying text (James and Peterson).

221. See notes 630-633 *infra* and accompanying text (Lawyer Johnson).

222. See notes 728-730 *infra* and accompanying text (Matera).

223. See notes 544-546 *infra* and accompanying text (William Green); notes 774-776 *infra* and accompanying text (Parrott).

224. See notes 677-679 *infra* and accompanying text (Langley).

225. See notes 375-379 *infra* and accompanying text (Jerry Banks).

226. See notes 798-799 *infra* and accompanying text (Reno).

227. See note 629 *infra* and accompanying text.

228. See notes 873-875 *infra* and accompanying text.

229. See notes 418-420 *infra* and accompanying text.

230. See, e.g., note 892 *infra* and accompanying text (Ward); notes 423-425 *infra* and accompanying text (Bradford Brown); notes 566-567 *infra* and accompanying text (Gordon Hall).

231. See, e.g., note 583 *infra* and accompanying text (Hefner); notes 788-791 *infra* and accompanying text (Pyle); notes 458-459 *infra* and accompanying text (Clark).

232. See notes 653-654 *infra* and accompanying text.

conducted the investigation that led to the release of the innocent defendants. In the 1916 Branson case²³³ (and in two Michigan cases, Prevost in 1919²³⁴ and Pecho in 1954²³⁵), the state parole board took the initiative. In some New York cases,²³⁶ the remarks of the warden are the chief testimony in support of our belief that these defendants were executed in error. A more recent case involved doubts expressed by the West Virginia warden that the man scheduled for execution was really guilty led to the complete exoneration of Robert Bailey, who had been convicted in 1950.²³⁷

In by far the largest proportion of our cases—16 percent (fifty-seven cases)—the error was exposed through the dogged efforts of defense counsel. Stories of such efforts have been told in detail in some notorious cases involving multiple capital defendants,²³⁸ where regional and even national publicity kept defense efforts alive. In a few isolated cases, the defense counsel later wrote about his role in vindicating his client (as in two 1956 cases, Foster and Miller).²³⁹ But in many others, the defense counsel labored in relative obscurity and no monument between hard covers attests to his eventual success on behalf of his client or clients (as in the 1928 cases of Garvey, Leshner, and Rohan, the 1946 Kamacho case, and the 1978 Fay case).²⁴⁰ Often the defense counsel is an unpaid volunteer attorney who works for years after the erroneous conviction, as in two cases from the 1920s (Storick and Harris)²⁴¹ and three more from the 1930s (Fowler and Pugh, and Clark).²⁴² Of these five innocent defendants, one died after spending thirteen years in prison, and the other four spent an average of twenty-four years behind bars before being vindicated.

What is noteworthy is that defense attorneys and their investigators failed to prevent the conviction of their clients in many cases where error was eventually established. Although each case has a slightly different story behind it and many stories are unknown, the records show that in some instances the defense counsel himself did not even believe

233. See notes 411-413 *infra* and accompanying text.

234. See notes 786-787 *infra* and accompanying text.

235. See note 777 *infra* and accompanying text.

236. See, e.g., note 388 *infra* and accompanying text (Becker); notes 367-368 *infra* and accompanying text (Bambrick).

237. See notes 365-366 *infra* and accompanying text.

238. See notes 400-403 *infra* and accompanying text (Billings); notes 817-818 *infra* and accompanying text (Sacco and Vanzetti); notes 758-760 *infra* and accompanying text (Montgomery ("Scottsboro Boys")); notes 465-467 *infra* and accompanying text (Cooper ("Trenton Six")); notes 441-449 *infra* and accompanying text (Chambers ("Pompano Four")).

239. See notes 516-517 *infra* and accompanying text (Foster); notes 754-757 *infra* and accompanying text (Miller).

240. See note 531 *infra* and accompanying text (Garvey); note 644 *infra* and accompanying text (Kamacho); notes 500-505 *infra* and accompanying text (Fay).

241. See note 854 *infra* and accompanying text (Storick); notes 580-581 *infra* and accompanying text (Harris).

242. See notes 518-519 *infra* and accompanying text (Fowler); notes 456-457 *infra* and accompanying text (Charles Clark).

in the innocence of his client. In most of these cases, quite apart from the defense counsel's beliefs regarding the guilt or innocence of his client, money for a sustained defense was so inadequate that once the trial itself was over the attorney could not continue to investigate except on his own time and at his own expense.²⁴³

In eight cases, a member of the defendant's family (e.g., a sister, in the 1924 Hardy case²⁴⁴) or loyal friends (as in the 1982 Carter case²⁴⁵) or the defendant's rabbi (as in the 1932 Gross case²⁴⁶) persisted in investigating the case or in trying to convince the authorities to reopen it and eventually succeeded.

In sixteen cases, a sympathetic citizen came to the defendant's rescue, as happened in 1907 to John Schuyler.²⁴⁷ The most dramatic recent case of this type occurred in 1973 in Connecticut after young Peter Reilly was convicted of manslaughter in the death of his mother.²⁴⁸ Had it not been for the well-publicized efforts of playwright Arthur Miller and novelist William Styron, Reilly might not have been vindicated so promptly—or even at all.²⁴⁹ In another case, a seminarian learned about a doubtful conviction and dedicated many months to vindicating the innocent defendant.²⁵⁰

The variety of persons who come to the aid of the innocent cannot be exaggerated: A volunteer attorney and several citizens together freed one defendant;²⁵¹ a trial jury foreman, after having second thoughts, joined with the victim's brother to help exonerate the wrongly convicted defendant;²⁵² a defense committee organized on behalf of three indigent defendants eventually succeeded in freeing them after they were wrongly convicted and condemned to death for rape;²⁵³ a victim's mother was persuaded that the wrong man was convicted of killing her son.²⁵⁴

In at least two cases the true story verges on the incredible: A man in Los Angeles read a newspaper advertisement placed by two despon-

243. Securing freedom for erroneously convicted defendants is not an inexpensive undertaking. The range of costs is undoubtedly large, and no case is truly typical. In one recent case, involving four defendants, a newspaper reported that it spent between \$50,000 and \$75,000 on its investigation. See note 534 *infra* and accompanying text (1974, Gladish); see also *Capital Punishment: Hearings Before the Senate Judiciary Committee on S. 114*, 97th Cong., 1st Sess. 720 (1981).

244. See note 579 *infra* and accompanying text.

245. See note 437 *infra* and accompanying text.

246. See notes 554-558 *infra* and accompanying text.

247. See notes 825-826 *infra* and accompanying text.

248. See notes 794-796 *infra* and accompanying text.

249. In New Jersey, Edgar Smith, a death row inmate during the 1960s who protested his innocence for years, also won celebrity support, and was released, only to be convicted of new crimes and later admit his guilt for the original one. See Bedau, *supra* note 31, at 238.

250. See notes 482-483 *infra* and accompanying text (De Los Santos).

251. See notes 888-889 *infra* and accompanying text (Wallace).

252. See note 762 *infra* and accompanying text (Morris).

253. See notes 532-533 *infra* and accompanying text (Giles).

254. See notes 897-899 *infra* and accompanying text (Wentzel).

dent Louisiana convicts on death row;²⁵⁵ a woman contacted the authorities after she read a news story and recognized the picture of a man who, she claimed, only a few days earlier had told her he had killed several persons and was about to kill another “legally,” thereby exonerating an innocent man three days before his scheduled execution.²⁵⁶

Investigators for the *New York Times* played an important role in revealing the truth of the crime that eventually led to the exoneration of Peter Reilly in 1973.²⁵⁷ Other newspapers and magazines did similar detective work on behalf of innocent capital defendants in thirty-seven of our cases, most of them in recent decades. Our records show, for example, that the detective work of one reporter—Gene Miller of the *Miami Herald*—helped free four wrongly convicted defendants in three different cases.²⁵⁸ An American newspaperman, Anthony Scaduto, in the 1970s, and a British writer and television commentator, Ludovic Kennedy, in the 1980s, gathered and organized evidence through extensive investigations that Bruno Richard Hauptmann, executed in 1935, was innocent.²⁵⁹ In two important instances, a journalist’s research and the resulting story revealed that an innocent man was executed.²⁶⁰ But in most cases little or no publicity attended the exposure of error by newspaper sleuths, except in the pages of their own newspapers.

In twelve cases, the efforts of a small group of persons dedicated to investigating and exposing erroneous felony convictions—“The Court of Last Resort”—discovered the exculpatory evidence. This group seems to have been the only one, public or private, ever established with the sole purpose of investigating possible judicial error and, in those cases where the newly discovered evidence seemed overwhelmingly in favor of the convicted defendant, of trying to convince the authorities to act on that evidence.²⁶¹ The cases in which this group was involved are among those where the cause of exoneration is most fully

255. See notes 661-665 *infra* and accompanying text (Labat).

256. See notes 428-429 *infra* and accompanying text (Bundy).

257. See notes 794-796 *infra* and accompanying text.

258. See notes 834-835 *infra* and accompanying text (1959, Shea); notes 571-572 *infra* and accompanying text (1961, Hampton); notes 686-692 *infra* and accompanying text (1963, Lee and Pitts).

259. See note 582 *infra* and accompanying text.

260. William Bradford Huie revealed the error made in Roosevelt Collins’ case in 1937. Huie, *The South Kills Another Negro*, in *THE DEATH PENALTY* 85-91 (E. McGehee & W. Hildebrand eds. 1964) (reprinted from *THE AMERICAN MERCURY* (1943); see also notes 461-462 *infra* and accompanying text. Carl Rowan uncovered the error made in Willie McGee’s case in 1945. C. ROWAN, *SOUTH OF FREEDOM* 174-92 (1952); see also notes 738-742 *infra* and accompanying text.

261. James McCloskey, a former seminary student who took an interest in the De Los Santos case, notes 482-483 *infra* and accompanying text, has now formed a small organization (Centurian Ministries) in Princeton, New Jersey, to investigate a handful of other possible miscarriages in felony cases. See Hammer, *Prison Samaritan Jim McCloskey Wins Freedom For an Innocent Man*, *PEOPLE*, Nov. 24, 1986, at 63; *Minister Fights to Free the Innocent*, *N.Y. Times*, Nov. 9, 1986, at 44, col. 1.

explained—and the obstacles to effective relief most convincingly presented.

Finally, in 134 of our cases—more than a third of the total—we can point to no identifiable person or group whose actions exposed the miscarriage. In part, this is because the reports usually fail to give the behind-the-scenes story of interest, persistence, and intervention that led to the exposure. Only the most notorious cases in our catalogue are chronicled in thorough detail. For the rest (and even for some on which books have been written), important questions remain unanswered as to how the miscarriage occurred, was discovered, or was corrected. Many of the defendants owe their vindication to a person or persons whose efforts have never been recorded for later historians. In others, including some of the cases in which the error was most blatant, Lady Luck is the only identifiable intervenor.²⁶²

Is there a lesson to be learned from the data summarized in Table 7 and discussed above? We believe there is: There is no common or typical route by which an innocent defendant can be vindicated, and vindication, if it ever comes, will not necessarily come in time to benefit the defendant. The criminal justice system is not designed to scrutinize its own decisions for a wide range of factual errors once a conviction has been obtained. Our data show that it is rare for anyone within the system to play the decisive role in correcting error. Even when actors in the system do get involved, they often do so on their own time and without official support or encouragement. Far more commonly, the efforts of persons on the fringe of the system, or even wholly outside it, make the difference. The coincidences involved in exposing so many of the errors and the luck that is so often required suggest that only a fraction of the wrongly convicted are eventually able to clear their names.

Some who read the descriptions of our cases and their summary in Table 7 might erroneously argue that these data prove that “the system works.” To be sure, many innocent defendants have used the system, notably the appellate courts, to win their freedom. But in the bulk of the cases, the defendant has been vindicated not *because* of the system, but *in spite* of it. The system provides at most the avenues and forums for vindication, not the impetus for it. Most victims of miscarriage, like other felony defendants found guilty, have expended all their financial resources trying to avoid conviction. Once convicted and imprisoned, few have attorneys who are willing or able to continue to fight for them. In short, the lesson taught by our data is how lucky these few erroneously convicted defendants were to have been eventually cleared. To think that these cases show that “the system works” is to ignore that,

262. In cases such as those of Terry Seaton in 1973, *see* notes 827-829 *infra* and accompanying text, or of Brett Bachelor in 1979, *see* note 364 *infra* and accompanying text, Lady Luck seems to have worked alone and in her own way.

once a defendant is convicted, there is no *system* to which he can turn and on which he can rely to verify and rectify substantive error. The convicted defendant can initiate an appeal based on procedural error in his trial, or on newly discovered evidence, but not on his factual guilt or innocence. This leaves most erroneously convicted defendants with no place to turn for vindication.

Table 8 summarizes the agony of error in our 350 cases, using as a

TABLE 8
DEFENDANTS' ACTUAL PUNISHMENT

	Number of Cases (N=350)	Percent
I. Released from Confinement	315	90.0
After serving 0-5 years (1)*	187	53.4
After serving 6-10 years (2)	65	18.6
After serving 11-15 years (3)	24	6.9
After serving 16 or more years (4)	39	11.1
II. Not Released from Confinement	31	8.9
Died while serving sentence (5)	8	2.3
Executed (6)	23	6.6
III. Unknown (7)	4	1.1

* Numbers in parentheses correspond to Coding Schedule, Appendix B, *infra*.

yardstick the amount of time spent by the defendant in prison before the error was recognized and rectified. In more than half the cases, 187, the error was corrected within five years of the conviction. But in more than a tenth of the cases (thirty-nine), the error was not corrected until after the innocent defendant had been in prison for more than fifteen years.²⁶³ One of the best known of these cases is that of Isidore Zimmerman, who spent twenty-four years in prison in New York, at first under death sentence, before he was released, exonerated, and finally indemnified—four months before his death in 1983.²⁶⁴ In another thirty-one cases, the error was not corrected before the defendant's death: Twenty-three defendants were erroneously executed and eight died in prison.

Table 9 turns the spotlight on twenty-two close calls—cases in which an execution was nearly carried out but was averted with only a day or two to spare; in some cases only a few hours. In eight of these

263. There are five cases in our catalogue in which defendants refused to accept or apply for parole or commutation because they professed to believe that to do so would have been a tacit admission of guilt. See notes 707-708 *infra* and accompanying text (Jesse Lucas); notes 714-719 *infra* and accompanying text (Marcinkiewicz (Majczek case)); notes 456-457 *infra* and accompanying text (Charles Clark); notes 544-546 *infra* and accompanying text (William Green); notes 883-887 *infra* and accompanying text (Walker).

264. See notes 921-923 *infra* and accompanying text.

TABLE 9
CLOSE CALLS (N=22)*

<u>Year of Conviction</u>	<u>Defendant</u>	<u>Proximity to Execution</u>
1901	J.B. Brown	At gallows
1907	Zajicek	Three days
1907	Sherman	A few days
1915	Stielow	Strapped in chair
1925	Larkman	Ten hours
1925	Reno	Seven hours
1926	Vargas	Head shaved
1927	Cero	Four hours
1927	Weaver	A few days
1931	Hollins	Thirty hours
1932	Langley	Twenty-five minutes
1933	Bernstein	Within minutes
1936	Jones	Five hours
1937	Zimmerman	Two hours
1942	Wellman	Seated in chair
1949	Irvin	Two days
1950	Bailey	Two days
1953	Morris	Three days
1953	Labat & Poret	Three hours
1956	Miller	Seven hours
1957	Bundy	Three days

* Rerieved within 72 hours of execution.

cases, there were two hours or less to spare. None came closer than Charles Stielow in 1915²⁶⁵ and William Wellman in 1942;²⁶⁶ each was already strapped into the electric chair when the rescuing reprieve from the governor arrived.²⁶⁷

VII. EXECUTION OF THE INNOCENT

As Table 10 shows, we include in our catalogue twenty-three cases of persons we believe to be innocent defendants who were executed. Chronologically, these cases divide very unequally; all but four occurred in the first half of the period under study (i.e., before 1943) and

265. See notes 542-543 *infra* and accompanying text (Nelson Green case).

266. See note 896 *infra* and accompanying text.

267. In some cases not in our catalogue the reprieves never arrived at all or arrived too late: The papers requiring a stay of execution for Rush Griffin in California were delivered to the state supreme court three days after he was hanged. See *San Francisco Chron.*, Apr. 10, 1935, at 1, col. 7. Two years earlier, also in California, a reprieve for Joseph Regan arrived at the prison two minutes after he was executed. See C. DUFFY, 88 MEN AND 2 WOMEN 75-76 (1962). In 1957, in a third California case, involving Burton Abbott, the governor's secretary reached the warden with news of a stay just after the pellets in the gas chamber were dropped. See B. ESHELMAN, *supra* note 145 at 184-85. We are unaware of any investigations subsequent to these executions based on the belief that any of these defendants was innocent.

TABLE 10
EXECUTED IN ERROR (N=23)

<u>Year of Conviction</u>	<u>Jurisdiction</u>	<u>Defendant</u>
1905	Alabama	Garner
1905	Massachusetts	Tucker
1907	Nebraska	Shumway
1912	New York	Becker & Cirofici
1915	Utah	Hill
1915	New York	Bambrick
1917	Alabama	Sanders
1919	Tennessee	Mays
1920	New Jersey	Lamble
1921	Massachusetts	Sacco & Vanzetti
1929	New York	Grzechowiak & Rybarczyk
1935	New Jersey	Hauptmann
1936	New York	Appelgate
1937	New York	Wing
1937	Alabama	Collins
1938	New York	Sberna
1945	Mississippi	McGee
1945	Florida	Anderson
1960	Florida	Dawson
1974	Florida	Adams

nearly half (ten) occurred in the first quarter of the period (i.e., before 1922).

From these figures, one might be tempted to infer that the problem of executing the innocent has diminished with the passage of time. The temptation should be resisted: A mere decrease in the absolute number of people wrongfully executed tells very little; a trend can be seen only by determining whether the *proportion* of erroneous executions has changed over time. Between 1900 and 1942, of an estimated 5,229 lawful executions in the United States,²⁶⁸ nineteen erroneous executions constitute 0.36 percent of the total. Between 1943 and 1985, of the 1,863 executions,²⁶⁹ four erroneous executions constitute 0.22 percent of the total, roughly one-third less than the proportion in the earlier period. Between 1900 and 1922, of an estimated 2,465 executions,²⁷⁰ we show ten in error, or 0.40 percent of the total—only slightly greater than for the entire 1900-1942 period and roughly twice that for the years 1943-1985. We advise caution in inferring a trend

268. See W. BOWERS, *LEGAL HOMICIDE: DEATH AS A PUNISHMENT IN AMERICA, 1864-1982*, at 54 (1984) (Table 2-3). Executions were not reliably counted prior to 1930. For a discussion of estimates for years prior to 1930, see *id.* at 52-54.

269. See NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *supra* note 78; U.S. DEPARTMENT OF JUSTICE, *CAPITAL PUNISHMENT, 1983*, at 10 (1984) (Table 1).

270. W. BOWERS, *supra* note 268, at 54.

because the differences in these proportions are quite small. In addition, we must repeat that we have not—nor has anyone else—examined *all* of the more than 7,000 executions during this century in light of *all* the available evidence. Until this is done, proposing trends in the execution of the innocent is idle speculation.

The cases can also be divided into three groups according to their notoriety. Three of the cases—Hill, Sacco and Vanzetti, and Hauptmann²⁷¹—are among the most discussed capital cases in this century. Each was in its day a household name rallying thousands to protest the injustice of the system and the tragedy of error that led to execution. In a few other cases involving black defendants—Collins, McGee, Dawson, and Mays²⁷²—regional publicity or a post-execution essay by a leading journalist helped the case reach a wider audience beyond the town in which the crime and trial took place. But in most of the cases there was no publicity; many are among the most obscure and least documented in our files. Why this is so is unclear. General toleration of the death penalty in earlier decades, the insignificant social status of the defendant, and the absence of vigorous post-conviction appeals in or out of the courtroom no doubt help to explain the slender record in these cases.

The evidence for judgment of error in these cases will naturally interest many, but what we can report will satisfy only a few. In the notorious cases, we have relied on the judgment of other scholars whose investigative work convinces us that error did indeed occur. Nothing we can say here will cause the controversy that still surrounds each of these cases to abate. In some of the more obscure cases,²⁷³ we have relied entirely on the opinions of officials whose views we believe deserve to be taken seriously. In none of these cases, however, can we point to the implication of another person or to the confession of the true killer, much less to any official action admitting the execution of an innocent person. As we have noted earlier, in none of the cases included in Table 10 can we point to any state action indicating the belief that the person executed was innocent.²⁷⁴ In three cases,²⁷⁵ another

271. See notes 585-588 *infra* and accompanying text (Hill); notes 817-818 *infra* and accompanying text (Sacco and Vanzetti); note 582 *infra* and accompanying text (Hauptmann).

272. See notes 461-462 *infra* and accompanying text (Collins); notes 738-742 *infra* and accompanying text (McGee); notes 476-478 *infra* and accompanying text (Dawson); notes 734-736 *infra* and accompanying text (Mays).

273. See note 388 *infra* and accompanying text (Becker); notes 367-368 *infra* and accompanying text (Bambrick); notes 914-915 *infra* and accompanying text (Wing); notes 821-824 *infra* and accompanying text (Sberna).

274. The cases that come closest are those of Leo Frank in Georgia, who was lynched, and Sacco and Vanzetti in Massachusetts, who were executed. In 1986, the Georgia Board of Pardons granted a posthumous pardon to Leo Frank. Language was carefully chosen to avoid any conclusive implication that the pardon was granted in the belief that Frank was wholly innocent. See notes 520-521 *infra* and accompanying text.

In 1977, Massachusetts Governor Dukakis issued a "proclamation" on the fiftieth anniversary of the executions of Sacco and Vanzetti. See Proclamation of the Governor of Massachusetts (July 19, 1977), reprinted in EXECUTIVE DEPARTMENT OF MASSACHUSETTS, REPORT TO

person was implicated, and we believe, on the balance of the evidence, that this other person was the guilty party. But we cannot point to the arrest, indictment, and conviction of this other person in any of these cases. In the six remaining cases,²⁷⁶ we believe that the confession of another person is more reliable evidence of guilt than the conviction of the person executed. But again, we cannot point to the arrest, indictment, and conviction of this other person. In several of the cases, the confession in question was given by a co-defendant about to be executed; in others it was from the deathbed of someone never seriously suspected. Only in the Mays case does it appear that the authorities could have indicted the belated confessor, though they did not do so.

VIII. ERROR AND THE ABOLITION OF THE DEATH PENALTY

A. *Historically*

Although concerns over executing the innocent have been expressed for over two hundred years, in no jurisdiction has such a concern been solely responsible for the abolition of the punishment. Where the death penalty has been eliminated, it is impossible to determine the precise strength that this argument had in the abolition move-

THE GOVERNOR IN THE MATTER OF SACCO AND VANZETTI (1977). But the governor carefully avoided declaring that post-execution evidence established the innocence of the two men. Instead, the proclamation denounced the "prejudice against foreigners and hostility toward unorthodox political views" that prevailed inside and outside the courtroom during the trial, and the limited scope of appellate review then in effect for capital cases, and declared only that "any stigma and disgrace" attached to the names of the executed men "should be forever removed." W. YOUNG & D. KAISER, *supra* note 176, at 3-4. A few days after the proclamation was issued, a bill was filed in the state Senate to denounce the Governor's action; the resolution was never brought to a vote. See Mass. Senate J., Aug. 1, 1977, at 1165.

In four other cases, two of them famous but all outside the parameters of our catalogue, there were posthumous pardons on grounds that innocent persons had been executed. In Illinois in 1893, Governor Altgeld pardoned three of the Haymarket defendants, six years after four of their co-defendants had been hanged. An eighth defendant had taken his own life on the eve of his scheduled execution. Altgeld issued the pardons because all eight "had been wrongfully convicted and were innocent of the crime . . ." P. AVRICH, *THE HAYMARKET TRAGEDY* 423 (1984). In England in 1950, Timothy John Evans was hanged for a crime actually committed by his landlord, John Reginald Christie. See L. KENNEDY, *supra* note 8. In 1966, Queen Elizabeth granted Evans a full pardon. See *Britain Pardons Man Hanged in '50*, *supra* note 9, at 19, col. 3.

In 1984, Governor Dukakis of Massachusetts issued a proclamation that cleared the names of James Halligan and Dominic Daley, who were executed in 1806. Another person later confessed to the crime. *Boston Globe*, Mar. 19, 1984, at 16, col. 6. In 1986, Governor Kerrey and the Nebraska Board of Pardons granted a posthumous pardon to William Jackson Marion, effective March 25, 1987, the 100th anniversary of Marion's hanging. Four years after the execution, the supposed victim of Marion's homicide was found to be alive. Nebraska Board of Pardons Report (Dec. 12, 1986).

275. See notes 476-478 *infra* and accompanying text (Dawson); note 350 *infra* and accompanying text (Adams); notes 359-362 *infra* and accompanying text (Appelgate).

276. See note 530 *infra* and accompanying text (Garner); notes 843-846 *infra* and accompanying text (Shumway); notes 819-820 *infra* and accompanying text (Sanders); notes 734-736 *infra* and accompanying text (Mays); notes 560-561 *infra* and accompanying text (Grzechowiak and Rybarczyk).

ment's success. Yet we do know that in at least some of these jurisdictions it played a powerful role.

In 1846, Michigan became the first English-speaking jurisdiction in the world to abolish capital punishment. The law took effect on March 1, 1847. A decade earlier, Patrick Fitzpatrick was hanged in Sandwich, Ontario, just across the Detroit River from Michigan's largest city. In 1840, Michigan citizens familiar with the case were shaken when a man named Maurice Sellars gave a deathbed confession to the crime.²⁷⁷ How much their distress contributed to the anti-death penalty support in the state is unknown, but apparently it did have some significance in strengthening the sentiment for abolition.

Rhode Island abolished the death penalty in 1852. Among the factors that influenced this decision was the 1844 trial of John and William Gordon, who were accused of killing Amasa Sprague, the brother of a United States senator. Although the evidence against the Gordons was "flimsy and circumstantial"²⁷⁸ and many believed them to be victims of anti-Irish prejudice, John was convicted and hanged in 1845. On identical evidence, William was acquitted. No proof ever surfaced that conclusively established John's innocence, but doubts about his guilt flourished and helped to strengthen the case for abolition.²⁷⁹

In Maine, too, the recognition of the possibility of erroneous convictions influenced the movement to abolish the death penalty. In 1968, then-Governor Edmund Muskie stated that the hanging of an innocent man had induced Maine to abolish the death penalty.²⁸⁰ In 1837, two years after the hanging of Joseph Sager "aroused great controversy,"²⁸¹ Maine severely limited the use of the death penalty. Prior to his execution, Sager had asserted his innocence to all who would listen. He did so again to the crowd of thousands who watched him die on the gallows.²⁸² Thirty years later, in 1869, Clifton Harris was hanged for murder.²⁸³ Several different innocent men had been suspected of the crime. Finally, Harris confessed his guilt, but at trial he implicated Luther Verrill as an accomplice. On this testimony, Verrill too was tried and convicted. The conviction, however, was reversed on appeal and the charges were dropped after Harris admitted that Verrill had noth-

277. See Bennett, *The Reasons for Michigan's Abolition of Capital Punishment*, 62 MICH. HIST. 42, 49 n.24 (1978); Burbey, *History of Execution in What Is Now the State of Michigan*, 22 MICH. HIST. MAG. 443, 452 (1938); Detroit News, May 23, 1985, at 1, col. 2.

278. T. SELLIN, *THE PENALTY OF DEATH* 145 (1980) (quoting P. COLEMAN, *THE TRANSFORMATION OF RHODE ISLAND, 1790-1860*, at 243 (1963)).

279. Mackey, "*The Result May Be Glorious*"—*Anti-Gallows Movement in Rhode Island 1838-1852*, 33 R.I. HIST. 19, 23-24 (1974); Providence Evening Bull., May 17-22, 1933 (on file with the *Stanford Law Review*).

280. MacNamara, *supra* note 20, at 61.

281. T. SELLIN, *supra* note 278, at 153.

282. J.W. NORTH, *THE HISTORY OF AUGUSTA* 559 (1870).

283. T. SELLIN, *supra* note 278, at 153.

ing to do with the crime.²⁸⁴ Seven years later, in 1876, the legislature abolished the death penalty entirely, although it was briefly re-enacted from 1883 to 1887. The last person to be executed in Maine was Daniel Wilkinson, who was convicted of killing a Bath police officer. At the time the case created much controversy, as many believed the crime to have not been premeditated, and thus that Wilkinson accordingly should have been convicted of manslaughter or second-degree murder rather than first-degree murder.²⁸⁵

Tennessee abolished the death penalty for murder (but not for rape) during the years 1915 to 1917. The abolition effort was led by a wealthy Memphis merchant, Duke Bowers; to support this legislation he prepared a 97-page memorandum.²⁸⁶ In the memorandum, Bowers reports that the bill passed through the House Committee because of a powerful argument made by Nashville attorney K.T. McConnico. Much of McConnico's argument, according to Bowers, was based on a 550-page document prepared by McConnico and filled with cases in which allegedly innocent defendants had been executed prior to 1901.²⁸⁷ Unfortunately, neither the Library of Congress nor the Tennessee State Archives has McConnico's document, so we have no knowledge of its contents. Bowers, however, asserts that McConnico's catalogue of errors provided was a "tremendous argument" for the passage of the bill.²⁸⁸

In 1966, England's Queen Elizabeth granted a full pardon to Timothy John Evans, who had been hanged in 1950 for the murder of his infant daughter. Concern that Evans had been wrongly executed played a large part in the successful attempt to abolish the death penalty in England.²⁸⁹ Three years after Evans had been hanged, bodies of several additional murder victims were found in his home, and his landlord, John Reginald Christie, confessed not only to having murdered them, but to the murder for which Evans had been condemned. Christie, too, was hanged.²⁹⁰

In Canada in the 1960's, widespread belief in the innocence of an adolescent boy who had been sentenced to death played a role in securing public support for the abolition of the death penalty. In 1959, 14-

284. Lewiston Evening J., Mar. 12, 1869, at 1, col. 4 (on file with the *Stanford Law Review*).

285. Portland (Me.) Press-Herald, Sept. 3, 1983, at 1, col. 4; Lewiston Saturday J., Nov. 20, 1915, at 9, col. 1 (on file with the *Stanford Law Review*).

286. D. Bowers, *Life Imprisonment vs. the Death Penalty*. To the Honorable Members of the Senate and Lower House of the 58th General Assembly and to the Chairman and Members of the Judiciary Committee Thereof. The Brief of Duke C. Bowers, et al., Advocates, on Senate Bill, No. 242, and House Bill, No. 235, Entitled "An Act to Abolish the Death Penalty in the State of Tennessee, and to Substitute Life Imprisonment Therefor" (1915) (available in the New York Public Library).

287. *Id.* at 73.

288. *Id.*

289. See N.Y. Times, Oct. 19, 1966, at 19, col. 3.

290. See L. KENNEDY, *supra* note 8; see also note 274 *supra*.

year-old Steven Truscott was convicted of the rape and murder of a 12-year-old girl. Only rather vague circumstantial evidence implicated Truscott; he was widely believed to be innocent. Truscott's death sentence was eventually commuted to life imprisonment, and in 1961 the Canadian Parliament enacted a prohibition against a death sentence for anyone under age eighteen at the time of the crime.²⁹¹ Canada temporarily abolished the death penalty in 1967,²⁹² and in 1976 the abolition was made permanent.²⁹³

B. *In Theory*

Evaluating the argument against the death penalty based on the fact that innocent defendants have been and will be executed requires some care. As it is *certain* that there are and will be such cases, death penalty proponents cannot evade the problem. Ernest van den Haag, one of this country's most vocal death penalty proponents, agrees, but then argues that the benefits of capital punishment outweigh this liability.²⁹⁴ His rationale requires that the alleged benefits of capital punishment (e.g., retribution and incapacitation) be accurately assessed, and then shown to outweigh its known liabilities (e.g., cost, arbitrariness, and the risk of errors). But since there is no consensus in our society over the weight to be assigned to each variable in this equation, we are doomed to disagree over how to compute it.

The van den Haag rationale also necessitates the impossible task of estimating the odds of executing the innocent. A 1 percent error rate, for example, might be acceptable to those who tend to favor the death penalty, whereas an arbitrarily selected higher rate—say 5 percent—would not be. Even if the odds could be calculated, it would be incorrect to use such a restricted notion of erroneous execution when debating whether or not to retain the death penalty. The criminal law defines innocence much more broadly than the narrow definition used in our research. Thus, a priori, the odds of executing the legally innocent (i.e., all those defendants who lack *mens rea*) are many times greater than are the odds of executing those who literally had nothing to do with causing the victim's death.²⁹⁵ Nonetheless, for reasons we have outlined below, any attempt to calculate the odds of executing the innocent, whatever the definition, is doomed to fail.

In any event, van den Haag's defense of the death penalty despite his concession that some innocent defendants will be executed can be

291. See D. CHANDLER, *CAPITAL PUNISHMENT IN CANADA: A SOCIOLOGICAL STUDY OF REPRESSIVE LAW* 31 (1976); I. LEBOURDAIS, *THE TRIAL OF STEVEN TRUSCOTT* (1966).

292. D. CHANDLER, *supra* note 291, at 20.

293. Fattah, *Canada's Successful Experience with the Abolition of the Death Penalty*, 25 *CAN. J. CRIM.* 421, 423 (1983).

294. See note 10 *supra*. For further discussion of this point, see Dolinko, *Foreword: How to Criticize the Death Penalty*, 77 *J. CRIM. L. & CRIMINOLOGY* 546, 585-91 (1986).

295. See C. BLACK, *supra* note 45, at 57.

criticized on grounds other than the impossibility of performing the calculations his argument requires. One could accept his cost-benefit logic for the sake of the argument, and still point to at least three objections. First, there is little or no empirical evidence on behalf of any of the alleged benefits of the death penalty that make it superior to long-term imprisonment. Second, van den Haag's comparison of the death penalty with other activities that cause the death of the innocent (building houses, driving a car, playing golf or football) is misleading for two reasons. Those who participate in the latter voluntarily consent to their exposure to risk, whereas there is no reason to believe that the *innocent* defendant has consented to the risk of being executed. Furthermore, the intention of capital punishment is to kill the convicted, whereas this is not the intention of the practices to which van den Haag draws a parallel. Third, and most importantly, we need to consider basic issues of individual rights in a democratic society. We suspect that those who reason as van den Haag does might see the issue differently were they the innocent defendants facing the executioner. The right to life of all innocent citizens is beyond dispute. A worker cannot be required to risk certain death by being forced to repair a malfunctioning nuclear reactor, even if by doing so he or she would save hundreds of lives. The American military cannot order draftees to become kamikaze pilots, regardless of what benefits might ensue. Only volunteers—those who willingly risk or waive their right to life—could be asked to do such jobs. Given the irremediability of the death penalty and the availability of an adequate alternative punishment, the execution of *any* defendant is unnecessary and cannot be justified even if there were substantial benefits of capital punishment.

Defenders of the death penalty will dispute this conclusion. They could argue that abolitionists have forgotten the risk that elimination of the death penalty would force society to bear: the risk of recidivist crimes by persons previously convicted of murder but not incapacitated from future offenses by execution. Every time a guilty person is convicted of murder but not sentenced to death and executed, society runs the risk that such a person may kill again, or commit other crimes—against a fellow inmate, a prison visitor, a prison employee, or even the general public. A comprehensive study of the incidence of recidivism by convicted murderers has yet to be done; still, evidence suggests that although the number of such crimes is not large,²⁹⁶ it exceeds the number of known innocents who have been executed. If this is indeed true, why should society run what appears to be the greater of the two risks?

An adequate reply to this important objection is complex. First, it is not possible to know which risk is greater merely by knowing the differ-

296. See Bedau, *Recidivism, Parole, and Deterrence*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 31, at 173, 180.

ence between the two aggregate numbers (those wrongfully executed and those victims of recidivist murderers). The proper way to determine which risk is greater is to take a fixed population of persons condemned but not executed (e.g., all those spared execution by the 1972 *Furman* decision), and determine (1) how many were wrongfully convicted and (2) how many of the others, truly guilty, committed subsequent murder. Such a study has yet to be done. Second, by abolishing mandatory death penalties, society has implicitly agreed to run the risk of recidivism by convicted murderers, whatever that risk may be, since the effect of discretionary death sentencing is that only a small fraction of all those convicted of murder are sentenced to death and executed.²⁹⁷ Third, as things currently stand, society runs *both* the risk of executing the innocent *and* the risk of recidivist murder, whereas it is only necessary that society run one or the other. To that extent, our current practice seems irrational unless it can be shown that a combination of these two risks is lower than either risk taken alone. Fourth, it is virtually impossible to imagine our society not running some risk of recidivist murder. Not only is the mandatory death penalty unconstitutional,²⁹⁸ but few American jurisdictions in this century enacted and enforced a truly mandatory death penalty even for murder during the years when it was a constitutionally permissible option. On the other hand, many nations and several American jurisdictions have decided not to run the risk of executing the innocent. Thus, the question we should really ask is this: Which is more rational, running the risk of recidivist murder for 100 percent of convicted murderers (as abolitionists evidently believe), or (as defenders of the death penalty seem to prefer) running the risk for 95 percent or more of convicted murderers plus the risk of executing the innocent for the remaining 5 percent or less?

But even this does not state the true problem accurately. In addition to the two risks under discussion, there are other risks associated with the deterrent and incapacitative effects of the death penalty that must be taken into account. For example, some have argued persuasively that the "brutalizing" effect of the death penalty is measurably greater than its deterrent and incapacitative effects.²⁹⁹ Abolishing the death penalty involves running a slightly greater risk of recidivist murder than at present plus the alleged risk of lesser deterrence, whereas retaining or expanding the death penalty involves preserving or increasing the risks of brutalization and of executing the innocent. Although no adequate calculation of the relative risks involved is possible, the fact of erroneous death sentences and executions, the absence

297. T. SELLIN, *supra* note 278, at 69-74.

298. *Sumner v. Shuman*, 107 S. Ct. 2716 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

299. See, e.g., Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

of any convincing evidence favoring the superior deterrent effect of the death penalty, and the low incidence of recidivism seems to us to show that abolition is the better policy.

C. *In the Courts*

Charles Dickens was one of many eminent Victorians who opposed the death penalty. In one of his first public statements on the subject he stressed that it was "an irrevocable punishment [administered by] men of fallible judgment."³⁰⁰ This fact—not the "Probability of mistake" but the barest "Possibility of mistake"—was, he insisted, "a sufficient reason against the taking of a life which nothing can restore."³⁰¹ "Better that hundreds of guilty persons should escape scot-free," he declared, "than that one innocent person should suffer."³⁰²

In a criminal justice system such as ours, which since 1976 has virtually abolished mandatory death penalties³⁰³ and instead instituted bifurcated trials in capital cases,³⁰⁴ "men of fallible judgment" can avoid the stark choice that faced trial juries in Dickens' day (acquit of murder or sentence to be hanged). They can conclude that a defendant is "guilty beyond a reasonable doubt," convict him or her accordingly, and yet acknowledge lingering doubts by recommending a life sentence. The struggle between those convinced "beyond a reasonable doubt" and those who harbor lingering doubts can be seen with striking effect today in jurisdictions such as Florida, where the jury's sentencing recommendation is not binding on the trial judge.³⁰⁵ In some of the cases in our catalogue, where the jury recommended life imprisonment, the trial judge overrode this recommendation and sentenced the defendant to death.³⁰⁶ Lingering doubt about the defendant's guilt probably explains the juries' recommendations.³⁰⁷ As subsequent evi-

300. *SELECTED LETTERS OF CHARLES DICKENS* 215 (D. Paroissien ed. 1985).

301. *Id.* at 216.

302. *Id.* at 215.

303. *Woodson v. North Carolina*, 428 U.S. 280 (1976). This abolition includes statutes mandating a death sentence for murders committed by inmates who are serving life sentences without the possibility of parole. *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

304. *Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976). Jurisdictions vary in the standards and procedures used to sentence a defendant to death. See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-19 (1980).

305. FLA. STAT. ANN. § 921.141(2)-(3) (West 1985).

306. See, e.g., notes 870-872 *infra* and accompanying text (Valletutti); notes 907-909 *infra* and accompanying text (Samuel Williams); notes 620-621 *infra* and accompanying text (Jaramillo); notes 421-422 *infra* and accompanying text (Anthony Brown).

307. For discussions of how lingering doubt can lead a jury to recommend a sentence of life rather than death, see Mello & Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 55-60 (1985); Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1427-30 (1985).

Recent research has shown, not surprisingly, that juries are more likely to sentence to death rather than to life imprisonment when there is "certainty" that the defendant is guilty and a "deliberate killer." Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1339 (1985). This subjective "certainty," of course, is no guarantee of objective validity in the verdict of guilt, as our research proves: In the jurisdiction (Geor-

dence in these cases showed, the juries were right.

A recurring issue before the courts is what type of information a defendant should be able to present in mitigation during the sentencing phase of a capital trial. Since 1977, juries during the sentencing phase have been permitted to hear any evidence concerning the nature of the crime or defendant that would mitigate the offense and warrant a sentence of life imprisonment. As the Supreme Court declared: "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."³⁰⁸ One factor that jurors may consider in mitigation is the possibility that the defendant is really innocent.³⁰⁹ As the California Supreme Court has observed:

[A] jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but that it still may demand a greater degree of certainty of guilt for the imposition of the death penalty.

.....

. . . The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment.³¹⁰

Or, in the more recent words of the Fifth Circuit Court of Appeals:

The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.³¹¹

The admissibility of this "lingering doubt" argument was recently echoed by the United States Supreme Court in its decision in *Lockhart v. McCree*.³¹² There, the Court ruled that prospective jurors in a capital case who are opposed to the death penalty may be excluded from sit-

gia) and during the years (1973-1978) on which Barnett's research is based, eight innocent persons were wrongly convicted of murder, two of whom, Banks and Charles, were sentenced to death. See notes 375-379 *infra* and accompanying text; notes 453-455 *infra* and accompanying text.

308. *Lockett v. Ohio*, 438 U.S. 586, 604 (1977).

309. As one commentator has written, "Every doubt, and not merely 'reasonable' doubt, should be overcome before a death sentence is imposed. Not probability, but certainty, should be demanded before a judge assumes the weightiest responsibility a man can take upon his conscience,—the responsibility for the life or death of a fellow human being." Hirschberg, *supra* note 20, at 46 (emphasis in original).

310. *People v. Terry*, 61 Cal. 2d 137, 145-46, 390 P.2d 381, 387, 37 Cal. Rptr. 605, 611, cert. denied, 379 U.S. 866 (1964).

311. *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. Unit B Nov. 1981) (emphasis in original).

312. 106 S. Ct. 1758 (1986).

ting not only when the jury is making its penalty decision, but also when it is deciding the prior issue of guilt. Writing for the majority, Justice Rehnquist argued that by having one jury make both guilt and penalty decisions, "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase."³¹³

By the end of 1986, the findings published in this article had been presented as expert testimony during the penalty phase of three different California capital trials. In all three the jury voted to spare the defendant's life. Striking as these results are, the cases are too few to test the power of the fruits of this research to buttress defense arguments for imprisonment rather than for death. In each of these cases, the defendant was fortunate in having highly skilled counsel, and each case presented a solid basis of facts for the construction of the "lingering doubt" argument.

Admissibility of expert testimony regarding this research project during the penalty phase of capital trials is a controversial matter. Some prosecutors have succeeded in preventing juries from hearing about this research, and appellate courts have yet to rule on their right to do so.³¹⁴ Defense attorneys involved in these cases view the results of the research as a means to remind capital juries that virtually every year, somewhere or other in the nation, an innocent person is convicted of murder. The attempts by prosecutors to prevent jurors from learning about this study suggest that they agree that this information can influence jurors.

IX. THE RISK OF ERROR

Criminologists have long referred to what they call "the dark figure of crime"³¹⁵—the unknown number of crimes actually committed in a community during a given period, unknown because neither arrest records nor victim reports mention them. Our research naturally leads to speculation about what might be called "the dark figure of innocence"—the number of cases per year or per jurisdiction in which undetected substantive (as opposed to "due process") error occurs in potentially capital cases.

Does the paucity of known and documented cases in which an innocent defendant was executed show that the criminal justice system, at least where the death penalty is concerned, works satisfactorily? Is the discovery of a case in which an innocent person is executed bound to be rare because so few cases of this sort have actually occurred? Or is

313. *Id.* at 1769.

314. See Radelet, *Sociologists as Expert Witnesses in Capital Cases: A Case Study*, in *EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM* 119 (P. Anderson & L.T. Winfree eds. 1987).

315. See, e.g., Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 708, 715 (1963).

the rarity of their discovery the result of other factors? In 1983, the Senate Judiciary Committee reported favorably on a bill that would have restored the federal death penalty. In its report, the Committee noted that "the procedural safeguards for criminal defendants mandated by the Supreme Court in recent years . . . have all but reduced the danger of error in . . . [capital] cases to that of a mere theoretical possibility."³¹⁶ The Committee conceded, however, that "due to the fallible nature of man, this possibility does continue to exist."³¹⁷ But it concluded that because the risk is "minimal," the death penalty is "justified by the protection afforded to society."³¹⁸

The Committee's confidence on the issue of risk is both excessive and misleading. First, the "procedural safeguards" to which the Committee alludes are not addressed to the problems of factual error that occurred in most of the cases in our catalogue. Second, because the Committee failed to distinguish between erroneous convictions in potentially capital cases, erroneous death sentences, and erroneous executions, it remains unclear how the Committee reached its conclusion. No doubt the Committee believed that these possibilities, even grouped together, are *very* unlikely.

Whether they are "minimal" remains a matter for conjecture and debate. Although we point only to a small number of what we believe to be erroneous executions, and although further research could undoubtedly increase that number, an estimate of the *risk* of execution—the risk faced by someone wholly innocent who is indicted for a capital crime, or convicted of a capital crime, or sentenced to death—cannot be determined merely by establishing the *proportion* of known cases of error among all capital convictions or all death sentences. More to the point, that proportion itself cannot be calculated with any accuracy, at least at this time, because even if the denominator of the fraction can be estimated, the numerator cannot. Our total of twenty-three wrongful executions³¹⁹ is not an estimate, and it cannot serve as a basis for a reasonable estimate, of the total number of wrongful executions in the United States during this century. Estimating the extent of the problem of convicting the innocent in potentially capital cases by extrapolation from our data is not possible. The cases in our catalogue are only a nonrandom subset of an indeterminate number of the relevant cases.³²⁰ The full story of all cases disposed of by execution must be

316. See SENATE COMM. ON THE JUDICIARY, ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT, S. REP. NO. 251, 98th Cong., 1st Sess. 14 (1983).

317. *Id.*

318. *Id.* at 14-15.

319. See Table 10 *supra*.

320. The ideal set of relevant cases is the union of two proper subsets, (a) those in which someone has been able to establish, officially or unofficially, that the defendants were victims of a miscarriage of justice, and (b) all other cases of such error, whether or not anyone has established that error occurred. Subset (a) can be bifurcated into two further subsets, (i)

examined before such an estimate would be possible.

Is it possible that the availability of the death penalty spurs the system to work more reliably than it otherwise might? If the possibility of executing convicted murderers were abolished, would society lose the greatest possible incentive to avoid tragic error? We think not. If this were true, the proportion of erroneous convictions in potentially capital cases should be higher in non-death penalty states than in death penalty states—assuming equal probability for the discovery of errors in capital and noncapital jurisdictions. Without data on the number of homicide convictions in each state since the turn of the century, the results of our research do not suffice to test this hypothesis.

Our results lead us to believe that the small number of cases in our catalogue in which major doubts remain about the guilt of the executed is an indication not of the reliability and fairness of the system, but rather of its power and finality. For a variety of reasons, very few cases in this century have managed to attract the sustained interest of persons in a position to undertake the research necessary to challenge successfully a guilty verdict meted out to a defendant later executed. Rarely are funds available to investigate executions of the allegedly innocent; there are not even funds available to investigate most of the convictions of those allegedly wrongly imprisoned, whether or not they are under death sentence. The 1974 Florida case of James Adams³²¹ illustrates this point: Once the defendant is dead, the best source of evidence is gone, as is the main motive to reinvestigate. Further, the limited resources of those who might challenge the deceased's guilt are quickly absorbed by the legal battles involved in trying to save the lives of others still on death row. The result is that, as time passes, relevant evidence of a miscarriage remains undiscovered. Today or tomorrow, it may be virtually unobtainable. In addition, no organization exists whose purpose is to gather and sift the evidence of a defendant's possible innocence after he or she has been executed. The Court of Last Resort did a remarkable job in a few capital cases, and our catalogue of errors is indebted to its labors.³²² But this organization never confined its attention to capital cases, and its work spanned less than two decades (1947 to 1960). More to the point, we know of no instance where it attempted to reopen any case of allegedly erroneous execution.

Finally, officials and citizens involved in a death penalty case, from arrest to denial of commutation, tend to close ranks and resist admission of error. They have been known to obstruct others from investigating the charge of erroneous execution. Silent witnesses or true

those miscarriages that have come to the attention of the present authors, and (ii) those that have not. Our research in this paper, obviously, contains the study only of the cases in subset (a)(i). Even if subset (a)(ii) were empty—and it is inconceivable that it is—that would not enable us to calculate or estimate the number of cases in the union of (a) and (b).

321. See note 350 *infra* and accompanying text.

322. See text accompanying notes 206-262 *supra* (discussing Table 7).

culprits are even less likely to step forward if their failure to do so earlier has cost the life of an innocent man. Our study of the records in hundreds of cases where error but no execution occurred confirms that all these factors play a role. Even if this were not so, exoneration of the innocent is thwarted from another direction. As others have noted,³²³ no forum save that of public opinion exists to present evidence in favor of the belief that some innocent person went to his death. Doubts about the Hauptmann case, for example, may never be resolved, if "resolved" means authoritatively reviewed and judged by a neutral, official tribunal.³²⁴

X. POSSIBLE REMEDIES

The study of erroneous convictions in potentially capital cases naturally leads to speculation over whether there are any constructive remedies that might be introduced into the criminal justice system to eliminate or at least significantly reduce the problem in the future. Half a century ago, Edwin Borchard concluded his study of erroneous convictions³²⁵ by proposing several specific remedies in criminal procedure. While he did not suppose their universal adoption would prevent all errors, he did believe that these remedies were feasible procedural changes and that their adoption would help to protect innocent defendants. His specific proposals were these: (1) since prior convictions of the defendant are relevant only to sentencing, they should be introduced into evidence only after a guilty verdict has been rendered;³²⁶ (2) if the rule proposed in (1) is deemed to be too restrictive, then prior convictions may be introduced into evidence only if the previous crime or crimes are relevant to the instant offense as charged;³²⁷ (3) no confession by the accused may be introduced into evidence unless given before a magistrate and in the presence of witnesses;³²⁸ (4) expert witnesses should be in the employ of the public and not retained solely by the defense or prosecution;³²⁹ (5) indigent defendants should be provided with counsel from a public defender;³³⁰ (6) in cases where erroneous conviction is a distinct possibility, an independent public investigatory body should be appointed to review the case;³³¹ (7) appel-

323. See Ehrmann, *supra* note 20, at 18 ("It is, however, almost impossible to secure evidence of innocence after a person is put to death."); see also note 19 *supra*.

324. See *Anna Hauptmann: Lindbergh Kidnapping's Final Victim*, U.S. NEWS & WORLD REP., Nov. 4, 1985, at 11.

325. E. BORCHARD, *supra* note 20.

326. *Id.* at xvi.

327. *Id.*

328. *Id.* at xvii.

329. *Id.* at xix.

330. *Id.* at xx.

331. *Id.* at xxi. There is one capital case in our catalogue in which a tribunal with powers similar to those proposed by Borchard was created. In Massachusetts in 1927, Governor Fuller appointed an Advisory Committee of three to review the Sacco and Vanzetti case in order to advise him on the issue of clemency. The Committee's conduct in its final report has

late courts should be empowered to review not only the law under which the defendant was convicted but also the facts introduced in evidence against him;³³² (8) no death sentence should issue against a defendant convicted solely on circumstantial evidence.³³³

In the decades since these proposals were first made, no jurisdiction has adopted all of them; except for one or another version of proposal (5), none has been adopted by all jurisdictions.³³⁴ It is not necessary here to evaluate all eight of Borchard's recommendations, but it is appropriate to comment on the one that has exclusive relevance to the death penalty, proposal (8). Borchard's suggestion is not original with him; although he did not mention it, his idea had been anticipated by ancient Talmudic law, which provided that a defendant could not be convicted of a capital offense unless two independent witnesses would attest to his guilt.³³⁵ Ancient though the lineage of this proposal is, we are skeptical that such a rule, if generally adopted, would be of much avail. If our catalogue of cases may be trusted, such a rule would suffice to prevent very few if any erroneous convictions in capital cases. It might even tempt the authorities to enlarge their use of "third degree" interrogation methods in order to secure confessions, as well as to enlist perjured eyewitness testimony. Finally, it would of course do nothing in the many cases in which erroneous conviction rests on false confessions or mistaken eyewitness testimony—and, as our research shows, these latter play a considerably larger role in creating error than does circumstantial evidence alone.

Indeed, if one wishes to focus exclusively on altering procedures in capital cases, one might with equal or greater persuasiveness argue that our data as well as Borchard's suggest a wholly different strategy: Bar a

been much criticized; see H. EHRMANN, *THE CASE THAT WILL NOT DIE: COMMONWEALTH VS. SACCO AND VANZETTI* 484-529 (1969); G.L. JOUGHIN & E. MORGAN, *THE LEGACY OF SACCO AND VANZETTI* 298-309 (1948); F. RUSSELL, *TRAGEDY IN DEDHAM: THE STORY OF THE SACCO-VANZETTI CASE* 380-419 (1962). Borchard could not have been unaware of this Committee's work, and it is somewhat surprising that he did not contrast its powers and conduct with the review board he favored.

332. E. BORCHARD, *supra* note 20, at xxi-xxiv.

333. *Id.* at xix. In an unpublished memorandum written subsequent to his book and prompted by his study of the 1929 Cero case in Massachusetts, Borchard advocated this proposal in even stronger language. See note 440 *infra* and accompanying text.

334. It might seem that Borchard's first proposal has also become universal since 1976 in all currently capital jurisdictions through the holding in *Gregg v. Georgia*, 428 U.S. 153 (1976). According to the Georgia law upheld in that case, "the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant" may be introduced as evidence during the sentencing phase of a capital trial. *Id.* at 163 (quoting GA. CODE ANN. § 27-2503 (Supp. 1985)). This provision does not, however, alter the time-honored practice which permits the prosecution to introduce such evidence during the guilt-determination phase of a capital trial if the defendant testifies at trial on his own behalf. See J. KAPLAN & J. SKOLNICK, *CRIMINAL JUSTICE* 429 (4th ed. 1987). Thus, nothing in *Gregg* requires Georgia prosecutors, much less all prosecutors in capital jurisdictions, to introduce evidence of prior convictions only in the sentencing phase of the trial. Consequently, the procedural change envisioned by Borchard has not become the law through *Gregg*.

335. Erez, *Thou Shalt Not Execute: Hebrew Law Perspective on Capital Punishment*, 19 *CRIMINOLOGY* 25, 35 (1981).

death sentence in any case where the conviction rests solely on the defendant's confession. (Talmudic law also forbade an accused in a capital case to testify against himself.³³⁶) Or, as a third option, bar a death sentence in which the conviction rests solely either on circumstantial evidence or on the defendant's confession. Other restrictive revisions in the same vein can be easily imagined.

Yet our research leaves us skeptical of all such simplistic revisions of the sentencing rules in capital cases. We doubt that any would find favor with experienced jurists or prosecutors, even if some defense counsel would be eager to see them adopted and enforced. Legislatures are obviously reluctant to enact them. Other serious investigators subsequent to Borchart have virtually ignored his recommendations,³³⁷ and we discern no emerging consensus in favor of other possible remedies. Finally, we should note that Borchart's proposed reforms are at odds with current practice, ratified by the Supreme Court in *Gregg*³³⁸ and expanded in subsequent rulings,³³⁹ which allow the sentencer in a capital case to take into account whatever evidence was put before the court to secure the defendant's conviction, plus whatever additional evidence was introduced exclusively on the issue of

336. *Id.* at 34. For a criticism of the prevailing use of confessions in American law, see W. LASSERS, *SCAPEGOAT JUSTICE: LLOYD MILLER AND THE FAILURE OF THE AMERICAN LEGAL SYSTEM* 201-15 (1973). Lassers, however, does favor a remedy roughly equivalent to Borchart's proposal (3). See *id.* at 212-13.

337. Jerome Frank and Barbara Frank advocated "major reforms of our methods of administering justice," J. FRANK & B. FRANK, *supra* note 20, at 249, but specifically discussed only three: drastically overhauling the adversary criminal trial system, *id.* at 225-33, choosing prosecutors on relevant (nonpolitical) grounds, *id.* at 240-41, and introducing into criminal trials the practice of discovery in civil cases, *id.* at 242-48. Hirschberg stressed the way "exact methods" of criminal investigation would reduce the likelihood of convicting the innocent, Hirschberg, *supra* note 20, at 22, but he advocated no changes of the law of criminal procedure. Donnelly urged "improvements in fact-finding techniques," Donnelly, *supra* note 20, at 37, relevant to the prosecution and defense of criminal cases, and he also favored what amounts to a version of Borchart's seventh proposal; but the several "remedies," *id.* at 22, that he does suggest concern only "post conviction" procedures, *id.* at 38, to assist the wrongfully convicted defendant in securing his freedom. Gardner did not address the problem of preventive remedies. E. GARDNER, *supra* note 20. Radin advocated two changes, one roughly equivalent to Borchart's fifth proposal, E. RADIN, *supra* note 20, at 228, and the other in favor of pretrial discovery, *id.* at 232-33, echoing the Franks. Lassers also favored introducing into criminal trials the practice of discovery used in civil cases. W. LASSERS, *supra* note 336, at 221-22.

More recently, Huff, Rattner, and Sagarin have also proposed several significant changes in criminal procedure in order to reduce the likelihood of convicting the innocent. Huff, Rattner & Sagarin, *supra* note 12, at 536-37. Unlike Borchart, none of their proposals is aimed specifically at capital cases. Nevertheless, two remedies, which in effect are variations on proposals that Borchart originally advanced, seem to us to have special merit where capital cases are concerned. These are granting "new trials . . . where reasonable concern about errors exists," *id.* at 537, and permitting "postconviction appeals for justice 'by reason of innocence,'" *id.* (resembling Borchart's seventh proposal).

For other discussions of methods of preventing miscarriages of justice, see P. HILL, M. YOUNG & T. SARGANT, *supra* note 20, at 211-19; R. BRANDON & C. DAVIES, *supra* note 20, at 236-58.

338. 428 U.S. 153 (1976).

339. Notably, *Lockett v. Ohio*, 438 U.S. 586 (1978), expanding beyond any finite statutory list the mitigating factors admissible during the sentencing phase of a capital trial.

the appropriate sentence. In our judgment, procedural reforms by themselves in capital trials—whether introduced into the guilt-finding phase or into the sentencing phase—hold out little hope of significantly reducing or rectifying erroneous convictions.

In the aftermath of *Furman v. Georgia*,³⁴⁰ statutory procedures in capital cases have been extensively revised.³⁴¹ But, so far as we know, none of these post-*Furman* procedural changes has been introduced with reducing the risk of executing the innocent as the paramount motive.

Two recent decisions by the Supreme Court indicate that it does not judge the risk of wrongful conviction to be so great as to warrant certain minor modifications in the imposition of the death penalty. Requiring a unanimous jury vote to impose a death sentence is one procedure that would reduce the probability of wrongful executions,³⁴² but in 1984, the Court, in upholding the constitutionality of Florida's jury-override provision, rejected an effort to require a simple majority vote,³⁴³ and thus is unlikely to demand a unanimous jury verdict to impose a death sentence. Also, several studies have found that the exclusion from capital juries of citizens who stand opposed to the death penalty makes such juries more conviction-prone and sympathetic to the prosecution.³⁴⁴ Nevertheless, in 1986 the Court refused to prohibit the exclusion of such jurors.³⁴⁵

Three major reforms that are feasible have already occurred: abolishing the mandatory death penalty;³⁴⁶ assuring automatic appellate review of all death sentences;³⁴⁷ and confining the death penalty to murder and other forms of criminal homicide. Only one further major reform remains available: abolishing the death penalty entirely. This, too, is a feasible step to take, as the history of the abolition of this punishment in some American jurisdictions and elsewhere in the world adequately demonstrates.³⁴⁸ Granted, we have no evidence that ending

340. 408 U.S. 238 (1972).

341. See, e.g., W. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* (1984); Davis, *The Death Penalty and the Current State of the Law*, 14 CRIM. L. BULL. 7 (1978); Project, *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1984-1985*, 74 GEO. L.J. 875-96 (1986).

342. See note 307 *supra*.

343. Spaziano v. Florida, 468 U.S. 447 (1984).

344. See generally Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984).

345. Lockhart v. McCree, 106 S. Ct. 1758 (1986).

346. See note 298 *supra*.

347. Since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court has in effect required that a constitutionally valid death penalty statute must provide for automatic state appellate review of a conviction that results in a death sentence. See Davis, *supra* note 341, at 15. The quality and extent of that review, however, have been a matter of continuing debate over the past decade. See Bedau, *supra* note 113, at 13-14; Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); Weisberg, *supra* note 113.

348. See generally THE DEATH PENALTY IN AMERICA, *supra* note 31; P. MACKEY, *supra* note 1; AMNESTY INTERNATIONAL, THE DEATH PENALTY (1979).

the death penalty would reduce the likelihood of wrongful conviction in what are now potentially capital cases. But no evidence is needed to support the claim that complete abolition of the death penalty would eliminate the worst of the possible consequences that accrue from wrongful convictions in what are now capital cases.

We agree with the observation of a supporter of the death penalty who writes: "[T]o say that someone deserves to be executed is to make a godlike judgment with no assurance that it can be made with anything resembling godlike perspicacity."³⁴⁹ The research presented in this article underscores the all-too-human errors that afflict the actual attempt to render such judgments.

349. W. BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* 178 (1979).

APPENDIX A: CATALOGUE OF DEFENDANTS*

ADAMS, JAMES (black). 1974. Florida. Adams was convicted of first-degree murder, sentenced to death, and executed in 1984. Witnesses located Adams' car at the time of the crime at the home of the victim, a white rancher. Some of the victim's jewelry was found in the car trunk. Adams maintained his innocence, claiming that he had loaned the car to his girlfriend. A witness identified Adams as driving the car away from the victim's home shortly after the crime. This witness, however, was driving a large truck in the direction opposite to that of Adams' car, and probably could not have had a good look at the driver. It was later discovered that this witness was angry with Adams for allegedly dating his wife. A second witness heard a voice inside the victim's home at the time of the crime and saw someone fleeing. He stated this voice was a woman's; the day after the crime he stated that the fleeing person was positively not Adams. More importantly, a hair sample found clutched in the victim's hand, which in all likelihood had come from the assailant, did not match Adams' hair. Much of this exculpatory information was not discovered until the case was examined by a skilled investigator a month before Adams' execution. Governor Graham, however, refused to grant even a short stay so that these questions could be resolved.³⁵⁰

AMADO, CHRISTIAN (black). 1980. Massachusetts. Amado was convicted of first-degree murder and sentenced to life imprisonment. On appeal the conviction was overturned and the trial court was ordered to enter a judgment of acquittal.³⁵¹ The only evidence linking Amado to the crime was an eyewitness. As the court noted, this eyewitness, who at first told police that Amado in a photo resembled the killer, testified on the witness stand "that he was 'positive' that the defendant was not the killer."³⁵² In 1982, Amado was released after serving two years.³⁵³

ANDERSON, WILLIAM HENRY (black). 1945. Florida. Anderson was convicted of the rape of a white woman, sentenced to death, and executed in 1945. No appeal was taken. He was executed only five months after his arrest, perhaps in part because the sheriff wrote to the governor, "I would appreciate special attention in this case before some sympathizing organization gets hold of it."³⁵⁴ The victim did not resist, scream, or use a pistol that was available to her in resisting Anderson's advances. Anderson's sister and one of his coworkers presented affida-

* The date given initially for each case is the date of conviction in trial court.

350. Application for Executive Clemency *in re* James Adams (May 1, 1984) (on file with the *Stanford Law Review*).

351. Commonwealth v. Amado, 387 Mass. 179, 439 N.E.2d 257 (1982).

352. *Id.* at 184, 439 N.E.2d at 260.

353. See generally Boston Globe, Aug. 21, 1982, at 13, col. 1; letter from Frank G. Keller to Hugo A. Bedau (Apr. 22, 1985) (on file with the *Stanford Law Review*).

354. Letter from Broward County Sheriff Walter Clark to John Wigginton, Executive Secretary to the Governor (Apr. 9, 1945) (on file with the *Stanford Law Review*).

vits to the governor claiming that Anderson and the victim had been consensually intimate for several months before rape charges were filed. Anderson's attorney also wrote to the governor that "There exists well founded belief . . . that William Henry Anderson and the prosecutrix were intimate since August 1944. This belief is widespread among Negroes, but white people have been heard to express opinions likewise."³⁵⁵

ANTONIEWICZ, JOSEPH, WILLIAM A. HALLOWELL, AND EDWARD H. PARKS (all white). 1952. Pennsylvania. Antoniewicz, Hallowell, and Parks were each convicted of felony murder and sentenced to life imprisonment. The defendants were all less than eighteen and pleaded guilty. The victim died nine days after being attacked and robbed by the youths. In 1968, the Philadelphia medical examiner testified that the victim "died as a result of a coronary heart disease which was not caused, contributed to, or aggravated by the assault."³⁵⁶ The defendants were ordered released, though the state won the right to retry them.³⁵⁷ In acting on the petition to release the defendants, the judge ruled that "at most, a \$15.00 robbery and assault had occurred."³⁵⁸

APPELGATE, EVERETT (white). 1936. New York. Appelgate was convicted, with Frances Q. Creighton, of the murder of Appelgate's wife; both were sentenced to death and executed in 1936. The conviction was affirmed on appeal.³⁵⁹ Creighton had been tried and acquitted on two separate occasions for similar murders a dozen years before she met Appelgate. In this case, she testified that she killed the victim (by arsenic poisoning) at Appelgate's instigation. During the investigation of the case, she also confessed to one of the previous murders. "[V]irtually no evidence against Appelgate existed beyond Mrs. Creighton's unsupported word."³⁶⁰ Appelgate had no previous criminal record, and Creighton's version of the crime changed somewhat during the investigation. Appelgate did admit to having had sexual relations with Creighton's 15-year-old daughter; that fact did not earn him any sympathy from the jury. Governor Lehman, who had doubts about Appelgate's guilt, requested the prosecutor's support for clemency; it was not forthcoming and clemency was denied.³⁶¹ A few weeks after the execution all investigation of his innocence ended.³⁶²

ARROYO, MIGUEL (Hispanic). 1965. New York. Arroyo was con-

355. Letter from L.E. Thomas to Governor Millard F. Caldwell (July 20, 1945) (on file with the *Stanford Law Review*). Materials on the Anderson case are located in the collection of governors' clemency files, Florida State Archives, in the Raymond Gray Library, Tallahassee.

356. N.Y. Times, Feb. 15, 1968, at 49, col. 2.

357. Commonwealth v. Antoniewicz, 430 Pa. 593, 244 A.2d 687 (1968).

358. N.Y. Times, Feb. 15, 1968, at 49, col. 2. See generally MacNamara, *supra* note 20, at 60.

359. *People v. Creighton*, 271 N.Y. 263, 2 N.E.2d 650 (1936).

360. W. BROWN, THEY DIED IN THE CHAIR 103 (1958).

361. *Id.* at 115.

362. See generally *id.* at 90-116; D. KILGALLEN, MURDER ONE 190-230 (1967); L. LAWES, MEET THE MURDERER 333-35 (1940).

victed of manslaughter for killing a boy during a street fight between Puerto Ricans and blacks outside his store. The trial judge immediately set aside the verdict when Arroyo's defense counsel produced a series of eyewitnesses to testify that they saw another man kill the boy. In 1966, this other man was arrested, indicted for murder, and key witnesses who had testified against Arroyo recanted their testimony. The indictment against Arroyo was then dismissed.³⁶³

BACHELOR, BRETT (white). 1979. Florida. Bachelor was convicted of second-degree murder and sentenced to fifteen years in prison. At the subsequent trial of an alleged co-defendant, evidence showed that a key witness had erroneously identified Bachelor. This co-defendant was acquitted. Eight months after Bachelor was found guilty, the trial court ordered him released from prison.³⁶⁴

BAILEY, ROBERT BALLARD (white). 1950. West Virginia. Bailey was convicted of first-degree murder and sentenced to death. Alibi witnesses included officers from the Charleston police department, who were in the process of arresting Bailey for drunk driving at the exact time of the murder. Two witnesses, however, erroneously identified Bailey. Nonetheless, the United States Supreme Court refused to review the case.³⁶⁵ Only forty-eight hours before his scheduled execution, he received a reprieve after the prison warden (Oral Skeen), convinced of Bailey's innocence, called for help from Erle Stanley Gardner. In 1951, Governor Patterson commuted Bailey's sentence to life; in 1960, Governor Underwood awarded a conditional pardon. In 1966, Bailey was released from the conditional pardon.³⁶⁶

BAMBRICK, THOMAS (white). 1915. New York. Bambrick was convicted of murder, sentenced to death, and executed in 1916. The conviction was affirmed on appeal.³⁶⁷ Evidence was later discovered that convinced Warden Thomas Mott Osborne and the prison chaplain that another man committed the crime. Although Bambrick knew the identity of this man, he refused to "squeal" on him. Osborne commented, "It is almost as certain that Bambrick is innocent as that the sun will rise tomorrow."³⁶⁸

BANKS, ALF, EDWARD HICKS, AND FORTY-NINE OTHER DEFENDANTS (all black). 1919. Arkansas. Twelve of the defendants were convicted of first-degree murder and sentenced to death, ten others were convicted

363. See generally *N.Y. Times*, July 26, 1966, at 41, col. 2; *id.*, July 22, 1966, at 32, col. 1.

364. See generally *Gainesville Sun*, July 25, 1980, at 7A, col. 1.

365. *State ex rel. Bailey v. Skeen*, 340 U.S. 949 (1951); *Bailey v. West Virginia*, 340 U.S. 905 (1950).

366. See generally E. GARDNER, *supra* note 20, at 232-45; Bedau, *supra* note 31, at 238; Gardner, *Helping the Innocent*, 17 *UCLA L. REV.* 535, 539 (1970); *Charleston (W. Va.) Gazette*, Dec. 28, 1960, at 1, col. 4; Telephone interview with West Virginia Parole Board Office (Aug. 2, 1983).

367. *People v. Bambrick*, 218 N.Y. 751, 113 N.E. 1063 (1916).

368. See generally *N.Y. Times*, Oct. 7, 1916, at 1, col. 3; see also R. BYE, *CAPITAL PUNISHMENT IN THE U.S.* 82-83 (1919).

of second-degree murder and sentenced to twenty-one years, and the rest (twenty-nine) were convicted of second-degree murder and sentenced to five years. The charges resulted from a race riot near Elaine, Arkansas, during which five whites and as many as two hundred blacks were killed. The convictions of Banks and five others were reversed on a technicality.³⁶⁹ These six were retried, reconvicted, and again sentenced to death, and the state supreme court again reversed the convictions.³⁷⁰ In 1923, charges against them were dismissed, and they were released.³⁷¹ The death sentences of Hicks and five others were affirmed by the state supreme court.³⁷² They appealed to the United States Supreme Court, which reversed a lower court's order dismissing a petition for habeas corpus.³⁷³ The case was returned to the district court, but before it was heard, Governor McRae commuted each of the six death sentences to twelve years' imprisonment. The Governor granted the defendants "indefinite furloughs" in 1925. By this time, the state had also released the other defendants who had been convicted of second-degree murder.³⁷⁴

BANKS, JERRY (black). 1975. Georgia. Banks was convicted on two counts of murder and sentenced to death. The conviction was reversed on appeal on the ground that the prosecution knowingly withheld evidence.³⁷⁵ In 1976, Banks was retried, reconvicted, and resentenced to death. Appellate courts refused to vacate this conviction.³⁷⁶ His attorney was later disbarred.³⁷⁷ In 1980, a third trial was ordered because of newly discovered evidence.³⁷⁸ Part of this evidence came from a previously silent witness, whose testimony revealed that the fatal shots could not have come from Banks' weapon. Banks was released later that year when all charges against him were dismissed by a circuit court

369. *Banks v. State*, 143 Ark. 154, 219 S.W. 1015 (1920).

370. *Ware v. State*, 146 Ark. 321, 225 S.W. 626 (1920).

371. *Ware v. State*, 159 Ark. 540, 252 S.W. 934; *see also* *Martin v. State*, 162 Ark. 282, 257 S.W. 752 (1924).

372. *Hicks v. State*, 143 Ark. 158, 220 S.W. 308 (1923).

373. *Moore v. Dempsey*, 261 U.S. 86 (1923).

374. *See generally* R. KLUGER, *SIMPLE JUSTICE* 112-14 (1975); B. MCCOOL, *UNION, REACTION, AND RIOT: A BIOGRAPHY OF A RURAL RACE RIOT* (1970); W. WHITE, *A MAN CALLED WHITE* 47-51 (1948); Rogers, *The Elaine Race Riots of 1919*, 19 *ARK. HIST. Q.* 142 (1960); Waterman & Overton, *The Aftermath of Moore v. Dempsey*, 6 *ARK. L. REV.* 1 (1951); White, "Massacring Whites" in Arkansas, 109 *NATION* 715 (1919); *N.Y. Times*, Nov. 6, 1919, at 17, col. 3.

375. *Banks v. State*, 235 Ga. 121, 218 S.E.2d 851 (1975).

376. *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. denied*, 430 U.S. 975 (1977); *Banks v. Glass*, 242 Ga. 518, 250 S.E.2d 431 (1978) (affirming denial of Banks' writ of habeas corpus).

377. *Banks v. State*, 246 Ga. 1, 2, 268 S.E.2d 630, 631 (1980). Banks' claim that he was denied effective assistance of counsel was rejected by the state supreme court. *Banks v. State*, 242 Ga. 518, 250 S.E.2d 431 (1978). Earlier, his attorney had been prohibited from practicing before the state court of appeals and the state supreme court because of failures to file appellate papers in two other cases. *Patrick v. State*, 238 Ga. 497, 233 S.E.2d 757 (1977); *Bailey v. State*, 130 Ga. App. 321, 228 S.E.2d 357 (1976).

378. *Banks v. State*, 246 Ga. 1, 268 S.E.2d 630 (1980).

judge. Three months later, after he learned his wife wanted a divorce, Banks killed her and himself. In 1983, a suit against the county for mishandling the case was filed by Banks' three children, and the county agreed to pay them \$150,000.³⁷⁹

BARBATO, JOSEPH (white). 1929. New York. Barbato was convicted of first-degree murder and sentenced to death. The conviction was reversed after evidence showed that Barbato's 4-word confession had been coerced.³⁸⁰ A physician's report verified that Barbato had been beaten while in custody. Following a recommendation by the prosecutor, the trial judge released him; Barbato had already spent six months in prison.³⁸¹

BARBER, ARTHUR (white). 1967. New York. Barber was convicted of first-degree murder and sentenced to life. On appeal, the conviction was affirmed.³⁸² In 1975, on further appeal in federal court, the conviction was reversed because Barber had been arrested without probable cause, beaten by the police, and subjected to numerous other illegal police tactics. The court stated that Barber's confession had been obtained by the police through "a pattern of lawlessness which shocks the conscience."³⁸³ Charges were then dismissed.³⁸⁴

BEALE, CLYDE (white). 1926. West Virginia. Beale was convicted of first-degree murder and sentenced to death. After the first execution date passed, the trial judge refused to set another date for execution and tried to commute the sentence to life imprisonment. "[The trial judge] has been convinced of the innocence of the defendant and has felt that the prisoner had not had a fair and impartial trial . . . and that the witnesses upon whose testimony Beale was convicted have admitted that their evidence was false, and have pleaded that the life of Beale be spared."³⁸⁵ Nonetheless, the state supreme court ordered the judge to reschedule the execution.³⁸⁶ In 1929, the judge followed these orders, but shortly thereafter the governor commuted the sentence to life. In 1933, Beale was granted a conditional pardon and released.³⁸⁷

BECKER, CHARLES, AND FRANK ("DAGO") CIROFICI (both white).

379. See generally Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 597-600 (1985); Gleason, *Undue Process: The Jerry Banks Case*, 21 ATLANTA 50 (1982); Atlanta Const., Apr. 1, 1983, at 10A, col. 1; *id.*, Mar. 22, 1983, at 14A, col. 1; *id.*, Mar. 18, 1983, at E1, col. 2; N.Y. Times, Dec. 26, 1980, at 31, col. 5; *id.*, Oct. 17, 1980, at 31, col. 5.

380. *People v. Barbato*, 254 N.Y. 170, 172 N.E. 458 (1930).

381. See generally N.Y. Times, Nov. 27, 1930, at 25, col. 7.

382. *People v. Barber*, 33 A.D.2d 892, 306 N.Y.S.2d 878 (1969), *aff'd*, 30 N.Y.2d 626, 282 N.E.2d 329, 331 N.Y.S.2d 440, *remittitur amended*, 30 N.Y.2d 834, 286 N.E.2d 464, 335 N.Y.S.2d 79 (1972).

383. N.Y. Times, Sept. 11, 1975, at 47, col. 4.

384. Correspondence from the Bronx County Supreme Court (Oct. 18, 1985) (on file with the *Stanford Law Review*).

385. *State ex rel. Chafin v. Bailey*, 106 W. Va. 32, 34, 144 S.E. 574, 574 (1928).

386. *Id.*

387. See letter from K.D. Knapp, Assistant Commissioner, West Virginia Department of Corrections, to Michael L. Radelet (Sept. 3, 1985) (on file with the *Stanford Law Review*).

1912. New York. Becker and Cirofici were convicted of murder; Cirofici was executed in 1914 and Becker in 1915. The victim, Rosenthal, was a gambling house owner. Shortly before the homicide, Rosenthal had implicated Becker, a police lieutenant, in gambling activities. Becker had earlier made the gambling world angry because of his vigorous work in suppressing their activities. He was convicted largely on the testimony of gamblers and ex-convicts in the glare of extensive newspaper publicity about police corruption. These witnesses, who were allegedly middlemen hired by Becker, were given immunity for their testimony by an ambitious district attorney. The alleged motive was graft, although no evidence was produced to support this theory.

Less is known about Cirofici, one of four gunmen put to death for the crime. It is alleged that the then warden of Sing Sing prison, Clancy, believed two of the executed gunmen were innocent. Another former Sing Sing warden, Osborne, who knew the closest friends of the gunmen, stated that these friends all agreed that Cirofici had nothing to do with the murder and was not even present when it occurred. Warden Osborne also believed that Becker was not guilty.³⁸⁸

BEEMAN, GARY L. (white). 1976. Ohio. Beeman was convicted of aggravated murder and sentenced to death. The defense alleged that the main prosecution witness, an escaped prisoner (Claire Liuzzo), was the actual killer. In 1978, the district court of appeals ordered a retrial because Beeman's right to cross-examine this witness had been unfairly restricted. At retrial in 1979, Beeman and Liuzzo continued to accuse each other of the crime. But five witnesses testified that they had heard Liuzzo confess to the murder, and Beeman was acquitted.³⁸⁹

BENNETT, LOUIS WILLIAM (white). 1957. Oklahoma. Bennett was convicted of manslaughter and sentenced to thirty-five years in prison. "He said he pleaded guilty, though he knew he was innocent, because he feared he would get a death sentence if convicted."³⁹⁰ In 1960, after three years in prison, he was released and he received an unconditional pardon when a Texas prisoner, Leonard McClain, confessed to the crime and the authorities verified the confession. The police demanded the guilty plea after finding Bennett's fingerprints on the victim's door. Bennett had been drinking and had no recollection of his activities; later he recalled he had painted the door for the victim, who had been a friend.³⁹¹

388. See generally R. BYE, *supra* note 368, at 77-78; H. KLEIN, SACRIFICED: THE STORY OF POLICE LIEUTENANT CHARLES BECKER (1927); A. LOGAN, AGAINST THE EVIDENCE: THE BECKER-ROSENTHAL AFFAIR (1970); H. SULLIVAN, TRIAL BY NEWSPAPER 21-40 (1961).

389. See Ashtabula Star Beacon, Oct. 5, 1979, at 1, col. 1; *id.*, Sept. 29, 1979, at 14, col. 4; *id.*, Sept. 25, 1979, at 11, col. 4; *id.*, Sept. 5, 1979, at 1, col. 6; *id.*, April 11, 1978, at 10, col. 4; *id.*, July 28, 1976, at 9, col. 1; *id.*, June 5, 1976, at 1, col. 2. See generally Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 920 n.69 (1982).

390. Oklahoma City Times, Dec. 22, 1960, at 3, col. 1.

391. Oklahoma City Times, Dec. 21, 1960, at 26, col. 1. See generally E. RADIN, *supra* note 20; D. REID & J. GURWELL, EYEWITNESS (1973).

BERNSTEIN, CHARLES (white). 1933. District of Columbia. Bernstein was convicted of first-degree murder and sentenced to death. At the trial, six witnesses testified that Bernstein was in New York at the time of the crime; only one of five eyewitnesses at the scene of the crime could identify Bernstein as the killer.³⁹² In 1935, minutes before his scheduled execution, President Roosevelt commuted the sentence to life.³⁹³ In 1940, Bernstein was released on a conditional pardon after eight years in prison. In 1945, he received an unconditional pardon from President Truman.³⁹⁴ Many years earlier, Bernstein had been erroneously convicted in Minnesota of a bank robbery; he was released and pardoned after the prosecutor discovered the eyewitnesses who identified Bernstein were in error.³⁹⁵

BERTRAND, DELPHINE (white). 1944. Connecticut. Bertrand was convicted of manslaughter after a guilty plea and sentenced to ten to fifteen years. In 1946, the actual killers confessed, the indictment against Bertrand was dismissed, and she was released. Two of these men were later convicted of the crime. They and a third man had visited the victim the night of the murder, and Bertrand and the third man were sexually intimate in another part of the house when the murder occurred. She apparently thought being branded a killer was better than publicly revealing her sex life during the trial, and thus had voluntarily confessed to the crime.³⁹⁶

BILGER, GEORGE, AND RUDOLPH SHEELER (both white). 1939. Pennsylvania. Although tried separately, both defendants were convicted of murdering a police officer and sentenced to life. In 1951, a new trial was granted, with a directed verdict of acquittal.³⁹⁷ In 1937, several months after the murder, Bilger was tried and convicted of the murder with a recommendation of death, but the trial judge set aside the jury's verdict, accepted a plea of guilty, and sentenced Bilger to life imprisonment. Nearly two years later, Sheeler, who happened to be visiting Philadelphia, was arrested (without warrant) as a co-felon, held incommunicado, tortured, and forced by the police to confess. A police informant gave perjured eyewitness testimony against Sheeler. After Sheeler's arrest, Bilger was released and transferred to a mental hospital. It is said to be "[o]ne of the most shameful cases ever brought to public notice."³⁹⁸ One week before Sheeler was arrested, the actual killer of the police officer was himself killed by the police in a gun

392. Greenwald, *Ordeal of an Innocent Man*, 236 SAT. EVENING POST 82 (1963); see also E. RADIN, *supra* note 20, at 108-09.

393. See J. BENNETT, *I CHOSE PRISON* 159-61 (1970).

394. Greenwald, *supra* note 392. See generally E. RADIN, *supra* note 20, at 107-10; Bernstein, Book Review, 29 FED. PROBATION 69 (1965) (reviewing E. RADIN, *THE INNOCENTS* (1964)).

395. E. RADIN, *supra* note 20, at 107-08.

396. See generally *id.* at 146-48.

397. *Sheeler v. Burke*, 367 Pa. 152, 79 A.2d 654 (1951).

398. J. FRANK & B. FRANK, *supra* note 20, at 179.

fight.³⁹⁹

BILLINGS, WARREN K., AND THOMAS J. MOONEY (both white). 1916. California. Billings and Mooney were indicted (with two others, who were acquitted) for the Preparedness Day bombing in San Francisco, in which ten were killed and forty wounded. Billings was tried first, convicted of murder, and sentenced to life imprisonment. Mooney was tried next, convicted, and sentenced to death. On appeal, both convictions were affirmed.⁴⁰⁰ In 1918, at the instigation of President Wilson, the death sentence was commuted by Governor Stephens, two weeks before the scheduled execution. In 1939, Governor Olson pardoned Mooney, and Billings' sentence was commuted to time served. In pardoning Mooney, Olson said "I am convinced that Mooney is innocent, that he was convicted on perjured testimony and is entitled to a pardon."⁴⁰¹ In 1961, Billings was given a complete pardon by Governor Brown. The Mooney-Billings case became "an international *cause célèbre*, a symbol of American capitalist oppression of militant labor."⁴⁰² The defendants were victims of "perjury, subornation of perjury, and the suppression of evidence by the prosecution."⁴⁰³

BLANTON, ROBERT H., III (white). 1974. Louisiana. Blanton was convicted of murder and sentenced to life imprisonment. The conviction was affirmed on appeal.⁴⁰⁴ On further appeal, the conviction was reversed.⁴⁰⁵ According to the state's theory, Blanton was one of three people hired to kill the victim. The court argued that the state failed to disclose to the jury agreements it had made with prosecution witnesses, who had admitted their own role in the crime and testified against Blanton in exchange for lighter sentences. Blanton's alibi at the trial was supported by several witnesses. The court ruled that this alibi testimony would have been given more credence by the jury had they known about the plea bargaining agreements with the incriminating witnesses. On remand, *nolle prosequi* was entered in the case.⁴⁰⁶

BOGGIE, CLARENCE GILMORE (white). 1935. Washington. Boggie was convicted of murder and sentenced to life. Perjured testimony suborned by the prosecution was used to obtain the evidence. A prison chaplain was able to interest The Court of Last Resort in the case. In 1948, he was conditionally pardoned by Governor Wallgren when considerable evidence pointed to the guilt of another person. Boggie had

399. See generally H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 222, 267 (3d ed. 1959); J. FRANK & B. FRANK, *supra* note 20, at 167-80; E. RADIN, *supra* note 20, at 27-34.

400. *People v. Billings*, 34 Cal. App. 549, 168 P. 396 (1917); *People v. Mooney*, 177 Cal. 642, 171 P. 690 (1918).

401. Weihofen, *The Effect of a Pardon*, 88 U. PA. L. REV. 177, 177 (1939).

402. R. FROST, *THE MOONEY CASE* at i (1968).

403. *Id.* See generally J. LOFTON, *JUSTICE AND THE PRESS* 88-91 (1966); Weihofen, *supra* note 401.

404. *State v. Blanton*, 312 So. 2d 329 (La. 1975).

405. *State v. Blackburn*, 494 F. Supp. 895 (M.D. La. 1980).

406. Letter from Lewis O. Unglesby, Blanton's attorney, to Michael Radelet (Apr. 19, 1985) (on file with the *Stanford Law Review*).

previously been erroneously convicted of a bank robbery, but was later pardoned when the error was discovered.⁴⁰⁷

BOWLES, JOE (white). 1919. North Carolina. Bowles was convicted of murder and sentenced to death with his co-defendants Joe and Gardner Cain. The conviction was affirmed on appeal.⁴⁰⁸ In 1920, his sentence was commuted to twenty years; in January 1921, Governor Bickett commuted the sentence to expire in June 1921. But upon the "very earnest" recommendation of the prosecutor, the newly elected governor, Cameron Morrison, issued Bowles a complete pardon on May 27, 1921. Bowles had been present at the time of the murder, but he was feeble minded and made intoxicated by his co-defendants, and there was no evidence that he ever had a weapon. Both Cain brothers were executed for the crime.⁴⁰⁹

BOYD, PAYNE (black). 1925. West Virginia. Boyd was convicted of first-degree murder, but the trial court set the verdict aside on technical grounds and ordered a new trial. Boyd was reconvicted and sentenced to life imprisonment despite testimony of thirty-one witnesses who said he was not Cleveland Boyd, who was known to be the real killer. The only issue in the trials was whether the prisoner before the court was Cleveland Boyd. An appellate court ordered a third trial. In this trial, also in 1925, fingerprint evidence was used to show that the prisoner was really Payne Boyd. He was acquitted and released after serving one and a half years in prison.⁴¹⁰

BRANSON, WILLIAM (white). 1916. Oregon. Branson was convicted of second-degree murder and sentenced to life imprisonment. The conviction was reversed on appeal because of improper jury instructions.⁴¹¹ In 1917, he was retried, reconvicted, and resentenced to life. The state parole board reported to the governor that "We . . . are satisfied after a full and complete investigation of this case that the accused was not guilty of the crime with which he was charged."⁴¹² The trial judge also wrote to the governor and requested the pardon. In 1920, Branson was given an unconditional pardon by Governor Olcott.⁴¹³

BRIGGS, JOSEPH ("JOCKO") (white). 1905. Illinois. Briggs was convicted of murder and sentenced to death. The state supreme court granted a new trial because of improper consideration of alibi witnesses.⁴¹⁴ The court also held that the verdict had been granted

407. See generally E. BLOCK, *THE VINDICATORS* 157-69 (1963); E. GARDNER, *supra* note 20, at 27-85.

408. *State v. Cain*, 178 N.C. 724, 100 S.E. 884 (1919).

409. 3 N.C. BD. OF PAROLES, *BOOK OF PARDONS* 1917-1932, at 302 (May 27, 1921); Letter from the North Carolina Department of Cultural Resources, Division of Archives and History to Michael L. Radelet (Nov. 20, 1984) (on file with the *Stanford Law Review*).

410. See generally E. BORCHARD, *supra* note 20, at 23-28.

411. *State v. Branson*, 82 Or. 377, 161 P. 689 (1916).

412. *Oregonian*, Sept. 12, 1920, at 1, col. 8.

413. *Id.*

414. *Briggs v. People*, 219 Ill. 330, 76 N.E. 499 (1905).

against the weight of the evidence. In the new trial, Briggs was acquitted. "A captain of police has told me more than once, that he knew absolutely that Briggs was innocent."⁴¹⁵

BRITE, COKE, AND JOHN BRITE (both white). 1936. California. Coke and John Brite were convicted on three counts of first-degree murder in the death of two police officers and a civilian and sentenced to death. The district attorney believed the Brites were innocent and refused to prosecute, but a special prosecutor was named to take the case. The convictions were affirmed on appeal.⁴¹⁶ A newspaper, the *Sacramento Bee*, launched an investigation. In 1938, Governor Olson commuted the death sentences to life imprisonment. But all further efforts to secure their release were abandoned until The Court of Last Resort became involved in the case. In 1952, the Brites were paroled after evidence was produced that the prosecution's case had been based on perjured testimony, withholding evidence vital to the exoneration of the defendants, and a false theory of the crime.⁴¹⁷

BROADY, THOMAS H., JR. (white). 1973. Ohio. Broady was convicted of first-degree murder and sentenced to ten to twenty-five years in prison. On appeal, the conviction was reversed on the ground of newly discovered evidence.⁴¹⁸ This evidence had been available to police before the first trial, but it was suppressed. The victim had been killed during the robbery of his store. Another man had confessed to this robbery and implicated a third man as his partner and the real killer, but his testimony was not introduced at Broady's trial. Mistaken eyewitness identification led to the erroneous conviction. At retrial, Broady was acquitted of the homicide, but then convicted of a different robbery and sentenced to ten to twenty-five years. Alibi witnesses were not permitted to testify.⁴¹⁹ In both cases, Broady was mistaken for the real criminal, a look-alike. In 1978, the judge in the murder trial, convinced of Broady's innocence in both crimes, testified in support of Broady's parole in the second case, and Broady was paroled after serving five years in prison.⁴²⁰

BROWN, ANTHONY SILAH (black). 1983. Florida. Brown was convicted of first-degree murder and sentenced to death, despite a jury recommendation of life imprisonment. The only evidence against Brown was from the testimony of a co-defendant, who was sentenced to life for his role in the crime. On appeal, the conviction was reversed and a new trial was ordered because Brown had not been notified before the state

415. Barbour, *Efforts to Abolish the Death Penalty in Illinois*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 500, 506 (1919). See generally Chi. Tribune, Dec. 21, 1905, at 2, col. 2.

416. *People v. Brite*, 9 Cal. 2d 666, 72 P.2d 122 (1937).

417. See generally E. GARDNER, *supra* note 20, at 123-53.

418. *State v. Brady*, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

419. *Columbus Dispatch*, Sept. 14, 1978, at B1, col. 1.

420. See generally *Columbus Citizen-Journal*, Oct. 3, 1978, at 14, col. 1; Letter from the Ohio Department of Rehabilitation and Correction to Michael L. Radelet (Aug. 26, 1985) (on file with the *Stanford Law Review*).

took a crucial deposition in the case and had thereby been deprived of his right to confront and cross-examine an adverse witness.⁴²¹ At retrial in 1986, the co-defendant admitted that his incrimination of Brown at the first trial had been perjured, and Brown was acquitted.⁴²²

BROWN, BRADFORD (black). 1975. District of Columbia. Brown was convicted of second-degree murder and sentenced to eighteen years to life. The conviction was affirmed on appeal.⁴²³ Mistaken eyewitness identification led to the conviction. In 1979, an informant came forward and told police that Brown had not been involved in the homicide. The informant implicated another man, who was arrested, pleaded guilty to manslaughter, and was convicted. The police detective who investigated the tip that freed Brown admitted to doubts about capital punishment: "I kept thinking about what could have happened if Bradford had been in a state with the death penalty."⁴²⁴ After the error was discovered, the judge who wrote the opinion of the appellate court that had unanimously affirmed the conviction, stated: "[T]he system worked but unfortunately convicted a man who was legally and factually innocent."⁴²⁵

BROWN, J.B. (black). 1901. Florida. Brown was convicted of murder and sentenced to death. The conviction was affirmed on appeal, despite the court's statement that there was very little testimony to connect the defendant with the crime, except a disputed confession.⁴²⁶ Cellmates testified that they heard Brown confess while in custody; this testimony, later found to have been perjured, was sufficient to obtain the conviction. The hanging was averted at the gallows only because the execution warrant erroneously listed the jury foreman's name instead of Brown's. In 1902, the sentence was commuted to life. In 1913, another man gave a deathbed confession admitting guilt. Governor Trammell granted Brown a full pardon, and Brown was released after serving twelve years in prison. In 1929 he was indemnified (\$2,492).⁴²⁷

BUNDY, HARRY DALE (white). 1957. Ohio. Bundy was convicted of first-degree murder and sentenced to death. The conviction was affirmed on appeal. Bundy had helped police investigate four murders committed by a "friend"; when this friend turned himself into the authorities, he implicated Bundy in two of the murders. Three days before Bundy's scheduled execution, a woman read a story about the crimes in a detective magazine, and recognized the co-defendant's pic-

421. *Brown v. State*, 471 So. 2d 6 (Fla. 1985).

422. See generally *Pensacola News*, Mar. 2, 1986, at 1, col. 2; *id.*, Feb. 20, 1986, at 1B, col. 2; *id.*, Feb. 13, 1986, at 1B, col. 2; *id.*, Feb. 9, 1986, at 1B, col. 4; *id.*, July 27, 1983, at 1, col. 4.

423. *State v. Brown*, 372 A.2d 557 (D.C. 1977).

424. *N.Y. Times*, Dec. 31, 1979, at 10, col. 3.

425. *Id.*; see also *Wash. Post*, Aug. 23, 1979, at C2, col. 1 (sentence erroneously reported to be 15 years to life).

426. *Brown v. State*, 44 Fla. 28, 32 So. 107 (1902).

427. See generally *E. BORCHARD*, *supra* note 20, at 33-39.

ture. She came forward and claimed this man had told her that he had already murdered four people and was in the process of arranging to murder a fifth, only this one would be "legal." Bundy's execution was immediately stayed. In a hearing for a new trial, it was asserted that the co-defendant was the actual killer and had implicated Bundy as his accomplice in an effort to have him executed in revenge for helping police investigate the other murders. The conviction was reversed and a new trial ordered.⁴²⁸ Bundy was acquitted, and released after spending one year in prison. "It was sheer luck that saved Bundy from execution"⁴²⁹

BURTON, SAMUEL L., AND SYLVANUS CONQUEST (both white). 1907. Virginia. Burton and Conquest were both convicted of voluntary manslaughter and sentenced to ten years in prison. The convictions were reversed by the state supreme court because of the trial court's refusal to grant a change of venue.⁴³⁰ The defendants were later retried, reconvicted of voluntary manslaughter, and sentenced to one year. The convictions were again reversed because the court held that the evidence was found to be "wholly insufficient . . . to sustain the verdict. . . . There is not a scintilla of evidence that either Burton or Conquest countenanced, encouraged, counselled, aided, abetted, advised, or consented" to the crime.⁴³¹ In 1908, *nolle prosequi* was entered in the cases, and the defendants were released.⁴³²

BUTLER, LOUISE, AND GEORGE YELDER (both black). 1928. Alabama. Butler and Yelder were both convicted of murder and sentenced to life imprisonment. Both received pardons and were released two months later after the supposed victim was discovered alive in another county. Butler at first confessed to the crime, but repudiated her confession in court. The main witnesses for the prosecution were two children, Butler's daughter and niece, who perjured themselves.⁴³³

CALLOWAY, WILLIE (black). 1945. Michigan. Calloway was convicted of first-degree murder and sentenced to life imprisonment. In 1953, two prison wardens learned that a key witness had admitted that under duress he had given false testimony against Calloway. Convinced of Calloway's innocence, they urged Pulitzer-Prize-winning *Detroit Free Press* reporter Ken McCormick to investigate. McCormick interviewed a co-defendant, who had confessed and implicated Calloway, and this co-defendant, like the other witness, retracted his incriminating statements. After reports of these initial findings were published, two alibi witnesses came forward, as did another witness

428. E. RADIN, *supra* note 20, at 249-50.

429. *Id.* at 135. *See generally id.* at 130-36; Columbus Dispatch, June 20, 1958, at 16A, col. 2.

430. *Burton v. Commonwealth*, 107 Va. 931, 60 S.E. 55 (1908).

431. *Burton v. Commonwealth*, 108 Va. 892, 900, 62 S.E. 376, 379 (1908).

432. Letter from the Circuit Court of the City of Norfolk to Michael L. Radelet (Oct. 19, 1984) (on file with the *Stanford Law Review*).

433. *See generally* E. BORCHARD, *supra* note 20, at 40-45.

who admitted he was present when a friend of his did the killing. The alibi witnesses signed affidavits saying that Calloway was at work at the time of the crime. A new trial was then ordered by the trial court. Convinced of Calloway's innocence, the prosecution dropped the case. In late 1953, after nearly nine years in prison, Calloway was released.⁴³⁴

CARDEN, RONALD Q. (white). 1982. Arkansas. Carden was convicted of first-degree murder and rape and sentenced to life. Prompt investigation by *Arkansas Democrat* reporter Mike Masterson led to a reversal of the conviction by the trial court and an order for a new trial. A confession by another man (who subsequently confessed that he had also murdered his own wife), physical evidence that connected this suspect with the victim, and an FBI finding that discredited the physical evidence linking Carden to the victim all led the prosecutor to drop the charges against Carden. Seven months after his conviction, he was freed. "Masterson believed in Carden's innocence and he fought to prove it for nearly seven months."⁴³⁵

CARMEN, JACK ALLEN (white). 1975. Ohio. Carmen was convicted of aggravated murder in the rape-murder of a fourteen-year-old, and sentenced to life imprisonment. Carmen, severely mentally retarded, was erroneously identified by eyewitnesses and pleaded guilty to the crime, apparently out of fear of being sentenced to death. Five months later, the trial court vacated the conviction on the ground that Carmen was incompetent to enter a plea of guilty. In 1977, at retrial, alibi witnesses gave unchallenged testimony on Carmen's behalf, and the jury acquitted him of all charges.⁴³⁶

CARTER, NATHANIEL (black). 1982. New York. Carter was convicted of second-degree murder and sentenced to twenty-five years to life. After the conviction, Carter's friends pursued investigation of the case, and succeeded in convincing the district attorney to reopen it. The conviction was overturned after Carter's former wife confessed to the killing. She had been the state's chief witness against her ex-husband. Prior to the trial, she had been given immunity from prosecution for murder; later, she was granted immunity from perjury in exchange for clearing her husband. In 1984, after serving twenty-eight months in prison, Carter was freed. Upon his release, one of Carter's lawyers stated, "If New York State had the death penalty, God knows what would have happened to this poor man."⁴³⁷

CERO, GANGI (a.k.a. Cero Gangi) (white). 1927. Massachusetts.

434. See generally K. McCORMICK, SPRUNG: THE RELEASE OF WILLIE CALLOWAY (1964).

435. *Arkansas Democrat*, Dec. 28, 1982, at 1, col. 2. See generally Guzda, *Reporter Helps Free Wrongly Convicted Man*, 116 *EDITOR & PUBLISHER* 16 (1983); *Arkansas Democrat*, Dec. 21, 1982, at 1, col. 2; *id.*, Dec. 19, 1982, at 1F, col. 1.

436. See generally *Columbus Citizen-Journal*, Dec. 20, 1977, at 1, col. 1; *id.*, June 8, 1977, at 8, col. 1; *id.*, June 7, 1977, at 13, col. 1; *id.*, Jan. 31, 1976, at 1, col. 5; *id.*, Jan. 16, 1976, at 1, col. 1; *id.*, Sept. 12, 1975, at 22, col. 1.

437. *N.Y. Times*, Jan. 19, 1984, at B9, col. 1. See generally *id.*, Mar. 26, 1984, at B2, col. 4; *id.*, Mar. 16, 1984, at B1, col. 1; *id.*, Mar. 15, 1984, at B1, col. 1; *id.*, Jan. 26, 1984, at B5, col. 1.

Cero was convicted of first-degree murder and sentenced to death. The conviction was affirmed on appeal.⁴³⁸ Due to persistent efforts by Cero's brother, an eyewitness to the shooting was located, and she identified another man, Samuel Gallo, as the actual murderer. This evidence secured a reprieve for Cero only four hours before the scheduled execution. In 1929, Gallo was tried and convicted of the murder. Both defendants were granted new trials by the trial court. In 1930, Cero and Gallo were jointly retried, with each defendant trying to implicate the other. Gallo was reconvicted of first-degree murder, and Cero was acquitted. On appeal, Gallo's conviction was affirmed.⁴³⁹ Later, after still another trial, Gallo was acquitted. As Borchard notes, "Cero Gangi was the victim of a chain of circumstances which brought him to the shadow of the electric chair and then by a miracle snatched him back. . . . The case presents a striking argument for the abolition of the death penalty in cases resting on circumstantial evidence."⁴⁴⁰

CHAMBERS, ISIAH ("IZELL"), CHARLIE DAVIS, JACK WILLIAMSON, AND WALTER WOODWARD (all black). 1933. Florida. All were convicted of first-degree murder and sentenced to death. In a case that became known as "Little Scottsboro," a large number of black suspects were arrested in a police dragnet for the murder of a white man.⁴⁴¹ After five days of continuous questioning, the defendants, dubbed "The Four Pompano Boys," confessed. These confessions were the only evidence against the defendants, three of whom pleaded guilty.⁴⁴² Their court-appointed attorneys offered only a perfunctory defense. The convictions were affirmed on appeal.⁴⁴³ After hearing allegations that the confessions and guilty pleas were coerced, the state supreme court allowed the defendants to apply for a writ of error coram nobis.⁴⁴⁴ When the writ was later denied by the trial court judge, the state supreme court ruled the issue should be resolved by a jury.⁴⁴⁵ After a jury ruled against the defendants, the state supreme court again reversed, this

438. *Commonwealth v. Cero*, 264 Mass. 228, 162 N.E. 349 (1928).

439. *Commonwealth v. Gallo*, 275 Mass. 320, 175 N.E. 718 (1931).

440. E. Borchard, Memorandum on Cero Gangi Case 7 (Dec. 21, 1931) (unpublished manuscript) (on file with the *Stanford Law Review*); see also Ehrmann, *For Whom the Chair Waits*, 26 *FED. PROBATION* 14, 19 (1962).

441. The exact number of men caught in the police dragnet appears to be in dispute. The Florida Supreme Court estimated the number to be 12 to 14. *Chambers v. State*, 117 Fla. 642, 644, 158 So. 153, 154 (1934) (en banc). Justice Black, in his opinion for the United States Supreme Court, initially states that 25 to 40 men were arrested, then refers to "thirty to forty negro suspects" later in the opinion. *Chambers v. Florida*, 309 U.S. 227, 229, 230 (1940).

442. See *Chambers v. State*, 111 Fla. 707, 712, 713 (1933) (opinion on petition for writ of error coram nobis); see also *Chambers v. State*, 113 Fla. 786, 787-88, 152 So. 437, 438 (1934).

443. *Chambers v. State*, 111 Fla. 707, 151 So. 499 (1933) (en banc). Counsel for the defendants failed to pursue an appeal to the state supreme court, even after receiving a 30-day extension. The court affirmed the convictions after reviewing the trial transcript forwarded by the prosecutor. *Id.* at 709-12, 151 So. at 500-01.

444. *Chambers v. State*, 111 Fla. 712, 151 So. 500; see also 113 Fla. 786, 152 So. 437 (1934).

445. *Chambers v. State*, 117 Fla. 642, 158 So. 153 (1934) (en banc).

time on the ground of erroneous jury instructions.⁴⁴⁶ After a change of venue, another jury ruled against the defendants, and this time the state supreme court affirmed.⁴⁴⁷ In 1940, the United States Supreme Court unanimously ruled that the confessions were coerced and reversed the convictions on the ground of denial of due process.⁴⁴⁸ Shortly thereafter one of the defendants (Chambers) was transferred to a mental hospital; in 1942, at retrial, the other three received a directed verdict of acquittal.⁴⁴⁹

CHAMBERS, LEON (black). 1969. Mississippi. Chambers was convicted of killing a white police officer and sentenced to life imprisonment. On initial appeal the conviction was affirmed.⁴⁵⁰ On further appeal, the United States Supreme Court reversed the conviction.⁴⁵¹ Shortly after Chambers' arrest, another man confessed to the crime (both orally and in writing), and two witnesses at the trial testified that they saw this second man shoot the officer. But the confession was retracted before Chambers' trial. Three witnesses who had heard the confession (repeated on separate occasions) were not permitted to testify. Chambers was one of dozens in a crowd who were fired upon by the police during an unsuccessful attempt to make an arrest. Chambers was hit and left for dead. Apart from one witness, who claimed that he had seen Chambers shoot the victim, there was no other evidence to connect Chambers to the crime. After the conviction was reversed, all charges against Chambers were dismissed.⁴⁵²

CHARLES, EARL (black). 1975. Georgia. Charles was convicted on two counts of murder and sentenced to death. In 1978, he was released after new evidence was uncovered that verified his alibi.⁴⁵³ Initial attempts to obtain compensation were unsuccessful.⁴⁵⁴ In 1983, a federal judge awarded Charles a \$417,000 judgment against a police officer for violating his civil rights prior to trial. The officer was unable to pay, so the city agreed to award \$75,000 in exchange for Charles dropping his claim.⁴⁵⁵

CLARK, CHARLES LEE (black). 1938. Michigan. Clark was convicted of felony murder and robbery, and sentenced to life imprisonment.

446. *Chambers v. State*, 123 Fla. 734, 167 So. 697 (1936) (en banc) (per curiam).

447. *Chambers v. State*, 136 Fla. 568, 187 So. 156 (1939).

448. *Chambers v. Florida*, 309 U.S. 227 (1940).

449. See generally F. STYLES, *NEGROES AND THE LAW* 31, 161-64 (1937); Palm Beach Post, Mar. 11, 1942, at 5, col. 6; *id.*, Mar. 10, 1942, at 1, col. 2; Ft. Lauderdale News, Mar. 10, 1942, at 1, col. 5; *id.*, Feb. 12, 1940, at 1, col. 2.

450. *Chambers v. State*, 252 So. 2d 217 (Miss. 1971).

451. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

452. See G. MILLER, *INVITATION TO A LYNCHING* 304 (1975); telephone interview with defense attorney, George West (Oct. 10, 1985).

453. *State v. Charles*, No. 23,392 (Ga. Super. Ct. July 5, 1978).

454. *Charles v. Wade*, 665 F.2d 661 (5th Cir. Unit B 1982), cited in Greenberg, *supra* note 389, at 920 n.69.

455. See generally Bentele, *supra* note 379, at 601; Greenberg, *supra* note 389, at 920 n.69; Schmitz, *Beyond a Reasonable Doubt*, ATLANTA WEEKLY, May 30, 1982, at 6; Poverty Law Report, Apr. 1984 (newsletter of the Southern Poverty Law Center, Montgomery, Alabama).

During the late 1950s, Clark refused to apply for parole or accept a commutation of his sentence on the ground that to do so would imply that he was guilty when in fact he was entirely innocent. In 1968, initiatives by the Detroit Legal Aid and Defender's Association led to the granting of a new trial for Clark. At the retrial, the only eyewitness from the original trial admitted that she had never been able to identify Clark and that her testimony had been affected by a police detective telling her at the lineup, "That's the man who shot your father."⁴⁵⁶ On motion from the prosecutor, the case was dismissed and Clark was released. In 1972, for his thirty years in prison, the legislature awarded him an indemnity of \$10,000.⁴⁵⁷

CLARK, EPHRAIM R., LINDBERG HALL, AND SCEOLA KUYKENDALL (all white). 1961. Michigan. All were convicted of first-degree murder and sentenced to life. The convictions were based on erroneous eyewitness identification and perjury by a woman who claimed to have driven the get-away car. The prosecutor ("I felt . . . that these men were not guilty."⁴⁵⁸) spent six hundred hours working on the case. Eleven months later, when one of the actual killers (in prison on another conviction) confessed and the state's chief witness admitted perjury, the trial judge ordered a new trial and freed the three defendants. The witness testified she had lied because the police promised her lenient treatment for another crime if she would implicate these men. The murder charges against the three defendants were then dismissed.⁴⁵⁹

COLEMAN, ROBERT (white). 1929. Georgia. Coleman was convicted of murdering his wife and sentenced to life imprisonment. Coleman had reported the crime to the police and was amazed to be arrested as the prime suspect. The evidence at his trial was wholly circumstantial. In 1932, the real killer, then in prison for another crime, confessed. In 1933, Coleman was granted an unconditional pardon; in 1941, he was indemnified by the legislature.⁴⁶⁰

COLLINS, ROOSEVELT (black). 1937. Alabama. Collins was convicted of rape, sentenced to death, and executed in 1937. The conviction was affirmed on appeal.⁴⁶¹ Collins testified that the "victim" (white) had consented, which caused a near-riot in the courtroom and led the woman's husband to pull out a gun and fire it at Collins. Collins was almost lynched and received only a perfunctory defense. The all-

456. Wash. Post, June 12, 1981, at 16A, col. 5.

457. Act Approved Jan. 28, 1972, No. 1, 1972 Mich. Pub. Acts 1. See generally People v. Anderson, 389 Mich. 155, 179-80, 200-02, 205 N.W.2d 461, 472, 484 (1973); Wash. Post, June 12, 1981, at 16A, col. 5.; Boston Globe, Jan. 29, 1972, at 2, col. 2; Detroit Free Press, Dec. 17, 1971, at 6B, col. 1;

458. Detroit Free Press, Nov. 15, 1961, at 2, col. 1.

459. See generally E. RADIN, *supra* note 20, at 18-23; Detroit Free Press, Nov. 25, 1961, at 3, col. 4.; *id.*, Nov. 19, 1961, at 3, col. 2; *id.*, Nov. 15, 1961, at 2, col. 1.

460. See generally J. FRANK & B. FRANK, *supra* note 20, at 190; Borchart, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201, 202-03 (1941).

461. Collins v. State, 234 Ala. 197, 174 So. 296 (1937).

white jury deliberated for only four minutes. Subsequent interviews with several jurors revealed that although they believed the act was consensual, they also thought that Wilson deserved death simply for “messin’ around” with a white woman. Even the judge, off the record, admitted his belief that Collins was telling the truth. “An innocent man went to his death.”⁴⁶²

COOKS, TONY (black). 1981. California. Cooks was convicted, after a mistrial and two hung juries, of second-degree murder and sentenced to fifteen years to life in prison. After the jury rendered its verdict, the trial judge vacated the conviction, saying he believed Cooks was innocent. On appeal by the prosecution, the conviction was reinstated and the judge was forced to pronounce sentence. At sentencing, the trial judge called the defense attorney “totally incompetent” and the police investigation “the worst job of investigation I have ever seen.”⁴⁶³ He then immediately freed Cooks on \$5,000 bail pending his appeal. A 1983 investigation by the *Los Angeles Times* revealed the conviction was based on mistaken eyewitness identification and perjury by a self-confessed participant in the slaying. On appeal by the defendant, a new trial was ordered, and in 1986 Cooks was acquitted. Said the jury foreman, “We felt the wrong identification was made.”⁴⁶⁴

COOPER, RALPH, COLLIS ENGLISH, MCKINLAY FORREST, JOHN MCKENZIE, JAMES THORPE, AND HORACE WILSON (all black). 1948. New Jersey. Known as the “Trenton Six,” all were convicted of robbery-murder and sentenced to death. Five of the six signed separate and inconsistent confessions, although all six had solid alibis. None was identified by eyewitnesses nor was there any physical evidence to connect the defendants to the crime. On appeal, the convictions were reversed; among the grounds cited was that the confessions were tainted by police coercion.⁴⁶⁵ In 1951, four of the defendants won acquittal in a second trial; the other two (Cooper and English) were reconvicted and sentenced to life imprisonment. These convictions were reversed on appeal.⁴⁶⁶ Before retrial, Cooper was released after he pleaded *non vult*; English had died in prison. In 1956, the physician who had testified at the first trial that the men appeared normal when they signed the coerced confessions, but who at the second trial reported the defendants appeared to be drugged, was convicted of perjury for this testimony. As Lofton notes, “there is little reason to doubt that in this case several innocent men were subjected to a cruel experience as a result of

462. Huie, *The South Kills Another Negro*, in *THE DEATH PENALTY* 91 (E. McGehee & W. Hildebrand eds. 1964) (reprinted from *THE AMERICAN MERCURY* (1943) (refers to Collins as “Roosevelt Wilson”)); see also *id.* at 85-91.

463. L.A. Times, Dec. 12, 1983, § II, at 1, col. 1.

464. L.A. Times, Nov. 11, 1986, § I, at 3, col. 4. See generally *id.*, Dec. 12, 1983, § II, at 1, col. 1; *id.*, Nov. 27, 1983, § VI, at 1, col. 1.

465. *State v. Cooper*, 2 N.J. 540, 67 A.2d 298 (1949).

466. *State v. Cooper*, 10 N.J. 532, 92 A.2d 786 (1952).

public hysteria which the press helped to whip up."⁴⁶⁷

CRAIG, ALVIN, AND WALTER HESS (both white). 1929. Missouri. Craig and Hess were both convicted of second-degree murder and sentenced to ten years in prison. Within a year, one of the real killers voluntarily came forward and confessed. Hess and Craig were pardoned by Governor Caulfield. The real killers were convicted.⁴⁶⁸ "The Hess and Craig case exemplifies the danger of conviction for first-degree murder on circumstantial evidence; only the prosecutor's belief that he might not be able to sustain that charge induced his request for the alternative second-degree charge, which under the circumstances was equally erroneous."⁴⁶⁹

CREAMER, JAMES, GEORGE EMMETT, LARRY HACKER, BILLY JENKINS, HOYT POWELL, CHARLES ROBERTS, AND WAYNE RUFF (all white). 1973. Georgia. All were convicted of first-degree murder and sentenced to life imprisonment. Creamer's conviction was affirmed on appeal,⁴⁷⁰ as was Emmett's.⁴⁷¹ In 1975, after an investigation of the case by the *Atlanta Constitution*, the convictions of these two defendants were vacated because the prosecution had suppressed evidence that would have thoroughly discredited the state's chief witness.⁴⁷² This witness had given several different versions of the crime, and had implicated at least one person who had a solid alibi. She admitted her perjury, and another man confessed to the murders. Later in 1975, new trials were ordered by the trial court for the other five men, and the charges against all seven were dropped. In 1979, the man who had confessed to the murders (already sentenced to death for other crimes) was indicted for the murders, but the case was eventually dismissed.⁴⁷³

CRUTCHER, WILLIE, JIM HUDSON, JOHN MURCHISON, AND CLEO STATEN (all black). 1920. Alabama. All were convicted of first-degree murder and sentenced to life imprisonment. The convictions were based on perjured testimony. In 1926, the nephew of the victim (white) admitted that he had conspired with the victim's wife to murder her husband. Three months later, when affidavits containing these facts were presented to the Board of Pardons, Murchison and Staten were released on parole. Meanwhile, Crutcher and Hudson had died in prison. In 1927, Governor Graves gave Staten a full pardon, but Staten died a few days before it was formally issued. A pardon was denied for

467. J. LOFTON, *supra* note 403, at 192. See generally *id.* at 191-92; Bedau, *Capital Punishment in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 37 n.141 (1964); Bliven, *The Trenton Murder Case*, NEW REPUBLIC, May 16, 1949, at 12; N.Y. Times, Feb. 10, 1956, at 46, col. 3; *id.*, Nov. 28, 1951, at 34, col. 1.

468. See E. BORCHARD, *supra* note 20, at 94-99.

469. *Id.* at 99.

470. *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974).

471. *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974).

472. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

473. See generally *Atlanta Const.*, Oct. 29, 1983, at 1B, col. 3; *id.*, Sept. 3, 1975, at 1A, col. 1; *id.*, Aug. 28, 1975, at 1A, col. 1; *id.*, Aug. 27, 1975, at 1A, col. 1; *id.*, Apr. 4, 1975, at 1A, col. 6.

Murchison because of his bad conduct in prison. In 1931 he was awarded compensation (\$750) by the state legislature.⁴⁷⁴

DABNEY, CONDY (white). 1926. Kentucky. Dabney was convicted of murder and sentenced to life imprisonment. A year later, the supposed victim turned up alive and Dabney was immediately pardoned. The conviction was obtained on false testimony, and the witness who gave it was convicted of perjury.⁴⁷⁵

DAWSON, SIE (black). 1960. Florida. Dawson was convicted of first-degree murder, sentenced to death, and executed in 1964. The victim was the 2-year-old son of a white woman for whom Dawson worked. (Although the boy's mother was also murdered, Dawson was not tried for that offense.) The conviction by an all-white male jury was based solely on a confession obtained from Dawson after he had spent more than a week in custody without the assistance of counsel, and on an accusation by the victim's husband. Dawson had an IQ of 64. At trial, Dawson repudiated his alleged confession, claiming it was given only because "the white officers told him to say he killed Mrs. Clayton or they'd give him to 'the mob' outside."⁴⁷⁶ On appeal, the conviction was affirmed on a 4-3 vote.⁴⁷⁷ Years later, newspaper stories revived doubts that had surrounded the conviction from the beginning. Dawson had claimed that the victim's husband had committed the murders. There were no eyewitnesses and the circumstantial evidence was slight and inconclusive.⁴⁷⁸

DEAN, DR. SARA RUTH (white). 1934. Mississippi. Dean was convicted of murder and sentenced to life imprisonment. The conviction was affirmed on appeal by a divided court.⁴⁷⁹ The conviction was based on the victim's dying declaration that Dean had killed him after he announced an end to their romantic relationship. But evidence showed it was Dean who initiated the break-up, after she had become engaged to another man. In 1935, Governor Connor granted Dean a full pardon, which she had requested because "she was wholly innocent of the charge upon which she was tried and convicted."⁴⁸⁰

DEDMOND, ROGER Z. (white). 1967. South Carolina. Dedmond was convicted of the murder of his wife and sentenced to eighteen years in prison. At Dedmond's trial, a police officer testified that Dedmond had confessed to the murder. Dedmond testified that he had no memory of

474. See generally E. BORCHARD, *supra* note 20, at 165-69.

475. See generally *id.* at 51-58.

476. Tallahassee Democrat, May 20, 1979, at 1A, col. 1.

477. Dawson v. State, 139 So. 2d 408 (Fla. 1962).

478. See generally Bedau, *supra* note 31, at 236-37; Tallahassee Democrat, May 20, 1979, at 1, col. 1; St. Petersburg Times, Sept. 20, 1977, at 1A, col. 1. Other materials on the Dawson case are located in the collection of governors' clemency files, Florida State Archives, in the Raymond Gray Library, Tallahassee.

479. Dean v. State, 173 Miss. 254, 160 So. 584 (1935).

480. Letter from Sara Ruth Dean to Governor Sennett Conner (May 28, 1935) (on file with the *Stanford Law Review*).

where he was at the time of the crime. In 1968, three months after Dedmond began serving his sentence, he was released on bond when another man confessed to the homicide. This man, who also confessed to several other murders, was subsequently tried, convicted, and sentenced to life imprisonment for the murder of Dedmond's wife. After that sentencing, the trial court dismissed all charges against Dedmond.⁴⁸¹

DE LOS SANTOS, GEORGE ("CHIEFIE") (Hispanic). 1975. New Jersey. George De Los Santos was convicted of first-degree murder and sentenced to life in prison. In 1983, a theological student, James McCloskey, devoted a year to studying the case and discovered proof that the prosecutors had suppressed evidence that undermined the credibility of their star witness. Other alleged eyewitness testimony against De Los Santos had been impeached as well. The conviction was voided by a federal district court because the original testimony of the star witness "reek[ed] of perjury."⁴⁸² This perjured testimony was provided by a cellmate, who had claimed to hear De Los Santos' confession after his arrest.⁴⁸³

DEMORE, LOUIS (white). 1934. Missouri. DeMore was convicted of murder and sentenced to life imprisonment. He had just moved to St. Louis when, on his first night in town, a police officer was slain by a fleeing robber. DeMore jokingly commented to three police officers that he fit the description of the killer, and was promptly arrested. Thinking he was in danger of being sentenced to death, he confessed after being assured that this would get him a life sentence instead. Ten days later, the real culprit was arrested, and after five months in prison, DeMore was pardoned by Governor Park.⁴⁸⁴

DOMER, ROBERT K. (white). 1963. Ohio. Domer was convicted of first-degree murder and sentenced to death. The state court of appeals ruled that the evidence did not sustain the conviction, and a new trial was ordered.⁴⁸⁵ Domer had started a fire to dispose of the body of the victim, who had died of a heart attack. Pathologists for both the state and the defense agreed that the deceased's blood showed no trace of carbon monoxide, and therefore fire was not the cause of death. At the retrial in 1966, Domer was acquitted.⁴⁸⁶

481. See generally MacNamara, *supra* note 20, at 60; Atlanta Const., Sept. 17, 1968, at 2, col. 1; Charlotte Observer, Mar. 1, 1968, at 1, col. 8; Letter from Frank B. Sanders, Director of Div. of Pub. Safety Programs, State of S.C., to Michael L. Radelet (Feb. 1, 1984) (on file with the *Stanford Law Review*).

482. De Los Santos v. O'Lone, No. 82-1717, slip op. at 4 (D.N.J. July 6, 1983).

483. See generally Newark Star-Ledger, Jan. 13, 1984, at 35, col. 5; Philadelphia Inquirer, Aug. 9, 1983, at B1, col. 2; *id.*, July 28, 1983, at 8B, col. 5; N.Y. Times, July 28, 1983, at B6, col. 2.

484. See generally E. RADIN, *supra* note 20, at 151-54, 251-52.

485. State v. Domer, 1 Ohio App. 2d 155, 204 N.E.2d 69 (1965).

486. See generally Lassars, *Proof of Guilt in Capital Cases—An Unscience*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 310, 315 (1967); letter from Robert Domer to Michael L. Radelet (June 21, 1984) (on file with the *Stanford Law Review*).

DONNELLY, JAMES (white). Circa 1910. Federal (Hoopa Valley Indian Reservation, California). Donnelly was convicted of first-degree murder and sentenced to life. A deathbed confession by another person was offered at trial, but was excluded as inadmissible evidence under the hearsay rule. Donnelly's conviction was affirmed by the Supreme Court.⁴⁸⁷

DOVE, FRANK, FRED DOVE, AND GEORGE WILLIAMS (all black). 1922. North Carolina. All three were convicted of first-degree murder and sentenced to death. A fourth defendant, on the morning of his execution, stated that these three men had nothing to do with the crime, although his perjured testimony, apparently coerced, was the basis for their conviction. In 1923, after petition from the trial judge, among others, Governor Morrison commuted the sentences of death to life imprisonment. In 1928, after petition by the prosecutor, some of the arresting officers, and some of the original jurors, the men received an "absolute" pardon from Governor McLean.⁴⁸⁸

DULIN, WILLIAM (white). 1933. California. Dulin was convicted of first-degree murder and sentenced to life imprisonment. The victim was a former boxer; the state alleged that the homicide occurred in an argument over division of funds realized from the sale of a diamond ring. The state's main witness testified that a co-defendant had told her the details of the crime, but the defense contended that this witness was threatened with a prison sentence unless she gave testimony against the defendants.⁴⁸⁹ In court, the co-defendant admitted his sole responsibility for the crime. On appeal, the conviction was affirmed.⁴⁹⁰ In 1936, Governor Merriam granted Dulin a full pardon because of his innocence, an action requested and supported by a number of officials, including two deputy sheriffs, two deputy district attorneys, and the judge who tried the case.⁴⁹¹

DWYER, PAUL N. (white). 1937. Maine. Dwyer, eighteen, was convicted of murder and sentenced to life imprisonment. He was arrested in New Jersey after a routine search of his car revealed the bodies of two South Paris, Maine, murder victims. In New Jersey and in Maine, he protested his innocence to the prison officials but was denied communication with others. During the trial he suddenly changed his plea to guilty. Shortly after arriving in prison to serve his sentence, Dwyer told officials that his change of plea "had been wrung from him by . . .

487. See *Donnelly v. United States*, 228 U.S. 243 (1913). See generally R. BYE, *supra* note 368, at 83-84.

488. See generally NORTH CAROLINA Bd. OF CHARITIES AND PUB. WELFARE, SPECIAL BULLETIN No. 10: CAPITAL PUNISHMENT IN NORTH CAROLINA 45-49 (1929).

489. See L.A. Times, May 2, 1933, at 8, col. 1; *id.*, Apr. 18, 1933, § II, at 8, col. 4; *id.*, Apr. 15, 1933, § II, at 2, col. 5; *id.*, Apr. 14, 1933, § II, at 8, col. 1; *id.*, Apr. 13, 1933, § II, at 8, col. 8; *id.*, Apr. 12, 1933, § II, at 8, col. 5; *id.*, Apr. 11, 1933, § II, at 8, col. 3.

490. *People v. Hayes*, 220 Cal. 220, 30 P.2d 21 (1934) (per curiam) (adopting the opinion of the court of appeal, 25 P.2d 995 (1933)).

491. L.A. Times, Aug. 15, 1936, at 1, col. 6.

duress and intimidation."⁴⁹² Deputy Sheriff Carroll of South Paris, he said, had threatened to murder his (Dwyer's) mother unless Dwyer agreed to dispose of the two bodies. These threats were renewed once Dwyer was returned to Maine, where he was placed in Carroll's custody prior to and during the trial. In 1938, after an investigation of Dwyer's allegations, Carroll was indicted for the murders, convicted, and sentenced to prison; after serving twelve years, he was released. Dwyer, however, having admitted guilt (albeit under duress) to a murder that, it was now clear, he had not committed, remained in prison. No evidence linked him to having voluntarily assisted in the crime except his guilty plea. Finally, in 1957, a new attorney obtained a writ of error,⁴⁹³ and in 1959, Dwyer was released.⁴⁹⁴

ELLISON, ELLA MAE (black). 1974. Massachusetts. Ellison was convicted of first-degree murder and armed robbery and sentenced to concurrent life terms in prison. On appeal, a new trial was ordered on the grounds of insufficiency of evidence and withholding of exculpatory evidence by the prosecution.⁴⁹⁵ The real killers testified that Ellison had driven the get-away car, but in so doing perjured themselves in an attempt to escape being convicted for first-degree murder. In 1976, they recanted this testimony and admitted that Ellison "had had no role in any part of the enterprise," and that they had perjured themselves because they feared being sentenced to death.⁴⁹⁶ On remand, the indictment against Ellison was dismissed.⁴⁹⁷ No evidence had linked her to the crime except the perjured testimony.

ESTES, CORNELL AVERY (black). 1979. Maryland. Estes was convicted (at the age of sixteen) of murder and sentenced to twenty years. After nearly a year in prison, Estes was released when the real killer confessed. In 1983, Governor Hughes pardoned Estes, noting the defendant "has been conclusively shown to have been convicted in error of those criminal offenses."⁴⁹⁸ In 1984, the state Board of Public Works awarded Estes damages (\$16,500) for the erroneous confinement.⁴⁹⁹

FAY, FLOYD ("Buzz") (white). 1978. Ohio. Fay was convicted of aggravated murder during an attempted robbery and sentenced to life imprisonment.⁵⁰⁰ On appeal, the conviction was affirmed.⁵⁰¹ The vic-

492. *Dwyer v. State*, 154 Me. 179, 180, 145 A.2d 100, 101 (1958).

493. *Id.*

494. See ACLU Weekly Bulletin No. 2021, Dec. 7, 1959, at 2-3.

495. *Commonwealth v. Ellison*, 376 Mass. 1, 379 N.E.2d 560 (1978).

496. *Id.* at 15, 379 N.E.2d at 567.

497. Letter from Max Stern, Ellison's Attorney, to Michael L. Radelet (May 9, 1985) (on file with the *Stanford Law Review*).

498. Letter from Mary Humphries, Maryland Assistant Attorney Gen., to Carl Beritela, Management Analyst, Md. Div. of Management Analysis and Audits (Jan. 4, 1984) (on file with the *Stanford Law Review*).

499. *Baltimore Sun*, Mar. 22, 1984, at C16, col. 6.

500. *State v. Fay*, No. 78-CR-24 (Wood County, Ohio, Ct. C.P. Aug. 11, 1978) (court journal entry of jury verdict against Fay).

tim, before expiring, muttered, "It looked like Buzz, but it couldn't have been."⁵⁰² The chief evidence against Fay was this "identification" and Fay's failure to pass two lie detector tests. These tests, which were presented to the jury, were later shown to have been incorrectly interpreted. Fay was exonerated when his attorney, a persistent public defender, located the driver of the getaway car in West Germany. This suspect later admitted that he and two other men committed the crime. In 1980, after investigation by the prosecuting attorney, a motion for a new trial and Fay's immediate release was granted. The charges were finally dismissed shortly thereafter. One of the three killers was given immunity, but the other two subsequently pleaded guilty to the crime.⁵⁰³ Had Ohio's death penalty law not been invalidated in 1978,⁵⁰⁴ Fay noted after he was released, "it's very likely I wouldn't be here."⁵⁰⁵

FERBER, NEIL (white). 1982. Pennsylvania. Ferber was convicted of first-degree murder and sentenced to death. In 1986, at the urging of the district attorney, the trial judge ordered a new trial. A polygraph test indicated that the state's chief witness against Ferber, a former cellmate, had perjured himself at the trial, falsely claiming that Ferber had confessed to the crimes. An earlier polygraph test, administered before trial and with the same results, had not been revealed to the defense. A homicide detective and several other prosecutors were also convinced of Ferber's innocence, and an eyewitness to the crime was positive that Ferber was not the man she saw. Two months after the new trial was ordered, charges against Ferber were formally dropped.⁵⁰⁶

FEWELL, STANFORD ELLIS (white). 1952. Alabama. Fewell was convicted of second-degree murder and sentenced to thirty years in prison. After thirteen days of continuous questioning, Fewell, in his third conflicting statement, confessed to the 1949 sex murder of his 9-year-old cousin. He repudiated this confession almost immediately. "Except for the confession . . . there was no case."⁵⁰⁷ The conviction was affirmed on appeal.⁵⁰⁸ His request to petition for a writ of error coram

501. *State v. Fay*, No. WD-78-32 (Ohio Ct. App. (Wood County) June 22, 1979), *appeal dismissed*, No. 79-1208 (Ohio Sup. Ct. Oct. 25, 1979).

502. *Denver Post*, Jan. 4, 1981, at 17, col. 3.

503. *State v. Marskland*, No. 81-CR-9 (Wood County, Ohio, Ct. C.P. Feb. 9, 1981); *State v. Quinn*, No. 80-CR-158 (Wood County, Ohio, Ct. C.P. Jan. 30, 1981).

504. *See Lockett v. Ohio*, 438 U.S. 586 (1978).

505. *Columbus Dispatch*, Jan. 29, 1981, at 1, col. 1. *See generally* Cimerman, "They'll Let Me Go Tomorrow": *The Fay Case*, *CRIM. DEF.*, May-June 1981, at 7; Lykken, *The Lie Detector and the Law*, *CRIM. DEF.*, May-June 1981, at 19; *Denver Post*, Jan. 4, 1981, at 17, col. 3; *N.Y. Times*, Nov. 3, 1980, at C20, col. 3.

506. *See generally* *Philadelphia Daily News*, Mar. 7, 1986, at 9, col. 1; *Philadelphia Inquirer*, Mar. 7, 1986, at 1B, col. 1; *id.*, Jan. 4, 1986, at 1B, col. 2.

507. S. RAAB, *JUSTICE IN THE BACK ROOM* 237 (1967).

508. *Fewell v. State*, 259 Ala. 401, 66 So. 2d 771 (1953).

nobis was also denied.⁵⁰⁹ Subsequent investigation by the former city editor of the *Birmingham News* and The Court of Last Resort led to four persons who confirmed Fewell's alibi. In 1959, after this new evidence was introduced, the Alabama Parole Board released Fewell.⁵¹⁰

FISHER, WILLIAM (white). 1933. New York. Fisher was convicted of first-degree manslaughter and sentenced to a prison term of fifteen to thirty years. In 1944, he was paroled after eleven years in prison.⁵¹¹ In 1958, the New York Court of Appeals reversed two lower courts' denials of Fisher's application for a writ of error coram nobis.⁵¹² The judgment of conviction against Fisher was vacated because the prosecuting attorney at the original trial had offered in evidence as the murder weapon a gun that he knew had not been fired by the defendant. The prosecutor also suppressed evidence that clearly demonstrated Fisher's innocence.⁵¹³ Six bills allowing Fisher to sue the state were passed by the New York Legislature but were vetoed by Governors Rockefeller, Carey, and Cuomo.⁵¹⁴ Finally, in 1984, the state waived its immunity in a bill signed by Governor Cuomo, and in 1986, the courts awarded Fisher \$750,000 for his wrongful imprisonment.⁵¹⁵

FOSTER, JAMES (white). 1956. Georgia. Foster was convicted of first-degree murder and sentenced to death. The conviction was affirmed on appeal.⁵¹⁶ It was based largely on erroneous eyewitness identification by the victim's wife and perjured testimony by a cellmate who claimed that Foster had confessed, notwithstanding Foster's alibi witnesses. In 1958, Foster was set free when a former police officer (Charles Rothschild, then in prison for another crime in South Carolina) confessed to the killing. Later that year, Rothschild was convicted of the murder and sentenced to life imprisonment. The state's lower house passed a bill to compensate Foster (\$2,000), but the Senate tabled it.⁵¹⁷

FOWLER, WALTER, AND HEYWOOD PUGH (both black). 1936. Illinois.

509. *Ex parte Fewell*, 261 Ala. 246, 73 So. 2d 558 (1954).

510. See generally S. RAAB, *supra* note 507, at 236-37; Lowall, *Ellis Fewell: Turned Down*, ARGOSY, July 1958, at 12; Lowall, *Ellis Fewell: Last Chance Gamble*, ARGOSY, Apr. 1958, at 16; Lowall, *The Case of the Dual Confessions*, ARGOSY, Feb. 1958, at 8; Schindler, *Ellis Fewell Freed*, ARGOSY, July 1959, at 41; Schindler, *The Fewell Case: To a Private Eye*, ARGOSY, May 1958, at 56 (as told to G. Lowall).

511. Memorandum in Support of S. 8082, 207th Leg. (N.Y. 1984), at 6 (Mar. 5, 1984) (on file with the *Stanford Law Review*). S. 8082 was subsequently enacted into law. See Act of Dec. 21, 1984, ch. 1007, 1984 N.Y. Laws 2836; N.Y. Times, July 3, 1983, at A18, col. 1.

512. *People v. Fisher*, 4 N.Y.2d 943, 151 N.E.2d 617, 175 N.Y.S.2d 820 (1958) (per curiam).

513. *Id.* at 944, 151 N.E.2d at 617, 175 N.Y.S.2d at 820; Memorandum in Support of S. 8082, 207th Leg. (N.Y. 1984), at 3-6 (Mar. 5, 1984) (on file with the *Stanford Law Review*); *Newsday*, Feb. 18, 1986, § II, at 3, col. 1.

514. *Newsday*, Feb. 18, 1986, § II, at 3, col. 1.

515. *Id.*; N.Y. Times, July 3, 1983, at 18A, col. 1.

516. *Foster v. State*, 213 Ga. 601, 100 S.E.2d 426 (1957), *cert. denied*, 355 U.S. 967 (1958).

517. See generally J. WOOD, *NOTHING BUT THE TRUTH* (1967); Martin, *The Question of Identity*, in *THE DEATH PENALTY IN AMERICA* 539 (H. Bedau 2d ed. 1967).

Fowler and Pugh were both convicted of murder and sentenced to life imprisonment. Fowler had a prior felony record, but Pugh, nineteen, did not. "There was no corroborative evidence to link either of them to the murder."⁵¹⁸ Nonetheless, Fowler confessed quickly, and Pugh confessed as well after sustaining beatings over several days while in custody. At trial the police perjured themselves by denying the beatings. In 1949, Fowler died in prison. In 1955, Pugh finally convinced a volunteer attorney to re-examine the case. This reinvestigation established that the prosecution had suppressed evidence of two eyewitnesses who had identified the true killer as white. Pugh's conviction was reversed, the prosecution dropped the charges, and Illinois later awarded Pugh a settlement of \$51,000.⁵¹⁹

FRANK, LEO M. (white). 1913. Georgia. Frank was convicted of murder and sentenced to death. The conviction was sustained on appeal.⁵²⁰ In 1915, two months after Governor Slaton commuted the death sentence to life imprisonment, Frank was lynched. Governor Slaton commuted the sentence because of doubts about Frank's guilt. The conviction was obtained in an atmosphere of strong anti-Semitism on perjured testimony from Jim Conley, the person who probably was the real culprit. In 1982, a witness to the crime admitted having seen Conley carrying the victim's body on the first floor of the factory where the murder took place. This contradicted Conley's testimony at trial that, on Frank's orders, he carried the body on the elevator directly from the second floor to the basement. In 1983, The Anti-Defamation League of B'nai B'rith, the American Jewish Committee, and the Atlanta Jewish Federation presented a petition and three hundred pages of evidence and supporting documents to the Georgia Board of Pardons and Paroles in an effort to obtain a posthumous pardon. In 1986, a pardon was granted because of blatant due process violations.⁵²¹

FREDERICK, JOHNNY, AND DAVID R. KEATON (both black). 1971. Florida. Frederick and Keaton were both convicted of the murder of an off-duty deputy sheriff during a robbery; Frederick was sentenced to life imprisonment and Keaton to death. Along with three other men who were indicted for this crime, they were called "the Quincy Five" by groups defending their innocence. (Of these three other defendants, one was found incompetent to stand trial, the second was acquitted, and charges against the third were dropped.) Their convictions were based mainly on mistaken testimony by five eyewitnesses, as well as coerced confessions. A year later three other men were arrested for the

518. S. RAAB, *supra* note 507, at 235.

519. *See id.* at 234-36.

520. Frank v. State, 141 Ga. 243, 80 S.E. 1016 (1914). The Supreme Court affirmed the federal district court's refusal to grant a writ of habeas corpus. *See* Frank v. Magnum, 237 U.S. 309 (1915).

521. *See generally* F. BUSCH, GUILTY OR NOT GUILTY?, 15-74 (1952); L. DINNERSTEIN, THE LEO FRANK CASE (1968); N.Y. Times, Mar. 12, 1986, at 10, col. 1; *id.*, Dec. 23, 1983, at A10, col. 1; *id.*, Dec. 13, 1983, at A22, col. 1; Atlanta Const., Apr. 26, 1983, at 1B, col. 1.

crime based on extensive circumstantial evidence, including the presence of their fingerprints at the scene of the crime. Two confessed, and all three were convicted. The state supreme court ordered a new trial for Keaton because of the newly discovered evidence.⁵²² In 1973, both Frederick and Keaton were released after the state decided not to prosecute. "The case of the Quincy Five stands as a classic [example] of eyewitness misidentification, or racial skew," noted one psychologist.⁵²³

FRY, JOHN HENRY (white). 1958. California. Fry was convicted of manslaughter and sentenced to one to ten years in prison. Charged with the murder of his common-law wife, Fry was too drunk to remember the events and finally pleaded guilty to the reduced charge of manslaughter. In 1959, another man (Richard Cooper) was arrested in connection with an unrelated murder; he confessed to the killing for which Fry had been convicted. Cooper was convicted, sentenced to death, and executed in 1960 for both murders. In 1959, less than a month after Cooper's confession, Fry was released and pardoned by Governor Brown. The State Board of Control voted to award Fry \$3,000 compensation.⁵²⁴

FUDGE, E.J. (white). 1916. Florida. Fudge was convicted of first-degree murder for killing his two daughters and sentenced to life in prison. On appeal, the conviction was reversed and a new trial was ordered. According to the court, a suicide note written by one of the children and the absence of a motive for murder by their father indicated the two deaths were caused by a suicide-murder by one of the girls. "While the testimony raises a vague and attenuated suspicion that by some rare chance the plaintiff in error might have murdered his children, there is no whit of it that points with any certainty in that direction . . ." ⁵²⁵ In 1918, *nolle prosequi* was entered in the case.⁵²⁶

GARCIA, FRANCISCO (Hispanic). 1913. New Mexico. Garcia was convicted of voluntary manslaughter and sentenced to seven to eight years in prison. Garcia had been shot by the victim and was unconscious when another man committed the homicide. The appellate court reversed the conviction and noted that it was "physically impossible for Francisco Garcia to be guilty of any crime in this connection."⁵²⁷ It later asserted that "[a] man has been convicted . . . where

522. *Keaton v. State*, 273 So. 2d 385 (Fla. 1973).

523. Tallahassee Democrat, Mar. 27, 1983, at 7G, col. 1. See generally J. LICKSON, DAVID CHARLES: THE STORY OF THE QUINCY FIVE (1974); G. MILLER, INVITATION TO A LYNCHING 253 (1975).

524. See generally *People v. Cooper*, 53 Cal. 2d 755, 349 P.2d 964, 3 Cal.Rptr. 148 (1960); CALIFORNIA SENATE COMMITTEE ON JUDICIARY, HEARING REPORT AND TESTIMONY ON SENATE BILL NO. 1, 1960 SECOND EXTRAORDINARY SESSION 8 (March 9, 1960); E. BLOCK, AND MAY GOD HAVE MERCY . . . THE CASE AGAINST CAPITAL PUNISHMENT 64-65 (1962).

525. *Fudge v. State*, 75 Fla. 441, 447, 78 So. 510, 512 (1918).

526. Court journal entry of *nolle prosequi*, *State v. Fudge*, No. 1916-24117-CA-01, Minute Book X, at 281 (Escambia County, Fla., Cir. Ct. filed Apr. 10, 1918).

527. *State v. Garcia*, 19 N.M. 414, 418, 143 P. 1012, 1013 (1914).

there is, not only no evidence to support the verdict, but where the evidence conclusively established his innocence."⁵²⁸ A new trial was awarded, and the charges were dropped.⁵²⁹

GARNER, VANCE, AND WILL JOHNSON (both black). 1905. Alabama. With Jack Hunter, Garner and Johnson were convicted of murder and sentenced to death, despite their claims of innocence. No appeals were taken. In 1905, Garner and Hunter were hanged. From the gallows Garner maintained his complete innocence, while Hunter admitted his own guilt and absolved both Garner and Johnson. In 1906, Johnson's sentence was commuted to life. A fourth man, Bunk Richardson, who was charged with perjuring himself in Garner's behalf, was lynched three nights after Johnson's death sentence was commuted.⁵³⁰

GARVEY, MIKE, HARVEY LESHER, AND PHIL ROHAN (all white). 1928. California. All three were convicted of murder and sentenced to life. The persistent efforts of their defense attorney uncovered several holes in the state's case. In 1930, full pardons were granted by Governor Young, and Rohan was indemnified (\$1,692). Perjured testimony plus mistaken identification by a 10-year-old boy contributed to the convictions.⁵³¹

GILES, JAMES, JOHN GILES, AND JOSEPH JOHNSON, JR. (all black). 1961. Maryland. All were convicted of the rape of a 16-year-old white girl and sentenced to death. (The Giles brothers were tried first; Johnson was not tried until 1962.) Several citizens, led by Germantown scientist Harold Knapp, believed the men were not guilty and continued to investigate the case. New evidence was discovered, and five jurors wrote to the governor to say that had they been aware of this information, they would not have found the defendants guilty. In 1963, after extensive further investigations, Governor Tawes commuted the sentences to life. In 1967, the United States Supreme Court, noting several problems with the credibility of the victim, ordered additional hearings on the case.⁵³² In 1967, at a post-conviction hearing in the county circuit court, both the prosecuting attorney and the state attorney general conceded that the original convictions rested in part on erroneous testimony, and a new trial was awarded. After reindictment, the prosecutor moved for an entry of *nolle prosequi*, and the brothers were released. Johnson, however, was not released until receiving a full pardon from Governor Agnew in 1968. The essence of the case, as it appeared to the Giles & Johnson Defense Committee, was that the victim had willingly and without threat or inducement consented to sexual

528. *State v. Garcia*, 19 N.M. 420, 422, 143 P. 1014, 1015 (1914) (order upon rehearing).

529. Records of the District Court Clerk, No. 773, Union County, N.M. (indicating no action taken after new trial was ordered).

530. See generally Birmingham News, Feb. 12, 1906, at 9, col. 3; *id.*, Dec. 29, 1905, at 8, col. 1; Tallahassee Weekly True Democrat, July 21, 1905, at 4, col. 3.

531. See generally E. BORCHARD, *supra* note 20, at 141-47.

532. *Giles v. Maryland*, 386 U.S. 66 (1967).

intercourse with all three defendants and had charged the defendants with rape only to protect herself from further proceedings when the police found her and one of the defendants *in flagrante delicto*.⁵³³

GLADISH, THOMAS V., RICHARD WAYNE GREER, RONALD B. KEINE, AND CLARENCE SMITH, JR. (all white). 1974. New Mexico. The defendants were convicted of murder, kidnapping, sodomy, and rape, and sentenced to death. Because three of the defendants were from Michigan, *Detroit News* reporters Douglas Glazier and Stephen Cain reinvestigated the case. Sixteen months after the convictions, a drifter in South Carolina admitted doing the killing. The murder weapon and auto used in the crime were traced to this man. Three months later a new trial for the four men was ordered by a state district court, and shortly thereafter another state district judge dismissed the original indictments. Perjured identification given under police pressure and the use of poorly administered lie detector tests were the bases for the erroneous convictions. The *Detroit News* spent between \$50,000 and \$75,000 reinvestigating the case. The defendants, who had been in Los Angeles on the day of the crime, were released after eighteen months on death row.⁵³⁴

GOODWIN, PAUL (white). 1936. Oklahoma. Goodwin was convicted of murder and sentenced to life imprisonment. He was paroled in 1961, but was returned to prison in 1962 for a parole violation. In 1968, his petition for a writ of habeas corpus was denied in the state court.⁵³⁵ In 1969, after the material facts were fully developed, a federal district court ordered his immediate release.⁵³⁶ The federal district court judge concluded that Goodwin was denied effective assistance of counsel, that the prosecution suppressed exculpatory evidence (the statement of an eyewitness), and that prejudicial pretrial publicity had prevented a fair trial. This judgment was affirmed on appeal.⁵³⁷ The only evidence against Goodwin was a written statement made by a co-defendant who twice before had admitted sole responsibility for the killing. This co-defendant's trial attorney (and later Speaker of the Oklahoma House of Representatives) also testified that his client alone was responsible. The district court was "convinced that petitioner did not shoot and kill the deceased."⁵³⁸

GRACE, FRANK ("PARKY") (black). 1974. Massachusetts. Grace was convicted of murder, with his brother, by an all-white jury, and sentenced to life in prison. Initial attempts to overturn the conviction

533. See generally F. STRAUSS, "WHERE DID THE JUSTICE GO?": THE STORY OF THE GILES-JOHNSON CASE (1970); Abramowitz & Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 161 (1964) (student authors); Wash. Post, Oct. 31, 1967, at A1, col. 1.

534. See generally *Detroit News*, Jan. 11, 1976, Magazine, at 14; *Detroit News*, Dec. 16, 1975, at 1, col. 1.

535. *Goodwin v. Page*, 444 P.2d 833 (Okla. Crim. App. 1968).

536. *Goodwin v. Page*, 296 F. Supp. 1205 (E.D. Okla. 1969).

537. *Goodwin v. Page*, 418 F.2d 867 (10th Cir. 1969).

538. *Goodwin*, 296 F. Supp. at 1210. See generally L.A. Times, Mar. 9, 1969, at 6, col. 6.

failed.⁵³⁹ Finally, in 1983, an evidentiary hearing was ordered. Investigation by staff of the New England American Friends Service Committee showed that Grace, a former Black Panther and political activist, had been targeted by the New Bedford police as an extremely dangerous troublemaker. Arrested over a dozen times, he was never found guilty of any crime prior to the murder conviction. "He was arrested [for the murder] by a police officer who had a long standing antipathy toward him, . . . he was sentenced although there was no evidence to convict him, and he remains in jail although proof of his innocence abounds."⁵⁴⁰ In hearings on Grace's request for a new trial in 1984, a key prosecution witness admitted he lied in the original trial. Grace's brother also took sole responsibility for the killing. Finally, in 1985, he was granted a new trial and freed.⁵⁴¹

GREEN, NELSON, AND CHARLES STIELOW (both white). 1915. New York. Stielow was convicted of murder and sentenced to death. Green pleaded guilty to second-degree murder to avoid the electric chair, and was given a twenty year to life term. The prosecution alleged Stielow had confessed, but Stielow maintained the confession had been obtained by intimidation. His conviction was affirmed on appeal.⁵⁴² Prison officials and a private attorney, convinced the confession had not been voluntary, took up the case. Stielow received a stay after he had already been led to the execution chamber. In 1916, his death sentence was commuted to life by Governor Whitman. In 1918, both Stielow and Green were pardoned and released when the real culprit confessed to friends, and after a detailed investigation by a lawyer uncovered ballistics evidence proving their innocence.⁵⁴³

GREEN, WILLIAM S. (black). 1947. Pennsylvania. Green was convicted of first-degree murder and sentenced to life imprisonment. The judgment was affirmed on appeal.⁵⁴⁴ In 1957, one of the two "excellent eyewitnesses" against Green convinced the district attorney that he had been paid by the other witness to give perjured testimony in an effort by that witness to get "revenge" against Green.⁵⁴⁵ The state joined in Green's petition for a new trial. Governor George Leader pardoned Green after he had served ten years. Earlier, Green had turned down an opportunity for parole because he wanted first to have

539. *Commonwealth v. Grace*, 381 Mass. 753, 412 N.E.2d 354 (1980); *Commonwealth v. Grace*, 370 Mass. 746, 352 N.E.2d 175 (1976).

540. Olen, *The Framing of Frank Grace*, *Outlook on Just.*, Dec. 1983-Jan. 1984, at 1, 6 (newsletter of the New England American Friends Service Committee).

541. *See generally* *Outlook on Just.*, Mar.-Apr. 1985, at 1 (newsletter of the New England American Friends Service Committee); Olen, *supra* note 540, at 1; Boston Phoenix, Mar. 19, 1985, at 1, col. 1; Boston Globe, Jan. 29, 1985, at 17, col. 1; *id.*, Jan. 16, 1985, at 19, col. 2.

542. *People v. Stielow*, 217 N.Y. 641, 112 N.E. 1069 (1916).

543. *See generally* E. BLOCK, *supra* note 407, at 203-20; E. BORCHARD, *supra* note 20, at 245-56; Brandon, *To the Rescue of Charlie Stielow*, *READER'S DIG.*, Apr. 1949, at 73.

544. *Commonwealth v. Green*, 358 Pa. 192, 56 A.2d 95 (1948).

545. E. RADIN, *supra* note 20, at 139-40.

his name cleared.⁵⁴⁶

GREENLEE, CHARLES, WALTER LEE IRVIN, AND SAMUEL SHEPHERD (all black). 1949. Florida. All were convicted by an all-white jury of the rape of a white woman; Irvin and Shepherd were sentenced to death and Greenlee (sixteen years old) to life imprisonment. A fourth, Ernest Thomas, was killed by a "posse" prior to arrest. Known as the "Grove-land Case," near-riot conditions prevailed prior to the trial, but a change of venue request was not granted. Although local newspapers reported that the defendants confessed, no confessions were introduced at trial. The convictions were affirmed on appeal.⁵⁴⁷ In 1951, the convictions were reversed by the United States Supreme Court because of racial discrimination in the method by which jurors were selected in Florida.⁵⁴⁸ While returning from the prison to trial court, Shepherd was killed and Irvin critically wounded by the transporting sheriff. Irvin, who maintained his innocence while he thought he was dying, said the shooting was done without provocation, but a coroner's jury believed the sheriff and ruled the shootings had been self-defense.⁵⁴⁹ In 1953, after a nominal change of venue to a bordering county, Irvin turned down a plea bargain for life imprisonment and was reconvicted and resentenced to death. The conviction was affirmed on appeal.⁵⁵⁰ At one point Irvin came to within two days of execution. Meanwhile, an investigation conducted by the *St. Petersburg Times* found "great doubt" about Irvin's guilt.⁵⁵¹ In 1955, Governor Collins and a unanimous pardon board commuted the sentence to life because of "serious questions" about Irvin's guilt, and the prosecuting attorney agreed with the Governor's doubts.⁵⁵² In 1960, Greenlee was paroled, and, in 1968, so was Irvin. Irvin died the next year. In 1971, Greenlee's civil rights were restored and his sentence (parole) was commuted to time served.⁵⁵³

GROSS, LOUIS (white). 1932. Michigan. Gross was convicted of first-degree murder and sentenced to life imprisonment. He had three previous convictions for larceny and attempted larceny. In 1945, a rabbi, convinced of Gross' innocence, persuaded The Court of Last Re-

546. See generally H. BARNES & N. TEETERS, *supra* note 399, at 267 n.56; E. RADIN, *supra* note 20, at 139-40; Philadelphia Daily News, Apr. 19, 1957, at 3, col. 1; *id.*, Feb. 22, 1957, at 5, col. 3.

547. *Shepherd v. State*, 46 So. 2d 880 (Fla. 1950).

548. *Shepherd v. Florida*, 341 U.S. 50 (1951).

549. See T. WAGY, GOVERNOR LEROY COLLINS OF FLORIDA 65 (1985).

550. *Irvin v. State*, 66 So. 2d 288 (Fla. 1953).

551. *St. Petersburg Times*, Jan. 14, 1955, at 6, col. 1.

552. *Tampa Tribune*, Feb. 17, 1956, at 1, col. 6.

553. See generally T. WAGY, *supra* note 549, at 64-68; Lawson, Colburn & Paulson, *Grove-land: Florida's Little Scottsboro*, 65 FLA. HIST. Q. 1 (1986); *St. Petersburg Times*, Mar. 7, 1969, at B1, col. 3; Florida Times Union (Jacksonville), Mar. 14, 1956, at 21, col. 4; *Tampa Tribune*, Feb. 17, 1956, at 1, col. 4; *id.*, Dec. 16, 1955, at 1, col. 8; *St. Petersburg Times*, Jan. 14, 1955, at 6, col. 1.

sort to reinvestigate the case.⁵⁵⁴ Meanwhile, all official records of the case had mysteriously disappeared.⁵⁵⁵ Evidence was discovered of a "frame-up" by the police and of perjured testimony by the state's chief witness. In 1948, the prosecutor obtained a new trial for Gross and announced his intention to dismiss the indictment.⁵⁵⁶ The judge stated: "It appears to me that this man, Louis Gross, has been framed."⁵⁵⁷ Gross was freed after serving sixteen years. "There was no necessity for any pardon. In the eyes of the law he had never been convicted of this crime."⁵⁵⁸

GROWDEN, GERALD (white). 1931. Michigan. Growden was convicted of murder and sentenced to life imprisonment. In 1932, another man confessed to the murder, all charges against Growden were dismissed, and he was released after serving nine months. His conviction had been based on erroneous eyewitness identification and the testimony of fellow inmates who claimed that Growden had confessed to the crime.⁵⁵⁹

GRZECHOWIAK, STEPHEN, AND MAX RYBARCZYK (both white). 1929. New York. Grzechowiak and Rybarczyk were both convicted of felony murder, sentenced to death, and executed in 1930, after their convictions were affirmed on appeal.⁵⁶⁰ Co-defendant Alexander Bogdanoff insisted that neither Grzechowiak nor Rybarczyk had been involved in the crime, and that each had been mistakenly identified by the eyewitnesses. He refused, however, to reveal the names of his true accomplices. In their final words, Grzechowiak and Rybarczyk maintained their innocence, and Bogdanoff again declared that the two were innocent.⁵⁶¹

GUNTER, THOMAS (white). 1929. Mississippi. Gunter was convicted of murdering his son-in-law, mainly on the basis of perjured testimony of his 7-year-old granddaughter and of the deceased's wife. He was sentenced to five years in prison. Several months later, his daughter admitted killing her husband; she pleaded guilty and received a suspended sentence. Meanwhile, Gunter had been temporarily released from prison. After his daughter received the suspended sentence, Gunter was ordered to return to prison. Governor Theodore Bilbo declared that "somebody ought to be in the penitentiary all the time for the murder of a sleeping man."⁵⁶² Gunter, however, had already fled

554. See E. GARDNER, *supra* note 20, at 163-73.

555. *Id.* at 166, 173-74.

556. *Id.* at 174-80.

557. E. BLOCK, *supra* note 407, at 251.

558. E. GARDNER, *supra* note 20, at 180. See generally E. BLOCK, *supra* note 407, at 237-52.

559. See J. FRANK & B. FRANK, *supra* note 20, at 190; Wash. Post, June 19, 1932, at 11, col. 1.

560. *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890 (1930).

561. See generally L. LAWES, *supra* note 362, at 314-15; N.Y. Times, July 18, 1930, at 21, col. 3; *id.*, July 17, 1930, at 14, col. 3.

562. E. BORCHARD, *supra* note 20, at 344.

the state.⁵⁶³

HAINES, ERNEST (white). 1916. Pennsylvania. Haines was convicted, with Henry Ward Mottorn, of first-degree murder and sentenced to death. Haines had a subnormal intellect. Both defendants were juveniles, and the impending execution of the two youths led to an effort to abolish the state's death penalty statute. The only evidence against Haines was the testimony of his co-defendant, who admitted the killing but claimed that Haines was involved in the plot. Haines denied this, and Mottorn's testimony was deemed reversible error by the state supreme court because he had discussed an earlier unrelated burglary that he and Haines had allegedly perpetrated.⁵⁶⁴ At retrial Haines was acquitted; the next year Mottorn's sentence was commuted to life.⁵⁶⁵

HALL, GORDON ROBERT CASTILLO (Hispanic). 1978. California. Hall was convicted of first-degree murder and sentenced to life imprisonment. He was sixteen at the time of the crime. At the urging of a new defense attorney, the two original police detectives reinvestigated the case and began to suspect that the wrong person had been convicted. The conviction was based on the eyewitness identification of two men who, after the trial, confessed that their identification was erroneous. In 1981, the state supreme court vacated the conviction and granted a new trial, citing the newly discovered evidence, erroneous eyewitness identification, and inadequate representation of counsel as the grounds for its decision.⁵⁶⁶ Several witnesses also came forward and confirmed Hall's alibi. In 1982, at the recommendation of the prosecutor, all charges against Hall were dropped.⁵⁶⁷

HALL, JAMES (black). 1974. Iowa. James Hall was convicted of second-degree murder and sentenced to fifty years in prison. On appeal, the conviction was affirmed.⁵⁶⁸ Hall and his attorneys continued to insist that he was innocent, and in 1983 they found that the prosecution had suppressed exculpatory evidence. Shortly thereafter, the conviction was overturned and a new trial ordered by a state district judge, and Hall was released on bail. In 1984 the original indictment was dismissed.⁵⁶⁹ The decision cited "racial slurs" made by the prosecutor in front of the grand jury, and stated that the prosecutor had failed to present evidence that pointed to other suspects in the case. It was also found that a state investigator had lied to the grand jury about comments Hall allegedly made during an interview.⁵⁷⁰

563. See generally *id.* at 342-44.

564. *Commonwealth v. Haines*, 257 Pa. 289, 101 A. 641 (1917).

565. R. BYE, *supra* note 368, at 87.

566. *In re Hall*, 30 Cal. 3d 408, 637 P.2d 690, 179 Cal. Rptr. 223 (1981).

567. *L.A. Times*, Feb. 19, 1982, § II, at 2, col. 1.

568. *State v. Hall*, 235 N.W.2d 702 (Iowa 1975); *State v. Hall*, 249 N.W.2d 843, *cert. denied*, 434 U.S. 822 (1977).

569. *State v. Hall* (Johnson County, Iowa, Dist. Ct. May 17, 1984) (on file with the *Stanford Law Review*).

570. *N.Y. Times*, Sept. 2, 1984, at 29, col. 1.

HAMPTON, MARY KATHRYN (white). 1961. Louisiana. Hampton, age nineteen, was convicted on two counts of first-degree murder and sentenced to life imprisonment. She was falsely implicated in the murders by the testimony of her self-confessed accomplice, a former boyfriend who was then under death sentence in Florida after having been convicted of murder in 1960 largely on the basis of her testimony. He had vowed revenge against her. Hampton was arrested in Kentucky, waived extradition to Louisiana, and admitted guilt—after the authorities threatened her with the death penalty if she refused. She did not make any further confession; her plea was accepted although the authorities knew her boyfriend's testimony was faulty and that she had credible alibi witnesses. No evidence linked her with these murders apart from this man's incrimination and her own plea. In 1963, *Miami Herald* reporter Gene Miller reinvestigated the case and established her alibi and the unreliability of the testimony against her. After volunteer attorneys (including F. Lee Bailey) were secured, Hampton's conviction was appealed; nonetheless, it was affirmed.⁵⁷¹ In 1966, after a special hearing, Governor McKeithen commuted her sentence to time served and the Parole Board ordered her released.⁵⁷²

HANKINS, LEONARD (white). 1933. Minnesota. Hankins was convicted of first-degree murder and sentenced to life. The erroneous conviction was based on mistaken eyewitness identification and misleading circumstantial evidence. A co-defendant, who had pleaded guilty, said that he had never seen Hankins until after the crime.⁵⁷³ Other members of the "gang" that was responsible for the robbery during which the murders took place also said that Hankins was not involved.⁵⁷⁴ Nevertheless, the conviction was affirmed on appeal.⁵⁷⁵ In 1936, an Associated Press reporter, notified by the prison warden who was certain that Hankins was innocent, reinvestigated the case. All but one of the eyewitnesses, after seeing a picture of one of the confessed killers, admitted that their identification could have been erroneous.⁵⁷⁶ As the years went by, a succession of Minnesota governors and attorneys general became interested in the case, only to abandon it. The county attorney who prosecuted Hankins apparently opposed any reopening of the case, fearing exposure of a prosecutorial mistake.⁵⁷⁷ In 1953, Hankins was given a "final unconditional release" and indemnified, and his sister was reimbursed by the state legislature for her ex-

571. *Hampton v. Allgood*, 254 F. Supp. 884 (E.D. La. 1966).

572. See generally THE PULITZER PRIZE STORY II 46 (J. Hohenberg ed. 1980); *Miami Herald*, Dec. 1, 1966, at 1, col. 1; *id.*, Aug. 24, 1966, at 16A, col. 1; *id.*, Aug. 23, 1966, at 7D, col. 1; *id.*, Aug. 22, 1966, at 5B, col. 1; *id.*, Aug. 21, 1966, at 6B, col. 1; *id.*, May 8, 1966, at 1F, col. 1; *id.*, Aug. 17, 1964, at 16A, col. 1.

573. See M. HOUTS, FROM ARREST TO RELEASE 161 (1958).

574. See E. RADIN, *supra* note 20, at 81-82.

575. *State v. Hankins*, 193 Minn. 375, 258 N.W. 578 (1935).

576. See M. HOUTS, *supra* note 573, at 161.

577. *Id.* at 162.

penses in exonerating him.⁵⁷⁸

HARDY, VANCE (white). 1924. Michigan. Hardy was convicted of first-degree murder and sentenced to life. His sister, having provided an unsuccessful alibi, was convinced of his innocence and secured the help of Erle Stanley Gardner. Perjured eyewitness testimony, given under coercion, was the basis of the conviction. Twenty-six years later, a new trial was granted by the trial court. When the identifying witness at the earlier trial repudiated his testimony, admitting that it was perjured and the result of unscrupulous police pressure, *nolle prosequi* was entered in the case. Some years earlier, this witness had attempted to correct his testimony in order to assist Hardy, but was deterred from doing so by what he regarded as a threat of prosecution for perjury. After serving twenty-six years, including ten in solitary confinement, Hardy was released.⁵⁷⁹

HARRIS, FRANK (white). 1926. Pennsylvania. Harris was convicted of first-degree murder and sentenced to life imprisonment. He had already served two short prison sentences on minor convictions. The killing occurred when Harris and a companion attempted to resist arrest; the victim was Harris' companion. The prosecution argued that Harris fired the fatal bullet. Harris protested his innocence to anyone who would listen, but to no avail. In 1946, a volunteer lawyer, convinced of Harris' innocence, reinvestigated the case. In 1947, Governor Duff commuted the sentence after it had been demonstrated that the bullet which had killed the victim could not have come from Harris' gun. Harris was then released.⁵⁸⁰ In 1951, he was detained as a parole violator, and he applied for a writ of habeas corpus. The court denied Harris' application but, noting that the ballistics test indicated that Harris had not fired the fatal shot, recommended that he should apply for a pardon or a new trial.⁵⁸¹

HAUPTMANN, BRUNO RICHARD (white). 1935. New Jersey. Hauptmann was convicted of felony-murder-burglary, sentenced to death, and executed in 1936. He was infamous as the ransom-kidnapper of the Lindbergh baby. Hauptmann's is a classic case of conviction based on an intricate web of circumstantial evidence, perjury, prosecutorial suppression of evidence, a grossly incompetent defense attorney, and a trial in an atmosphere of near-hysteria. The trial followed a 2-year nationwide hunt for the kidnapers of the baby boy of "Lindy," the nation's favorite hero, whose wife was the daughter of the wealthy and socially prominent Morrow family. Hauptmann was the victim of overzealous prosecutors, intent on solving the most notorious crime of the decade. Although Governor Hoffman believed that Hauptmann was

578. *Id.*

579. See generally E. GARDNER, *supra* note 20, at 183-214.

580. N.Y. Times, July 13, 1947, at 32, col. 2.

581. Commonwealth *ex rel.* Harris v. Burke, 374 Pa. 43, 47-48, 96 A.2d 909, 911-12 (1953).

framed, he chose not to halt the execution. There is no doubt that the conviction rested in part on corrupt prosecutorial practices, suppression of evidence, intimidation of witnesses, perjured testimony, and Hauptmann's prior record. In 1986, his aging widow brought suit against the prosecuting attorney and a dozen other defendants in a civil action.⁵⁸²

HEFNER, CECIL (white). 1920. North Carolina. Hefner was convicted of second-degree murder and sentenced to fifteen years imprisonment. Five months later, following a recommendation by the prosecutor and the trial judge, Hefner was pardoned by Governor Morrison. The prosecutor reported that his post-trial investigation "proves conclusively" that Hefner was not present when the victim was killed.⁵⁸³

HICKS, LARRY (black). 1978. Indiana. Hicks was convicted on two counts of murder and sentenced to death. Two weeks before the scheduled execution, a volunteer attorney became interested in the case. After Hicks passed lie detector tests, the Playboy Foundation provided funds for a thorough reinvestigation. In 1980, the original judge ordered a new trial because Hicks (who had a "low normal" IQ) had not understood the proceedings well enough to assist in his own defense. Later that year, at the new trial, evidence established Hicks' alibi and that eyewitness testimony against him in his original trial was perjured. He was acquitted and released: "the case of a young man with no family, friends or funds who avoided the electric chair mainly by a stroke of extraordinary good luck."⁵⁸⁴

HILL, JOE (real name: Joseph Hillstrom) (white). 1915. Utah. Hill was convicted, sentenced to death, and executed in 1915 for the murder of two storekeepers. The prosecution was based on sketchy circumstantial evidence and was in part the result of collusion between the prosecution and the trial judge in an atmosphere of anti-union hostility. Despite several appeals from President Wilson to the Utah authorities, which were successful in obtaining one reprieve, Hill was denied a new trial. He was also denied executive clemency.⁵⁸⁵ His appeal to the Utah Supreme Court was unsuccessful.⁵⁸⁶ Hill appears to have been an innocent victim of "politics, finance and organized religion, . . . a pow-

582. Plaintiffs' Briefs, *Hauptmann v. Borman*, No. 86-2426 (D.N.J. filed June 18, 1986). See generally L. KENNEDY, *THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN* (1985); A. SCADUTO, *SCAPEGOAT: THE LONESOME DEATH OF BRUNO RICHARD HAUPTMANN* (1976); G. WALLER, *KIDNAP: THE STORY OF THE LINDBERGH CASE* (1961); Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That "Will Not Die,"* 66 GEO. L.J. 1 (1977). Undoubtedly the best contemporary authority on the Hauptmann case is Hauptmann's widow's attorney, Robert R. Bryan, in San Francisco.

583. Pardon Report for Cecil Hefner (Apr. 4, 1921) (available at the North Carolina Department of Archives and History) (on file with the *Stanford Law Review*).

584. *The Man Who Didn't Do It*, PLAYBOY, Aug. 1980, at 62, 62. See generally *id.*; *The Ordeal of Larry Hicks*, PLAYBOY, May 1981, at 66.

585. P. FONER, *THE CASE OF JOE HILL* 66-96 (1965).

586. *State v. Hillstrom*, 46 Utah 341, 150 P. 935 (1915).

erful trinity";⁵⁸⁷ his conviction and death are "one of the worst travesties of justice in American labor history."⁵⁸⁸

HOFFMAN, HARRY L. (white). 1924. New York. Hoffman was convicted of second-degree murder and sentenced to twenty years to life. Upon learning that he was a suspect, Hoffman tried to manufacture an alibi that would help him avoid both lynching and the death penalty. He was inspired to commit this folly by his fear that he would otherwise be another Leo Frank.⁵⁸⁹ The false alibi was exposed at trial and the jury viewed it as evidence of guilt. The conviction was reversed on a technicality—faulty wording in the original indictment.⁵⁹⁰ At retrial, a mistrial was declared when Hoffman's defense counsel collapsed from a heart attack. The third trial resulted in a hung jury. In 1929, at the fourth trial, it was shown that the original eyewitness testimony was perjured and that the fatal shots could not have come from Hoffman's gun. Hoffman was acquitted because "[t]he jury had realized how treacherous circumstantial evidence could be."⁵⁹¹

HOFFNER, LOUIS (white). 1941. New York. Hoffner was convicted of first-degree murder and sentenced to life. He had a previous criminal record and had served a prison sentence for larceny. The conviction was affirmed on appeal.⁵⁹² In 1947, a New York newspaper reporter reinvestigated the crime and confirmed Hoffner's alibi. In 1952, after the prosecutor moved to reopen the case and set aside the conviction, Hoffner was released. In 1955, the state indemnified Hoffner for false imprisonment (\$112,290).⁵⁹³ The district attorney's office had withheld information on misidentification made by an eyewitness under police pressure.⁵⁹⁴

HOLBROOK, ERNEST, JR., AND HERMAN RAY RUCKER (white). 1982. Ohio. Both were convicted of the rape and murder of a child and sentenced to life imprisonment. No physical evidence linked either defendant to the crime. After a key witness recanted his testimony, Rucker was awarded a new trial, and in 1983, he was acquitted. This witness was then convicted of perjury. In 1984, Holbrook was released

587. P. FONER, *supra* note 585, at 104.

588. *Id.* at 108. See generally W. STEGNER, JOE HILL: A BIOGRAPHICAL NOVEL (1980) (first published under the title *The Preacher and the Slave* (1950)).

589. See Q. REYNOLDS, COURTROOM: THE STORY OF SAMUEL S. LEIBOWITZ 46-47 (1950); notes 520-521 *supra* and accompanying text.

590. *People v. Hoffman*, 219 A.D. 334, 220 N.Y.S. 249 (App. Div.), *aff'd*, 245 N.Y. 588, 157 N.E. 869 (1927).

591. Q. REYNOLDS, *supra* note 589, at 58. See generally *id.* at 35-62; Gilman, *Without Apology: The State Releases Harry Hoffman*, 59 NEW REPUBLIC 90 (1929).

592. *People v. Hoffner*, 288 N.Y. 552, 42 N.E.2d 15 (1942).

593. *Hoffner v. State*, 207 Misc. 1070, 142 N.Y.S.2d 630 (1955); see also Act approved Apr. 29, 1955, ch. 841, 1955 N.Y. Laws 1992.

594. See generally SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT NO. 2575 TO THE MASS. H.R. OF 1958, at 26 (Dec. 30, 1958) [hereinafter SPECIAL COMMISSION]; E. BLOCK, *supra* note 524, at 63; E. RADIN, *supra* note 20, at 110-12; N.Y. Herald Tribune, June 17, 1955, at 1, col. 1.

after the prosecutor dismissed all charges against him. By this time, another man had been convicted and sentenced to death for crimes similar to the offenses for which Holbrook and Rucker had been convicted. The erroneous convictions rested entirely on the shaky testimony of two witnesses, and the jury's refusal to believe the defendants' alibis.⁵⁹⁵

HOLLAND, KENNETH R. (white). 1948. Virginia. Holland was convicted of first-degree murder and sentenced to twenty years in prison. He was a former police officer, and the victim was the husband of a friend. The conviction was reversed on appeal because of insufficient evidence.⁵⁹⁶ In 1950, Holland was acquitted at retrial.⁵⁹⁷

HOLLINS, JESS (black). 1931. Oklahoma. Hollins was convicted of rape and sentenced to death. He had engaged in sexual relations with a white woman. She and her brother-in-law charged Hollins with rape. Alarmed by lynching rumors and unaided by legal counsel after his arrest, Hollins promptly pleaded guilty. The trial lasted less than one hour.⁵⁹⁸ On appeal, the conviction was reversed because the plea was judged to have been made out of fear of lynching.⁵⁹⁹ In 1934, at a second trial before an all-white jury, Hollins was again convicted and sentenced to death. On appeal, the conviction was affirmed.⁶⁰⁰ Thirty hours before the scheduled execution, the United States Supreme Court granted a stay and subsequently overturned the conviction because of the exclusion of blacks from the jury.⁶⁰¹ In 1936, a third trial was held, again before an all-white jury. Again, the sole evidence against Hollins was the testimony of the alleged victim. Defense attorneys were able to document the poor reputation of the victim; they argued that she had voluntarily consorted with Hollins and cried rape only when she and Hollins unexpectedly encountered her brother-in-law.⁶⁰² Nonetheless, Hollins was again convicted, although this time he was sentenced to life imprisonment. One newspaper editor reported that several dozen whites had told him in private that the prosecution's case was not really believable.⁶⁰³ Hollins, however, having already once been shaved for electrocution, refused to put his life in jeopardy again by appealing his conviction, despite the obvious violation of due process in the racial composition of the jury. He died in prison in

595. See generally *Atlanta Const.*, May 5, 1984, at 8A, col. 3; *N.Y. Times*, Apr. 16, 1984, at 19, col. 1.

596. *Holland v. Commonwealth*, 190 Va. 32, 55 S.E.2d 437 (1949).

597. *Norfolk Virginian-Pilot*, Apr. 15, 1950, at 13, col. 1.

598. See Martin, *Oklahoma's "Scottsboro" Affair: The Jess Hollins Rape Case, 1931-1936*, at 79 S. ATLANTIC Q. 175, 176 (1980).

599. *Ex parte Hollins*, 54 Okla. Crim. 70, 14 P.2d 243 (1932).

600. *Hollins v. State*, 56 Okla. Crim. 275, 38 P.2d 36 (1934).

601. *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curiam).

602. See Martin, *supra* note 598, at 183-84.

603. Roscoe Dunjee, editor of the *Oklahoma City Black Dispatch*, had played an important role in the defense of the young man throughout the case. *Id.* at 184.

1950.⁶⁰⁴

HORN, GEITHER (white). 1935. Washington. Horn was convicted of first-degree murder and sentenced to life imprisonment. When three police officers took Horn to an open grave and told him they were going to bury him alive unless he confessed to murdering a farm hand, Horn confessed. The confession was used at the trial despite Horn's subsequent claim of innocence. His original application for a writ of habeas corpus was denied.⁶⁰⁵ In 1959, after serving twenty-four years, he was freed by a federal judge.⁶⁰⁶ In 1963 the legislature awarded Horn \$6,000 for his false imprisonment, and an insurance company settled Horn's civil suit against the three officers out of court.⁶⁰⁷

IMBLER, PAUL KERN (white). 1961. California. Imbler was convicted of felony murder and sentenced to death. The conviction was affirmed on appeal.⁶⁰⁸ In 1962, Dr. LeMoyn Snyder, a physician who worked with The Court of Last Resort, reinvestigated and discovered perjury by the state's chief witness, as well as prosecutorial coverup of this perjury and of other exculpatory evidence. The original prosecutor also wrote to the governor reporting doubts about the credibility of this witness (an ex-felon and ex-mental patient) and the discovery of new evidence supporting Imbler's alibi. On the basis of this evidence, only seven days before Imbler's scheduled execution, the execution was stayed. In 1964, after forty months on death row, Imbler was granted a new penalty trial because of prejudicial comments by the prosecutor and trial judge about the possibilities for parole for those convicted of murder.⁶⁰⁹ On remand, Imbler was sentenced to life imprisonment. In 1969, after further appeals, a new trial was granted.⁶¹⁰ In 1971, the state decided not to retry the case and released Imbler. He sued the prosecutor for damages, but the United States Supreme Court dismissed the suit on the ground of prosecutorial immunity.⁶¹¹

JACKSON, EDMOND D. (black). 1971. New York. Jackson was convicted of murder and felony murder and sentenced to two concurrent terms of twenty years to life in prison. On appeal, the convictions were affirmed.⁶¹² In 1978, on a subsequent petition for habeas corpus in federal court, the conviction was reversed on grounds of unreliable eyewitness testimony (by four people) and the fact that "not a scintilla

604. See R. KLUGER, *supra* note 374, at 161; Martin, *supra* note 598, at 186.

605. Horn v. State, 52 Wash. 2d 613, 328 P.2d 159, *cert. denied*, 358 U.S. 900 (1958).

606. Horn v. Rhay, No. 59-1385 (E.D. Wash. June 27, 1959); *see also* Horn v. Bailie, 309 F.2d 167 (9th Cir. 1962).

607. See E. RADIN, *supra* note 20, at 26.

608. People v. Imbler, 57 Cal. 2d 711, 371 P.2d 304, 21 Cal. Rptr. 568 (1962), *cert. denied*, 379 U.S. 908 (1964).

609. *In re Imbler*, 61 Cal. 2d 556, 393 P.2d 687, 39 Cal. Rptr. 375 (1964).

610. Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969), *aff'd sub nom.* Imbler v. California, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970).

611. Imbler v. Pachtman, 424 U.S. 409 (1976). *See generally* B. WOLFE, PILEUP ON DEATH Row 335-41 (1973); S.F. Examiner & Chronicle, May 4, 1969, at 8A, col. 1.

612. People v. Jackson, 35 N.Y.2d 856, 322 N.E.2d 272, 363 N.Y.S.2d 580 (1974).

of [other] evidence was offered at the trial to connect petitioner with the crime."⁶¹³ In ordering Jackson freed after he had spent eight years in prison, the judge said, "I shudder to think what the situation would have been in this case if there had been a mandatory death penalty."⁶¹⁴ In addition, the judge criticized the district attorney for proceeding with the trial "on such highly dubious evidence and in light of the incomplete and negligent investigation conducted by the detectives."⁶¹⁵ The police ignored evidence which pointed to another suspect after they had decided that Jackson was guilty.⁶¹⁶

JACKSON, SERGEANT (white). 1974. California. Jackson was convicted of first-degree murder and first-degree robbery and sentenced to life imprisonment. He had been arrested without a warrant. Shortly after Jackson's conviction, another man came forward and implicated himself in the crimes. He was subsequently tried and convicted. After having spent seven months in prison, Jackson was set free and the judgment against him was vacated. A wallet in his possession had been erroneously identified as belonging to the victim. A jury awarded him \$280,000 for false imprisonment, but this judgment was reversed on the ground that he could sue only for his detention under warrantless arrest. The court of appeals described Jackson as "an innocent man, convicted and imprisoned for crimes he did not commit."⁶¹⁷ The City of San Diego later paid Jackson \$17,000.⁶¹⁸

JAMES, TYRONE, AND WINFRED J. ("WILBUR") PETERSON (both black). 1982. South Carolina. Both were convicted of murder and sentenced to life imprisonment. James and Peterson were convicted primarily on the testimony of a police officer, who stated that he overheard them making incriminating statements while in custody after their arrest. Two months later, prompted by testimony from a previously silent witness that implicated four other men, the trial court ordered a new trial. Subsequently a grand jury dropped the charges against James and Peterson (and two others who had not yet been tried for the crime). Each of the four men implicated by the new witness was arrested, and at least one of these men pleaded guilty and was sentenced to life imprisonment.⁶¹⁹

JARAMILLO, ANIBAL (Hispanic). 1981. Florida. Jaramillo was con-

613. *Jackson v. Fogg*, 465 F. Supp. 177, 187 (S.D.N.Y.), *aff'd*, 589 F.2d 108 (2d Cir. 1978).

614. N.Y. Times, Dec. 23, 1978, at 1, col. 2.

615. *Id.* at 24.

616. *Id.*

617. *Jackson v. San Diego*, 121 Cal. App. 3d 579, 581, 175 Cal. Rptr. 395, 396 (1981).

618. See generally L.A. Times, Oct. 27, 1974, § 3, at 20, col. 3; *id.*, Oct. 20, 1974, at 3, col. 2; letter from the San Diego City Attorney's Office (by William Corbett) to Michael L. Radelet (May 14, 1985) (on file with the *Stanford Law Review*).

619. See generally *The State* (Columbia, South Carolina), Sept. 29, 1982, at 3C, col. 5; *id.*, Sept. 26, 1982, at 7C, col. 1; *id.*, Sept. 24, 1982, at 1C, col. 5; *id.*, Sept. 15, 1982, at 1C, col. 4; *id.*, Sept. 9, 1982, at 3C, col. 3; *id.*, Aug. 27, 1982, at 1C, col. 1; letter from David I. Bruck to Michael L. Radelet (Aug. 19, 1985) (on file with the *Stanford Law Review*).

victed on two counts of first-degree murder and sentenced to death. The trial jury had unanimously recommended a sentence of life imprisonment. On appeal the convictions were reversed and Jaramillo was released on the ground that the circumstantial evidence against him was "not legally sufficient to establish a prima facie case" ⁶²⁰ At trial, one prosecution witness admitted under cross-examination that he had seen another "anxious-looking" man, a roommate of the victims, less than one mile from the scene shortly after the time of the crime; another prosecution witness admitted that shortly thereafter she and her husband drove this same frightened man back to the house where the killing occurred. The failure of this man to mention having seen any signs of a fight or the dead victims suggests he may have been implicated in the crime (although he was never indicted). ⁶²¹

JENKINS, LONNIE (white). 1931. Michigan. Jenkins was convicted of first-degree murder and sentenced to life imprisonment for killing his wife. Initially, a coroner's jury found that Mrs. Jenkins had committed suicide by shooting herself. After subsequent investigation, however, Jenkins was arrested and charged with murder. At trial, Jenkins was convicted because a teen-age girl testified that she had forged the wife's suicide note at Jenkins' instigation. ⁶²² Subsequent investigation by Jenkins' dedicated daughter revealed that the handwriting was indeed her mother's and that the testimony against her father was perjured. ⁶²³ In 1940, a motion for a new trial was granted. The prosecutor informed the court that a mistake had been made, and Jenkins was released after nine years in prison. ⁶²⁴

JENNINGS, JASPER (white). 1906. Oregon. Jennings was convicted of first-degree murder for killing his father and sentenced to death. The state supreme court reversed the conviction because of improper testimony by a prosecution witness. ⁶²⁵ On motion at retrial, the charges were dismissed. Jennings' sister had told others that she had committed the crime. ⁶²⁶

JOHNSON, EMMA JO (white). 1951. Nevada. Emma Jo Johnson was convicted of second-degree murder and sentenced to ten to twelve years. After she had quarreled with her landlady, the latter died from a blood clot. In 1954, a physician who had examined the victim the day before her death testified that the quarrel had nothing to do with the death; the victim had been suffering from the blood clot for some time.

620. *Jaramillo v. State*, 417 So. 2d 257, 258 (Fla. 1982).

621. See generally *Miami Herald*, July 9, 1982, at D1, col. 1.

622. E. RADIN, *supra* note 20, at 159-63.

623. *Id.* at 164-65. Jenkins' attorney had conducted a prior investigation also showing Jenkins' innocence. In a macabre twist of fate, the attorney shot himself in the head while presenting a simulation of Mrs. Jenkins' suicide. *Id.*

624. See generally *id.*; *Detroit Free Press*, Dec. 24, 1940, at 1, col. 2.

625. *State v. Jennings*, 48 Or. 483, 87 P. 524 (1906).

626. See Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 24 n.96.

“[T]here had been no crime.”⁶²⁷ Johnson was imprisoned for thirty-three months before being pardoned and released.⁶²⁸

JOHNSON, JOHN (white). 1911. Wisconsin. John Johnson was convicted of murder and sentenced to life imprisonment. A former mental patient, Johnson feared being lynched. When told that a mob was about to break into his cell, he confessed. A former judge, however, was convinced of Johnson’s innocence and continued to pursue the case. Governor Blaine commuted Johnson’s sentence, and in 1922 Johnson was released after the victim’s father was shown to have committed the crime. “There was no reason at all to connect Johnson with the crime; but the need for a scapegoat seemed to furnish the necessary motive for pinning the crime upon the poor fellow.”⁶²⁹

JOHNSON, LAWYER (black). 1971. Massachusetts. Johnson was convicted of first-degree murder and sentenced to death. In 1974, the conviction was reversed on appeal to the state supreme court because of improper limits placed on Jackson’s opportunity to cross-examine witnesses.⁶³⁰ Retried, he was reconvicted of second-degree murder and sentenced to life imprisonment. On initial appeal the reconviction was affirmed.⁶³¹ Both juries that convicted Johnson were all-white; the murder victim was also white. In 1982, Johnson was awarded a new trial when a previously silent eyewitness came forward and identified the real killer as the man who testified against Johnson in the two previous trials.⁶³² Johnson was released after the district attorney decided not to retry the case. In 1983, a bill was filed in the state legislature to obtain compensation for Johnson; it initially passed in both houses, but proponents of the bill failed to secure its final enactment before the end of the year.⁶³³

JONES, HARLLEL B. (black). 1972. Ohio. Jones was convicted of second-degree murder and sentenced to life imprisonment. A leader of a black nationalist organization, Jones was charged with ordering random shootings in retaliation for the shooting of a member of his organization by a security guard. The chief witness against Jones, a co-defendant (and admitted triggerman) turned FBI informant, had first-degree murder charges against him dismissed in exchange for testifying against Jones. But two others who were present said Jones had nothing to do with the crime, and another co-defendant’s written version of the homicide failed to mention any involvement by Jones. This written statement and the prosecutor’s agreement to drop charges against the

627. E. RADIN, *supra* note 20, at 116.

628. *See generally id.* at 115-16.

629. E. BORCHARD, *supra* note 20, at 119. *See generally id.* at 112-22.

630. *Commonwealth v. Johnson*, 365 Mass. 534, 313 N.E.2d 571 (1974).

631. *Commonwealth v. Johnson*, 372 Mass. 185, 361 N.E.2d 212 (1977).

632. *Commonwealth v. Johnson*, 13 Mass. App. Ct. 10, 429 N.E.2d 726 (1982).

633. *See generally* Boston Globe, Oct. 20, 1982, at 25, col. 5; *id.*, July 1, 1982, at 15, col. 5; MCADP News (Massachusetts Citizens Against the Death Penalty, Boston), Winter 1984, at 3, col. 1.

chief witness were withheld from the defense. In 1977, after Jones had spent five years in prison, his petition for habeas corpus relief was granted on the basis of the state's suppression of exculpatory evidence, and he was released on bail to await a new trial.⁶³⁴ Efforts by the state to return Jones to prison prior to retrial were unsuccessful.⁶³⁵ In 1978, all charges against Jones were dropped. In 1979, Jones filed a \$4.2 million damage suit, still pending, against eleven defendants.⁶³⁶

JONES, TOM (white). 1936. Kentucky. Jones was convicted of murder for the killing of his wife and sentenced to death. On appeal the conviction was affirmed.⁶³⁷ After appeal to the federal district court, a stay was granted only five hours before the scheduled execution. Petitions for executive clemency had been signed by more than two thousand citizens, including the original jurors. The conviction was reversed on further appeal after investigation by the Kentucky Attorney General led him to state that he was "strongly inclined to the view that Tom Jones was convicted on perjured testimony."⁶³⁸ The defense contended that the gun was discharged in a scuffle for its possession when the wife threatened suicide. The indictment against Jones was dismissed upon entry of *nolle prosequi*.⁶³⁹

JORDAN, THEODORE V. (black). 1932. Oregon. Jordan was convicted of first-degree murder and sentenced to death. The state supreme court affirmed the conviction on appeal.⁶⁴⁰ From the start, Jordan contended that his confession (the only evidence against him) was coerced. After public outcry arose, a special gubernatorial commission was appointed to reinvestigate the case. In 1934, Governor Meier commuted the sentence to life on the recommendation of the commission, and in 1954 Jordan was paroled. In 1963 he was picked up as a parole violator after leaving the state without the consent of the parole board, and this led to further investigation of the homicide. In 1964, the murder conviction was set aside, and the prosecution dropped the indictment.⁶⁴¹

JORDAN, WILLIAM (white). 1934. Alabama. William Jordan was convicted of second-degree murder and sentenced to twenty-five years in prison. After the conviction, the police continued their investigation, and another suspect confessed to the killing. Shortly thereafter, the

634. Jones v. Jago, 428 F. Supp. 405 (N.D. Ohio 1977).

635. Jago v. United States Dist. Court, 570 F.2d 618 (6th Cir.); Jones v. Jago, 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978).

636. See generally Newsletter of Cleveland ACLU, Aug. 1985, at 1; Cleveland Plain Dealer, Oct. 19, 1978, at 1, col. 1.

637. Jones v. Commonwealth, 267 Ky. 465, 102 S.W.2d 345 (1936).

638. Jones v. Commonwealth, 97 F.2d 335, 336 (6th Cir. 1938).

639. Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48, 51-52 (1943). See generally Miller, *State and Federal Administration of Criminal Justice: Tom Jones v. The Commonwealth of Kentucky*, Ky. ST. B.J., Sept. 1938, at 12; Warder, *Remedies Available to Convicted Defendant When New Facts Are Found*, 39 MICH. L. REV. 963 (1941).

640. State v. Jordan, 146 Or. 504, 26 P.2d 558 (1933).

641. Oregon J., Nov. 6, 1964, at 21, col. 1; see also Bedau, *supra* note 626, at 23 n.94.

state supreme court reversed Jordan's conviction because his guilt was only "a remote possibility," there was no motive, and all the evidence against him was circumstantial.⁶⁴² A month later all charges against Jordan were dropped.⁶⁴³

KAMACHO, DANIEL (Hispanic). 1946. California. Kamacho was convicted of first-degree murder and sentenced to life imprisonment. Having been arrested and identified in a police line-up by an eyewitness, Kamacho confessed after admitting that he had been "high" at the time of the murder. Prior to trial, he retracted this confession, claiming that he now remembered he had been in Mexico when the crime was committed. This statement was corroborated by his sister's testimony at the trial, but the jury was not convinced. A public defender volunteered to challenge the conviction, and in 1947, when the alibi was verified by the Mexican authorities, the conviction was set aside and Kamacho was released.⁶⁴⁴

KANIESKI, EDWARD F. (white). 1952. Wisconsin. Kanieski was convicted of first-degree murder and sentenced to life imprisonment. Kanieski consistently maintained his innocence, but his petitions for a writ of error and habeas corpus were denied.⁶⁴⁵ In 1972, on further appeal, the conviction was reversed, and the state supreme court ordered Kanieski released after he had served nearly twenty years.⁶⁴⁶ The court found the evidence was not sufficient to sustain the conviction and directed that Kanieski "is thus entitled to release from custody and his freedom, without the possibility of a new trial."⁶⁴⁷ After Kanieski's claim for compensation was denied, his case became instrumental in changing Wisconsin's criteria for compensating innocent convicts from one requiring proof of innocence "beyond a reasonable doubt" to a "clear and convincing" standard.⁶⁴⁸

KAPATOS, THOMAS (white). 1938. New York. Kapatos was convicted of second-degree murder and sentenced to twenty years to life imprisonment. He was paroled in 1960 but returned to prison in 1961 when he pleaded guilty to a charge of receiving stolen goods. In 1962 a federal judge overturned the murder conviction on the ground that the prosecutor had prejudiced the case by concealing from the trial court and the defense the exculpatory testimony of an eyewitness.⁶⁴⁹ This eyewitness had seen two men, neither of whom was the defendant, run-

642. *Jordan v. State*, 229 Ala. 415, 416, 157 So. 485, 485 (1934).

643. 8 Geneva County Minute Book 593 (1934). See generally Geneva County Reaper, Nov. 23, 1934, at 1, col. 5; *id.*, Sept. 14, 1934, at 1, col. 3; *id.*, Sept. 7, 1934, at 5, col. 4.

644. See generally E. RADIN, *supra* note 20, at 149-51.

645. *Kanieski v. Gagnon*, 427 F.2d 401 (7th Cir. 1970); *State v. Kanieski*, 30 Wis. 2d 573, 141 N.W.2d 196 (1966).

646. *Kanieski v. Gagnon*, 54 Wis. 2d 108, 194 N.W.2d 808 (1972).

647. *Id.* at 117, 194 N.W.2d at 813.

648. See generally Wisconsin St. J. (Madison), May 4, 1980, § 5, at 1, col. 1; *id.*, Mar. 7, 1980, § 3, at 1, col. 1; *id.*, Feb. 4, 1979, at 4, col. 1; *id.*, Jan. 1, 1978, at 1, col. 1; *id.*, Mar. 8, 1972, § 4, at 1, col. 1; *id.*, Mar. 3, 1972, at 1, col. 6.

649. *In re Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962).

ning from the scene of the crime. Such testimony, the court wrote, "would have supported a conclusion that someone else had committed the crime."⁶⁵⁰

KASSIM, AHMAD (white). 1958. New York. Kassim was convicted of first-degree manslaughter and sentenced to a five to ten year prison term. In 1965, the conviction was vacated on the ground that Kassim's confession was involuntary. The defendant was unfamiliar with the English language, and his "supposed admissions . . . actually were the words of the District Attorney."⁶⁵¹ In addition, another person had confessed to the crime. In 1966, after a new trial had been ordered, the indictment was dismissed, and Kassim was released after having spent seven years in prison. In 1984, for the third time, the New York Legislature passed a bill enabling Kassim to sue the state; this time it was signed by the Governor. In 1986, a New York court awarded Kassim \$501,653 for loss of civil rights, humiliation, mental anguish, and lost earnings.⁶⁵²

KENDALL, HAMP, AND JOHN VICKERS (both white). 1906. North Carolina. Kendall and Vickers were convicted of second-degree murder and sentenced to thirty and twenty-six years' imprisonment respectively. Their convictions were affirmed on appeal, with the court noting: "There is abundant evidence from which the prisoners might have been convicted of murder in the first degree."⁶⁵³ In 1917 an investigation by Governor Bickett concluded that the men had been framed by the actual killers (who had at one point been arrested and acquitted). Kendall and Vickers were both granted unconditional pardons. One of the actual killers had testified against Kendall and Vickers. In 1922, this culprit had a coffin built for himself, confessed, and then committed suicide.⁶⁵⁴

KIDD, ROBERT LEE (white). 1960. California. Kidd was convicted of first-degree murder and sentenced to death. In 1961, the state supreme court reversed the conviction.⁶⁵⁵ The murder weapon was allegedly a sword belonging to the victim, but the prosecution had prevented the defense from informing the jury that shortly after the murder the coroner had told reporters that the suspected sword could not have been the murder weapon. In addition, the jury falsely perceived that a 3-page document produced by a police witness at trial and described as the defendant's "rap sheet" implied that Kidd had a long series of previous arrests. At retrial, Kidd was acquitted as evidence emerged that the prosecutor had suppressed information that showed the victim was alive several hours after Kidd was alleged to have mur-

650. *Id.* at 888; *see also* N.Y. Times, July 10, 1962, at 35, col. 7.

651. N.Y. Times, Nov. 9, 1986, at 25, col. 1.

652. *See generally id.*, Nov. 9, 1986, at 25, col. 1; *id.*, Jan. 6, 1985, at 22E, col. 1.

653. State v. Kendall, 143 N.C. 659, 665, 57 S.E. 340, 342 (1907).

654. *See generally* E. RADIN, *supra* note 20, at 144-45, 251.

655. People v. Kidd, 56 Cal. 2d 759, 366 P.2d 49, 16 Cal. Rptr. 793 (1961).

dered him. Subsequent investigation revealed that the police had photographic evidence in their files indicating that the murder weapon was a revolver used to beat the victim to death; no evidence connected this weapon to the defendant. In 1974, Kidd filed a \$200,000 damage suit against the prosecutor, but this complaint was dismissed.⁶⁵⁶

KIRKES, LEONARD M. (white). 1951. California. Kirkes was convicted of second-degree murder and sentenced to five years to life in prison. The state court of appeals reversed the judgment and order denying a motion for a new trial;⁶⁵⁷ the superseding decision of the California Supreme Court also reversed the judgment and order on the grounds of prosecutorial misconduct and faulty instructions by the judge.⁶⁵⁸ In 1953, at retrial, evidence revealed that the key eyewitness against Kirkes had a history of hospitalization for mental illness. The judge advised the jury to acquit Kirkes, which it did.⁶⁵⁹

KRAUSE, JULIUS (white). 1931. Ohio. Krause was convicted of first-degree murder and sentenced to life imprisonment. In a 1935 death-bed statement, Krause's co-defendant implicated another man as his actual partner. In 1940, Krause escaped from prison and found this man, who was later tried and convicted. Krause voluntarily returned to prison, thinking he would be promptly released. Instead, he was kept in prison until 1951, when he was paroled. Although he was never officially cleared of the crime, "[n]o one doubts his complete innocence."⁶⁶⁰

LABAT, EDGAR, AND CLIFTON ALTON PORET (both black). 1953. Louisiana. Labat and Poret were convicted of aggravated rape and of robbery of the rape victim's companion (whites), and were sentenced to death. The convictions and sentences were affirmed on appeal.⁶⁶¹ In 1957, after many stays of execution, the men were abandoned by their attorneys. In a desperate effort they smuggled out of death row an appeal for help that was published as an advertisement in the *Los Angeles Times*. A sympathetic reader saw their ad, hired new attorneys, and in 1960 another stay of execution (their ninth) was obtained, this one with only three hours to spare. Eventually, one of the three original witnesses recanted his testimony, and a second admitted that his original testimony, given under police pressure, had been perjury. The testimony by the victim was found to be full of inaccuracies and discrepan-

656. *Kidd v. Maurer*, No. 74-2000 (D. Cal. filed Sept. 18, 1974).

657. *People v. Kirkes*, 243 P.2d 816 (Cal. Ct. App. 1952).

658. *People v. Kirkes*, 39 Cal. 2d 719, 249 P.2d 1 (1952).

659. See generally SPECIAL COMMISSION, *supra* note 594, at 26-27; L.A. Times, May 6, 1953, § II, at 7, col. 1; *id.*, May 5, 1953, § II, at 6, col. 3; Santa Barbara News-Press, May 5, 1953, at 1, col. 2; *id.*, April 30, 1953, at 1, col. 1; *id.*, April 29, 1953, at 1, col. 1; *id.*, April 28, 1953, at 1, col. 1; *id.*, April 24, 1953, at 1, col. 1; *id.*, April 16, 1953, at 4, col. 1.

660. E. RADIN, *supra* note 20, at 16; see also correspondence from Linda Sneed, Chief of the Bureau of Records Management, Ohio Department of Rehabilitation and Correction to Michael L. Radelet (Sept. 25, 1986) (on file with the *Stanford Law Review*).

661. *State v. Labat*, 226 La. 201, 75 So. 2d 333 (1954).

cies. Alibi witnesses also came forward, and it became evident that one of the defendants had been beaten by the police into confessing. In 1966, the convictions were reversed and a new trial ordered.⁶⁶² The state's appeal to vacate this order was denied.⁶⁶³ In 1969, the Louisiana courts, reluctant to admit their errors, sentenced the men to time served—sixteen years on death row—and released them.⁶⁶⁴ “[I]f it were not for the long delays of executions brought about by the oft-damned ‘legal loopholes,’ these two men would have been executed sixteen years before they were finally released, and their cases closed with nobody giving a hang that they had been unjustly convicted.”⁶⁶⁵

LAMBERT, HENRY J. (white). 1901. Maine. Lambert was convicted of first-degree murder and sentenced to life imprisonment. The conviction was affirmed on appeal.⁶⁶⁶ The conviction was based on circumstantial evidence in an atmosphere of great public outcry; the defendant, a French Canadian, could not speak English. The trial judge believed in Lambert's innocence, and after the conviction, several citizens continued to demand a reinvestigation. In 1923, after Governor Baxter and the Executive Council became convinced that Lambert was innocent, the defendant received a full pardon. He had spent twenty-two years in prison. After his release, he was driven directly from the prison to be welcomed to freedom by the Governor. As Borchard wrote, “[The evidence] demonstrates how the impossible may be transformed into reality when one is blinded by prejudice or a revengeful spirit, as the prosecution and the jury must have been. . . . Reviewing the case impartially, it seems almost incredible that a jury acting on the evidence introduced could have found a verdict of guilty against Lambert.”⁶⁶⁷

LAMBLE, HAROLD (alias George Brandon) (white). 1920. New Jersey. Lamble was convicted of murder, sentenced to death, and executed in 1921. His conviction was affirmed on appeal.⁶⁶⁸ Lamble consistently asserted his innocence. After the execution, Governor Edwards refused requests to appoint a special counsel to investigate the case, despite what the *New York Times* called a “rather widespread fear that perhaps” Lamble was innocent.⁶⁶⁹ Lamble's attorney was disbarred for mishandling the defense.⁶⁷⁰ Testimony of an alleged accom-

662. *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966).

663. *Bennett v. Labat*, 386 U.S. 991 (1967).

664. B. WOLFE, *supra* note 611, at 296-98.

665. *Id.* at 297-98; see also Maas, *The Man Who May Break Chessman's Death-Cell Record*, *LOOK*, July 19, 1960, at 19.

666. *State v. Lambert*, 97 Me. 51, 53 A. 879 (1902).

667. E. Borchard, Memorandum on the Lambert Case 10, 14 (unpublished manuscript) (on file with the *Stanford Law Review*). See generally Files of the Maine State Archives; Bangor Daily News, July 25, 1923, at 1, col. 1; Daily Kennebec J., July 25, 1923, at 1, col. 7; N.Y. Times, July 25, 1923, at 6, col. 3.

668. *Lamble v. State*, 96 N.J.L. 231, 114 A. 346 (1921).

669. N.Y. Times, Aug. 30, 1921, at 14, col. 5.

670. *In re McDermit*, 96 N.J.L. 17, 114 A. 144 (1921).

plice and Lamble's admission on the witness stand of his previous convictions led to his conviction.⁶⁷¹

LAMSON, DAVID (white). 1933. California. Lamson was convicted of first-degree murder for killing his wife and sentenced to death. On appeal, the conviction was reversed and a new trial ordered.⁶⁷² In his book, *We Who Are About to Die*, Lamson (a graduate of Stanford University and an employee of Stanford University Press) explains that when he went to trial, he and his attorneys were confident his innocence would be established. "It never occurred to any of us that anything but an acquittal might result."⁶⁷³ The conviction was based entirely on circumstantial evidence; no murder weapon, evidence of motive, or confession was introduced at trial. The state supreme court concluded in part: "Every statement of the defendant, capable of verification, tends to support his claims. It is true that he may be guilty, but the evidence thereof is no stronger than mere suspicion. It is better that a guilty man escape than to condemn to death one who may be innocent."⁶⁷⁴ Lamson spent thirteen months on death row in San Quentin. The jury in a second trial was unable to agree on a verdict, as was the jury in a third trial. Shortly thereafter, the judge dismissed all charges on the recommendation of the prosecutor, who claimed that it was impossible to obtain a jury to convict the defendant.⁶⁷⁵ Thirty years later a journalist described Lamson as "[o]ne of the 20th century's most distinguished victims of a capital error."⁶⁷⁶

LANGLEY, GUS COLIN (white). 1932. North Carolina. Langley was convicted of first-degree murder and sentenced to death. The conviction was based in part on the perjured testimony of Langley's cellmate, who claimed that he had heard Langley confess to the crime. After this testimony, unrelated charges against the cellmate were dropped.⁶⁷⁷ Only twenty-five minutes before the scheduled execution, a technicality saved Langley's life. His head had been shaved and he had already eaten his final meal when it was discovered that the judge, in pronouncing the death sentence, had neglected to mention that the conviction was for "first-degree" murder.⁶⁷⁸ Letters from several witnesses who had testified that Langley was 400 miles away on the day of the crime

671. See generally Public Hearing on Assembly Bills Nos. 33 & 34 (Abolition of Capital Punishment) Before the New Jersey Leg. Assembly, Judiciary Comm., at 26A-34A (June 19, 1958) (second day, testimony of J.G. Deardorff, Jr.); N.Y. Times, Aug. 30, 1921, at 14, col. 5; *id.*, Aug. 29, 1921, at 4, col. 5; *id.*, Aug. 26, 1921, at 4, col. 2; *id.*, Aug. 25, 1921, at 12, col. 5; *id.*, July 16, 1920, at 7, col. 2.

672. *People v. Lamson*, 1 Cal. 2d 648, 36 P.2d 361 (1934).

673. D. LAMSON, *WE WHO ARE ABOUT TO DIE: PRISON AS SEEN BY A CONDEMNED MAN* at ix (1935).

674. *Lamson*, 1 Cal. 2d at 662, 36 P.2d at 367.

675. See generally N.Y. Times, Apr. 4, 1936, at 4, col. 4; *id.*, Mar. 25, 1936, at 46, col. 5; *id.*, May 15, 1935, at 44, col. 4.

676. Moskowitz, *You Can't Apologize to the Dead*, *INSIDE DETECTIVE*, Dec. 1962, at 46, 70.

677. E. RADIN, *supra* note 20, at 79-80.

678. *Id.* at 75.

resulted in six subsequent postponements. Eventually, his death sentence was commuted to life; later he was released on parole. In 1936, almost four years after his arrest, "North Carolina finally admitted that he was innocent" and he was granted a full pardon by Governor Ehringhaus.⁶⁷⁹

LANZILLO, LUIGI (white). 1918. Connecticut. Lanzillo was convicted of second-degree murder and sentenced to life imprisonment. He was implicated when the gun found near the murder scene was identified as his. He declared that his brother, Carmello, had taken it without his knowledge. The brother and two others were also convicted of the crime; the three were sentenced to death and executed in 1918. A confession from the three condemned men, written just days before their execution, absolved Lanzillo of any participation in the crime. Not until ten years later, after sustained pleas by concerned citizens, including attorneys for two of the three men executed for the crime, was Lanzillo pardoned and released. (In some news reports, Lanzillo appears under the surname "Longello," but the state board of pardons reports no record of a pardon for anyone of that name, and execution records list a Carmello Lanzillo.)⁶⁸⁰

LARKMAN, EDWARD (white). 1925. New York. Larkman was convicted of murder and sentenced to death. The conviction, based on erroneous eyewitness identification, was affirmed on appeal.⁶⁸¹ In 1927, only ten hours before the scheduled execution, and with Larkman's head already shaved for the electric chair, Governor Smith commuted the sentence to life imprisonment. In 1929, another convict confessed to the crime, yet it took another four years before Smith's successor, Herbert H. Lehman, unconditionally pardoned Larkman.⁶⁸²

LEASTER, BOBBY JOE (black). 1971. Massachusetts. Leaster was convicted of first-degree murder and sentenced to life imprisonment. The conviction was based on erroneous eyewitness identification. In 1977, two attorneys, convinced of Leaster's innocence, volunteered to work on the case (a commitment that ultimately resulted in approximately \$400,000 of volunteered time). In 1986, a Boston constable read about the case, and came forward to report that he had seen two men fleeing from the crime scene, neither of whom was Leaster. It was also discovered that the murder weapon had been used in a robbery two weeks after Leaster's arrest. A new trial was ordered, Leaster was released, and the state dismissed charges. He had spent fifteen years in prison.⁶⁸³

679. *Id.* at 81.

680. *See generally* Hartford Courant, May 8, 1928, at 1, col. 6; New Haven Journal-Courier, May 8, 1928, at 1, col. 7; letter from the Connecticut Bd. of Pardons to Michael L. Radelet (Nov. 11, 1985) (on file with the *Stanford Law Review*).

681. *People v. Larkman*, 244 N.Y. 503, 155 N.E. 873 (1926).

682. *See generally* J. FRANK & B. FRANK, *supra* note 20, at 188-89; E. WILLIAMS, *ONE MAN'S FREEDOM* 237-38 (1962); N.Y. Times, Jan. 14, 1927, at 12, col. 3.

683. *See generally* Boston Globe, Dec. 27, 1986, at 1, col. 2; *id.*, Nov. 16, 1986, at 1, col. 3;

LEE, CHOL SOO (Asian). 1974. California. Lee was convicted of first-degree murder and sentenced to life imprisonment. The case became a *cause célèbre* for the San Francisco Asian-American community. The conviction was overturned on appeal because of erroneous eyewitness identification and the prosecution's suppression of exculpatory evidence.⁶⁸⁴ In 1982, at retrial, Lee was acquitted. In 1977, however, while still in prison Lee was convicted of murdering another inmate and was sentenced to death. It was in the course of reviewing his conviction for the murder of the inmate that the miscarriage of justice in the original case was discovered. In 1983, Lee's conviction for the prison killing was overturned because of improper jury instructions, and he was released from prison. Later that year he pleaded guilty to the prison homicide in exchange for a sentence of time served.⁶⁸⁵

LEE, WILBERT, AND FREDDIE PITTS (both black). 1963. Florida. Lee and Pitts were convicted of murder in connection with the deaths of two white men and sentenced to death. No physical evidence linked the defendants to the crime; their guilty pleas, testimony of an alleged eyewitness, and incompetent defense counsel brought about their convictions. Pitts soon claimed that his confession was beaten out of him; both defendants, when interviewed by the FBI, claimed they were innocent. Nonetheless, on appeal the convictions were affirmed.⁶⁸⁶ In 1966, another man (already in prison for a crime similar to the one for which Pitts and Lee had been convicted) confessed to being the real killer. In 1968, the eyewitness recanted her accusations, but the prosecution withheld this fact from the defense for four years. At a rehearing in 1969, the court vacated their convictions and ordered a retrial.⁶⁸⁷ In 1970, however, the state court of appeals reinstated the convictions and death sentences. In 1971, the state Attorney General conceded that the state had unlawfully suppressed evidence; the state supreme court ordered a new trial.⁶⁸⁸ Lee and Pitts were again convicted and sentenced to death, again before an all-white jury who knew nothing about the other man's confession. On appeal, the reconviction was affirmed.⁶⁸⁹ Later that year, however, Governor Askew granted Pitts and Lee a full

id., Nov. 5, 1986, at 33, col. 2; *id.*, Nov. 4, 1986, at 1, col. 3; Kennedy, *The Trials of Bobby Joe Leaster*, Boston Globe, July 27, 1986, Magazine, at 19, col. 1; Boston Globe, Apr. 1, 1986, at 17, col. 4.

684. *In re Chol Soo Lee*, 103 Cal. App. 3d 615, 163 Cal. Rptr. 204 (1980).

685. See generally L.A. Times, Aug. 11, 1983, at 16, col. 1; San Francisco Examiner, Mar. 29, 1983, at B1, col. 1; Waugh, *Doubts Cloud Victory in Asian "Cause Celebre,"* San Francisco Examiner, Jan. 16, 1983, at B2, col. 1; Parachini, *A Light May Be Glowing at the End of Death Row*, L.A. Times, Sept. 26, 1982, § 4, at 1, col. 4; San Francisco Chron., Sept. 4, 1982, at 2, col. 3.

686. *Lee v. State*, 166 So. 2d 131 (Fla. 1964), *cert. denied*, 380 U.S. 917 (1965).

687. *State v. Pitts*, 227 So. 2d 880 (Fla. Dist. Ct. App.), *cert. denied*, 234 So. 2d 123 (Fla. 1969).

688. *Pitts v. State*, 247 So. 2d 53 (Fla. 1971).

689. *Pitts v. State*, 307 So. 2d 473 (Fla. Dist. Ct. App.), *cert. dismissed*, 423 U.S. 918 (1975).

pardon, saying "I am sufficiently convinced that they are innocent."⁶⁹⁰ In 1972, their appellate attorney said that the defendants, "although totally innocent, were convicted because they were black."⁶⁹¹ Their eventual vindication was the result largely of the unrelenting efforts of Gene Miller, a reporter from the *Miami Herald*.⁶⁹²

LEFEVRE, FRANK B. (white). 1942. Wisconsin. LeFevre was convicted of first-degree murder and sentenced to life imprisonment. Alibi testimony and results of lie detector tests (not admitted at trial) supported his claim of innocence. On appeal, the conviction was reversed on the ground that the evidence was insufficient to sustain the conviction, and LeFevre's release was ordered.⁶⁹³ However, he failed to receive compensation from the state under a standard which required him to establish his innocence "beyond a reasonable doubt."⁶⁹⁴ In 1980, the legislature eased the standard for proving claims against the state to the level of "clear and convincing."⁶⁹⁵

LEYRA, CAMILO (white). 1950. New York. Leyra was convicted on two counts of first-degree murder for killing his parents and sentenced to death. On appeal to the Court of Appeals of New York, the convictions were reversed on the grounds that his confession was coerced.⁶⁹⁶ Leyra was retried, reconvicted, and resentenced to death. On appeal to the United States Supreme Court, the convictions were again reversed, again because of the questionable confession.⁶⁹⁷ Again Leyra was retried, reconvicted, and resentenced to death. Again on appeal, the conviction was reversed; the court stated that other than the dubious confession:

The prosecution has produced not a single trustworthy bit of affirmative, independent evidence connecting defendant with the crime. . . . It may well be that the law enforcement officials, relying too heavily on the "confessions" . . . , failed to do the essential careful and intensive investigatory work that should be done before a defendant is charged with crime, certainly with one as serious as murder.⁶⁹⁸

The court ordered the indictment dismissed and Leyra released. By the time of his release in 1956, Leyra had spent nearly five years on death row. He stated he planned to spend the rest of his life looking for the

690. G. Miller, Epilogue 2 (1975) (unpublished manuscript) (on file with the *Stanford Law Review*).

691. G. MILLER, *supra* note 523, at 300-01.

692. *See generally id.*; Greenberg, *supra* note 389, at 919; G. Miller, *supra* note 690, at 4; St. Petersburg Times, Sept. 20, 1985, at 2B, col. 1; N.Y. Times, Sept. 20, 1975, at 1, col. 5.

693. *LeFevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

694. *LeFevre v. Goodland*, 247 Wis. 512, 514, 19 N.W.2d 884, 885 (1945).

695. *See generally* Wisconsin State Journal (Madison), March 7, 1980, § 3, at 1, col. 1; *id.*, Jan. 1, 1978, at 1, col. 1.

696. *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951).

697. *Leyra v. Denno*, 347 U.S. 556 (1954).

698. *People v. Leyra*, 1 N.Y.2d 199, 210, 134 N.E.2d 475, 481, 151 N.Y.S.2d 658, 666 (1956).

person who killed his parents.⁶⁹⁹

LINDLEY, WILLIAM MARVIN ("RED") (white). 1943. California. Lindley was convicted of first-degree murder and sentenced to death. His conviction was affirmed on appeal.⁷⁰⁰ His execution was averted by a last-minute correspondence between Erle Stanley Gardner and the governor's office, state supreme court, and lieutenant governor. Governor Warren commuted the sentence to life, but Lindley was declared insane and neither released nor pardoned. Eyewitness testimony, later shown to be mistaken, was the basis of the conviction; the real killer was identified but never located. "I know of no case which gives a better example of the dangers inherent in capital punishment."⁷⁰¹

LOBAUGH, RALPH W. (white). 1947. Indiana. Lobaugh was convicted on three counts of rape and murder and sentenced to death. He had voluntarily confessed to the crimes, pleaded guilty, and an eyewitness implicated him at the trial. By 1950, another man had been convicted of one of the crimes. A third man (Franklin Click) confessed to the other two crimes and was executed for them in 1950. In 1951, following a state investigation, Lobaugh's sentence was commuted to life by Governor Schricker, who stated that Lobaugh was "a degenerate and a homosexual, not a fit person to be free on the streets of any city, but not guilty of killing any of these three women."⁷⁰² Lobaugh was immediately transferred to a mental hospital. In 1975, Governor Bowen ordered an investigation that resulted in Lobaugh's release on parole in 1977. He had been confined for thirty years, twenty-eight of them after the state's investigation had proven him innocent. After two months of freedom, Lobaugh voluntarily returned to prison, telling officials that he could not relax on the outside.⁷⁰³

LONG, ELI J. (white). 1918. Wisconsin. Long was convicted of murder and sentenced to life imprisonment. In 1920, he was released by court action on the basis of newly discovered evidence. Efforts to obtain compensation from the state failed.⁷⁰⁴ In 1927, the Wisconsin legislature passed a bill awarding Long \$2,750 "for his wrongful imprisonment . . . for a crime of which he was innocent,"⁷⁰⁵ but the bill was vetoed by Governor Zimmerman because Long "was required not only to have been convicted of an offense of which he was not guilty, but he must have served his term."⁷⁰⁶

699. See generally N.Y. Times, May 3, 1956, at 25, col. 3; *id.*, Apr. 28, 1956, at 36, col. 1.

700. *People v. Lindley*, 26 Cal. 2d 780, 161 P.2d 227 (1945).

701. E. GARDNER, *supra* note 20, at 8. See generally *id.* at 3-14.

702. Boston Globe, Aug. 25, 1977, at 12, col. 1.

703. See generally E. RADIN, *supra* note 20, at 190-98; Atlanta Const., Oct. 29, 1977, at 2, col. 1; Boston Globe, Aug. 25, 1977, at 12, col. 1.

704. *Long v. State*, 176 Wis. 361, 187 N.W. 167 (1922).

705. Wis. Assembly Bill No. 147, 58th Leg. (1927); see also Wis. S. BILL No. 294, 58th Leg. (1927); E. BORCHARD, *supra* note 20, at xxix.

706. Veto Message of Governor Zimmerman to the Wisconsin Assembly Rejecting Bill 147, A., to Provide Indemnification for Eli Long, J. OF PROCEEDINGS OF THE FIFTY-EIGHTH SESSION OF THE WISCONSIN LEGISLATURE, at 1648 (1927).

LUCAS, JESSE, AND MARGARET LUCAS (both white). 1909. Illinois. Both defendants (son and mother) were convicted of first-degree murder and sentenced to life imprisonment (after the jury failed by one vote to impose a death sentence on Jesse). The trial court granted Margaret's motion for a new trial, and charges against her were dropped. Jesse's conviction was affirmed on appeal.⁷⁰⁷ He continued to maintain his innocence, rejecting advice that he would be paroled if he admitted guilt. In 1931, the actual killer made a deathbed confession, and after further investigation a key witness at the original trial admitted that her testimony had been perjured because her life had been threatened. The only other witness against Lucas had been a prison inmate, who had perjured himself as a means of reducing his sentence for an unrelated crime. Lucas was released after serving twenty-three years.⁷⁰⁸

LYONS, ERNEST (black). 1909. Virginia. Lyons was convicted of second-degree murder and sentenced to eighteen years' imprisonment. The conviction was based on circumstantial evidence. Lyons was released in 1912 after a friend, convinced of Lyons' innocence, located the supposed victim, who was alive and well in North Carolina. Governor Mann promptly granted Lyons a pardon.⁷⁰⁹

MACFARLAND, ALLISON M. (white). 1912. New Jersey. MacFarland was convicted of first-degree murder for killing his wife and sentenced to death. Four months later the conviction was reversed because, in an attempt to establish a motive, the state improperly used correspondence between MacFarland and another woman.⁷¹⁰ At retrial the other woman admitted writing the letters, but sustained MacFarland's contention that he had merely wished to divorce his wife. In addition, it was shown that the poison taken by Mrs. MacFarland had been kept in a medicine cabinet next to her sleeping pills, and that she easily could have taken the poison by mistake. MacFarland was acquitted.⁷¹¹

MACGREGOR, DR. ROBERT (white). 1912. Michigan. MacGregor was convicted of murder and sentenced to life imprisonment. The conviction, based entirely on circumstantial evidence, was affirmed on appeal.⁷¹² In 1916, after a thorough review of the case by Governor Ferris, MacGregor was granted a full pardon. Governor Ferris stated: "I am firmly convinced that Dr. MacGregor is absolutely innocent of the crime for which he was convicted, and I am satisfied that in sending him to prison, the state of Michigan made a terrible mistake."⁷¹³

MAJCZEK, JOSEPH, AND THEODORE MARCINKIEWICZ (a.k.a. "Ted Mar-

707. *People v. Lucas*, 244 Ill. 603, 91 N.E. 659 (1910).

708. *See generally* A. SQUIRE, *SING SING DOCTOR* 266-72 (1937); *N.Y. Times*, Sept. 28, 1931, at 20, col. 2.

709. *See generally* E. BORCHARD, *supra* note 20, at 148-52.

710. *State v. MacFarland*, 83 N.J.L. 474, 83 A. 993 (1912).

711. *Bedau*, *supra* note 467, at 37 n.141; *N.Y. Times*, Oct. 4, 1913, at 10, col. 4.

712. *People v. MacGregor*, 178 Mich. 436, 144 N.W. 869 (1914).

713. E. BORCHARD, *supra* note 20, at 156. *See generally id.* at 153-57; S. HOLBROOK, *MURDER OUT YONDER* 113-25, 236-39 (1941).

cin") (both white). 1933. Illinois. Majczek and Marcinkiewicz were both convicted of first-degree murder and sentenced to life imprisonment. The convictions were affirmed on appeal.⁷¹⁴ In 1944, Majczek's mother convinced a Chicago newspaper to reinvestigate the case. They found that testimony perjured with the collusion of the police had secured the conviction.⁷¹⁵ In 1945, Majczek received an unconditional gubernatorial pardon, and was released after serving eleven years. The next year he was awarded \$24,000 by the state legislature.⁷¹⁶ In 1949, Marcinkiewicz refused an effort by the Governor to commute his sentence to seventy-five years, which would have made him eligible for parole in 1958.⁷¹⁷ He was freed on a writ of habeas corpus by a Cook County judge in 1950, five years after Majczek's pardon.⁷¹⁸ In 1965, Marcinkiewicz was awarded \$35,000 by the state legislature for his wrongful conviction.⁷¹⁹

MALLOY, EVERETT BAILY (white). 1984. Texas. Malloy was convicted of murder and sentenced to fifteen years' imprisonment. He was released two months later when an anonymous tip led police to a woman who had witnessed the murder. Her information led to the filing of charges against the real killer and freedom for Malloy. The conviction had been based on erroneous eyewitness identification by four people.⁷²⁰

MANSELL, ALVIN (black). 1925. North Carolina. Mansell was convicted of the rape of a white woman and sentenced to death. Before the trial, Mansell was saved from a lynch mob (fifteen members of this mob were later convicted for their actions). Defense counsel was not appointed until the day before Mansell's trial, but his request for postponement so he could study the case was denied. The conviction was affirmed on appeal.⁷²¹ Nevertheless, Mansell's attorneys continued to investigate the case. They discovered that the victim's initial descriptions of her assailant were contradictory and did not match the defendant, that two physicians who examined the victim on the day of the attack "believed it impossible that Mansel [sic] had assaulted her," and that Mansell could not have been at the scene of the crime.⁷²² A petition signed by 4,000 citizens supported clemency. In 1926 Governor McLean commuted the sentence to life imprisonment, and in 1930 Governor Gardner ordered Mansell freed, declaring that he was "abso-

714. *People v. Majczek*, 360 Ill. 261, 195 N.E. 653 (1935).

715. J. FRANK & B. FRANK, *supra* note 20, at 28-29.

716. *Id.* at 29-30. In 1948, the story was made into the movie *Call Northside 777* starring James Stewart. See L.A. Times, June 2, 1983, at 28, col. 1.

717. Chicago Tribune, Aug. 11, 1965, § II, at 12, col. 8. Marcinkiewicz was the first Illinois convict ever to refuse a sentence reduction. *Id.*

718. J. FRANK & B. FRANK, *supra* note 20, at 30.

719. Chicago Tribune, Aug. 11, 1965, § II, at 12, col. 8.

720. See generally Tallahassee Democrat, Apr. 15, 1984, at 5A, col. 5.

721. *State v. Mansell*, 192 N.C. 20, 25, 133 S.E. 190, 193 (1926).

722. Norfolk Journal, Nov. 15, 1930, at 1, col. 8.

lutely convinced" that the mentally-retarded defendant was innocent.⁷²³

MARINO, TONY (white). 1925. Illinois. Marino was convicted of murder and sentenced to life imprisonment. He could not speak or read English, was unrepresented by counsel at the trial, and steadfastly maintained his innocence.⁷²⁴ Nevertheless, the trial record falsely showed that he had signed a guilty plea. One of the two interpreters appointed to assist him at trial was the arresting police officer. In 1947, after Marino had been imprisoned for twenty-two years (during which time he learned English), he wrote a letter to the United States Supreme Court, and certiorari was granted.⁷²⁵ The Court ordered his release because of the deprivation of due process.⁷²⁶ The Illinois Attorney General admitted these facts, confessed to having made an error, and consented to a reversal of the judgment.⁷²⁷

MATERA, PIETRO (white). 1931. New York. Matera was convicted of first-degree murder and sentenced to death. On appeal, the conviction was affirmed.⁷²⁸ In 1932, Matera's sentence was commuted to life by Governor Roosevelt. The real culprit's wife confessed on her deathbed in 1960 that she had "fingered Matera to save her husband."⁷²⁹ After serving thirty years in prison, Matera was released.⁷³⁰

MAYNARD, WILLIAM A. ("TONY") (black). 1971. New York. After a hung jury and a mistrial, Maynard was convicted of first-degree manslaughter for a 1967 killing and was sentenced to a term of ten to twenty years. The Appellate Division upheld the conviction.⁷³¹ In 1974, the state supreme court, acting at the request of the district attorney, dismissed all charges against Maynard and ordered his release because the prosecution had suppressed evidence of the unreliability of its chief witness.⁷³² This witness had a long history of psychiatric hospitalizations and a criminal record that prosecutors failed to reveal. Maynard, who had a background of black militancy, had spent six and a half years in prison before his release. His attorney described it as a "great wrong done to an innocent man."⁷³³

MAYS, MAURICE F. (black). 1919. Tennessee. Mays was convicted of murder in the killing of a white woman and sentenced to death. The National Guard had to be called out to quiet the white lynch mob. The

723. *Id.* See generally D. CORBITT, PUBLIC PAPERS AND LETTERS OF ANGUS WILTON MCLEAN 749-59 (1931).

724. A. GERSHENSON, THE BENCH IS WARPED: EQUAL JUSTICE UNDER LAW? 138 (1963).

725. *Id.* at 141.

726. *Marino v. Ragen*, 332 U.S. 561 (1947).

727. See generally A. GERSHENSON, *supra* note 724, at 137-44.

728. *People v. Matera*, 258 N.Y. 563, 180 N.E. 333 (1932).

729. *N.Y. Journal American*, July 24, 1961, at 9, col. 3.

730. *Id.*

731. *People v. Maynard*, 40 A.D.2d 779, 337 N.Y.S.2d 644 (1972).

732. *People v. Maynard*, 80 Misc. 2d 279, 363 N.Y.S.2d 384 (Sup. Ct. 1974).

733. *N.Y. Times*, Aug. 24, 1974, at 1, col. 6; see also *id.*, Feb. 6, 1973, at 44, col. 3.

entire black community in Knoxville was terrorized, and several blacks were killed by white rioters. The conviction rested on the testimony of a police officer who had disliked Mays for years and on the testimony of an eyewitness who never got a clear look at the killer. On appeal, the conviction was reversed because the judge, rather than the jury, had fixed the penalty at death.⁷³⁴ Mays was retried, reconvicted, and resentenced to death, and this conviction and sentence were affirmed on appeal.⁷³⁵ In 1922, Mays was executed, still maintaining his innocence. In 1926, the real killer confessed in a written statement which revealed that she was a white woman who had dressed up as a black man to kill the woman with whom her husband was having an affair. The authorities, however, never accepted this confession. Mays had been previously convicted in 1903 for killing a black man, but was pardoned for that crime.⁷³⁶

MCDONALD, WILBUR (white). 1971. Illinois. McDonald was convicted of murder and sentenced to a prison term of 100 to 150 years. In 1973, McDonald was released from prison when another man confessed to the killing after having been arrested for a similar murder. In 1974, McDonald was granted a full pardon because of belief in his innocence.⁷³⁷

McGEE, WILLIE (black). 1945. Mississippi. McGee was convicted of the rape of a white woman, sentenced to death, and executed in 1951. The all-white jury deliberated for only two and a half minutes. The conviction was reversed on appeal because a request to change venue was not granted.⁷³⁸ After a change of venue, McGee was retried, reconvicted, and resentenced to death by another all-white jury. This conviction was also reversed because of the exclusion of blacks from juries in the indicting county.⁷³⁹ In 1948, McGee was reindicted, retried, reconvicted, and again resentenced to death; three blacks were on the jury but there was no change of venue. On appeal the conviction was affirmed, and the United States Supreme Court declined to intervene.⁷⁴⁰ An attempt to win a retrial on the basis of newly discovered evidence failed.⁷⁴¹ The chief evidence against McGee was a coerced confession that he gave after being held incommunicado for thirty-two days after his arrest; the victim's husband and her two children, asleep in the next room, never heard any commotion from the

734. *Mays v. State*, 143 Tenn. 443, 226 S.W. 233 (1920).

735. *Mays v. State*, 145 Tenn. 118, 238 S.W. 1096 (1921).

736. See generally Egerton, *A Case of Prejudice: Maurice Mays and the Knoxville Race Riot of 1919*, S. EXPOSURE, July 1983, at 56.

737. See generally *McDonald v. Illinois*, 557 F.2d 596, 599 (7th Cir.), cert. denied, 434 U.S. 966 (1977); N.Y. Times, Sept. 30, 1973, at 47, col. 1; Chicago Tribune, Aug. 16, 1973, at 1, col. 1.

738. *McGee v. State*, 200 Miss. 592, 26 So. 2d 680 (1946).

739. *McGee v. State*, 203 Miss. 592, 33 So. 2d 843 (1948) (en banc).

740. *McGee v. State*, 40 So. 2d 160 (Miss.) (en banc), cert. denied, 338 U.S. 805 (1949).

741. *McGee v. State*, 47 So. 2d 155 (Miss. 1950), cert. denied, 340 U.S. 921 (1951).

alleged attack. Investigation by journalist Carl Rowan revealed that the victim had been consorting with McGee for four years and was angry at his efforts to terminate their relationship. Nonetheless, local blacks were too intimidated to give this evidence in court, and local whites felt the woman's consent was impossible or irrelevant.⁷⁴²

MCINTOSH, WALTER (black). 1980. Georgia. McIntosh was convicted of a double murder and sentenced to confinement for life in a mental hospital. At first he denied the crimes; then he confessed and pleaded guilty by reason of insanity. The county sheriff was convinced of McIntosh's innocence. The defendant's niece had been a suspect in the case and in 1982 was indicted for the crimes, but the state did not proceed because of insufficient evidence. In 1984, this niece and a friend both confessed their guilt and were convicted of manslaughter. McIntosh, however, had already died while in confinement.⁷⁴³

McKINNEY, CLARENCE LEROY (white). 1922. Ohio. McKinney was convicted of first-degree murder and sentenced to life imprisonment. While an appeal was pending, two other men confessed. They were indicted and convicted. In 1923, McKinney was awarded a new trial by an appellate court judge, the indictment was dismissed upon entry of *nolle prosequi*, and he was released after serving five months in prison. McKinney had a previous criminal record, and his conviction was obtained by circumstantial evidence and mistaken eyewitness identification.⁷⁴⁴

MCLAUGHLIN, ROBERT (white). 1981. New York. McLaughlin was convicted of second-degree felony murder and sentenced to fifteen years to life imprisonment. The conviction was affirmed on appeal.⁷⁴⁵ A judge in the New York Appellate Division, believing the conviction "might have been a miscarriage of justice," asked for a reinvestigation.⁷⁴⁶ McLaughlin's father, aided by a New York Civil Liberties Union attorney, a police detective, and a reporter from the *Village Voice*, continued to investigate and maintain the defendant's innocence. The conviction was based primarily on erroneous eyewitness identification by a 15-year-old. Furthermore, subsequent revelations and investigation suggested prosecutorial suppression of a quite different identification by other witnesses. In 1986, with the state's attorney's office stating that it no longer had confidence in the credibility of its key witness, the conviction was set aside, and McLaughlin was released.⁷⁴⁷

742. See generally S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 263-71 (1975); W. PATTERSON, *THE MAN WHO CRIED GENOCIDE* 157 (1971); C. ROWAN, *SOUTH OF FREEDOM* 174-92 (1952).

743. See generally Atlanta Const., Aug. 28, 1984, at 9, col. 1; Telephone interview with Floyd Keeble, McIntosh's attorney (June 30, 1987).

744. See generally E. BORCHARD, *supra* note 20, at 158-64.

745. State v. McLaughlin, 104 A.D.2d 829, 480 N.Y.S.2d 151 (App. Div. 1984).

746. N.Y.L.J., July 9, 1986, at 1, col. 3.

747. See generally N.Y. Times, July 20, 1986, at 24, col. 1; Village Voice, July 15, 1986, at 13, col. 1; N.Y.L.J., July 9, 1986, at 1, col. 3; N.Y. Times, July 4, 1986, at B10, col. 4; Village

McMULLEN, EDWARD A. (white). 1956. Ohio. McMullen was convicted of first-degree murder in the course of a robbery and sentenced to life imprisonment. In 1963, McMullen's attorney learned that the police had suppressed evidence that showed that the gun used in the killing had been used in a prior burglary committed by three other men. The ballistic evidence available to the prosecution showed that the defendant's gun was not the murder weapon. In 1965, McMullen's conviction was overturned.⁷⁴⁸ At retrial, he was acquitted.⁷⁴⁹

MERRITT, GEORGE (black). 1968. New Jersey. Merritt was convicted of first-degree murder and sentenced to life imprisonment for killing a white police officer during a "race riot." Merritt was one of a dozen persons charged for this crime. The appellate division reversed and the state supreme court affirmed the reversal.⁷⁵⁰ At retrial in 1974, Merritt was again convicted and sentenced to life imprisonment. On appeal in 1976, this conviction was reversed.⁷⁵¹ In 1977, he was again retried and reconvicted. In 1980, on habeas corpus petition to the federal courts, the third conviction was reversed.⁷⁵² The case against Merritt rested solely on the testimony of one witness. The prosecutor had failed to disclose a report of a pretrial police interview with this witness that was completely at variance with the testimony given at trial. After ten years in prison, Merritt was freed. After release, his attorney asked: "What would the proponents of the death penalty have to say if Merritt had been executed before the discovery of the concealed document?"⁷⁵³

MILLER, LLOYD ELTON, JR. (white). 1956. Illinois. Miller was convicted of the murder of a 7-year-old girl and sentenced to death. On appeal, the conviction was affirmed.⁷⁵⁴ Miller was granted a stay of execution ten times, once only seven and one-half hours before his scheduled death. Investigation later established that the "blood stained shorts" supposedly belonging to the defendant and used by the prosecution to secure the conviction, in fact had only paint smears, and that the prosecution knew this at the time of the trial. Miller's confession to the crime was also shown to have been extracted after long hours of interrogation. In 1963, litigation in federal courts succeeded in reversing the conviction and death sentence.⁷⁵⁵ The Supreme Court upheld

Voice, June 10, 1986, at 14, col. 3; N.Y.L.J., June 2, 1986, at 1, col. 3; Village Voice, Aug. 6, 1985, at 14, col. 1.

748. McMullen v. Maxwell, 3 Ohio St. 2d 160, 209 N.E.2d 449 (1965).

749. Journal Entry, Indictment for Murder in the First Degree, State v. McMullen, No. 7624 (Miami County, Ohio, Ct. C.P. filed Oct. 7, 1965) (copy on file with the *Stanford Law Review*). See generally W. LASSERS, *supra* note 336, at 220.

750. State v. Madden, 61 N.J. 377, 294 A.2d 609 (1972).

751. United States *ex rel.* Merritt v. Hicks, 492 F. Supp. 99, 100 (D.N.J. 1980) (citing unpublished opinion of the N.J. Super. Ct. App. Div. dated Oct. 6, 1976).

752. United States *ex rel.* Merritt v. Hicks, 492 F. Supp. 99 (D.N.J. 1980).

753. N.Y. Times, Dec. 21, 1983, at A26, col. 1.

754. People v. Miller, 13 Ill. 2d 84, 148 N.E.2d 455, *cert. denied*, 357 U.S. 943 (1958).

755. United States *ex rel.* Miller v. Pate, 226 F. Supp. 541 (N.D. Ill. 1963).

the decision, declaring: "The prosecution deliberately misrepresented the truth."⁷⁵⁶ In 1967, Miller was ordered released after eleven years and three months in prison.⁷⁵⁷

MONTGOMERY, OLEN, CLARENCE NORRIS, HAYWOOD PATTERSON, OZIE POWELL, WILLIE ROBERSON, CHARLIE WEEMS, EUGENE WILLIAMS, ANDREW WRIGHT, AND ROY WRIGHT ("The Scottsboro Boys") (all black). 1931. Alabama. In this famous case, nine teenagers (the youngest was thirteen) were charged with raping two white women. Tried by an all-white jury, all were convicted and all but Roy Wright were sentenced to death. On appeal, a retrial was ordered.⁷⁵⁸ Patterson was again convicted and sentenced to death, despite testimony from one of the "victims" that the attack never occurred. Shortly thereafter the trial judge set aside the verdict and sentence and ordered a third trial. Patterson and Norris were again convicted and sentenced to death. On appeal the convictions were reversed because of the exclusion of blacks from the jury.⁷⁵⁹ In 1936, Patterson was again convicted and sentenced to seventy-five years; he was also shot by a sheriff (rape charges against Powell were later dropped, but he was sentenced to twenty years for assaulting the sheriff). In 1937, Norris was again reconvicted and sentenced to death, Andy Wright was reconvicted and sentenced to ninety-nine years, Weems was reconvicted and sentenced to seventy-five years, and charges were dropped against Roy Wright, Williams, Montgomery, and Roberson. In 1938, Norris' sentence was commuted to life. Weems was paroled in 1943, Norris and Andrew Wright were paroled in 1944, Powell was paroled in 1946, and Patterson escaped in 1948. The nine spent a total of 104 years in prison for a crime that never occurred. In 1976, Alabama granted Norris, the sole surviving defendant, an unconditional pardon based on evidence of his (and his co-defendants') innocence.⁷⁶⁰

MORELLO, RAFFAELLO E. (white). 1918. New Jersey. Morello was convicted of the murder of his wife and sentenced to life imprisonment. A native Italian, he had admitted through an interpreter at the coroner's inquest that he was "responsible" for her death. No appeal was taken. In 1926, he was pardoned after he had learned enough English to explain that his wife committed suicide after he told her that he was drafted into the Army. Investigation by welfare workers cleared his name; he was freed after serving eight years. "[A] fatally wrong meaning was given to his testimony through misunderstandings of the

756. *Miller v. Pate*, 386 U.S. 1, 6 (1967).

757. See generally W. LASSERS, *supra* note 336, at 191-93.

758. *Powell v. Alabama*, 287 U.S. 45 (1932).

759. See *Norris v. Alabama*, 294 U.S. 587 (1935); see also *Patterson v. Alabama*, 294 U.S. 600 (1935).

760. See generally D. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); C. NORRIS & S. WASHINGTON, *THE LAST OF THE SCOTTSBORO BOYS* 249-55 (1979); H. PATTERSON & E. CONRAD, *SCOTTSBORO BOY* (1950); W. WHITE, *supra* note 374, at 125-33.

interpreter."⁷⁶¹

MORRIS, GORDON (white). 1953. Texas. Morris was convicted of murder and sentenced to death. All in one day, the jury was selected, the trial conducted, the jury verdict announced, and the sentence imposed. Subsequent investigation by the victim's brother demonstrated that Morris was physically incapable of committing the crime, and that the conviction had been obtained by mistaken eyewitness testimony. In 1955, three days before the scheduled execution, Morris' sentence was commuted to life. The foreman of the jury, contacted by news reporter Don Reid, reinvestigated the case, located all other members of the jury, and together they urged a pardon. In 1976, the Board of Pardons and Paroles consented, and Morris was paroled.⁷⁶²

NORWOOD, ALBERT E. (black). 1983. Missouri. Norwood was convicted of second-degree felony murder in the killing of a police officer and sentenced to probation. Prior to sentencing, the prosecutor sought to have the conviction reversed and the murder charge dropped on the ground of newly discovered evidence. The indictment had alleged that because Norwood had possessed marijuana, he was criminally liable for the death of a policeman killed in a shoot-out while delivering a search warrant. Norwood argued that he was uninvolved in the shooting, had no knowledge of the drugs discovered in the house, and therefore was not liable for the officer's death. The prosecutor agreed and entered a *nolle prosequi* as to the murder charge after the jury's guilty verdict but before sentencing. The judge, however, refused to accept the prosecutor's motion, and stated his intention to sentence Norwood for the murder. Without addressing the substantive issues in the case, the state supreme court refused to intervene, arguing that the judge's refusal was within the trial court's discretion.⁷⁶³

OLSON, HENRY (white). 1927. Illinois. Olson was convicted of murder and sentenced to life imprisonment after a previous trial had ended in a hung jury. After being released on bond pending decision on a motion for a third trial, Olson vanished. His attorney, however, continued to work on the case. Later, two youths confessed to the crime and were tried and convicted. Olson was eventually located, returned, and acquitted in his third trial. All three trials occurred in a six month period. Mistaken eyewitness testimony was the basis of the conviction.⁷⁶⁴

761. F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 110 (1927). See generally *id.* at 109-10; N.Y. Times, June 5, 1926, at 15, col. 2; *id.*, May 23, 1926, at 4, col. 2; *id.*, May 21, 1926, at 15, col. 2; *id.*, May 20, 1926, at 27, col. 3.

762. See generally D. REID & J. GURWELL, *supra* note 391, at 101-05 (refers to Morris as "Horgan"); Reid, *My 23 Years in the Death House*, in *DEATH HOUSE* 122, 128-29 (P. Hirsch ed. 1966); letter from Cecil Simpson, Director of Institutional Services, Texas Board of Pardons and Paroles, to Michael L. Radelet (Oct. 29, 1985) (on file with the *Stanford Law Review*).

763. *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238 (Mo. 1985); see also letters from Mary Dames, Office of the Public Defender, St. Louis, to Michael L. Radelet (Apr. 17, 1984, and Aug. 30, 1984) (on file with the *Stanford Law Review*).

764. See generally E. BORCHARD, *supra* note 20, at 176-80.

OWENS, AARON LEE (black). 1973. California. Owens was convicted on two counts of first-degree murder and sentenced to life imprisonment. In 1980, following a denial of parole, the original prosecutor (by then in private practice) talked with Owens, and decided to reinvestigate the case. His investigation determined that another man, who resembled Owens, was guilty of the crime. In 1981, Owens was released when the state admitted its case was based on erroneous eyewitness identification. Owens had served nine years in prison.⁷⁶⁵

PADGETT, EUGENE (white). 1940. Texas. Padgett was convicted of murder after a guilty plea and sentenced to ninety-nine years' imprisonment. He confessed to this crime while in prison serving a 2-year burglary sentence. He did so, he claimed, because he thought his trial for murder would necessitate his being held in a small town jail, from which escape would be easy. He appealed the murder conviction, but it was not heard until the burglary sentence was completely served.⁷⁶⁶ In 1955, the state court of appeals finally freed Padgett.⁷⁶⁷

PADGETT, WILLIAM H. (white). 1936. Michigan. William Padgett was convicted of first-degree murder in the death of a policeman and sentenced to life imprisonment. Six years later, the conviction was overturned. Padgett was retried, reconvicted, and resentenced to life. In 1949, after fourteen years in prison, Padgett was given a "truth serum" injection; on the basis of the results from this test, and on other evidence, the parole board released him with a full pardon. The conviction was based on mistaken eyewitness testimony by two people.⁷⁶⁸

PARKER, GEORGE (white). 1980. New Jersey. Parker was convicted of aggravated manslaughter and sentenced to twenty years in prison. The chief evidence against Parker came from two eyewitnesses, one of whom was later indicted and convicted of the murder and both of whom were subsequently convicted of perjuring themselves in Parker's trial. Parker at first confessed to the crime, but later claimed that he had done so because he was in love with the woman who actually committed it. On appeal, the conviction was affirmed, and the state supreme court denied a petition for certification.⁷⁶⁹ In 1986, after the convictions of the two women, Parker was awarded a new trial.⁷⁷⁰ The appellate court found that "the State essentially conceded that Parker's confession . . . was false,"⁷⁷¹ and that the newly discovered evidence "is the State's camouflaged concession that defendant was convicted on

765. See generally L.A. Daily J., Mar. 6, 1981, § I, at 2, col. 1; Viets, *The Wrong Man Spent Nine Years in Prison*, San Francisco Chron., Mar. 5, 1981, at 2, col. 1.

766. *Ex parte* Padgett, 230 S.W.2d 813 (Tex. Crim. App. 1950).

767. *Ex parte* Padgett, 161 Tex. Crim. 498, 278 S.W.2d 865 (Crim. App. 1955); see also E. RADIN, *supra* note 20, at 155.

768. Michigan v. Padgett, No. 919 (Washtenaw County Cir. Ct. July 14, 1949); see also CALIFORNIA SENATE COMMITTEE ON JUDICIARY, *supra* note 524, at 60-61.

769. State v. Parker, 93 N.J. 260, 460 A.2d 665 (1983).

770. State v. Parker, No. A-453-83T4 (N.J. Super. Ct. App. Div. Feb. 4, 1986).

771. *Id.*, slip op. at 9.

the basis of perjured and false testimony.”⁷⁷² It concluded that “[i]n light of the subsequent convictions [of the two women], the prosecution’s case against Parker has been wholly discredited.”⁷⁷³

PARROTT, LEMUEL, AND SAM THOMPSON (both white). 1947. North Carolina. Parrott was convicted of first-degree murder and sentenced to death; Thompson was convicted of second-degree murder and sentenced to thirty years’ imprisonment. Parrott’s petition for state certiorari was denied,⁷⁷⁴ as was his appeal.⁷⁷⁵ The convictions were based on Thompson’s confession and his implication of Parrott. Thompson later retracted this testimony and claimed that both he and Parrott had been several hundred miles from the scene of the crime. This claim was corroborated by an investigation conducted by the State Bureau of Investigation. A retrial was ordered, and at this new trial Parrott was acquitted. Despite the new evidence, Thompson’s conviction was permitted to stand. A charge of perjury against Thompson for his false testimony was filed, but later dropped because he had spent so much time in prison. In 1959, he was finally paroled.⁷⁷⁶

PECHO, WALTER A. (white). 1954. Michigan. Pecho was convicted of second-degree murder in the killing of his wife and sentenced to fifteen to twenty years’ imprisonment. When his attorney learned that the prosecution had concealed fingerprint evidence showing that the death was actually a suicide, a motion for a new trial was filed, but it was denied. Further investigation led to another motion for a new trial on the ground of newly discovered evidence; again the motion was denied. In 1960, after the parole board conducted its own inquiry, Governor Williams granted an unconditional pardon, saying: “This is a case of miscarriage of justice. . . . [I]n this case an innocent man was convicted.”⁷⁷⁷

PENDER, JOHN (white). 1914. Oregon. After one hung jury, Pender was convicted on two counts of first-degree murder and sentenced to death. Nine months later, after an outcry of public sympathy, the sentence was commuted to life by Governor West. In 1920, after a mental patient confessed to the crime and both trial judges appealed for clemency, Pender was pardoned by Governor Olcott.⁷⁷⁸

PETREE, JOHN WILSON (white). 1981. Utah. Petree was convicted of second-degree murder and sentenced to five years to life. At the time

772. *Id.*, slip op. at 10-11.

773. *Id.*, slip op. at 13; *see also* N.Y. Times, Feb. 9, 1986, at 46, col. 1.

774. *State v. Parrott*, 228 N.C. 752, 46 S.E.2d 851 (1948).

775. *State v. Parrott*, 228 N.C. 754, 47 S.E.2d 21 (1948).

776. *See generally* Washington (N.C.) Daily News, July 15, 1959, at 4, col. 1; Raleigh Times, July 11, 1959, at 4, col. 1; Kinston (N.C.) Daily Free Press, July 10, 1959, at 12, col. 1; Raleigh News and Observer, July 10, 1959, at 1, col. 6.

777. E. RADIN, *supra* note 20, at 44. *See generally id.* at 40-44, 293; Lansing State Journal, July 15, 1960, at 13, col. 7.

778. *See generally* Bedau, *supra* note 626, at 33; Oregonian, Dec. 1, 1964, at 26, col. 4; *id.*, Nov. 30, 1964, at 34, col. 3; *id.*, Sept. 12, 1920, at 1, col. 8.

of the crime, both Petree and the victim were fifteen years old. Upon appeal, the conviction was reversed for insufficiency of evidence, and the defendant was ordered released from custody.⁷⁷⁹ The court found that there was "no other evidence of admissions [by Petree], no physical evidence, and no motive for the homicide."⁷⁸⁰ Petree spent a year and a half in prison before being freed.⁷⁸¹

PFEFFER, PAUL (white). 1954. New York. Pfeffer was convicted of second-degree murder and sentenced to twenty years to life. At his trial, Pfeffer claimed that his confession had been obtained by coercion. On the day of his conviction, another man, John Roche, was arrested in connection with other killings and confessed to the murder for which Pfeffer had been tried. On the basis of this confession, and after passing a series of lie detector tests, Pfeffer was granted a new trial. One newspaper observed at the time, "The Pfeffer-Roche case dramatically illustrated to New York the built-in danger of its capital punishment law: the ever-present possibility of executing an innocent man."⁷⁸² Roche was never tried for this crime. For the other killings, he was tried, convicted, and executed in 1956. Pfeffer was reindicted for first-degree manslaughter. In 1955, while trial on that charge was pending, he was indicted and tried in a completely different case, convicted of second-degree murder, and sentenced to twenty years to life. A month later, the manslaughter charge in the first case was dropped.⁷⁸³

PHILLIPS, RICHARD (black). 1900. Virginia. Phillips was convicted of first-degree murder and sentenced to death. The only witness against Phillips was Grant Watts; a week after Phillips' conviction Watts was acquitted on the same charge. Phillips' attorney had been appointed only two hours before the trial. In 1901, a special jury found Phillips insane; consequently he was transferred to a mental hospital and the execution was postponed pending his recovery. After Phillips was committed to the hospital, his attorney learned that Watts was indeed the murderer. He also learned that the fatal shot could not have been fired from Phillips' weapon; the attorney had been unable to demonstrate this in court because he lacked the time to investigate the case before trial. Thinking Phillips was hopelessly insane, the attorney made no effort to correct the record. In 1930, the attorney, by this time a state attorney, was contacted by Phillips' sister, and informed the governor of these facts. He added: "I am morally certain this man was convicted of a crime he did not commit, and if anyone was ever entitled

779. *State v. Petree*, 659 P.2d 443 (Utah 1983).

780. *Id.* at 445.

781. Salt Lake City Tribune, Feb. 8, 1983, at 7A, col. 1.

782. N.Y. Herald Tribune, July 20, 1954, at 1, col. 3.

783. See generally Cook, *Capital Punishment: Does it Prevent Crime?*, 182 NATION 194, 196 (1956); N.Y. Times, Jan. 10, 1956, at 63, col. 1; *id.*, Dec. 10, 1955, at 42, col. 5; *id.*, Nov. 23, 1955, at 50, col. 1; *id.*, Oct. 25, 1955, at 34, col. 2; N.Y. Herald Tribune, Aug. 25, 1955, at 17, col. 7; *id.*, Aug. 3, 1954, at 17, col. 1; *id.*, July 20, 1954, at 1, col. 3.

to clemency, or rather justice, he is."⁷⁸⁴ A month later, Governor Pollard granted a pardon, and Phillips was released.⁷⁸⁵

PREVOST, LLOYD (white). 1919. Michigan. Prevost was convicted of first-degree murder and sentenced to life. The conviction was affirmed on appeal.⁷⁸⁶ In 1930, because of Prevost's exceptional prison record, the State Pardon Board reopened the case and concluded that he was innocent; the Board recommended a pardon, and that year it was granted. The conviction was obtained by unscrupulous methods of prosecution, perjury, and mistaken expert ballistics testimony. "Prevost's refusal to talk before trial . . . certainly did not help him On the whole, the case may be deemed to show that the supposed privilege against self-incrimination is of but little if any help to an innocent man."⁷⁸⁷

PYLE, HARRY (white). 1935. Kansas. Pyle was convicted of first-degree murder and robbery and sentenced to life. The conviction was affirmed on appeal.⁷⁸⁸ Pyle claimed the conviction was based on perjured testimony coerced from witnesses by the state and on the state's suppression of exculpatory evidence. In 1941, a letter to Pyle from the prosecuting attorney, submitted in Pyle's application for habeas corpus, stated: "Your conviction was a grave mistake."⁷⁸⁹ A letter from a witness admitting perjury was also enclosed. The appeal was denied.⁷⁹⁰ After the trial of another man for complicity in the same crimes, in which evidence was produced that contradicted the evidence used in Pyle's trial, the United States Supreme Court ruled the new evidence "clearly exonerates petitioner," and Pyle was released.⁷⁹¹

REICHHOFF, KENNY RAY (white). 1975. Wisconsin. Reichhoff was convicted on two counts of first-degree murder and sentenced to life imprisonment. In 1977, an investigation by *Wisconsin State Journal* reporter Richard Jaeger raised many doubts and revealed major discrepancies in the prosecutor's case. On appeal the conviction was overturned on the technical grounds that the judge erred in allowing the jury to infer that the defendant's silence at the time of his arrest was a tacit admission of guilt.⁷⁹² Later in 1977, Reichhoff was acquitted at retrial; after nearly three years in prison he was released. The fight to prove his innocence cost Reichhoff tens of thousands of dollars. In

784. Letter from Mr. B. Lewis to Governor John Pollard (Oct. 17, 1930), *quoted in E. Borchard, Memorandum on the Phillips Case 2* (unpublished manuscript on file with the *Stanford Law Review*).

785. Executive Papers of the Secretary of the Commonwealth, Oct. 9-31, 1930 (available in Virginia State Library Archives).

786. *People v. Prevost*, 219 Mich. 233, 189 N.W. 92 (1922).

787. E. BORCHARD, *supra* note 20, at 209. *See generally id.* at 201-09.

788. *State v. Pyle*, 143 Kan. 772, 57 P.2d 93 (1936).

789. A. GERSHENSON, *supra* note 724, at 208.

790. *Pyle v. Amrine*, 153 Kan. 568, 112 P.2d 354 (1941).

791. *Pyle v. Kansas*, 317 U.S. 213, 214 (1942). *See generally* A. GERSHENSON, *supra* note 724, at 207-11.

792. *Reichhoff v. State*, 76 Wis. 2d 375, 251 N.W.2d 470 (1977).

1980, attempts to pass a special bill in the state legislature to compensate him for these costs and lost income failed.⁷⁹³

REILLY, PETER A. (white). 1973. Connecticut. Reilly was convicted of first-degree manslaughter and sentenced to six to sixteen years in prison. He was released on bond after attracting the interest of playwright Arthur Miller and writer William Styron, and following a special investigation by the *New York Times* that uncovered evidence exonerating Reilly and showing that police had coerced him into making a false confession. In 1976 Reilly won a new trial.⁷⁹⁴ According to the court, new evidence established that "a grave injustice had been done."⁷⁹⁵ Before the new trial began, all charges were dropped when it was found the prosecution had suppressed evidence confirming Reilly's alibi. Reilly's efforts to sue the Connecticut State Police were unsuccessful.⁷⁹⁶

REISSFELDER, GEORGE A. (white). 1966. Massachusetts. Reissfelder was convicted of armed robbery and first-degree murder and sentenced to life. In 1972, his co-defendant, in a deathbed confession to a former prison chaplain, said that Reissfelder had been incorrectly identified by eyewitnesses. At a special hearing in 1982, five policemen, an FBI agent, a probation officer, and the prison chaplain to whom the co-defendant confessed gave evidence supporting the contention that the co-defendant never knew Reissfelder before the trial. A new trial was ordered. The prosecutor decided to dismiss the charges, and Reissfelder was released. In 1985, a bill to compensate Reissfelder (\$900,000) was defeated in the state legislature.⁷⁹⁷

RENO, RALPH (white). 1925. Illinois. Reno was convicted of murder and sentenced to death. In an earlier trial, after his conviction and a jury recommendation of death, the trial judge refused to impose the sentence and ordered a new trial on the ground that the evidence was totally insufficient. There were two victims in the crime, but Reno was tried for only one of the murders. The only evidence linking him to the crime was the testimony of a neighbor of the victims, who claimed that Reno had also tried to kill her (her story changed somewhat between the two trials). Reno's wife, with whom he had been asleep at home, was prevented from giving alibi testimony at the trial. In 1926, just seven hours before the scheduled execution, Reno received a stay in

793. See generally Wisconsin State Journal, Dec. 30, 1982, at 10, col. 7; *id.*, Oct. 17, 1977, at 1, col. 1; *id.*, Feb. 5, 1976, at 10, col. 1; *id.*, Jan. 1, 1976, § 3, at 1, col. 1.

794. *Reilly v. State*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976).

795. *Id.* at 377, 355 A.2d 340.

796. *Reilly v. Leonard*, 459 F. Supp. 291 (D. Conn. 1978). See generally J. BARTHEL, A DEATH IN CANAAN (1976); D. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977); N.Y. Times, Sept. 26, 1979, at B2, col. 1; *id.*, Oct. 13, 1977, at A1, col. 2; *id.*, Nov. 25, 1976, at 1, col. 1; *id.*, March 26, 1976, at 18, col. 1; *id.*, Dec. 15, 1975, at 1, col. 1.

797. See generally Boston Globe, May 13, 1984, at 1, col. 3; *id.*, Aug. 31, 1982, at 40, col. 4; N.Y. Times, Aug. 31, 1982, at 10, col. 1; Boston Globe, Aug. 26, 1982, at 28, col. 1; *id.*, July 23, 1982, at 18, col. 1; *id.*, June 22, 1982, at 21, col. 5.

order to pursue an appeal. His appeal was aided by the volunteer efforts of the judge from the first trial, who was convinced of Reno's innocence. A new trial was ordered.⁷⁹⁸ In the new trial, the witness again changed her testimony, and Reno was promptly acquitted. An indictment for the second murder was quashed, and Reno was acquitted on the attempted murder charge. In 1928, after three years in prison, he was finally released. He later wrote that when he came out, his "health had been ruined . . . and I had a complete breakdown Everything that I had built up in my first thirty-six years of life was gone—money, job, home, wife and baby, and my good health!"⁷⁹⁹

REYNOLDS, MELVIN LEE (white). 1979. Missouri. Reynolds was convicted of the second-degree murder of a 4-year-old boy and sentenced to life. On appeal, the conviction was affirmed.⁸⁰⁰ He confessed after nearly forty hours of interrogation, but later retracted this confession. In 1983, another man (Charles Hatcher) confessed to three murders, including the one for which Reynolds had been convicted, and Reynolds was released after nearly four years in prison. Said the prosecutor: "I feel fortunate that I've had the opportunity to straighten out my own mistake."⁸⁰¹

RIPAN, ALEXANDER (white). 1919. Michigan. Ripan was convicted of first-degree murder and sentenced to life. In 1929, he escaped but was recaptured in 1935. Ripan's prosecutor helped him obtain a new trial. At the retrial, the charges were dismissed. A ballistics expert using newly developed techniques, proved that the fatal bullet could not have come from Ripan's gun. Ripan had spent fourteen years in prison.⁸⁰²

RIVERA, ANTONIO, AND MERLA WALPOLE (both Hispanic). 1974. California. Rivera and Walpole were both convicted of second-degree murder for killing their 3-year-old child. Evidence against them consisted of the disappearance of their child and a girl's skeletal remains found in a crude grave near their former home. Prior to sentencing, the convictions were reversed by the trial judge on a technicality, and during retrial an investigator for the San Bernardino District Attorney's office found the "victim" alive in San Francisco. This finding was made twenty months after the original convictions. The desperately poor defendants had abandoned their seriously ill daughter in 1965 in a San Francisco gasoline station in hopes that she would be found by some-

798. *People v. Reno*, 324 Ill. 484, 494, 155 N.E. 329, 332 (1927).

799. *Reno*, IN THE SHADOW OF THE GALLOWS 15 (1931) (published privately by the author). See generally Pasley, *Returned from the Dead*, N.Y. Daily News, Feb. 20-28, 1932 (series of articles); N.Y. Sunday News, Nov. 15, 1931, at 62, col. 1.

800. *State v. Reynolds*, 619 S.W.2d 741 (Mo. 1981).

801. L.A. Times, Mar. 17, 1985, at 1, col. 1. See generally *Kansas City Star*, Oct. 16, 1983, at 1, col. 1; N.Y. Times, Oct. 15, 1983, at 7, col. 6; *Kansas City Times*, Oct. 14, 1983, at 1, col. 4.

802. See generally J. FRANK & B. FRANK, *supra* note 20, at 187-88.

one able to care for her.⁸⁰³

ROBERTSON, DAVID WAYNE (white). 1980. Maryland. Robertson was convicted on two counts of first-degree murder and sentenced to two life terms. In 1983, the conviction was reversed because of improper jury instructions.⁸⁰⁴ Robertson was present when a friend murdered two victims, and this co-defendant testified falsely against him. The perjured testimony represented the prosecution's price for an agreement with the co-defendant not to proceed at trial under the state's death penalty statute. In 1984, Robertson was acquitted at the retrial. The co-defendant is serving a life term in prison.⁸⁰⁵

ROBINSON, VAN BERING (black). 1981. New Mexico. Robinson was convicted of armed robbery and felony murder of a police officer and sentenced to life. On appeal the convictions were overturned on the ground that the prosecutors subjected an eyewitness to prejudicial questioning in the attempt to impeach him. The witness had testified that Robinson was not the perpetrator.⁸⁰⁶ In 1983, at retrial, Robinson was acquitted.⁸⁰⁷

RODRIGUEZ, SANTOS (Hispanic). 1954. Massachusetts. Rodriguez was convicted of second-degree murder and sentenced to life. His appeal was dismissed for late filing.⁸⁰⁸ The conviction was based on a coerced confession and Rodriguez's lack of fluency in understanding English (he was semi-literate and had recently emigrated from Puerto Rico). In 1957, after serving thirty-nine months, he was released with a full pardon when another man pleaded guilty to the killing. The legislature subsequently approved a \$12,500 indemnity for Rodriguez.⁸⁰⁹

ROGERS, COURTNEY ("FRED") (white). 1942. California. Rogers was convicted on two counts of first-degree murder in the death of his parents and sentenced to death. On appeal, the convictions were reversed by a unanimous state supreme court.⁸¹⁰ Mrs. Rogers' death was first ruled a suicide, and eight months later, when Mr. Rogers, Sr., died in a fire, his death was also ruled a suicide. Four months later, Fred Rogers was arrested on an unrelated charge. Subjected to "more or less continuous questioning for sixteen days after his arrest," and told by the police that "if I didn't confess [to the murder] . . . I was a dead

803. L.A. Times, Nov. 23, 1975, at 2, col. 6; N.Y. Times, Nov. 23, 1975, at 42, col. 4; letter from David W. Call, defense attorney, to Michael L. Radelet (Sept. 4, 1985) (on file with the *Stanford Law Review*).

804. *Robertson v. State*, 295 Md. 688, 457 A.2d 826 (1983) (per curiam).

805. See generally *Baltimore Sun*, Apr. 27, 1984, at D1, col. 5; *id.*, Apr. 26, 1984, at D14, col. 1.

806. *State v. Robinson*, 99 N.M. 674, 662 P.2d 1341 (1983).

807. See generally *Albuquerque J.*, Oct. 20, 1983, at A1, col. 3; *id.*, Oct. 13, 1983, at A9, col. 1; *id.*, Mar. 22, 1983, at A1, col. 3.

808. *Commonwealth v. Rodriguez*, 333 Mass. 501, 131 N.E.2d 774 (1956).

809. See generally *Boston Am.*, Jan. 16, 1958, at 1, col. 2; *Boston Globe*, Apr. 10, 1957, at 1, col. 7; *Boston Daily Rec.*, Apr. 6, 1957, at 3, col. 5; *Boston Globe*, Apr. 5, 1957, at 1, col. 3; *id.*, Apr. 4, 1957, at 1, col. 3.

810. *People v. Rogers*, 22 Cal. 2d 787, 141 P.2d 722 (1943).

cinch to be sent to the gas chamber,"⁸¹¹ he finally confessed. In 1943, at retrial, the trial court dismissed the charges, and after spending fourteen months on death row, Rogers was released.⁸¹²

ROGERS, SILAS (black). 1943. Virginia. Rogers was convicted of first-degree murder and sentenced to death. His conviction was affirmed on appeal.⁸¹³ Investigation by the *Richmond News Leader* attracted volunteer lawyers to challenge the conviction, and eventually The Court of Last Resort became involved. In 1944, perjury by the state's chief witnesses was discovered and alibi witnesses were located, as were witnesses who had seen another man at the scene of the crime. In 1945, the Board of Pardons commuted the sentence to life imprisonment. In 1953, Governor Battle ordered an unconditional pardon and immediate release for Rogers, stating that the defendant had been the "victim of a gross miscarriage of justice."⁸¹⁴

ROSS, JOHNNY (black). 1975. Louisiana. Ross was convicted of the rape of a white woman and sentenced to death. Only sixteen at the time of the crime, Ross confessed after being beaten by the police. His trial lasted only a few hours; no alibi witnesses were called to testify and the eyewitness testimony, including that of the victim, was of dubious value. The conviction was affirmed on appeal, but because the death penalty had been imposed under a mandatory sentencing statute that was later invalidated, the case was remanded with directions to impose a sentence of twenty years.⁸¹⁵ Beginning in 1975, investigations by the Southern Poverty Law Center sought to obtain a new trial for Ross. In 1980, the blood type of the sperm found in the victim was compared with Ross', and it was established that the two were not the same. Presented with this evidence, as well as a federal habeas corpus order, the New Orleans District Attorney's Office agreed to his release in 1981.⁸¹⁶

SACCO, NICOLA, AND BARTOLOMEO VANZETTI (both white). 1921. Massachusetts. Sacco and Vanzetti were convicted of murder in the course of armed robbery, sentenced to death, and executed in 1927. Their case is probably the most controversial death penalty case in this century. They were arrested and tried in an atmosphere dominated by "the Red Scare" of the early 1920s; the defendants—described as "anarchist bastards" in an off-the-bench comment during the trial by the

811. *Id.* at 798, 801, 141 P.2d at 727, 729.

812. See Moskowitz, *You Can't Apologize to the Dead*, *INSIDE DETECTIVE*, Dec. 1962, at 46, 70-71.

813. *Rogers v. Commonwealth*, 183 Va. 190, 31 S.E.2d 576 (1944).

814. Ehrmann, *supra* note 440, at 18. See generally E. BLOCK, *supra* note 407, at 144-56; Petersburg (Va.) Progress-Index, Dec. 23, 1952, at 1, col. 7; Pardon Report (Dec. 22, 1952).

815. *State v. Ross*, 343 So. 2d 722 (La. 1977).

816. See generally NEW YORK STATE DEFENDER'S ASSOCIATION, *CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY IN NEW YORK STATE* 14 (1982); Poverty Law Report, Jan. 1982, at 1 (newsletter of the Southern Poverty Law Center, Montgomery, Alabama); letter from John L. Carroll, Ross' attorney, to Michael L. Radelet (Sept. 21, 1983) (on file with the *Stanford Law Review*).

judge—were on death row for six years. In 1925, another man also under a death sentence in Massachusetts confessed to the crime. Extensive investigation of the confession convinced many that he was, indeed, telling the truth. In 1926, the trial judge denied motions for a retrial based on the confession, and his decision was sustained on appeal.⁸¹⁷ In 1977, on the occasion of the fiftieth anniversary of the executions, Governor Dukakis signed a carefully worded proclamation intended to remove “any stigma and disgrace” from their names, declaring, in part, that their “trial and execution . . . should serve to remind all civilized people of the constant need to guard against our susceptibility to prejudice, our intolerance of unorthodox ideas, and our failure to defend the rights of persons who are looked upon as strangers in our midst”⁸¹⁸

SANDERS, ALBERT (black). 1917. Alabama. Sanders was convicted, with Fisher Brooks (also black), of murder. Both were sentenced to death and executed in 1918. The conviction was affirmed on appeal.⁸¹⁹ Brooks testified at Sanders’ trial that the latter was innocent. Nevertheless, a fellow prisoner testified that he had heard Sanders confess. In a statement from the scaffold, Brooks again claimed Sanders was innocent, as did Sanders before he was hanged.⁸²⁰

SBERNA, CHARLES (white). 1938. New York. Sberna was convicted of first-degree murder of a police officer, sentenced to death, and executed in 1939. His conviction was affirmed on appeal.⁸²¹ Sberna’s co-defendant, Salvatore Gati (also executed), testified at the trial that Sberna was innocent. Both Gati and Sberna had prior criminal records. The prison chaplain declared: “This is the first time I’ve ever been positive that an innocent man was going to the chair, and there is nothing I can do about it.”⁸²² In prison, both Gati and Sberna told Isidore Zimmerman⁸²³ that Sberna was innocent. Gati said the head of the New York Homicide Bureau (Jacob Rosenblum) had told him that he knew Sberna was innocent, and would clear his name if Gati would reveal the name of his real accomplices. Gati refused to do this. Later it turned out this police official had also been involved in wrongfully convicting

817. *Commonwealth v. Sacco*, 255 Mass. 369, 151 N.E. 839 (1926).

818. Proclamation of the Governor of Massachusetts (July 19, 1977), reprinted in EXECUTIVE DEPARTMENT OF MASSACHUSETTS, REPORT TO THE GOVERNOR IN THE MATTER OF SACCO AND VANZETTI (1977). Much has been written in defense of the innocence of Sacco and Vanzetti. See generally H. EHRMANN, *supra* note 331; F. FRANKFURTER, *supra* note 761; G. L. JOUGHLIN & E. MORGAN, *supra* note 331; W. YOUNG & D. KAISER, *supra* note 176. But see F. RUSSELL, *supra* note 176 (author, long a student of the case, claims recently to have discovered evidence of Sacco’s and Vanzetti’s guilt); see also F. RUSSELL, *supra* note 331.

819. *Sanders v. State*, 202 Ala. 37, 79 So. 375 (1918).

820. See generally *Mobile Reg.*, July 20, 1918, at 3, col. 5; *id.*, Aug. 4, 1917, at 6, col. 1; *id.*, July 21, 1917, at 1, col. 1; *id.*, July 20, 1917, at 1, col. 7; *id.*, July 1, 1917, at 10, col. 7.

821. *People v. Gati*, 279 N.Y. 631, 18 N.E.2d 35 (1938).

822. L. LAWES, *supra* note 362, at 338 (refers to Sberna as “Russell”).

823. See notes 921-923 *infra* and accompanying text.

Zimmerman.⁸²⁴

SCHUYLER, JOHN EDWARD (white). 1907. New Jersey. Schuyler was convicted of first-degree murder and sentenced to death. The conviction was based wholly on circumstantial evidence, but was affirmed on appeal.⁸²⁵ In 1914, Schuyler was pardoned and released after the real murderer confessed. "Had it not been for the persistent efforts of ex-Governor Stokes and of the New York banker, Mr. C. Ledyard Blair, . . . the death chamber would have had him as its victim."⁸²⁶

SEATON, TERRY (black). 1973. New Mexico. Seaton was convicted of first-degree murder and sentenced to life imprisonment. His conviction was affirmed on appeal.⁸²⁷ In 1979, a state district judge ruled the conviction was based on perjured testimony given by another person in exchange for a lighter sentence on other charges. Evidence also indicated that the state had suppressed the confession of a third person. A new trial was ordered, the prosecution dropped the charges, and Seaton was released after serving six and a half years in prison. In 1983 a federal court jury awarded Seaton \$118,000 in damages from the county, the sheriff, and a deputy; this decision was not appealed.⁸²⁸ The state also paid an attorneys' fees award of \$217,500.⁸²⁹

SHAFFER, HOWARD, CHARLES STEVENS, AND WILLIAM TROOP (all white). 1927. Florida. Shaffer, Stevens, and Troop were all convicted of first-degree murder and sentenced to death. On grounds of new evidence, the trial judge granted a motion for retrial; the defendants were again convicted and sentenced to death. On appeal the convictions were reversed and a third trial was ordered.⁸³⁰ The only evidence against the defendants was the testimony of an alleged eyewitness, the victim's husband. An alcoholic and drug addict, this man had previously threatened to kill his wife with an axe (which was the murder weapon), and he had beaten her on several occasions. In granting the new trial, the court cited the complete lack of any motive for the slaying by the defendants and the numerous divergences of the victim's husband's testimony from that of "credible disinterested witnesses" and from his own prior testimony.⁸³¹ "Law enforcement officers familiar with the case frequently expressed doubts as to the guilt of the trio."⁸³² At the new trial in 1930, the judge ordered that the charges be dropped

824. See generally L. LAWES, *supra* note 362, at 337-39; Q. REYNOLDS, *supra* note 589, at 347-57; J. SAUTER & S. ABEND, *THE GUARDIANS* 77-79 (1979).

825. *State v. Schuyler*, 75 N.J.L. 487, 68 A. 56 (1907).

826. Editorial Notes, 38 N.J.L.J. 1, 1-2 (1915); see also *N.Y. Times*, Dec. 24, 1914, at 16, col. 2.

827. *State v. Seaton*, 86 N.M. 498, 525 P.2d 858 (1974).

828. *Seaton v. Eddy County*, No. 81-0286 (D.N.M. Jan. 18, 1983).

829. See generally Curley, *Terry Seaton: Did Justice Misfire?*, *Albuquerque J.*, Aug. 28, 1979, *Magazine*, at 6-11, 21-23; *Albuquerque J.*, Jan. 14, 1983, at 1, col. 2; *id.*, Dec. 26, 1982, at 16, col. 1.

830. *Troop v. State*, 98 Fla. 385, 123 So. 811 (1929).

831. *Id.* at 393, 123 So. at 814.

832. *Fla. Times Union* (Jacksonville), May 1, 1930, at 15, col. 8.

and the defendants immediately released.⁸³³

SHEA, JOSEPH FRANCIS (white). 1959. Florida. Shea was convicted of murder and sentenced to life. His conviction was based entirely on his false confession. In 1966, after an investigation led by *Miami Herald* reporter Gene Miller, Shea was retried and acquitted. Enlisted in the United States Air Force at the time of the crime, Shea spent six years in prison before his release. A police detective admitted he had denied Shea access to counsel and lied to obtain the false confession. Shea stated that he falsely confessed because he had suicidal urges and wanted to die in the electric chair. A Miami police officer commented: "Shea was a neurotic, of low intelligence, who wanted to be punished. . . . All the evidence was against his being the killer, but the authorities just didn't want to know."⁸³⁴ In 1967, Shea received an indemnification of \$45,000 from the state legislature.⁸³⁵

SHEPPARD, DR. SAMUEL H. (white). 1954. Ohio. Sheppard was convicted of second-degree murder for killing his wife and sentenced to life imprisonment. On initial appeal, the conviction was affirmed.⁸³⁶ At the beginning of the Ohio Supreme Court decision, Justice Bell commented: "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals."⁸³⁷ In 1966, after considerable litigation, Sheppard's conviction was overturned and a new trial was ordered, on grounds that massive, pervasive, and prejudicial publicity had attended his prosecution.⁸³⁸ At retrial, it was established through blood stain patterns that Sheppard was not his wife's killer, and he was acquitted.⁸³⁹

SHERMAN, DAVID (black). 1907. Tennessee. Sherman was convicted (with two co-defendants) of murder and sentenced to death. No appeal was taken. In 1907, a few days before the scheduled executions, one co-defendant (Beulah McGhee) absolved Sherman of guilt. McGhee was hanged, but Governor Patterson granted a reprieve for Sherman and the other co-defendant. In 1908, their sentences were commuted to life. The conviction was obtained by "the uncorroborated statements of one of the parties who was a witness."⁸⁴⁰ In 1911, Governor Patterson pardoned Sherman after the Board of Pardons concluded,

833. See generally *id.*; Jacksonville J., Aug. 7, 1929, at 1, col. 2; *id.*, Aug. 3, 1929, at 2, col. 8; Fla. Times Union (Jacksonville), Aug. 3, 1929, at 1, col. 2.

834. N.Y. Daily News, Nov. 6, 1965, at 4, col. 1.

835. Act of July 12, 1967, ch. 910, 1967 Fla. Laws 620. See generally G. MILLER, *supra* note 523, at 76; S. RAAB, *supra* note 507, at 237-40; Miami Herald, Mar. 20, 1966, at 1, col. 4; N.Y. Daily News, Nov. 6, 1965, at 4, col. 1.

836. State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340 (1956).

837. State v. Sheppard, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956).

838. Sheppard v. Maxwell, 384 U.S. 333, 349-63 (1966).

839. See generally F.L. BAILEY, THE DEFENSE NEVER RESTS 55-92 (1971); P. HOLMES, *supra* note 44; J. POLLACK, *supra* note 44; S. SHEPPARD, ENDURE AND CONQUER (1966).

840. Nashville Banner, Jan. 18, 1911, at 13, col. 4.

“[t]his appears to us quite a remarkable case of a miscarriage of justice.”⁸⁴¹ The Attorney General, who prosecuted the case, wrote that “the prisoner had nothing to do with the murder.”⁸⁴²

SHUMWAY, R. MEAD (white). 1907. Nebraska. Shumway was convicted of first-degree murder, sentenced to death, and executed in 1909.⁸⁴³ He was convicted on circumstantial evidence of murdering the wife of his employer. One juror, leaving a note in which he expressed “great worry at the trial,” killed himself before Shumway’s hanging. This juror, the only one to hold out against the death penalty for Shumway, told his friends he “had not slept well any night since the trial.”⁸⁴⁴ Shumway’s last words were: “I am an innocent victim. May God forgive everyone who has said anything against me.”⁸⁴⁵ In 1910, the victim’s husband confessed on his deathbed that he had murdered his wife.⁸⁴⁶

SMITH, GRACE M. (white). 1945. Virginia. Smith was convicted of first-degree murder for killing her husband and sentenced to twenty years in prison. On appeal, the conviction was reversed because the evidence indicated the deceased might have taken his own life.⁸⁴⁷ “The result of the evidence is that only by speculation or guess can it be said that this defendant aided or abetted in the commission of the crime and the verdict against her must be set aside.”⁸⁴⁸ Upon remand, the case against Smith was dismissed.⁸⁴⁹

SMITH, LARRY THOMAS (white). 1976. Ohio. Larry Smith was convicted of aggravated murder and sentenced to life imprisonment. Despite the testimony of alibi witnesses, Smith was convicted by a 3-judge panel. The main evidence against him came from the victim’s wife, who, according to the defense, had a long history of drug abuse. In 1978, the sheriff’s department reopened the investigation and found evidence implicating another suspect in the slaying. In 1980, the trial court ordered a new trial. Later that year, at retrial, this evidence was introduced and Smith was acquitted. As the Akron newspaper commented, “His story makes another strong argument against reinstating the death penalty in Ohio.”⁸⁵⁰

841. *Id.*

842. *Id.*, Jan. 13, 1911, at 13, col. 4. *See generally* Nashville Tennessean, Jan. 14, 1911, at 5, col. 6; *id.*, Nov. 27, 1907, at 6, col. 1; Galveston News, Nov. 27, 1907, at 2, col. 2; Nashville Banner, Nov. 26, 1907, at 3, col. 5.

843. *Shumway v. State*, 82 Neb. 152, 117 N.W. 407 (1908).

844. Lincoln Star, Jan. 16, 1908, at 5, col. 3.

845. *Id.*, Mar. 5, 1909, at 1, col. 1.

846. *See generally* Barbour, *supra* note 415, at 508; Lincoln Star, Mar. 5, 1909, at 1, col. 1; *id.*, Jan. 16, 1908, at 5, col. 3.

847. *Smith v. Commonwealth*, 185 Va. 800, 40 S.E.2d 273 (1946).

848. *Id.* at 821, 40 S.E.2d at 283.

849. Harrisonburg Daily News Rec., Nov. 26, 1946, at 1, col. 7; letter from Allen L. Lucy, Clerk of the Virginia Supreme Court, to Michael L. Radelet (June 28, 1984) (on file with the *Stanford Law Review*).

850. Akron Beacon-Journal, Nov. 26, 1980, at 4, col. 1. *See generally* Ohio v. Smith, No. 76-3-383 (Ohio Nov. 21, 1980); Greenberg, *supra* note 389, at 920 n.69; Akron Beacon-Jour-

STAPLES, DR. F.N. (white). 1905. California. Staples was convicted of first-degree murder and sentenced to death. On appeal, the evidence was held insufficient to establish the existence of a crime and a new trial was ordered.⁸⁵¹ Staples' wife was suffering from typhoid fever and died. When, one month later, Staples moved to San Francisco and was joined there by a neighbor's wife, their conduct "doubtless awoke the indignation of the residents . . . and generated a suspicion as to the cause of his wife's death."⁸⁵² The body was exhumed, an autopsy was performed, and traces of arsenic were found. But the appellate court found it was "quite apparent" that the arsenic was introduced into the body through the embalming, and the death of Mrs. Staples was quite consistent with the type of death experienced by victims of typhoid fever.⁸⁵³

STORICK, MAUDE CUSHING (white). 1923. Michigan. Storick was convicted of first-degree murder and sentenced to life imprisonment. The victim was her husband, and when Storick remarried one month later, the town gossip suggested that the death was a murder. In 1949, after twenty-six years in prison, she received a gubernatorial pardon. She had been convicted of poisoning her husband with bichloride of mercury; later investigation by a volunteer attorney established that the deceased was in the habit of using the poison as a throat gargle. The investigation also revealed that the prosecutor (then deceased) had also believed that Storick was innocent.⁸⁵⁴

SWEENEY, JAMES (white). 1926. New Jersey. Sweeney was convicted of first-degree murder and sentenced to life. In 1928, the Board of Pardons exonerated and freed him when the true culprits confessed. The conviction was obtained by mistaken eyewitness identification, perjury, and circumstantial evidence despite several alibi witnesses.⁸⁵⁵

SYNON, MICHAEL J. (white). 1900. Illinois. Synon was convicted of the murder of his wife and sentenced to death. On appeal the conviction was reversed because of prejudicial remarks by the judge, and a retrial was ordered.⁸⁵⁶ At the retrial, several reputable witnesses testified that Synon was four miles from the scene of the crime when it was committed; Synon was acquitted. Governor Dunne, who had presided over the second trial as judge before his gubernatorial election, stated, "Only those words in which the Court had committed error in uttering stood between him and the cruel tragedy of which my State would have

nal, Nov. 22, 1980, at E1, col. 6; *id.*, Nov. 20, 1980, at C1, col. 5; *id.*, Nov. 17, 1980, at D3, col. 2; *id.*, Nov. 12, 1980, at B11, col. 6; *id.*, Nov. 10, 1980, at D1, col. 1; *id.*, June 6, 1980, at D1, col. 1.

851. *People v. Staples*, 149 Cal. 405, 86 P. 886 (1906).

852. *Id.* at 415, 86 P. at 889.

853. *Id.* at 423, 86 P. at 893.

854. See generally E. RADIN, *supra* note 20, at 70-75.

855. See generally E. BLOCK, *supra* note 524, at 61-62.

856. *Synon v. People*, 188 Ill. 609, 59 N.E. 508 (1901).

been guilty."⁸⁵⁷

THROWER, ALLAN E. (black). 1973. Ohio. Thrower was convicted of first-degree murder in the ambush death of a police officer and sentenced to life imprisonment. He was convicted despite his lack of motive, claims of innocence, and the testimony of three alibi witnesses that placed him in Detroit at the time of the crime. The only evidence against him was eyewitness identification by another police officer (the victim's partner). On appeal the conviction was affirmed.⁸⁵⁸ In 1978, an internal police investigation revealed that the eyewitness had perjured himself when testifying against Thrower. This officer, who admitted making the false statements, was suspended, and a police detective, who had falsely testified that he heard two of the alibi witnesses plotting to perjure themselves, resigned. In 1978, the trial court ordered a new trial (at the request of the prosecutor), and Thrower was released after spending five years in prison. In 1979, the prosecutor formally dropped the charges.⁸⁵⁹

TIBBS, DELBERT (black). 1974. Florida. Tibbs was convicted of the rape of a 16-year-old white girl and the murder of her companion, and sentenced to death. On appeal the conviction was overturned on the ground that it was not supported by the weight of the evidence.⁸⁶⁰ Tibbs, a former theological student, was convicted by an all-white jury on the strength of the testimony of the female victim, a drug user whose testimony against him was uncorroborated and inconsistent with her first description of the assailant. No other evidence could place Tibbs within two hundred miles of the crime. In 1977, Tibbs was released pending resolution of complex legal issues concerning whether double jeopardy prevented the state from retrying him.⁸⁶¹ In 1982, the United States Supreme Court ruled that Tibbs could indeed be retried.⁸⁶² The state then decided not to reopen the case on the ground that the police investigation of the crime "was tainted from the beginning . . . and the investigators involved knew it."⁸⁶³ The original prosecutor said if there was a retrial, he would appear as a witness for Tibbs.⁸⁶⁴

TORRES, PEDRO (Hispanic). 1985. Texas. Torres was convicted of

857. Davis, *Death by Law*, 131 *OUTLOOK* 525, 527 (1922); see also R. BYE, *supra* note 368, at 84; Barbour, *supra* note 415, at 506.

858. *State v. Thrower*, No. 73AP-292, slip op. 3032 (Ohio Ct. App. (Franklin County) Nov. 27, 1983).

859. See generally Columbus Dispatch, Jan. 5, 1979, at 3, col. 1; *id.*, Aug. 29, 1978, at 1, col. 1; *id.*, Aug. 9, 1978, at 1, col. 1; *id.*, July 21, 1978, at B7, col. 5; *id.*, Nov. 27, 1973, at 7, col. 4; *id.*, July 13, 1973, at B1, col. 1.

860. *Tibbs v. State*, 337 So. 2d 788 (Fla. 1976).

861. *Tibbs v. Florida*, 397 So. 2d 1120 (Fla. Dist. Ct. App. 1981).

862. *Tibbs v. Florida*, 457 U.S. 31 (1982).

863. McClory, *Justice for Mr. Tibbs*, *READER*, Feb. 11, 1983, at 1, 25.

864. See generally S. GETTINGER, *SENTENCED TO DIE* 183-84 (1979); Cannon, *The Delbert Tibbs Case*, 223 *NATION*, Dec. 18, 1976, at 652; McClory, *supra* note 863; Miami Times, Sept. 16, 1982, at 4, col. 5; Miami Herald, June 8, 1982, at 1, col. 3.

murder and sentenced to seventy-five years in prison. Three months later, the original trial judge ordered the defense attorney to file a motion for a new trial when the judge learned that records showed Torres was at work, 250 miles from the crime, at the time of the murder. The judge reversed the conviction and ordered the immediate release of Torres. The defense attorney had not presented the exonerating work records at the original trial. Torres, a so-called "illegal alien," had been confused with a different Pedro Torres, who had actually committed the crime.⁸⁶⁵

TREADAWAY, JONATHAN CHARLES, JR. (white). 1975. Arizona. Treadaway was convicted of sodomy and the first-degree murder of a 6-year-old boy and sentenced to death. On appeal the conviction was reversed because evidence of a prior criminal act by the defendant had been improperly introduced at trial.⁸⁶⁶ At retrial Treadaway was acquitted by the jury after five pathologists testified that the victim probably died of pneumonia and that there was no evidence that the victim had been sodomized. Members of the jury reported having voted to acquit because the prosecutors failed to present enough evidence to establish that Treadaway was even inside the victim's home.⁸⁶⁷

TUCKER, CHARLES LOUIS (white). 1905. Massachusetts. Tucker was convicted of first-degree murder, sentenced to death, and executed in 1906. His conviction was affirmed on appeal. Evidence against the defendant was circumstantial only.⁸⁶⁸ More than 100,000 Massachusetts residents signed petitions on behalf of clemency. Among those convinced of his innocence was the county medical examiner (who lost his job because of his stand) and a clergyman who said a witness had told him she perjured herself at the original trial.⁸⁶⁹

VALLETUTTI, JOHN (white). 1947. New York. Valletutti was convicted of first-degree murder and sentenced to death, despite the jury's recommendation of life imprisonment. His conviction was reversed on appeal.⁸⁷⁰ Valletutti had been beaten by police officers into signing a confession, and this confession was the chief evidence against him. The admitted killer, convicted six months prior to Valletutti's trial, testified in Valletutti's defense that he had inculpated Valletutti as his accomplice only to avoid further police beatings.⁸⁷¹ Valletutti was released after two years in prison when, at the request of the District Attorney,

865. See generally N.Y. Times, Apr. 28, 1985, at 15, col. 5; Corpus Christi Caller-Times, Apr. 27, 1985, at 2B, col. 1.

866. State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977); State ex rel. La Sota v. Corcoran, 119 Ariz. 573, 583 P.2d 229 (1978).

867. See generally Greenberg, *supra* note 389, at 920 n.69; Ariz. Republic, Oct. 10, 1978, at 1, col. 4; *id.*, Sept. 22, 1978, at B2, col. 7; *id.*, Sept. 15, 1978, at B1, col. 2; *id.*, Sept. 14, 1978, at B1, col. 2; *id.*, Sept. 7, 1978, at B1, col. 3; *id.*, Sept. 1, 1978, at B2, col. 3.

868. Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905).

869. See generally G. GROSS, MASTERPIECES OF MURDER 157-79 (1963); Hewett, *Shreds of Evidence*, BOSTON MAG., Nov. 1983, at 133.

870. People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485 (1948).

871. *Id.* at 230, 78 N.E.2d at 487.

the indictments were dismissed.⁸⁷²

VARGAS, ANASTACIO (Hispanic). 1926. Texas. Vargas was convicted of murder and sentenced to life imprisonment. On appeal the conviction was reversed and a new trial was ordered.⁸⁷³ At retrial he was again convicted, and sentenced to death. On appeal, the conviction was affirmed.⁸⁷⁴ His head had already been shaved for execution and he had been served his last meal when a look-alike confessed to the crime. The judge investigated the case, commuted the sentence to life, and in 1929 Vargas was granted a full pardon. He was released after four years in confinement. In 1965, he sued the state for damages and was awarded \$20,000; the state appealed but the award was affirmed.⁸⁷⁵

VENEGAS, JUAN (Hispanic). 1972. California. Venegas was convicted of first-degree murder and sentenced to life imprisonment. In 1974, the conviction was reversed on the ground that the evidence was insufficient to sustain the conviction.⁸⁷⁶ Venegas was released and no attempt was made to retry him. In 1980, he won a \$1 million judgment against the city of Long Beach for false imprisonment on the ground that his conviction was secured in part by false testimony caused by police misconduct. The jurors voted unanimously in support of the judgment "because they wanted to show there was no doubt that Mr. Venegas wasn't involved in the murder."⁸⁷⁷ The judgment was later reversed on the ground of governmental immunity.⁸⁷⁸ In 1986, however, he was awarded a judgment in excess of \$2 million for his erroneous conviction.⁸⁷⁹

VINDIOLA, BERNARD (Hispanic). 1977. California. Vindiola was convicted of second-degree murder and sentenced to five years to life imprisonment. On appeal, the conviction was reversed because of the admission of hearsay evidence that identified Bernard, rather than his brother, Eddie, as the culprit and because evidence tending to impeach Eddie's testimony was excluded. The court also questioned the quality of the eyewitness identification.⁸⁸⁰ "Much evidence pointed to Eddie as the killer. . . . There was persuasive evidence that it was Eddie, not appellant, who entered the back seat of the car where . . . the killer

872. See generally E. RADIN, *supra* note 20, at 24-26; N.Y. Times, Sept. 29, 1948, at 19, col. 4; *id.*, Mar. 12, 1948, at 33, col. 6; *id.*, June 18, 1947, at 10, col. 7; *id.*, June 8, 1947, at 41, col. 3.

873. *Vargas v. State*, 104 Tex. Crim. 283, 284 S.W. 564 (Crim. App. 1926).

874. *Vargas v. State*, 107 Tex. Crim. 666, 298 S.W. 591 (Crim. App. 1927).

875. *State v. Vargas*, 419 S.W.2d 926 (Tex. Ct. App. 1967), *writ refined n.r.e.*, 424 S.W.2d 416 (Tex. 1968) (per curiam). See generally Ehrmann, *supra* note 440, at 18; Houston Post, Apr. 15, 1965, at 4, col. 3.

876. *People v. Reyes*, 12 Cal. 3d 486, 526 P.2d 225 (1974).

877. Nat'l L. J., Sept. 22, 1980, at 5, col. 1.

878. *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983); *Venegas v. City of Long Beach*, No. 66285, (D. Cal. Aug. 22, 1983).

879. JURY VERDICTS WEEKLY, Aug. 8, 1986, at 26; Nat'l L. J., Sept. 22, 1980, at 5, col. 1.

880. *People v. Vindiola*, 96 Cal. App. 3d 370, 158 Cal. Rptr. 6 (1979).

sat.”⁸⁸¹ A prosecution informant also came forward and admitted that she had told law enforcement officials that Bernard had not committed the crime. The prosecution thereupon dropped charges.⁸⁸²

WALKER, LEE DELL (black). 1954. Michigan. Walker was convicted of first-degree murder and sentenced to life imprisonment. The conviction was affirmed on appeal.⁸⁸³ A gun used in the killing was found in Walker’s car, and Walker, under duress, confessed to the crime. In 1965, the case was remanded to the trial court to determine whether the confession was voluntary.⁸⁸⁴ The court concluded that the confession was indeed voluntary, and on appeal this was affirmed.⁸⁸⁵ Further appeals were denied.⁸⁸⁶ In 1972, the case was reinvestigated by the *Detroit Free Press*. Alibi witnesses were located and Walker’s claim that his confession was coerced was confirmed. A new trial was then granted. Walker refused to seek executive clemency in order to win the new trial and clear his name. The prosecutor entered a *nolle prosequi*, and Walker was released after serving eighteen years. In 1974, an indemnity bill (\$25,000) unanimously passed the state Senate, but failed in the House after the prosecutor claimed that Walker was indeed guilty. Walker’s efforts to sue this prosecutor for defamation failed.⁸⁸⁷

WALLACE, EARNEST (black). 1916. Illinois. Wallace was convicted of murder and sentenced to death. An eyewitness identified Wallace as the culprit, but three other witnesses stated the gunman was masked, thus making identification impossible. Three alibi witnesses also testified for Wallace. A volunteer attorney and five Chicagoans fought on his behalf, and, in the words of a state senator, “were able to convince the public finally that Wallace was absolutely innocent.”⁸⁸⁸ On appeal, the conviction was reversed because of the insufficiency of the evidence.⁸⁸⁹

WAN, ZIAN SUNG (Asian). 1919. District of Columbia. Wan was convicted of murder and sentenced to death. The conviction was reversed on appeal because his coerced confession was improperly admitted at trial.⁸⁹⁰ Juries in two later trials refused to reconvict, and the indictment was dropped. Wan, a native of China, was released after seven years in prison. “[T]he review exercised by the Supreme Court

881. *Id.* at 388, 158 Cal. Rptr. at 16.

882. Letter from Curtis B. Sisk, Fresno Public Defender’s Office, to Michael L. Radelet (July 18, 1986) (on file with the *Stanford Law Review*).

883. *People v. Walker*, 371 Mich. 599, 124 N.W.2d 761 (1963).

884. *People v. Walker*, 374 Mich. 331, 132 N.W.2d 87 (1965).

885. *People v. Walker*, 6 Mich. App. 600, 149 N.W.2d 912 (1967).

886. *People v. Walker*, 379 Mich. 781 (1967); *People v. Walker*, 6 Mich. App. 600, 149 N.W.2d 912 (1967), *cert. denied*, 393 U.S. 1028 (1969).

887. *See generally* *Detroit Free Press*, Dec. 24, 1972, at B1, col. 3; *id.*, Feb. 27, 1972, at B1, col. 1; *Lansing St. J.*, July 16, 1974, at B3, col. 5.

888. Barbour, *supra* note 415, at 509.

889. *People v. Wallace*, 279 Ill. 139, 116 N.E. 700 (1917). *See generally* Barbour, *supra* note 415, at 508-09; *Chicago Tribune*, June 22, 1917, at 1, col. 2.

890. *Wan v. United States*, 266 U.S. 1 (1924).

in this case is seldom assumed by that Court. But for this unusual intervention Wan would have been executed”⁸⁹¹

WARD, WILLIAM (black). 1975. Alabama. Ward was convicted of first-degree manslaughter and sentenced to ten years in prison. Two years later, the original investigating police detective, who never had been comfortable with the conviction, discovered that the fatal bullet could not have come from Ward’s gun. Ward had fired his weapon into the air, and witnesses erroneously believed that this harmless shot was the cause of the victim’s death. The trial court ordered a new trial, the indictment was dismissed, and Ward was released.⁸⁹²

WEAVER, JOSEPH (black). 1927. Ohio. Weaver was convicted of first-degree murder and sentenced to death. His conviction was affirmed on appeal.⁸⁹³ Despite Weaver’s alibi witnesses, a co-defendant who had confessed to the crime testified against him. In 1929, a few days before Weaver’s scheduled execution, the co-defendant (serving a life term after being convicted of manslaughter) retracted his implication of Weaver. Three days later, on further appeal, the Ohio Supreme Court granted a retrial on the technical ground that certain hearsay evidence was inadmissible.⁸⁹⁴ Later that year, after twenty-two months under death sentence, Weaver was retried. When his attorney demanded a directed verdict of acquittal and the prosecutor did not object, the court ordered his release. In 1933, the Legislature awarded Weaver \$15,000 “for the damages he suffered by reason of the erroneous conviction.”⁸⁹⁵

WELLMAN, WILLIAM MASON (black). 1942. North Carolina. Wellman was convicted of the rape of a white woman and sentenced to death. On appeal, the conviction was affirmed. On the morning of the scheduled execution, Governor Broughton received word that another man had confessed to the crime. Wellman had already been seated in the electric chair when the reprieve came. Six months later he received a full pardon and was released. An investigation by the State Parole Commission, ordered after a routine request for executive clemency, showed that on the day of the crime, Wellman was “unquestionably” at work some 350 miles from the scene of the crime. Wellman had been convicted on the basis of the testimony of the victim, who was nonetheless described in the pardon report as “an honorable woman of the

891. F. FRANKFURTER, *supra* note 761, at 109. *See generally id.* at 108-09; N.Y. Times, June 17, 1926, at 3, col. 4.

892. *See generally* Bass, *And the Truth Shall Set You Free*, *INSIDE DETECTIVE*, June 1977, at 20.

893. *Weaver v. State*, 32 Ohio App. 5, 166 N.E. 594 (1928), *aff’d*, 120 Ohio St. 44, 165 N.E. 573 (1929).

894. *Weaver v. State*, 120 Ohio St. 44, 165 N.E. 569 (1929).

895. H.B. 55, 90th Gen. Assembly, Reg. Sess., 1933 Ohio Laws 56. *See generally* E. Borchard, Memorandum on Weaver Case (Sept. 14, 1931) (unpublished manuscript on file with the *Stanford Law Review*); Cleveland Plain Dealer, Apr. 6, 1929, at 9, col. 6; *id.*, Apr. 5, 1929, at 10, col. 1; *id.*, Apr. 4, 1929, at 6, col. 3.

highest integrity."⁸⁹⁶

WENTZEL, GERALD C. (white). 1947. Pennsylvania. Wentzel was convicted of second-degree murder and sentenced to ten to twenty years. The conviction was affirmed on appeal.⁸⁹⁷ Chief Justice Maxey, in a strong dissent joined by two other justices, stated: "[T]he Commonwealth produced no evidence which justified a verdict of guilty of murder against this appellant and the trial judge should have given binding instructions for acquittal."⁸⁹⁸ The conviction was based wholly on circumstantial evidence; the jury refused to believe Wentzel's alibi that he was out of town at the time of the crime. Through the efforts of the victim's mother and sister, The Court of Last Resort intervened. In 1950, after another man's confession convinced the Board of Pardons that the wrong man had been convicted, Wentzel was released. His sentence was commuted by Governor Fine to time served after the Board of Pardons unanimously recommended a pardon. As Gardner notes, "This [result was] a compromise, something of a sop to all parties concerned, but it . . . automatically prevented [Wentzel] from claiming damages from the State for false imprisonment."⁸⁹⁹

WILKINSON, ROBERT (white). 1976. Pennsylvania. Wilkinson was convicted on five counts of murder in the firebombing of a home but not formally sentenced because an appeal was immediately filed. In 1976, Wilkinson was released after another man pleaded guilty to the firebombing. An investigation by the *Philadelphia Inquirer* indicated Wilkinson's confession was coerced, and at least seven other people were beaten, threatened, or otherwise forced by the police into making false statements. One witness admitted he lied at the trial, and another man confessed (two others were indicted) before the mildly retarded Wilkinson was freed after spending more than a year in prison. The convictions of several Philadelphia police officers for civil rights violations arising from their "brutal and unlawful" mistreatment of Wilkinson were sustained on appeal.⁹⁰⁰ Wilkinson was later awarded damages of \$325,000.⁹⁰¹

WILLIAMS, JOSEPH S. (white). 1920. Virginia. Williams was convicted of voluntary manslaughter for the murder of his wife and sentenced to five years in prison. The cause of death was a brain hemorrhage; the state argued it resulted from a fight between the

896. Raleigh News and Observer, Apr. 16, 1943, at 1, col. 1 (quoting the Pardon Report). See generally Hart, *Gas Chamber Executioner*, AMAZING DETECTIVE MAG., Nov. 1945, at 42 (in which the crime is erroneously reported as "murder").

897. Commonwealth v. Wentzel, 360 Pa. 137, 61 A.2d 309 (1948).

898. *Id.* at 150-51, 61 A.2d at 315-16 (Maxey, C.J., dissenting).

899. E. GARDNER, *supra* note 20, at 160. See generally E. BLOCK, *supra* note 407, at 254-65; J. FRANK & B. FRANK, *supra* note 20, at 119-29; E. GARDNER, *supra* note 20, at 154-62; J. LORTON, *supra* note 403, at 202-04.

900. United States v. Ellis, 595 F.2d 154 (3d Cir. 1979); Wilkinson v. Ellis, 484 F. Supp. 1072, 1091 (E.D. Pa. 1980).

901. See generally Miami News, Dec. 24, 1976, at 10A, col. 1; N.Y. Times, Dec. 21, 1976, at 20, col. 6.

spouses two days earlier, and the defense argued it resulted from other factors. On appeal, the conviction was reversed because “[t]here was no bruise or outward physical evidence of any blow on the head” and “there is no evidence in the case to support the verdict in the finding that the corpus delicti was proven.”⁹⁰² Prior to retrial, *nolle prosequi* was entered in the case.⁹⁰³

WILLIAMS, ROBERT (white). 1956. California. Williams was convicted of first-degree murder and sentenced to life at the age of eighteen. He falsely confessed to the murder to kindle interest from his girlfriend, who he believed had been about to marry someone else. He was paroled in 1975, and three years later he established that he was completely innocent; police records showed that he had been in custody at the time of the murder. In 1978, after testimony on Williams’ behalf from the former prosecuting attorney (who nonetheless was not totally convinced of Williams’ innocence), a superior court judge ordered his release from parole.⁹⁰⁴

WILLIAMS, ROBERT (white). 1958. California. Williams was convicted of murder and sentenced to life imprisonment. While in prison on the previous conviction discussed in the preceding paragraph,⁹⁰⁵ he falsely confessed to a murder in order to convince the prison authorities that an innocent person could indeed be convicted on a false confession. For the second time, he was right. In 1975 he was paroled, and in 1978 he was released from parole.⁹⁰⁶

WILLIAMS, SAMUEL TITO (black). 1948. New York. Williams was convicted of first-degree murder for the killing of a teenaged girl and sentenced to death, despite the jury’s recommendation of life. The conviction was affirmed on appeal.⁹⁰⁷ In 1949, his sentence was commuted to life by Governor Dewey. In 1963, Williams was finally granted habeas corpus relief, and the conviction was reversed on the ground that his confession had been coerced.⁹⁰⁸ This confession was the only evidence against him. Williams was freed after twenty-two months on death row and almost sixteen years in prison. He later received compensatory damages from the state for “malicious prosecution.”⁹⁰⁹

WILSON, BILL (white). 1914. Alabama. Bill Wilson was convicted of first-degree murder and sentenced to life, despite testimony of five eye-

902. *Williams v. Commonwealth*, 130 Va. 778, 781, 783, 107 S.E. 655, 656 (1921).

903. *Richmond Times-Dispatch*, Oct. 5, 1921, at 14, col. 1.

904. *See generally* N.Y. Times, Dec. 24, 1978, at 22, col. 1; text accompanying notes 905-906 *infra*.

905. *See* text accompanying note 904 *supra*.

906. *See generally* N.Y. Times, Dec. 24, 1978, at 22, col. 1.

907. *People v. Williams*, 298 N.Y. 803, 83 N.E.2d 698, *remittur amended*, 298 N.Y. 863, 84 N.E.2d 446, *aff’d sub nom. Williams v. New York*, 337 U.S. 241 (1949).

908. *United States ex rel. Williams v. Fay*, 323 F.2d 65 (2d Cir. 1963).

909. *Williams v. City of New York*, 508 F.2d 356 (2d Cir. 1974). *See generally* N.Y. Times, Sept. 11, 1964, at 16, col 5.

witnesses that the victim was alive after the date of the alleged homicide. The conviction was based on perjured testimony and was affirmed on appeal.⁹¹⁰ In 1916, the trial judge was among those who petitioned the governor for a commutation. In 1918, Wilson was fully pardoned after his persistent attorney found the "victim" alive and well in Indiana. In 1919, Wilson was indemnified by the legislature (\$3,500), but most of this money was stolen by a probate judge who had been named a trustee of the account.⁹¹¹

WILSON, SHELIA (white). 1979. Kentucky. Wilson was convicted of first-degree murder and sentenced to twenty years in prison. Her conviction was affirmed on appeal.⁹¹² In 1983, a federal court found that the evidence of her "intent" to murder her husband was insufficient to support a jury conviction of first-degree murder. Wilson drove off in a car with her husband (the victim) and a friend (a fugitive from justice at the time, having murdered his wife). The two men were quarreling, and after she stopped the car by the road, the men got out. Shots were fired and Shelia Wilson and the other man drove off. The court noted that she was probably guilty of hindering prosecution (which was not charged), but not of murder. As one attorney noted, "The triggerman gave a sworn deposition stating [Wilson] was 'in no fashion or form' involved in her husband's murder. This could have been a capital case but was not prosecuted as such."⁹¹³

WING, GEORGE CHEW (Asian). 1937. New York. Wing was convicted of first-degree murder, sentenced to death, and executed in 1937. His conviction was affirmed on appeal.⁹¹⁴ While he was in prison awaiting execution, Wing convinced several observers that he had been falsely identified by eyewitnesses and that perjured testimony had been used against him. A participant in the killing testified against Wing and was sentenced to twenty years.⁹¹⁵

WOODMANSEE, ERNEST (white). 1947. California. Woodmansee was convicted of first-degree murder in the killing of a special police officer during a robbery and was sentenced to life. His conviction was affirmed on appeal, although one justice argued in dissent that the evidence connecting Woodmansee with the crime was insufficient.⁹¹⁶ The major evidence at the trial was the testimony of a self-confessed participant in the murder (who had been granted immunity) that connected Woodmansee with another co-defendant, Trujillo. Trujillo was exe-

910. *Wilson v. State*, 191 Ala. 7, 67 So. 1010 (1915).

911. See generally E. BORCHARD, *supra* note 20, at 309-16.

912. *Wilson v. Commonwealth*, 601 S.W.2d 280 (Ky. 1980).

913. Letter from Kevin McNally, Kentucky Department of Public Advocacy, to Michael L. Radelet (March 26, 1984) (on file with the *Stanford Law Review*); see also *Wilson v. Kassulke*, Nos. 81-5633, 81-5680 (6th Cir. Jan. 4, 1983) (LEXIS, Genfed library, USApp file).

914. *People v. Wing*, 274 N.Y. 477, 8 N.E.2d 611 (1937).

915. See generally L. LAWES, *supra* note 362, at 323-26; N.Y. Times, Jan. 5, 1937, at 2, col. 5.

916. *People v. Trujillo*, 32 Cal. 2d 105, 194 P.2d 681 (1948).

cuted for his role in the crime. After intervention by The Court of Last Resort, this testimony was impeached and the murder weapon was found in the possession of the witness' sister. In 1956, Woodmansee was released on parole.⁹¹⁷

WOON, LEM (Asian). 1908. Oregon. Woon was convicted of first-degree murder and sentenced to death. The conviction was affirmed on appeal.⁹¹⁸ Woon presented an alibi defense and always maintained his innocence. Two state supreme court justices, dissenting from the denial of rehearing, argued that the evidence was insufficient for conviction. In 1913, Governor West commuted the sentence to life, and in 1914, he granted Woon a pardon (conditional on Woon's return to China). Woon never left the country, and thus in 1927 the pardon was revoked by Governor Patterson. In 1935, however, Governor Martin granted Woon another pardon, again conditional on his deportation.⁹¹⁹

ZAJICEK, HERMAN (a.k.a. Herman Billik) (white). 1907. Illinois. Zajicek was convicted of murder and sentenced to death. He received a stay three days before the scheduled execution. In 1908, the sentence was commuted to life by Governor Dennen. In 1916, when the prosecution's key witness admitted having given "false and perjured testimony," Zajicek was granted a full pardon by Governor Dunne. An investigation by the State Pardon Board had led them to conclude that the prisoner "is at present an inmate of the prison hospital, in poor health, and, as we believe, an innocent man."⁹²⁰

ZIMMERMAN, ISIDORE (white). 1937. New York. Zimmerman was convicted of first-degree murder for providing the guns used to kill a police detective and was sentenced to death. On initial appeal the conviction was affirmed, notwithstanding the court's acknowledgment that Zimmerman was not at the scene of the crime.⁹²¹ Zimmerman was two hours away from execution (his head had been shaved and he had eaten his last meal) when Governor Lehman commuted the sentence to life. After twenty-four years in prison, and after the rejection of several appeals, an attorney volunteered to reinvestigate the case. The conviction was reversed, a new trial was ordered, the indictment was dismissed, and Zimmerman was released.⁹²² In 1981, the New York Legislature passed legislation allowing him to sue the state. In 1982,

917. See generally Cook, *supra* note 783, at 196-97; Arcosy, Feb. 1956, at 57; *id.*, Jan. 1956, at 28; *id.*, May 1955, at 92; *id.*, Jan. 1953, at 4.

918. State v. Lem Woon, 57 Or. 482, 107 P. 974, *aff'd sub nom.* Lem Woon v. Oregon, 229 U.S. 586 (1913).

919. See generally Bedau, *supra* note 626, at 33; Oregonian, Apr. 19, 1935, at 20, col. 1; Pardon Reports of Dec. 17, 1914, and Apr. 18, 1935 (Secretary of State's Records of Pardons, Permissions, and Commutations of Sentences, 1904-1954, Oregon State Archives).

920. Report of the Illinois Board of Pardons 1, 6 (Oct. 1916) (on file in the Executive Clemency files, Illinois State Archives); see also Barbour, *supra* note 415, at 506.

921. People v. Guariglia, 279 N.Y. 707, 18 N.E.2d 324 (1938).

922. People v. Zimmerman, 10 N.Y.2d 430, 179 N.E.2d 849 (1962).

the New York State Court of Claims agreed that the prosecutor knew Zimmerman was innocent, suppressed evidence, and intimidated witnesses into perjuring themselves. In 1983, he was awarded \$1 million by the state, but he died four months later.⁹²³

923. See generally I. ZIMMERMAN, PUNISHMENT WITHOUT CRIME (1964); NEWSWEEK, June 13, 1983, at 82; N.Y. Times, Oct. 14, 1983, at 25, col. 3; Florida Times Union, Nov. 17, 1982, at 3, col. 1; Boston Phoenix, Oct. 26, 1982, at 18, col. 2; N.Y. Times, Feb. 3, 1962, at 19, col. 1.

APPENDIX B: CODING SCHEDULE

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1900	IL	Synon	1	4	6	12	12	1
1900	VA	Phillips	1	4	2	7	8	4
1901	FL	Brown, J.	1	4	1	7	2	3
1901	ME	Lambert	1	3	2	15	9	4
1905	IL	Briggs	1	4	6	12	12	1
1905	AL	Garner	1	5	7	16	2	6
1905	AL	Johnson*	1	4	7	16	2	7
1905	MA	Tucker	1	5	9	7;9	12	6
1905	CA	Staples	1	4	5	13	12	1
1906	OR	Jennings	1	4	5	8	12	1
1906	NC	Kendall & Vickers	2	3	2	7	6	3
1907	VA	Burton & Conquest	3	2	5	9	12	1
1907	TN	Sherman	1	4	2	8	2	1
1907	IL	Zajicek	1	4	2	7	3	2
1907	NJ	Schuyler	1	4	2	9	9	2
1907	NB	Shumway	1	5	7	16	2	6
1908	OR	Woon	1	4	2	12	12	3
1909	VA	Lyons	2	2	2	9	1	1
1909	IL	Lucas, J.	1	3	7	7	2	4
1909	IL	Lucas, M.*	1	3	5	7	2	1
1910	US	Donnelly	1	3	7	11	2	7
1911	WI	Johnson, J.	4	3	3	1	5	3
1912	MI	MacGregor	4	3	2	9	12	1
1912	NY	Becker	1	5	9	5;7	6	6
1912	NY	Cirofici*	1	5	9	5;7	6	6
1912	NJ	MacFarland	1	4	6	13	12	1
1913	GA	Frank	1	4	2	7;15	3	5
1914	NM	Garcia	3	2	5	9	12	1
1914	AL	Wilson, B.	1	3	1	7;12	1	1
1914	OR	Pender	1	4	2	16	2	2
1915	UT	Hill	1	5	10	5;15	12	6
1915	NY	Green, N.	2	3	2	14	6;7	1
1915	NY	Stielow*	1	4	2	1	6;7	1
1915	NY	Bambrick	1	5	9	16	6	6
1916	FL	Fudge	1	3	5	13	12	1
1916	PA	Haines	1	4	6	7	12	1
1916	CA	Billings	4	3	2	4;7;5	7	4
1916	CA	Mooney*	1	4	2	4;7;5	7	4
1916	IL	Wallace	1	4	5	6;12	7;9	1
1916	OR	Branson	2	3	2	16	5;6	1
1917	AL	Sanders	1	5	7	7	2	6
1918	NJ	Morello	4	3	2	1	6	2
1918	WI	Long	4	3	1	16	12	1

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1918	CT	Lanzillo	2	3	2	9	9	2
1919	NC	Bowles	1	4	2	16	4	1
1919	AR	Banks, A. & 5 others	1	4	5	15	12	2
1919	AR	Hicks & 5 others*	1	4	3	15	12	2
1919	AR	39 other defendants*	2	2	3	15	12	1
1919	TN	Mays	1	5	7	6;3	2	6
1919	MI	Ripan	1	3	5	9	4	3
1919	DC	Wan	1	4	5	1	12	2
1919	MI	Prevost	1	3	2	7;8;5	6	3
1920	NC	Hefner	2	2	2	16	4	1
1920	NJ	Lamble	1	5	10	10	12	6
1920	VA	Williams, J.	3	2	5	13	12	1
1920	AL	Crutcher & Hudson	1	3	7	7	2	5
1920	AL	Murchison*	1	3	1	7	2	2
1920	AL	Staten*	1	3	2	7	2	5
1921	MA	Sacco & Vanzetti	1	5	10	5;6;15	7	6
1922	OH	McKinney	1	3	5	6;9	2	1
1922	NC	Dove & 2 others	1	4	2	7	2	2
1923	MI	Storick	1	3	2	13	7	4
1924	MI	Hardy	1	3	5	7;3	8;11	4
1924	NY	Hoffman	2	3	6	7;9;14	7	1
1925	IL	Reno	1	4	6	8	5	1
1925	WV	Boyd	1	3	6	12	12	1
1925	NC	Mansell	R	4	3	6;12	7	1
1925	IL	Marino	4	3	5	5	12	4
1925	NY	Larkman	1	4	2	6	2	2
1926	TX	Vargas	1	4	4	6	5	1
1926	PA	Harris	1	3	3	8	7	4
1926	NJ	Sweeney	1	3	2	6;7;12	2	1
1926	KY	Dabney	4	3	2	7	1	1
1926	WV	Beale	1	4	2	7	5	2
1927	FL	Shaffer & 2 others	1	4	5	6	12	1
1927	MA	Cero	1	4	6	9	8	1
1927	OH	Weaver	1	4	1	7;12	12	1
1927	IL	Olson	4	3	6	6	7	1
1928	CA	Garvey & Leshner	1	3	2	6;7	7	1
1928	CA	Rohan*	1	3	1	6;7	7	1
1928	AL	Butler	4	3	2	7;1	1	1
1928	AL	Yelder*	4	3	2	7	1	1
1929	NY	Barbato	1	4	5	1	4	1

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1929	MO	Craig & Hess	2	2	2	9	2	1
1929	MS	Gunter	4	2	7	7	2	1
1929	GA	Coleman	4	3	1	9	2	1
1931	NY	Grzechowiak & Rybarczyk	1	5	7	6	12	6
1931	MI	Growden	4	3	3	6;7	2	1
1931	AL	Montgomery, Roberson, & Williams	R	4	2	7;15	7	2
1931	AL	Wright, R.*	R	3	2	7;15	7	2
1931	AL	5 other Scottsboro defendants*	R	4	2	7;15	7	4
1931	NY	Matera	1	4	3	7	3	4
1931	OK	Hollins	R	4	10	7;14;15	10	5
1931	MI	Jenkins	1	3	5	7;13	8	2
1931	OH	Krause	1	3	8	16	3	2
1932	OR	Jordan, T.	1	4	5	1	12	4
1932	MI	Gross	1	3	5	7;3	11;8	4
1932	NC	Langley	1	4	2	7;12	3	1
1933	CA	Lamson	1	4	6	9	12	1
1933	MN	Hankins	1	3	1	6;9	10	4
1933	NY	Fisher	3	3	4	4	12	3
1933	IL	Majczek	1	3	1	7;3	10	3
1933	IL	Marcinkiewicz*	1	3	1	7;3	10	4
1933	DC	Bernstein	1	4	2	6;12	12	2
1933	FL	Chambers, I. & 3 others	1	4	6	3;1;10	7	2
1933	CA	Dulin	1	3	2	7;5	12	1
1934	MO	DeMore	4	3	2	14	12	1
1934	AL	Jordan, W.	2	3	5	9	12	1
1934	MS	Dean	4	3	2	13	12	1
1935	KS	Pyle	1	3	5	4;7	4	2
1935	NJ	Hauptmann	1	5	10	3;5;7	10	6
1935	WA	Boggie	4	3	2	7	11	3
1935	WA	Horn	1	3	1	1	12	4
1936	KY	Jones, T.	1	4	5	7;13	6;9	1
1936	CA	Brite, C.	1	4	3	7;4	11	4
1936	CA	Brite, J.*	1	4	3	7;4	11	4
1936	MI	Padgett, W.	1	3	2	6	12	3
1936	NY	Appelgate	1	5	8	7	12	6
1936	IL	Fowler	4	3	8	1;4	7	5
1936	IL	Pugh*	4	3	1	1;4	7	4
1936	OK	Goodwin	4	3	5	10;4;7	12	4
1937	NY	Wing	1	5	9	7;6	12	6
1937	AL	Collins	R	5	10	10;15	10	6
1937	ME	Dwyer	4	3	8	14	7	4
1937	NY	Zimmerman	1	4	1	7;4	7	4

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1938	NY	Kapatos	2	3	5	4	12	3
1938	MI	Clark, C.	1	3	1	6;3	7	4
1938	NY	Sberna	1	5	9	2	6	6
1939	PA	Bilger	4	3	5	14	12	1
1939	PA	Sheeler*	4	3	5	1;7	12	3
1940	TX	Padgett, E.	4	3	5	14	12	3
1941	NY	Hoffner	1	3	1	12;4;6	10	3
1942	WI	LeFevre	1	3	5	11	12	1
1942	CA	Rogers, C.	1	4	5	1;14	12	1
1942	NC	Wellman	R	4	2	12;6	2	1
1943	VA	Rogers, S.	1	4	2	7;12	10;11	2
1943	CA	Lindley	1	4	8	6	11	7
1944	CT	Bertrand	3	2	5	14	2	1
1945	MS	McGee	R	5	10	1;7	10	6
1945	FL	Anderson	R	5	10	2;7	12	6
1945	VA	Smith, G.	1	2	5	13	12	1
1945	MI	Calloway	1	3	5	7;12	10;7	2
1946	CA	Kamacho	1	3	5	1;12;6	7	1
1947	NC	Parrott	1	4	5	7;12	3	1
1947	NC	Thompson*	2	3	3	1;12	3	3
1947	PA	Wentzel	2	2	3	9;12	8;11	1
1947	NY	Valletutti	1	4	5	1;7	2	1
1947	PA	Green, W.	1	3	2	7	3	2
1947	IN	Lobaugh	1	4	3	14;6	6	4
1947	CA	Woodmansee	1	3	3	7	11	2
1948	NY	Williams, S.	1	4	1	1	12	4
1948	VA	Holland	1	2	6	9	12	1
1948	NJ	Cooper	1	4	10	1;12	7	1
1948	NJ	English*	1	4	10	1;12	7	5
1948	NJ	4 other Trenton defendants*	1	4	6	1;12	7	1
1949	FL	Greenlee	R	3	3	15;3	10	3
1949	FL	Irvin*	R	4	10	15;3	10	4
1949	FL	Shepherd*	R	4	10	15;3	10	5
1950	NY	Leyra	1	4	5	1;2	12	2
1950	WV	Bailey	1	4	2	12;6	11;6	2
1951	CA	Kirkes	2	3	5	5;8	12	1
1951	NV	Johnson, E.	2	2	2	13	12	1
1952	WI	Kanieski	1	3	5	16	12	4
1952	PA	Antoniewicz & 2 others	1	3	5	13	12	4
1952	AL	Fewell	2	3	3	1;12	10;11	2
1953	TX	Morris	1	4	3	6	9	7
1953	LA	Labat & Poret	R	4	10	7;1;12	9	4
1954	OH	Sheppard	2	3	6	9	7	3
1954	NY	Pfeffer	2	3	5	1	2	1
1954	MA	Rodriguez	2	3	1	1	2	1

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1954	MI	Pecho	2	2	2	4;13	7;6	2
1954	MI	Walker	1	3	5	1;12	10	4
1956	OH	McMullen	1	3	6	3	7	2
1956	CA	Williams, R. (1st)	1	3	3	12;14	12	4
1956	IL	Miller	1	4	5	4;1;9	7	3
1956	GA	Foster	1	4	5	6;7;12	2	1
1957	OH	Bundy	1	4	6	7	9	1
1957	OK	Bennett	3	3	2	14	2	1
1958	CA	Williams, R. (2d)	4	3	3	12;14	12	4
1958	NY	Kassim	3	2	4	1	2	2
1958	CA	Fry	3	2	1	14	2	1
1959	FL	Shea	4	3	1	1;2	10	1
1960	CA	Kidd	1	4	6	11;4;2	12	1
1960	FL	Dawson	1	5	8	1	10	6
1961	LA	Hampton	1	3	3	7;14;12	10	1
1961	MD	Giles & Giles	R	4	5	7	9;7	2
1961	MD	Johnson*	R	4	2	7	9;7	2
1961	CA	Imbler	1	4	5	7;4	11	2
1961	MI	Clark, E. & 2 others	1	3	5	6;7	4;2	1
1963	OH	Domer	1	4	6	13	12	1
1963	FL	Lee & Pitts	1	4	2	1;8	10	3
1965	NY	Arroyo	3	1	5	6	3	1
1966	MA	Reissfelder	1	3	5	6	2	3
1967	SC	Dedmond	4	2	5	7	2	1
1967	NY	Barber	1	3	5	1;2	12	2
1968	NJ	Merritt	1	3	5	8;4;3	7	2
1969	MS	Chambers, L.	4	3	5	3;6;11	7	1
1971	NY	Maynard	3	2	5	4;8	12	2
1971	IL	McDonald	4	3	2	16	2	1
1971	NY	Jackson, E.	1	3	5	8;5;2	12	2
1971	FL	Frederick	1	3	5	1;6	2	1
1971	FL	Keaton*	1	4	5	1;6	2	1
1971	MA	Johnson, L.	1	4	5	11;7	3	3
1971	MA	Leaster	1	3	6	6	3;7	3
1972	CA	Venegas	1	3	4	3;8	12	1
1972	OH	Jones, H.	2	3	5	7;4	7	1
1973	OH	Broady	1	3	5	6;4;12	5	2
1973	NM	Seaton	1	3	4	7;4	12	2
1973	CA	Owens	1	3	3	6	4	2
1973	CT	Reilly	3	2	5	1;4	9;10	1
1973	OH	Thrower	1	3	5	12;2;7	12	1
1973	GA	Creamer & 6 others	1	3	5	4;7	10	1
1974	IA	Hall	2	3	5	4;7	7	2
1974	MA	Grace	4	3	5	3;7	9	2

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1974	FL	Adams	1	5	8	9;6	7	6
1974	CA	Lee, C.	1	3	6	4;6	9	2
1974	CA	Jackson, S.	1	3	4	9	2	1
1974	LA	Blanton	4	3	5	8;12	12	2
1974	MA	Ellison	1	3	5	4;7	12	1
1974	NM	Gladish & 3 others	1	4	5	7;8	10	1
1974	CA	Rivera & Walpole	2	1	5	9	1	1
1974	FL	Tibbs	1	4	5	7;2	12	1
1975	AZ	Treadaway	1	4	6	13	12	1
1975	AL	Ward	3	2	5	8	4	1
1975	WI	Reichoff	1	3	6	5	10	1
1975	OH	Carmen	1	3	6	14;6;12	12	1
1975	LA	Ross	R	4	5	1;6	7	2
1975	NJ	De Los Santos	1	3	5	4;6;7	9	2
1975	DC	Brown, B.	2	3	5	6	4	1
1975	GA	Charles	1	4	4	12;2	12	1
1975	GA	Banks	1	4	4	4;10	3	1
1976	PA	Wilkinson	4	1	4	1;7;3	10	1
1976	OH	Beeman	1	4	6	8	12	1
1976	OH	Smith, L.	1	3	6	6;12	4	1
1977	CA	Vindiola	2	3	5	11	12	1
1978	CA	Hall, G.	1	3	5	6;10;12	4	1
1978	OH	Fay	1	3	5	8	7	1
1978	IN	Hicks	1	4	6	7;12	10	1
1979	KY	Wilson, S.	1	2	5	9	12	1
1979	MD	Estes	4	2	1	16	2	1
1979	MO	Reynolds	2	3	3	1	2	1
1979	FL	Bachelor	2	2	5	6	12	1
1980	GA	McIntosh	4	3	7	1;14	4	5
1980	MA	Amado	1	3	6	6	12	1
1980	MD	Robertson	1	3	6	7	12	1
1980	NJ	Parker	3	2	5	7;1	12	2
1981	FL	Jaramillo	1	4	5	9	12	1
1981	UT	Petree	2	2	5	16	12	1
1981	NM	Robinson	1	3	6	5	12	1
1981	CA	Cooks	2	3	6	10;2;6	10	1
1981	NY	McLaughlin	2	2	5	6;4	7;8	1
1982	AR	Carden	1	3	5	9	10	1
1982	SC	James & Peterson	4	3	5	7;3	3	1
1982	OH	Holbrook	4	3	5	7;12	3	1
1982	OH	Rucker*	4	3	6	7;12	3	1
1982	NY	Carter	2	3	5	7	8	1
1982	PA	Ferber	1	4	5	7	4	1
1983	FL	Brown, A.	1	4	6	7	2	1
1983	MO	Norwood	2	1	3	9	4	1

Year of Conviction	Juris-diction	Defendant	Table 1	Table 2	Table 5	Table 6	Table 7	Table 8
1984	TX	Malloy	4	2	5	6	3	1
1985	TX	Torres	4	3	5	11;12	12	1

* Indicates case is found in Appendix A with the immediately previous defendant.