LOST LIVES: MISCARRIAGES OF JUSTICE IN CAPITAL CASES

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I

INTRODUCTION

One of the longstanding complaints against the death penalty is that it "distort[s] the course of the criminal law."[1] Capital prosecutions are expensive and complicated; they draw sensational attention from the press; they are litigated—before, during, and after trial—at greater length and depth than other felonies; they generate more intense emotions, for and against; they last longer and live in memory. There is no dispute about these effects, only about their significance. To opponents of the death penalty, they range from minor to severe faults; to proponents, from tolerable costs to major virtues. Until recently, however, the conviction of innocent defendants was not seen as a special hazard of capital punishment. Everybody agreed, of course, that condemning innocent defendants is a singular wrong, but it was not widely viewed as a major problem, and certainly not as a problem of special significance for capital cases. In the past decade, this complacent view has been shattered. In case after case, erroneous conviction for capital murder has been proven. I contend that these are not disconnected accidents, but systematic consequences of the nature of homicide prosecution in general and capital prosecution in particular—that in this respect, as in others, death distorts and undermines the course of the law.

There are three factual premises behind the argument that capital convictions of innocent defendants are vanishingly rare. The first is that erroneous convictions are rare in criminal prosecutions of any sort, and that their danger

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1. Herbert B. Ehrmann, *The Death Penalty and the Administration of Justice*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 83 (1952).

is greatly exaggerated. Judge Learned Hand captured this sentiment in his frequently quoted observation:

> Under our criminal procedure, the accused has every advantage. . . . He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[2]

The second premise is that, on the whole, homicides are easier to solve than most other violent felonies. Homicide is typically a crime of passion rather than design, and the killer is usually a relative, friend, or acquaintance of the victim. For example, in 1994, about seventy-eight percent of robberies and fifty-two percent of the aggravated assaults in the United States were committed by strangers,[3] but only about twenty-five percent of the homicides.[4] As a result, most homicides present no real question about the identity of the criminal, and no real risk of mistake.

The third premise is that homicides, and capital homicides in particular, get far more attention than other crimes—which suggests that errors will be less likely in these cases because they are examined with much more care than others. For example, Frank Carrington wrote in 1978: "[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."[5] In other words, we need not worry about this problem because we have already taken care of it.

How convincing are these three premises? The strong version of the first—Judge Hand's position that convictions of innocent people just do not happen—is false. In 1932, Edwin Borchard responded to the claim that "innocent men are never convicted" by publishing his now classic book, *Convicting the Innocent*,[6] in which he documented sixty-five of these cases that never happen. Since then, several other compilations of proven erroneous convictions have been published,[7] and new cases continue to surface with regularity.

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

3. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1996, at 214 tbl 3.12 (1997) [hereinafter SOURCEBOOK 1996]. Rape is the only serious nonhomicidal crime of violence that does not fit this pattern. In 1994, only 22.8% of rapes were committed by strangers. *See id.*

4. *See id.* at 334 tbl. 3.124 (reporting a total of 3,036 stranger homicides out of 12,138 for whom the relationship of the killer to the victim was known).

5. FRANK CARRINGTON, NEITHER CRUEL NOR UNUSUAL 123 (1978).

6. EDWIN M. BORCHARD, CONVICTING THE INNOCENT, ERRORS OF CRIMINAL JUSTICE vii (1932). The entire statement by a prosecuting attorney was the following: "Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility."

7. *See* JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); EDWARD D. RADIN, THE INNOCENTS (1964); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283 (1988).

Nobody knows the true number of mistaken convictions. Since 1992, at least fifty-five defendants—mostly convicted rapists—have been exonerated by DNA identification evidence; most of them were released after spending years in prison.[8] These were flukes. The technology to prove their innocence happened to become available before the physical evidence from the crime (semen or blood) was lost or destroyed, or deteriorated beyond use. It is anybody's guess how many other innocent prisoners have not had the benefit of this sort of luck. The erroneous convictions that are discovered may truly be the tip of an iceberg.

Still, the vast majority of convicted defendants are no doubt guilty; the iceberg—whatever its size—floats in a sea of factually correct decisions. Learned Hand's view is simply an example of a common human tendency to assimilate "usually" to "always," and "rarely" to "never." This can be dangerous. Airplane crashes (or, to continue a conceit, collisions between ocean liners and icebergs) are also rare; as passengers, we can feel comfortable telling ourselves and each other not to worry, that it will never happen. But engineers, traffic controllers, and pilots must not ignore crashes: They are terrible, tragic events, and they remain rare precisely because as a society we do worry about them, and try to stop them from ever happening.

The second point—that in most homicides there is no serious factual question about the guilt of the accused—is true.[9] That reduces the field considerably. Unfortunately, the ease with which most homicides may be solved does relatively little to increase the accuracy of decisionmaking in *capital* homicide cases, because that subset is likely to include most of the cases in which factual determinations are most difficult. In most homicides, the killer was known to the victim; that is the main fact that makes most homicides easy to solve. But not in capital murders. For example, a study of homicide prosecutions from 1976 through 1980 in Georgia, Florida, and Illinois found that while only seventeen to twenty-two percent of all the homicide victims in those states were killed by strangers, fifty-five to seventy-one percent of the death sentences were returned in this comparatively rare set of cases.[10]

The third step in the argument—that capital cases get an extraordinary amount of attention—is also certainly true. For the purpose of minimizing the risk of erroneous convictions and executions, however, that attention is, at best, a two edged sword: It generates many more mistakes than would occur if capital murders were handled as casually as run-of-the-mill robberies and assaults. The extra attention we devote to capital cases might also help us catch some or

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8. *See* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (28 cases); Letter from Lawrence C. Marshall & Barry C. Scheck, The Innocence Project, Cardozo School of Law, to Colleagues at North American Law Schools (Oct. 2, 1998) (on file with author) (55 cases).

9. *See supra* notes 2-3 and accompanying text.

10. *See* SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 48-50 (1989); *see also id.* at 236-44 (showing similar patterns for Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas).

even most of these mistakes, to the extent that we are committed to doing so. Unfortunately, recent history suggests that our commitment to correcting deadly judicial errors is weak.

The last paragraph must seem very puzzling: Why would added attention increase errors? And yet, that nonintuitive statement is the core of my argument. I will develop it in Part IV, after defining my terms in Part II and briefly discussing in Part III the large volume of evidence that has accumulated that shows that mistaken convictions in capital cases do occur on a regular basis. Finally, in Part V, I will review what we might do and what we in fact do to minimize these tragedies.

II

DEFINING THE ISSUES

The archetypal capital case is a highly publicized prosecution for a brutal and gory murder, in which the defendant is tried, convicted, sentenced to death, and eventually executed. Needless to say, most capital cases differ from this standard in one or several respects. The case may receive relatively little publicity; the murder may be relatively low on the scale of horror; the defendant may plead guilty rather than go to trial, in which case he will normally be sentenced to life imprisonment or a term of years; if he does go to trial, he may be convicted of a noncapital crime, or acquitted altogether;[11] if he is convicted of a capital crime, he may be sentenced to life imprisonment; and finally, if he is sentenced to death, he will probably never be executed.[12]

I am concerned with any wrongful conviction of a defendant charged with a capital crime, regardless of the crime or the penalty. The worst mistake, the execution of an innocent defendant, appears to be the rarest. This is what we ought to expect: Guilty or innocent, few of those who are sentenced to death in America are actually executed.[13] Among the known cases of wrongful conviction, many more innocent defendants were either convicted of first-degree murder and sentenced to death but not executed, or convicted of first-degree murder and sentenced to life imprisonment; much smaller groups were convicted of second-degree murder, or even manslaughter or lesser felonies, and sentenced to terms of years.[14]

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11. Throughout this paper, I refer to homicide defendants using masculine pronouns. This is a conscious editorial choice rather than an archaic and sexist convention. It reflects the fact that 91% of homicide defendants, 98.6% of death row prisoners, and 99.4% of prisoners executed in this country since 1976 are men. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A., Fall 1998, at 1, 4 [hereinafter DEATH ROW U.S.A.]; SOURCEBOOK 1996, *supra* note 3, at 556 tbl. 6.62.

12. *See* Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUD. L. POL. & SOC'Y 71, 77 (1993).

13. From January 1, 1973, to October 1, 1998, there have been 5,879 death sentences and 481 executions in the United States. *See* DEATH ROW U.S.A., *supra* note 11, at 1.

14. *See* Hugo Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 35, 36 (1987).

A conviction can be "wrong" in many ways. It might be excessive—for example, if the defendant is really guilty of second-degree murder but was convicted of first-degree murder; or the jury might have been right to conclude that the defendant committed the fatal act, but wrong to reject a defense of insanity or self-defense; or a conviction that is factually accurate might have been obtained in violation of the defendant's constitutional rights. I am not concerned with any of these types of errors. I shall limit my focus to convictions of "the wrong man"—a defendant who did not do any act that caused or contributed to the death or deaths for which he was convicted.[15]

Erroneous convictions (as I have defined them) may occur disproportionately often in capital cases for two types of reasons: (1) because of factors that are common or inevitable in capital prosecutions, but that occur in other cases as well—for instance, the fact that the crime involves homicide or that it was heavily publicized; or (2) because of consequences that flow from the demand for the death penalty itself. Some factors may appear in both groups. For example, a capital case is likely to be the sort of case that would be highly publicized in any event, and asking for the death penalty is likely to make it more so.

If capital cases do produce erroneous convictions, there are different implications depending on the cause of the erroneous conviction. The causes in the first group imply that we should be wary of imposing or executing death sentences, because capital cases are of the sort where erroneous convictions are particularly likely regardless of the sanction requested or imposed. Abolishing the death penalty would not reduce the number of erroneous convictions of that type, but rather would eliminate the worst consequences of those errors. The causes in the second group imply that the death penalty itself undermines the accuracy of our system of adjudication. As Justice Frankfurter put it, "When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect . . . [is] very bad."[16] If that is true, abolishing capital punishment would reduce the number of erroneous convictions of all sorts in those cases in which we now seek the death penalty, and not merely limit the harm of those errors that do occur.

III

HOW OFTEN ARE INNOCENT PEOPLE SENTENCED TO DEATH?

It is anybody's guess how many of the 3,517 prisoners on death row[17] are innocent of the murders for which they were condemned. But we are beginning to be able to place a lower bound on how few it may be, and it is quite a few. The major authority in this area is a study of wrongful convictions in "potentially capital cases" by Professors Hugo Bedau and Michael Radelet.[18]

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15. This definition tracks the one in *id.* at 42.

16. FELIX FRANKFURTER, OF LAW AND MEN 81 (1956).

17. *See* DEATH ROW U.S.A., *supra* note 11, at 1 (as of October 1, 1998).

18. *See* Bedau & Radelet, *supra* note 14. Bedau & Radelet define a "potentially capital case" as a prosecution for a crime for which the death penalty was available in the jurisdiction (that is, homicides

The first published version of this work, which appeared in 1987, listed 350 such wrongful convictions from 1900 through 1985, including 139 death sentences and twenty-three executions.[19] In 1992, Professors Bedau and Radelet, together with Constance Putnam, published their findings in book form.[20] By then, the catalogue had been extended to 416 miscarriages of justice, from 1900 through 1990. Some of the cases on their list are notorious and controversial, including several of the executions: Bruno Hauptmann, Joe Hill, Nicola Sacco, and Bartolomeo Vanzetti.[21] For these cases, there are other writers who maintain that the defendants were in fact guilty.[22] But the precision of Bedau and Radelet's judgment in every case hardly matters; it is the overall pattern that tells the story. In the great majority of the cases they identify, the error has been admitted or is beyond dispute.[23] Even the disputed cases suggest that there are severe doubts about the defendants' guilt—which in turn means that many of them were innocent. On the other side, Bedau and Radelet excluded cases in which the defendants may well have been innocent, if, in their judgment, the evidence of innocence was not sufficiently convincing.[24] In any event, a compilation such as theirs can only illustrate the problem, it cannot catalogue the errors. As Bedau and Radelet readily admit, nobody knows how many miscarriages of justice have gone entirely undetected.[25]

In 1996, Professors Radelet and Bedau and William Lofquist published a third study on this issue: a compilation of cases of prisoners who have been released from death row since 1970 because of serious doubts about their guilt.[26] They list sixty-eight such cases,[27] about 1.2% of the total number of death sentences returned between the end of 1972 and the beginning of 1998.[28] As the authors point out, their definition of the category—"serious doubts about guilt"—applies to some death row inmates who were ultimately acquitted, or whose cases were dismissed, but who may in fact have been guilty. Nonethe-

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and a small number of rapes in several southern states) or for which the death penalty would have been available but for the abolition of capital punishment (which drew in 24 cases from abolitionist states). Most of these cases did not result in death sentences, and in many the defendants were convicted of noncapital crimes. *See id*. at 31-32.

19. *See id*. at 36.

20. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

21. *See* Bedau & Radelet, *supra* note 14, at 74. The authors note without surprise that "we have found no instance in which the government has officially acknowledged that an execution carried out under lawful authority was in error." *Id.* at 25. They do note a couple of marginal exceptions: In the 1980s, two American governors issued posthumous pardons (or their equivalent) for prisoners executed in the 19th century, and in 1960, Queen Elizabeth of Great Britain pardoned a man who had been hanged in 1950. *See id*. at 74-75 n.274.

22. *See, e.g.*, Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

23. Bedau & Radelet, *supra* note 14, at 48-49.

24. *See id*. at 27.

25. *See id.*

26. Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907 (1996).

27. *See id*. at 916.

28. *See supra* note 13.

less, they almost certainly undercount the number of defendants erroneously convicted and sent to death row, for several reasons: (1) In some of the cases—the most tragic—the error will never be discovered and the defendant will be executed or die in prison of other causes. (2) In other cases, the error will probably never be discovered because it has become moot. The published list does not include any case in which a defendant who might well be innocent obtained release on other grounds, such as a constitutional violation, or the death or absence of a witness. (3) Some errors that will eventually be discovered are not yet known. The average time-to-release for the cases that Radelet and his colleagues list is 7.34 years; the median time is between six and seven years.[29] The death-row population in the United States has been growing steadily for decades; as a result, many prisoners on death row have been there six years or less.[30] (4) Finally, some cases in which innocent death row prisoners have been released—perhaps most—are not in the sample.[31] More than a quarter of the total number of cases (eighteen of sixty-eight) are from Florida; California, which has the largest death row in the country—513 compared to 387 in Florida—has only two cases; and Texas, which has executed more prisoners than any other state—159 compared to forty-three for Florida—has only six.[32] The reason for this disproportion, as the authors point out, is probably that Professor Radelet works in Florida and has maintained detailed data on every capital prosecution in the state.[33] If there were comparable data for all death penalty states, or if there was a comprehensive registry of all death row inmates released because of doubts about guilt, the total of known cases might be much higher.[34] But these resources do not exist.

The essential thing to know about mistaken convictions in capital cases is that they do happen and will continue to happen with some regularity—as Bedau and Radelet have shown. Bedau and Radelet do not try to estimate how often these tragic mistakes occur, and neither will I. Instead, I will address a related issue: Why do they happen in death penalty cases?

At the outset, however, it may be useful to put the numbers I have provided in perspective. Bedau and Radelet have assembled information on more erroneous convictions in capital cases in America in this century than all other col-

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29. *See* Radelet et al., *supra* note 26, at 966.

30. Because death rows in the United States were cleared by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), there was no backlog of old cases at the beginning of this time period to balance the accumulation of new ones at the end.

31. And, of course, Radelet et al.'s sample includes no cases—such as that of John Sosnovske, see *infra* note 87 and accompanying text—in which an innocent defendant was charged with capital murder but sentenced to life imprisonment or any lesser punishment.

32. *See* DEATH ROW U.S.A., *supra* note 11, at 4, 14, 18, 23; Radelet et al., *supra* note 26, at 962.

33. Radelet et al., *supra* note 26, at 918.

34. Assuming the rate of miscarriages of justice in capital cases in Florida is the same as the national average, it is possible to get a very rough estimate of the true number of cases in which death row inmates have been released because of doubts about guilt by multiplying the number of cases in Florida (18) by the ratio of the national death row total (3,517) to Florida's death row (387). The result is 164, which is 2.4 times the number of cases Radelet et al. were actually able to collect.

lections of such errors in all criminal cases combined.[35] Since then, similar errors keep coming to light. In 1988, Arye Rattner published the most comprehensive summary of information on known miscarriages of justice in America, regardless of crime or cause—205 erroneous convictions from 1900 on.[36] In forty-five percent of Rattner's cases the offense was murder, and in twelve percent the penalty was death.[37] By comparison, homicides (of all sorts) make up a fraction of one percent of all arrests in this country, and about three percent of arrests for crimes of violence.[38] Murder and nonnegligent homicide account for 1.3% of all criminal convictions, about seven percent of convictions for violent crimes, less than three percent of all commitments to prison, and about ten percent of commitments to prison for crimes of violence.[39] Death sentences account for about two percent of all murder convictions, less than two-tenths of one percent of all convictions for violent crimes, and perhaps three-hundredths of one percent of all criminal convictions.[40] In other words, capital cases are heavily over-represented among known miscarriages of justice—five-to-one or ten-to-one or 100-to-1 or more, depending on which comparison seems most telling.

Does this mean that miscarriages of justice are more likely in capital cases than other prosecutions? I think so, for reasons I will explain in the next section. But there is also an obvious competing explanation for this striking disproportion. Since we pay more attention to homicides than to other crimes, and more to capital cases than to other homicides, we would be likely to detect more errors among homicide convictions than among other felonies—and especially among the most aggravated homicides—even if the errors that occur were evenly distributed. In part, this argument is certainly true. With more effort, we could discover more miscarriages of justice, and we do devote more attention to capital cases than to other felony prosecutions. But it cannot be a complete explanation for the apparent abundance of errors in capital cases. Many of the known miscarriages of justice—capital and noncapital alike—were

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35. The most complete compilations of erroneous convictions, regardless of penalty, are Gross, *supra* note 7 (136 proven misidentifications, of which 97 resulted in convictions), and Rattner, *supra* note 7 (205 erroneous convictions). Each of these compilations includes cases presented in the major earlier compilations, *see supra* notes 6-7 and additional cases from other sources. Rattner's 1988 data were later republished in HUFF ET AL., *supra* note 7, in which the authors refer to a total of "more than 500" cases of erroneous convictions, including their original 205 and others "reported in the mass media and in scholarly publications." *Id.* at 65-66. Unfortunately, they give no information whatsoever on these additional cases. Presumably their sources included Bedau & Radelet, *supra* note 14, and Radelet et al., *supra* note 26, both of which they cite. If so, all or virtually all of their additional cases may have come from these two sources. Since 45% of Rattner's original 205 cases—or 92—were homicides—it is a good guess that only about that many of those 205 cases could also have been included in Radelet et al.'s compilation of 416 errors in potentially capital cases, which leaves more than 300 additional cases from that one scholarly source alone.

36. *See* Rattner, *supra* note 7.

37. *See id*. at 287-88.

38. *See* SOURCEBOOK 1996, *supra* note 3, at 378-79 tbl. 4.7.

39. *See id*. at 473 tbl. 5.54.

40. *See id*. at 470 tbl. 5.50, 559 tbl. 6.65, 561 tbl. 6.67.

discovered by sheer chance.[41] If chance were the only factor, the known cases would be representative of all errors; since it is only one causal factor, the sample is no doubt quite different from the universe. Still, if even a third of the errors surfaced by luck alone, it would be surprising if the actual proportion of errors in murder cases were overrepresented in the set of known errors by as large a factor as we see: five or ten or a hundred to one.

Ultimately, the comparative proportion of miscarriages of justice in capital cases does not matter. It is just possible, I suppose, that erroneous convictions are as common in other criminal cases, but it is a depressing thought. It implies that behind the seventy-some prisoners who have been released from death row in recent years because of doubts about their guilt, there are thousands of undiscovered cases of defendants with equally doubtful convictions for noncapital homicides, and dozens of thousands or more equally questionable convictions for robbery, burglary, and assault. However, even if we assume this unlikely equivalence, the basic problems would be the same. Capital cases are at least as error prone as any others (if not much more so), and we regularly sentence innocent people to death. So the underlying question remains: Considering all the attention we devote to death penalty cases, why do we make so many mistakes?

IV

WHY ARE INNOCENT PEOPLE REGULARLY SENTENCED TO DEATH?

The road to conviction and sentence has three main stages: investigation, which is primarily the province of police; pre-trial screening and plea bargaining, where the dominant actor is the prosecutor; and trial, before a judge and jury. At each stage, capital cases receive more care, more resources, and more scrutiny than other prosecutions. This special focus is a natural consequence of the unique importance of death—the deaths of the victims, and the prospect of death as punishment for the defendants. In most cases, the effects of this special treatment are beneficial. But there is a cost: In some cases, the very same process produces terrible deadly errors.

A. Investigation

This is the critical stage, where most errors occur. The circumstances that produce them are variable, but the basic cause is the same: Homicides, and in particular capital homicides, are pursued much more vigorously than other crimes. As a result, more guilty defendants are identified and apprehended. Unfortunately, along the way, more innocent defendants—a larger number and a higher proportion—are caught up in the process as well.

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41. *See* BORCHARD, *supra* note 6, at xix; Bedau & Radelet, *supra* note 14, at 70; Gross, *supra* note 7, at 422; Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 223, 233-34 (J. Acker et al. eds., 1998).

1. Clearance Rates. Most crimes are never solved. In 1995, a mere twenty-one percent of all serious crimes known to the police were "cleared," which usually means that a suspect was arrested; of serious violent crimes, forty-five percent were cleared.[42] But even these low figures tell only half the story. Most crimes are not "known to the police": In 1994, only thirty-six percent of all crimes and forty-two percent of crimes of violence were reported.[43] In other words, only about eighteen percent of all crimes of violence are solved by the police, including about fourteen percent of robberies, eighteen percent of rapes, and seven percent of burglaries.[44]

On the whole, the crimes that are reported to the police have better evidence than those that are not reported. Cases with extremely strong evidence—those in which the culprit is caught in the act, or seen and identified by several people—are almost always reported. If the victim has to take the initiative to notify the police, he will be more likely to do so if he thinks there is a good chance that the criminal will be caught. When the police do hear about a robbery, or a rape, or a burglary, for which the identity of the criminal is not immediately obvious, their investigation is usually perfunctory: put out a call to other officers to try to spot the criminal in flight; interview the witnesses at the scene; collect immediately available physical evidence—that is it. If a suspect does not emerge from this process, it is unlikely that the case will ever be prosecuted. Most police detectives do not have the time to conduct detailed investigations of every reported felony, and in the usual run-of-the-mill case, there is little pressure on them to do so. The net result is that in general the felonies that are prosecuted are likely to be those in which the evidence of guilt is the strongest.

Homicides are different. First, almost every homicide is reported to the police when the body of the deceased person is found.[45] Second, most homicides known to the police are cleared—sixty-five percent in 1995,[46] more in previous years.[47] Overall, the proportion of all homicides that are solved is about

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42. *See* SOURCEBOOK 1996, *supra* note 3, at 398 tbl. 4.19. The "serious crimes" included in this figure are those on the FBI's uniform crime reporting "index": murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. *See* U.S. DEP'T OF JUSTICE, CRIMINAL JUSTICE INFORMATION SERVICES, DIVISION UNIFORM CRIME REPORTS: PRELIMINARY ANNUAL RELEASE 1 (1998). Of these, all but burglary, larceny, and motor vehicle theft are "serious violent crimes." *See id.* Arson is also an "index" crime, but it is not included in this tabulation because the data are insufficiently complete. *See id.*

43. *See id.* at 224 tbl. 3.32.

44. *See id.* at 224 tbl. 3.32, 398 tbl. 4.19.

45. There are exceptions—cases in which the body is not discovered, and others in which the cause of death is mistaken for accident or suicide or natural causes—but they could not account for more than a few percent of the total. *See* Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L .REV. 27, 51 n.98 (1984) (comparing homicides reported to the police to vital statistics data on mortality from homicide, which are taken from death certificates).

46. *See* SOURCEBOOK 1996, *supra* note 3, at 398 tbl. 4.19.

47. *See, e.g.*, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1952, at 43 (clearance rate for murder and nonnegligent homicide in 1952 was 94.9%); FEDERAL BUREAU OF

four times higher than the comparable proportion for other violent crimes.[48] A study of robbery investigations in Chicago in 1982-83, by Franklin Zimring and James Zuehl, provides an excellent illustration: Thirteen percent of all *robberies* reported to the police were solved within two months (including a somewhat lower proportion of robberies with injuries to the victims), compared to fifty-seven percent of *robbery killings*.[49] This difference cannot be explained by superior evidence—on the contrary, robbery homicides will usually have weaker evidence, since the victim is dead—but must be due to a systematic difference in the investigation by the police.

As we have noted, many homicides are easy to investigate.[50] In a typical case—a killing by a friend as a result of a drunken fight—the killer is known from the start. But the police get the hard murders as well as the easy ones, and there is much more pressure to solve these cases than nonhomicidal crimes. The relatives of the victim care more, the prosecutor cares more, the public is much more likely to be concerned, and the police themselves care more. Death produces strong reactions—in this context, a desire to punish and to protect. Other outrageous crimes can have the same effect—kidnappings, for example, or serial rapes—but they are rare. Homicide is common.

For the most part, the pressure to solve homicides produces the intended results. An investigation that would be closed without arrest if it were a mere robbery may end in a conviction if the robber killed one of his victims. But that same pressure can also produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and—if they believe they have the killer—perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying and to the extent that it attracts public attention—factors that also increase the likelihood that the murder will be treated as a capital case.

The murder of ten-year-old Jeanine Nicarico is a good example.[51] In February 1983, she was abducted from her home in Naperville, Illinois, raped, and killed—a crime of stunning brutality. The murder was the subject of a long,

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INVESTIGATION, UNIFORM CRIME REPORTS 1961, ch. 8, at 14 (clearance rate for murder and nonnegligent homicide in 1961 was 93.1%).

48. For some crimes—conspicuously, robbery and burglary—the police clearance rate (such as it is) is inflated by a common pattern of criminal behavior. Often a robber or a burglar will commit a series of similar crimes: several holdups of 7-11s, on weekend evenings, using the same snub-nosed .38; a series of daytime burglaries in a particular neighborhood, stealing only stereo equipment; whatever. If the criminal is eventually caught in the act, or by chance, the police, who have done little all along but keep tabs on the progression, may be able to clear three or five or ten felonies all at once. Homicides rarely provide this opportunity. Serial murders are thankfully rare, and when they do occur, the police are in no position to sit back and hope that the criminal will eventually fall into their hands in the course of some future killing.

49. Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1, 26-28 (1986).

50. *See supra* notes 3-4, 9 and accompanying text.

51. *See* Maurice Possley, *The Nicarico Nightmare, Admitted Lie Sinks Cruz Case*, CHI. TRIB., Nov. 5, 1995, at A12. All the information on the Nicarico case in the following paragraph comes from Mr. Possley's article.

frustrating, unsuccessful investigation—a humiliating public failure. Thirteen months after the murder—and less than two weeks before the local prosecutor stood for reelection—three men were indicted: Rolando Cruz, Alejandro Hernandez, and Stephen Buckley. Cruz and Hernandez were convicted and sentenced to death; their convictions were reversed by the Illinois Supreme Court. They were convicted again, but this time only Cruz was sentenced to death. Again the convictions were reversed. Finally, at Cruz's third trial—more than twelve years after the murder—the case fell apart when a police officer admitted he had lied under oath and the judge entered a judgment of acquittal. What seems to have happened is this: Under intense pressure, the police convinced themselves that they knew who killed Jeanine Nicarico and they manufactured evidence to convince prosecutors and to use in court. If the criminal had taken jewelry from the Nicarico home rather than a child—or even if he had knocked out a family member or set the home on fire—there would probably have been a minimal investigation, no arrests, no trial, and no erroneous convictions.[52]

2. Evidence. Most miscarriages of justice are caused by eyewitness misidentifications. In Rattner's sample of wrongful convictions, fifty-two percent of the errors for which the cause could be determined were caused by misidentifications;[53] other researchers concur that eyewitness misidentification is by far the most common cause of convictions of innocent defendants.[54] On the other hand, eyewitness misidentification was a factor in only sixteen percent of Bedau and Radelet's cases of errors in potentially capital

52. In some highly charged murders, the police manufacture a case out of whole cloth. When Ronda Morrison was murdered on November 1, 1986, in Monroeville, Alabama, there were no suspects, and an eight-month investigation turned up no leads. Then the police arrested a man by the name of Ralph Myers in connection with a different killing in a nearby county, and pressured him into saying that he drove Walter McMillian—a local resident—to the scene of the crime, and saw him shoot Ms. Morrison. Myers initially denied that he knew McMillian, or anything whatever about the killing, but eventually gave in and said what he was told to say. McMillian was convicted and sentenced to death; he spent six years on death row before the frame-up was exposed. *See* Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1. It is easy to see the hand of racism in this case. Apparently McMillian was chosen for the role of killer because he was a black man in rural Alabama who was known to have carried on an extra-marital affair with a white woman. But the nature of the crime was also an essential ingredient. Even the most racist police would hardly go to all that trouble for anything less than a heinous crime, and they would be most likely to do it for capital murder.

53. *See* Rattner, *supra* note 7, at 291.

54. *See, e.g.*, United States v. Wade, 388 U.S. 218, 229 (1967) (quoting WALL, *infra*); Report of Committee of Inquiry into Case of Adolph Beck, 62 Parl. Papers § 2315 (1905); PATRICK DEVLIN ET AL., REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES (1976); JUDICIAL COUNCIL OF THE STATE OF NEW YORK, FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 229-68 (1948); BORCHARD, *supra* note 6, at xiii; FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927); PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); C. Ronald Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 524 (1986).

prosecutions,[55] which suggests that among the nonmurder cases in Rattner's sample, more than eighty percent of the errors were due to misidentifications.[56]

No doubt the main reason for this difference is the absence of a live victim in most homicides.[57] Victims provide crucial identification evidence in most robberies and rapes, and so they make most of the mistakes, when mistakes are made. In the absence of a victim, the police may have no eyewitness evidence, and therefore no room for eyewitness error. This is hardly an advantage for accuracy. Many, perhaps most eyewitness identifications of criminals by strangers are accurate.[58] Frequently they are corroborated or lead to other evidence that greatly reduces the likelihood of error—for example, fingerprints, stolen property, or reliable confessions.[59] In addition, for about half of all violent crimes, eyewitness identifications are extremely reliable because the crimes were committed by relatives, friends, or others who are known to the victims.[60] Murderers are even more likely to be known to their victims[61] but that may not help because, in the words of the immortal cliché, "dead men don't talk."

Eyewitness identifications are also very uncommon in burglary cases. But the upshot is different. There are very few erroneous burglary convictions based on misidentifications,[62] but because there are also few burglary prosecutions based on noneyewitness evidence, there are few errors of any sort. There are also comparatively few convictions; the clearance rate for reported burglaries is only thirteen percent.[63] But killers must be pursued, and, in the absence of eyewitness evidence, the police are forced to rely on evidence from other sources: accomplices; jail-house snitches and other underworld figures; and confessions from the defendants themselves. Not surprisingly, perjury by a prosecution witness is the most common type of evidence that produces erroneous capital convictions, and coerced or otherwise false confessions are the third most common cause.[64]

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55. *See* Bedau & Radelet, *supra* note 14, at 57, 61 n.184.

56. Unfortunately, Rattner does not report the cause of error by category of crime. The figure in the text was calculated by assuming that among the murder cases in Rattner's sample, which make up 45% of the total, eyewitness misidentifications caused 17% of the errors (a slightly higher proportion than Bedau and Radelet report). We could arrive at a similar estimate from a different direction: by assuming that the proportion of murders among all misidentifications (which Rattner also does not report) is the same as the ratio I found in my study of misidentification, 18% (24 of 135). *See* Gross, *supra* note 7, at 413. Using those figures, the estimates are that 21% of the errors in Rattner's murder cases and 78% of the errors in his nonmurder cases were caused by misidentifications.

57. *See* Bedau & Radelet, *supra* note 14, at 61 n.184.

58. *See* Richard Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. PERS. & SOC. PSYCH. 27 (1993) (stating that, contrary to popular impression, one-on-one on the scene "showup" identifications may lead to few erroneous identifications).

59. *See* Gross, *supra* note 7, at 432-40.

60. *See* SOURCEBOOK 1996, *supra* note 3, at 214 tbl. 3.12.

61. *See id.* at 334 tbl. 3.124; *supra* note 4.

62. Only one of the 136 proven misidentification cases in Gross, *supra* note 7, was a burglary. *See id.* at 413.

63. *See* SOURCEBOOK 1996, *supra* note 3, at 398 tbl. 4.19.

64. *See* Bedau & Radelet, *supra* note 14, at 57.

3. Perjury. From Macbeth to Mark Twain's Injun Joe,[65] the killer who blames his crime on others is a familiar character in fiction. Similar things happen in life. Some criminals implicate innocent defendants in order to divert suspicion from themselves. In other cases, false witnesses who may have had no role in the crime lie for money or for other favors. Both types of motives are more powerful in homicides than in other criminal cases, and especially in capital homicides.

First, the threat of being caught is much greater for a homicide than for almost any other crime. It is no news that the police work much harder to find killers than burglars or robbers, and that their interest increases in proportion to the brutality and notoriety of the crime.

Second, if the culprit is suspected and caught, he has more to fear in a capital case: He might get executed. The threat of death can be a powerful motivator when it is concrete. The death penalty as an abstract prospect does not seem to deter many homicides.[66] Before the crime, the killer—if he thinks at all—no doubt expects to escape scot-free; he is not likely to weigh the benefits of murder against the costs of the possible punishment. After the crime, however, there is more time to think, and the fear of conviction and execution may be vivid, especially if the police seem to be closing in.

Third, a perjurious killer may have to admit to crimes himself. He and the innocent defendant may in fact have been accomplices in some crime other than the murder, or he might have been caught in undeniably compromising circumstances, or he might have to admit to some level of guilt in order to make his accusation credible. If so, the real killer has more to gain in a capital case than under other circumstances. If he has to go to prison, the gain from cooperation is time versus death, as opposed to less time versus more time. But that may not be necessary: If he helps break a capital case, he may walk.

Fourth, if the witness is lying to get favors unrelated to the crime at issue, he will do much better if it is a big case, which usually means a murder, or better yet, a capital murder. The typical witness in this category is the jail-house snitch. For example, in 1932, Gus Colin Langley was convicted of first-degree murder in North Carolina based in part on testimony from his cellmate, who said that Langley had confessed to him.[67] Langley came within half an hour of electrocution when his execution was postponed for unrelated reasons. Four years later, he was exonerated and received a full pardon. His cellmate did not

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65. WILLIAM SHAKESPEARE, MACBETH (University Press 1951); SAMUEL CLEMENS, THE ADVENTURES OF TOM SAWYER (Oxford Univ. Press 1996) (1876).

66. For useful summaries of the literature on the deterrent effects of the death penalty, see ROGER HOOD, THE DEATH PENALTY, A WORLD-WIDE PERSPECTIVE, 180-212 (2d ed. 1996); FRANK E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 167-86 (1986); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases for Capital Punishment*, 79 MICH. L. REV. 1177, 1187-1224 (1981).

67. *See* Radelet & Bedau, *supra* note 14, at 137-38.

have to wait that long; after his perjurious testimony, unrelated charges against him were dropped.[68]

Fifth, it is easier to lie about a capital case than most other crimes of violence: There is usually no live victim to contradict the false witness.

The overall result seems to be that witness perjury is a far more common cause of error in murders and other capital cases than in lesser crimes. Bedau and Radelet identified it as a factor in thirty-five percent of their erroneous capital convictions,[69] while Rattner lists perjury as the cause of only eleven percent of his errors.[70] Recall, however, that forty-five percent of Rattner's cases *are* murders. If perjury were as common among the murder convictions in Rattner's sample as among Bedau and Radelet's cases, then erroneous murder convictions could easily account for *all* the cases in which the error was caused by perjury.

The case of Paris Carriger is a good illustration of the role of perjury in capital prosecutions.[71] On March 14, 1978, Carriger was arrested for the brutal robbery murder of Robert Shaw, the owner of a jewelry store, on the previous day. The evidence against Carriger was provided by Robert Dunbar, a friend on whose property Carriger was living in a trailer. Dunbar—who had a great deal of experience as a police informant—called the police and said he could identify Shaw's killer in return for immunity from prosecution for various felonies: another robbery he committed two days earlier, possession of a gun he had bought (which was illegal because he was a convicted felon), and attempting to dispose of the proceeds of the Shaw robbery-murder. The police agreed to these terms. Dunbar then told them that Carriger had come to him, confessed to the killing, and asked for help in disposing of bloody clothes and stolen jewelry; Dunbar corroborated the story by producing some of the loot and leading the police to some of the clothes. Carriger was convicted and sentenced to death almost entirely on Dunbar's testimony. He steadfastly maintained his innocence and claimed that Dunbar himself—a man with a long history of violence and deception—must have committed the murder. After the trial, Dunbar, who was soon jailed for other crimes, bragged that he had framed Carriger. In 1987, he confessed his own guilt to various people, including his parents and a clergyman. That same year, he repeated his confession in court, and admitted that he had lied at Carriger's trial and that he had committed the murder himself. Three weeks later, he retracted that confession but admitted that he was doing so for fear that he would be prosecuted for the murder and

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68. *See id.* This is hardly the only case in which perjury by a jail-house snitch contributed to a capital conviction. *See also id.* at 101 (the case of J.B. Brown, Florida, 1901), 142 (the case of Margaret and Jesse Lucas, Illinois, 1909), 158 (the case of Albert Sanders, Alabama, 1917), 121 (the case of Gerald Growden, Michigan, 1931), 114 (the case of James Foster, Georgia, 1956), 110 (the case of George De Los Santos, New Jersey, 1975), 113 (the case of Neil Ferber, Pennsylvania, 1982).

69. *See id.* at 57.

70. *See* Rattner, *supra* note 7, at 291.

71. *See* Beth Hawkins & Kristin Solheim, *The Wrong Man*, TUCSON WKLY., Dec. 8-14, 1993, at 1. All information in the following paragraph about the Carriger case comes from the article by Ms. Hawkins and Ms. Solheim.

executed himself. In 1991, shortly before he died in prison, Dunbar confessed again, to his cellmate. Dunbar's ex-wife, who had corroborated his original story and had given him an alibi, testified in 1987 that Dunbar had forced her to lie.

In December 1997, the Ninth Circuit Court of Appeals *en banc* ordered that Carriger be retried or released.[72] As of this writing, Carriger is in custody awaiting a retrial. He has come close to execution on several occasions in the twenty years since his arrest.[73] Under the circumstances, a new trial seems a modest goal, since, at a minimum, the evidence that has turned up after trial raises grave doubts about Carriger's guilt. If Robert Shaw had not been killed, however, none of this would ever have happened. Dunbar would probably never have approached the police; they would hardly have given an ex-felon immunity from prosecution for three serious felonies in order to convict someone else of a single robbery, and the victim would have been available to contradict a false story.

4. False Confessions. A typical robbery investigation is resolved by an eyewitness identification; a typical homicide investigation is resolved by a confession. Many confessions are easy, straightforward affairs, volunteered by suspects who are overcome by guilt or believe they have nothing to lose. These are the easy cases, where nothing has been done that might produce a false confession and where more often than not there is strong corroborating evidence of guilt. Some confessions, however, are not so readily given, but are instead the end products of long, drawn-out interrogations.

American police officers use all sorts of coercive and manipulative methods to obtain confessions. They confuse and disorient the suspect; they lie to him about physical evidence, witnesses, and statements by other suspects; they pretend they already have their case sealed and are only giving the suspect a chance to explain his side of the story; they pretend to understand, sympathize, and excuse; they play on the suspect's fears, biases, guilt, loyalty to family and friends, religion; they exhaust the suspect and wear him down; in some cases, they use violence, even torture.[74] These are powerful techniques. They work to get confessions from guilty defendants—and sometimes from innocent defendants as well.

From the point of view of the police, the main problem with interrogation is not that it occasionally produces errors, but that it is extremely time consuming. It is likely to take hours, perhaps days, to break down a suspect who resists and insists on his innocence. Frequently, several police officers cooperate in the effort, questioning the suspect simultaneously or in relays. As a result, extended

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72. *See* Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1827 (1998).

73. *See* Bob Egelko, *U.S. Appeals Court Stays Arizona Execution*, ARIZ. DAILY STAR, Dec. 2, 1995, at 1A.

74. For a classic description of the coercive aspects of interrogation, *see* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 1-40 (1980).

interrogation is largely reserved for big cases in which confessions are necessary for successful prosecution. Typically, that means homicides, and especially the most heinous homicides, for reasons I have mentioned: These are the cases the police are most anxious to solve, and yet, because the victim is dead, they frequently lack eyewitnesses.[75]

As with perjury, false confessions are a much more common cause of errors for homicides than for other crimes. They were a cause of fourteen percent of Bedau and Radelet's errors in homicide and capital cases,[76] but only eight percent of the errors reported by Rattner.[77] Since forty-five percent of Rattner's cases are homicides, this suggests that false confessions are three to four times more common as a cause of miscarriages of justice for homicide cases than for other crimes.

The case of Melvin Reynolds is a good example,[78] but by no means unique.[79] On May 26, 1978, four-year-old Eric Christgen disappeared in downtown St. Joseph, Missouri. His body later turned up along the Missouri River; he had been sexually abused and died of suffocation. The police questioned more than a hundred possible suspects, including "every known pervert in town," to no avail. One of them was Melvin Reynolds, a twenty-five-year-old man of limited intelligence who had been sexually abused himself as a child and who had some homosexual episodes as an adolescent. Reynolds, although extremely agitated by the investigation, cooperated through several interrogations over a period of months, including two polygraph examinations and one interrogation under hypnosis. In December 1978, he was questioned under sodium amytal ("truth serum") and made an ambiguous remark that intensified police suspicion. Two months later, in February 1979, the police brought the still cooperative Reynolds in for another round of interrogation—fourteen hours of questions, promises, and threats. Finally, Reynolds gave in and said, "I'll say so if you want me to." In the weeks that followed, Reynolds embellished this concession with details that were fed to him, deliberately or otherwise. That was enough to convince the prosecutor to charge Reynolds, and to convince a jury to convict him of second-degree murder. He was sentenced to life imprisonment.

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75. There is a separate reason why the police might conduct extensive interrogations in homicide cases even if the identity of the killer is not in doubt. For most crimes, such as robbery, once you know who did it, the outcome is determinant: guilt. Criminal homicide, however, is a finely graded offense, from capital murder at the top to involuntary manslaughter at the bottom, and it is often subject to arguments of self defense (a justification) or provocation (a partial excuse). If the state wants to convict the suspect of first-degree or capital murder, it may need evidence on the circumstances leading up to the killing, and on the killer's state of mind. Skillful interrogators can often get that sort of evidence out of the mouths of the suspects themselves. Interrogations for the purpose of establishing the level of a criminal homicide, or to negate self defense, are beyond the scope of this article, since I am concerned only with convictions of defendants who did not kill at all.

76. *See* Bedau & Radelet, *supra* note 14, at 58.

77. *See* Rattner, *supra* note 7, at 291.

78. *See* Bedau & Radelet, *supra* note 14, at 155; Radelet et al., *supra* note 26, at 10-15. All the information about the Reynolds case in this paragraph is based on these two sources.

79. *See* Richard Jerome, *Suspect Confessions*, N.Y. TIMES, Aug. 13, 1995, § 6, at 28.

Four years later, Reynolds was released when another man, Charles Hatcher, confessed to three murders, including that of Eric Christgen.

B. Pre-Trial Screening

Most prosecutions are resolved without trial. Eighty to nearly ninety percent of convictions result from guilty pleas,[80] usually after plea bargains, and at least eighty percent of defendants who are not convicted obtain pre-trial dismissals rather than acquittals.[81] In other words, most of the work of sorting criminal cases after arrest is done pretrial, by the exercise of prosecutorial discretion to dismiss, reduce charges, or recommend or agree to a particular sentence. This pretrial screening is undoubtedly less important than the initial police investigation, but it has more impact on the accuracy of criminal dispositions than anything that happens later on. If the wrong person has been arrested, this is where the mistake is most likely to be caught. But in capital cases, the value of that screening is undermined, in part by the effect of the threat of the death penalty, and in part by the attention and pressure that capital cases generate. As a result, there is a danger of two distinct types of errors.

1. Guilty Pleas by Innocent Defendants. Threat is an essential part of all plea bargaining: Take the deal or you'll do worse after conviction. There is, undeniably, a coercive aspect to this bargain—the defendant must risk a severe penalty in order to exercise his right to trial—and plea bargaining has been strongly criticized on that ground.[82] One attack is that the threat is so effective that it drives some innocent defendants to plead guilty along with the mass of guilty ones.[83] That may happen with some regularity for innocent defendants who are offered very light deals: time-served, diversion, six-months unsupervised probation, and so forth. But among the more serious criminal convictions with severe penalties of imprisonment or death—those convictions that show up in cases of proven miscarriages of justice—the picture is different. I have located exactly one reported miscarriage of justice based on a guilty plea for a nonhomicidal crime, and that was a peculiar case—a defendant who pled guilty to a crime he did not commit along with one he did commit.[84] The available collections of known errors are hardly representative samples of the universe of erroneous convictions, and errors based on guilty pleas are

80. *See* SOURCEBOOK 1996, *supra* note 3, at 471 tbl. 5.52.

81. *See id.* at 450-51 tbl. 5.29 (dispositions of criminal cases in U.S. District Courts); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 546 tbl. 5.73 (Kathleen Maguire & Ann L. Pastore eds., 1994) (state court cases) [hereinafter SOURCEBOOK 1993].

82. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 695-703 (1981); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 55; John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 15-16 (1978). *But see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1919-21 (1992).

83. *See, e.g.*, Alschuler, *supra* note 82, at 713-16; Kenneth Kipuis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976).

84. *See* Gross, *supra* note 7, at 415-16 & n.62 (the case of James Willis).

undoubtedly less likely to be discovered than those based on trials.[85] Even so, this is a stark contrast to the overwhelming proportion of *all* convictions that are based on guilty pleas.

Judging from the available evidence, innocent defendants almost never plead guilty when doing so entails a substantial term of imprisonment—except in capital prosecutions. Radelet, Bedau, and Putnam[86] list sixteen cases of innocent homicide defendants who pled guilty; in most, fear of execution is given explicitly as the reason for the plea. This is, no doubt, another illustration of how death is different. It seems that innocent defendants will almost always risk additional years of their lives in order to seek vindication rather than accept disgrace coupled with a long term of imprisonment, but some will not go so far as to risk death.

The case of John Sosnovske is a good example.[87] In 1990, his girlfriend, Laverne Pavlinac, who apparently was afraid of him and anxious to be rid of him, falsely implicated Sosnovske in the rape-murder of Taunja Bennett. In the process, Ms. Pavlinac became entangled in her own lies, and claimed to have participated in the killing herself. Both were charged with murder. Ms. Pavlinac recanted her confession but was convicted and sentenced to life in prison. Following her conviction, Mr. Sosnovske, who was facing the death penalty, pled no contest and was also sentenced to life imprisonment. Both were freed in 1995 after another man, Keith Hunter Jesperson, confessed and also pled guilty to the same murder.

2. Failure to Dismiss False Charges. The major filter that may prevent a charge based on questionable evidence from turning into a conviction is prosecutorial discretion to dismiss. Overall, dismissals of felony charges outnumber acquittals about four to one.[88] Many cases are dismissed because of weak evidence even though the prosecutor is convinced the defendant is guilty; other cases are dismissed because the prosecutor is convinced of the defendant's innocence, or at least has come to doubt his guilt. For homicides, and especially capital homicides, both sorts of dismissals are less likely. In both situations, the major reason is the same: We devote more attention and more resources to criminal cases when death is at stake.

Trials are time consuming and expensive; they are a scarce resource. Since most cases cannot be tried, it is obviously sensible for a prosecutor to try to restrict trials to cases where the outcomes will be useful—that is, convictions. If possible, a likely loss at trial will be avoided through generous plea bargaining; if not, the case may be dismissed even if the prosecutor is convinced of the defendant's guilt. Regardless of their belief in the defendants' guilt, prosecutors

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85. *See id*. at 415.

86. *See* RADELET ET AL., *supra* note 20, at 282, 286-87, 294, 305, 308-09, 318, 326, 328, 331, 333, 336, 338, 342, 350.

87. *Evidence Clears Them but the Law Does Not*, N.Y. TIMES, Nov. 2, 1995, at A17; Editorial, *Justice Done Finally*, PORTLAND OREGONIAN, Nov. 28, 1995, at C6.

88. *See supra* note 81 and accompanying text.

focus on the easiest cases first—the ones with the best evidence—because those are the cases where their limited resources will have the greatest impact. But homicides are different. Homicides (and other notorious crimes) are the cases for which resources are conserved. A dead loser will still be dismissed, but what if it is merely *likely* that the defendant will be acquitted? If it is a robbery, the prosecutor may dump the case and try another; if it is a murder, she is more likely to forge ahead.

Prosecutors lose a much higher proportion of murder trials than other felony trials, about thirty percent compared to about fifteen percent,[89] which suggests that in murder cases they are willing to go to trial with comparatively weak evidence. The main effect of this extra effort is that guilty defendants are convicted who otherwise would never be tried. In some cases, however, the evidence is weak because the defendants are not guilty, and some of those innocent defendants are not only tried but convicted. In other words, (as with police investigations) as prosecutors work to obtain convictions in hard homicide cases, they draw in cases where it is difficult to separate the innocent from the guilty.

Prosecutors also dismiss charges in some cases because they believe the defendant may be innocent, regardless of the evidence available to obtain a conviction.[90] The rules of professional responsibility allow a prosecutor to consider her own view of the defendant's guilt in deciding whether to charge, but do not require her to do so.[91] Prosecutors have widely varying views on how to apply this vague standard, from those who say they will never prosecute unless they themselves are convinced beyond a reasonable doubt of the defendant's guilt, to those who believe that regardless of their own uncertainty, their task is to make a case and let the jury decide.[92] One way or the other, this is always a discretionary choice, and whatever the prosecutor's position is in the abstract, an actual decision to dismiss a serious charge that would probably have resulted in a conviction is always difficult. It is bound to be much more difficult—and less likely—if the crime has attracted a lot of attention, or if a victim, or several, were killed.

The problem is not just public pressure. Evidence of a defendant's innocence does not arrive on the prosecutor's door step on its own. If the police did not find it at an earlier stage, it is usually presented by the defendant's attorneys. Everybody agrees that innocent defendants should not be charged or convicted; the trouble is identifying the cases in which that applies. If there happens to be overwhelming independent evidence of innocence, there is no problem. But if the evidence of the defendant's innocence is not so clear, or if

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89. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 526 tbl. 5.51 (recalculated) [hereinafter SOURCEBOOK 1990].

90. *See, e.g.*, Gross, *supra* note 7, at 438; ROBERT FERGUSON & ALLAN MILLER, THE POLYGRAPH IN COURT 117 (1973) (the case of Charles Del Monico).

91. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION std. 3-3.9(b), at 71 (3d ed. 1993).

92. *See* Gross, *supra* note 7, at 445-46.

its significance is not obvious, the defendant's fate may hinge on the prosecutor's willingness to listen with an open mind. The more notorious the case, the more difficult that may be. Prosecutors, like the rest of us, have a harder time recognizing an error the more publicly they have endorsed it and the more time, money, and prestige they have committed to it.

A prosecutor can always discount a defense attorney's claim that her client is innocent: This is hardly a nonpartisan source. An attorney for an innocent defendant must overcome this handicap in any case; in capital cases, it may be insurmountable. In an ordinary criminal case, most pretrial contact between the prosecutor and the defense attorney takes place in the context of plea bargaining. In many capital cases, however, especially those most likely to produce death sentences, there is no plea bargaining. The prosecutor knows from the start that she will insist on the death penalty, so there is nothing to bargain over. In the absence of plea bargaining, there will be fewer open channels of communication between the defense and the prosecution, so it may be harder for the defense attorney to get a serious hearing. Worse, in that context, the true value of a claim of innocence becomes harder to interpret. When plea bargaining is an option, a defense lawyer is not likely to commit her credibility to the argument "he didn't do it" unless the lawyer believes it is true, because (quite apart from possible effects on her reputation) taking that position will undermine her ability to bargain convincingly for a lenient deal. When no deal is possible, arguing that her client is innocent may be the only pretrial move available. As far as this client is concerned, there may be nothing to lose by making it, and, because the client's life is at stake, the defense attorney may be driven to make the claim whether she believes it or not. More important, the prosecutor knows the defense attorney may feel obliged to argue that the defendant is innocent, whether or not she thinks it is true. As a result, when inflexible lines are drawn at the start—which is particularly likely in a capital prosecution of a heinous, gruesome, and highly publicized murder—the defense attorney is less likely to be able to convince the prosecutor of anything, true or false, and especially not that her client has been wrongly accused.

C. Trial

An innocent defendant who goes to trial faces a high risk of conviction. The best generalization about jury decisionmaking in criminal cases is that they usually convict. To be sure, the great majority of defendants should be convicted. The question is: can juries accurately sort the innocent from the guilty? Or, to put it in context, how often do juries spot innocent defendants the prosecutors have missed? Unfortunately, juries approach this task with two severe handicaps: They have less information than the prosecutors or the police and they have essentially no experience. Given these limitations, it is unrealistic to

expect juries to systematically correct errors in the earlier decisions to investigate, arrest, and prosecute.[93]

This is bad news for homicide defendants. Whether it is because prosecutors take weaker cases to trial[94] or because they insist on the maximum penalty,[95] homicide defendants are more likely to face juries than other criminal defendants. For example, in 1988, thirty-three percent of murder cases in the seventy-five largest counties in the United States went to trial, compared to five percent of all felony prosecutions and nine percent of all violent felonies.[96] In 1994, fifteen percent of robbery convictions across the country were obtained at trials, of which ten percent were jury trials, while forty-two percent of murder convictions were after trial, including thirty-five percent that went to jury trial.[97] In other words, since pretrial sorting does less to winnow homicide cases than other prosecutions, homicide defendants are more likely to face the chancy ordeal of trial.

I do not mean to say that the institution of trial by jury does not help reduce the incidence of erroneous convictions. It no doubt does fill that function, but by brute force: by making it more difficult for the prosecution to obtain *any* convictions and by discouraging trials of the guilty and the innocent alike unless the evidence of guilt is very strong. The main benefit of this process is that feedback from court may improve pretrial investigations and increase selectivity in charging, the stages of the process we have already discussed. If all works well, the result is that few innocent defendants are brought to trial, most defendants who are convicted are guilty, and most who are acquitted are also guilty. And yet, if an innocent defendant is tried, he will probably be convicted.

Given this structure, trial plays a comparatively minor role in the production of errors in capital cases. To the extent that jury behavior at trial does matter, the question is: Do juries behave differently in homicide trials in general, and in capital homicides in particular, than in other criminal trials? There are several reasons to think that juries treat homicides and capital cases differently than other criminal cases, and most of them point in the direction of a higher likelihood of conviction.

1. Factors That Increase the Likelihood of Conviction.

a. Publicity. Most crimes, even most homicides, receive very little attention from the media. A few crimes, however, are heavily publicized.

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93. *See id.* at 432:

> If [juries] return few erroneous convictions it is because they are given few opportunities to judge innocent defendants. In the usual case[,] the actual determination of guilt occurs much earlier and in less formal settings, at a police precinct or in a district attorney's office, and is based on an investigation that is not necessarily conducted in anticipation of a trial.

See also id. at 441-49.

94. *See supra* notes 88-92 and accompanying text.

95. *See supra* text following note 92.

96. *See* SOURCEBOOK 1990, *supra* note 89, at 526 tbl. 5.51.

97. *See* SOURCEBOOK 1996, *supra* note 3, at 471 tbl. 5.52.

Many, perhaps most, of these notorious crimes are homicides, and especially the unusual and heinous homicides that are most likely to be charged as capital crimes. In those cases, most jurors will have heard all sorts of things about the case before they get to court, many of them inadmissible, misleading, and inflammatory. They may have seen, heard, or read that police officers or other government officials have declared the defendant guilty. They may have witnessed or felt a general sense of communal outrage. All of this will make them more likely to convict. Courts may attempt to mitigate the impact of pretrial publicity by various means—most effectively by changing the location of the trial—or they may refuse to do so.[98] Not surprisingly, the records of erroneous convictions include scores of cases in which publicity and public outrage clearly contributed to the error, from Leo Frank in 1913[99] and the Scottsboro Boys in 1931,[100] to Rolando Cruz and Alejandro Hernandez in 1985.[101]

b. Death qualification. In capital cases, juries decide the sentence as well as determine guilt or innocence. To accommodate this function, capital jury selection process includes a unique procedure, "death qualification," that is designed to ensure that the jury is qualified for the sentencing phase. Most jurors who are strongly opposed to the death penalty, and some who are strongly in favor, are excluded at the outset.[102] Many studies have shown that these exclusions produce juries that are more likely to convict.[103] In addition, the process of questioning jurors about their willingness to impose the death penalty before the trial on guilt or innocence has begun tends to create the impression that guilt is a foregone conclusion and that the only real issue is punishment.[104]

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98. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding that refusal to question jurors about content of news reports to which they were exposed in heavily publicized trial did not violate defendant's rights to due process and an impartial jury).

99. *See* Bedau & Radelet, *supra* note 14, at 115.

100. *See id*. at 63.

101. *See supra* note 51.

102. The current standards for disqualification are defined by *Wainwright v. Witt*, 469 U.S. 412 (1985) (limiting the state's power to exclude opponents of the death penalty), and *Morgan v. Illinois*, 504 U.S. 719 (1992) (requiring the exclusion of some strong proponents of capital punishment). *See also* Lockhart v. McCree, 476 U.S. 162 (1986) (holding that the exclusion of death penalty opponents from guilt phase of capital trials is constitutional, despite evidence that it affects the decision on guilt or innocense); Witherspoon v. Illinois, 391 U.S. 510 (1968) (stating that the state may constitutionally exclude only those death penalty opponents who would not consider imposing a death sentence, or could not be impartial in deciding on guilt).

103. *See, e.g.*, Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process v. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984). See generally Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980) and studies cited therein. *See also* Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom*. Lockhart v. McCree, 476 U.S. 162 (1986).

104. *See Hovey*, 616 P.2d at 1347-54; Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

c. Fear of death. In a capital case, avoiding execution can become the overriding imperative for the defense. In extreme cases, fear of death drives innocent defendants to plead guilty in return for a lesser sentence, even life imprisonment.[105] If the defendant does not plead guilty, either because he is unwilling to agree to a plea bargain or because none is offered, the same pressure will be felt at trial. Fear of a death sentence may drive the defense to make tactical choices that compromise its position on guilt in order to improve the odds on penalty. In some cases, the defense may virtually concede guilt and focus entirely on punishment. Fear of death will certainly distract the defense from the issue of guilt and force it to spread its resources more thinly. This distraction might increase the chances of conviction even for those capital defendants who are represented by skillful lawyers with adequate resources; it will be far more damaging for the many capital defendants whose defense is shamefully inadequate.[106]

d. Heinousness. In theory, jurors are supposed to separate their decision on the defendant's guilt from their reaction to the heinousness of his conduct: If the evidence is insufficient, they should be just as willing to acquit a serial murderer as a shoplifter. Nobody believes this. Even in civil trials, where the jury is asked to decide cases by a preponderance of the evidence, there are indications that juries (and judges) are more likely to find defendants liable, on identical evidence, as the harm to the plaintiff increases.[107] In criminal trials, the problem is worse, because the burden of persuasion is proof beyond a reasonable doubt. In a close criminal case, jurors are supposed to release a defendant even if they believe he is probably guilty. This is a distasteful task under any circumstances, but it becomes increasingly unpalatable—and unlikely—as we move up the scale from nonviolent crime, to violent crime, to homicide, to aggravated, grisly murder.

2. Factors That Decrease the Likelihood of Conviction.

a. Quality of the defense. Capital defendants, and to some extent homicide defendants in general, may be better represented than other criminal defendants. The attorneys who are appointed to represent them may be more experienced and skillful, and may have more resources at their disposal. Other things being equal, higher quality representation will decrease the likelihood of conviction and may operate as a check on errors and misconduct that drive some innocent capital defendants to trial and to conviction.

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105. *See supra* notes 82-87 and accompanying text.

106. *Cf.* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

107. *See* Edmond S. Howe & Thomas C. Loftus, *Integration of Intention and Outcome Information by Students and Circuit Court Judges: Design Economy and Individual Differences*, 22 J. APPLIED PSYCHOL. 102 (1992); Robert MacCoun, *The Black Box: What Empirical Research Tells Us About Decision Making by Civil Juries*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 155-56 (Robert E. Litan ed., 1993).

b. Severity of the penalty. Prosecutors, defense attorneys, and judges widely believe that some jurors are more reluctant to convict a defendant who might be executed than one who faces a less extreme punishment. In *Adams v. Texas*,[108] the United States Supreme Court acknowledged this possibility and held that a juror could not automatically be excluded from service because of this reaction.[109] To the extent jurors do feel this way, they may be less likely to convict in capital trials than in other homicides.

3. Net Effects. When there are forces that push in opposite directions, it is sometimes possible to say that they cancel out. Not here. The effects I have described are extremely variable. Publicity, death qualification, the heinousness of a homicide—each of these may make a critical difference in a particular case, or it may not. On the other side, the protective features of capital trials are uneven at best. Many capital defendants do not have quality representation, by any standard,[110] and the anxiety jurors may feel when a defendant's life is at stake will be relieved if a jury decides (as they may do in deliberations on *guilt*) that he will not be sentenced to death. With that out of the way, the competing impulse—not to free a man who has killed—may take over, in force.

I once saw a cartoon of two men in black robes, obviously judges, talking in a hall. One says, "Some days I'm feeling good and everyone gets probation, and some days I get up on the wrong side of bed and I throw the book at everybody. It all balances out." In statistical terms, the problem is increased variance: Since nobody gets the average punishment, the more the judge's sentences are spread out arbitrarily, the more of them are errors—and errors on one side do not balance out errors on the other. Likewise, on guilt and innocense, mistakes in one direction do not balance mistakes in the opposite direction in other cases. In capital trials, one particular type of mistake, conviction of an innocent defendant, is overwhelmingly important, and the fact that other, guilty defendants get the benefit of other errors is no help. If you are building a seawall, adding height to one part will not compensate for cutting away at another.

V

CONCLUSION: CATCHING ERRORS

The basic conclusion is simple. The steady stream of errors we see in cases in which defendants are sentenced to death is a predictable consequence of our system of investigating and prosecuting capital murder. Behind those cases,

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108. 448 U.S. 38 (1980).

109. "Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they . . . frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system. . . ." *Id*. at 50.

110. *See generally* Bright, *supra* note 106.

there is no doubt a larger group of erroneous convictions in capital cases in which defendants are not sentenced to death. But what about what happens after trial? Everybody knows that direct and collateral review are more painstaking for capital cases than for any others. Is it likely that all these mistakes are caught and corrected somewhere in that exacting process? The answer, I am afraid, is "No." At best, we could do an imperfect job of catching errors after they occur, and in many cases we do not really try. As a result, most miscarriages of justice in capital cases never come to light.

Probably the best way to figure out how to catch miscarriages of justice is to look at the cases in which we have done so. Judging from the cases that are reported, three factors, separately or in combination, are usually responsible for an innocent defendant's exoneration: attention, confession, and luck.

A. Attention

If a defendant is sentenced to death, he may well get more careful and attentive consideration from the courts on review. More important, he is likely to be better represented on direct appeal than he would be otherwise, and he is likely to have counsel on the post-appellate collateral review, while most defendants have none. These advantages may explain in part the high proportion of death sentences among known miscarriages of justice.[111] But a comparative advantage is not a panacea. Many death row inmates have inadequate representation at every level of review, and some have no legal assistance whatever for collateral review. And many, very likely most, capital defendants who are convicted in error are not sentenced to death. They do not receive any special attention from their attorneys or from the courts; on the contrary, they might suffer from the perception that they have already received the benefit of whatever doubts their cases may raise. When Walter McMillian was released after six years on death row for a murder for which he had been framed by local enforcement officials,[112] his attorney said that "only the death sentence had allowed Mr. McMillian to receive adequate representation."[113] In truth, McMillian's post-conviction representation was not adequate, it was extraordinary. If he had merely been sentenced to life imprisonment, he may never have been heard from again; but the death sentence he in fact received did not guarantee exculpation, it just bought him a chance.

B. Confessions

In most cases in which miscarriages of justice are uncovered, the real criminal confesses to the crime.[114] In the common scenario, the true murderer is ar-

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111. *See supra* text following note 9.

112. *See supra* note 52.

113. Applebome, *supra* note 52, at A1.

114. *See* Gross, *supra* note 7, at 421; Rattner, *supra* note 7, at 292. Rattner states that in 40.5% of his wrongful convictions, exoneration was caused by a confession of the real culprit. This appears to be an underestimate, since he lists various forms of official exoneration—pardon, habeas corpus, *et cetera*—as separate causes, when they are often triggered by such confessions.

rested and imprisoned for another crime—sometimes a similar homicide—and confesses before trial or in prison. For example, among the cases described above: Melvin Reynolds confessed falsely, under intense pressure, to the rape-murder of a four-year-old boy; he was released when Charles Hatcher was arrested and confessed to three murders, including the one for which Reynolds was imprisoned.[115] Similarly, John Sosnovske and Laverne Pavlinac were both freed in 1995, after Keith Jesperson confessed to the murder for which they were falsely convicted.[116]

C. Luck

Getting a confession from the real killer is the common stroke of luck in cases in which a miscarriage of justice is caught. But sometimes luck takes a different route. The break in Randall Dale Adams's case came when documentary filmmaker Errol Morris ran into Adams by chance in 1985, when Morris was doing research on psychiatric testimony in Texas capital prosecutions. Morris went on to produce a movie about Adams's case, *The Thin Blue Line*, which was released in 1988; the movie drew national attention to the case and resulted in Adams's release in 1989, twelve years after he had been sentenced to death.[117]

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The basic cause for the comparatively large number of errors in capital cases is a natural and laudable human impulse: We want murderers to be caught and punished. Sometimes that impulse drives police and prosecutors to lie and cheat, but usually it simply motivates them to work harder to catch killers and convict them. It works: More cases are cleared, more murderers are convicted. But harder cases are more likely to produce mistakes—still exceptions, no doubt, but not as rare as for other crimes, where the cases that are prosecuted are mostly skimmed off the top. Perhaps the worst mistake we might make in this connection is to assume that the danger of error for homicides is as small as it is for other crimes, or, worse yet, that it is even smaller. Homicides, especially capital murders, require more care to correct miscarriages of justice, and not just because the consequences are worse, but also because the risk of error is greater.

When an erroneous conviction is discovered and the mistake is proven beyond doubt, we know what to do: stop the execution, release the prisoner. If there were some general method for identifying mistakes, we would not have this problem in the first place. But of course, there is not. Instead, the errors we have discovered advertise the existence of others that we have missed. How often will an innocent prisoner run into a movie producer who is struck by his

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115. *See supra* note 51 and accompanying text.

116. *See supra* note 87 and accompanying text.

117. *See* J. Michael Kennedy & Daniel Cerone, *Conviction Set Aside for Thin Blue Line Character*, L.A. TIMES, Mar. 2, 1989, at A1.

story? What if the real killer is killed in a car crash, or dies of a drug overdose, or is never arrested, or never confesses? The most the legal system can do is improve the odds by providing resources to help discover and prove errors, by considering serious claims whenever they are made, and by taking action even if proof of innocence is not absolute.

Attention and quality representation improve an innocent defendant's chances. They help get court hearings; they increase visibility, which produces opportunities for lucky breaks; and they buy time during which the true killer may confess. But these assets, whatever their value, are unevenly distributed. For the most part, they are the special preserve of defendants who have been sentenced to death and who still face the possibility of execution. And even for that restricted group, this special attention is under fire. Executive clemency—the traditional backstop that was said to prevent execution "when there is the slightest doubt of guilt"[118]—has shriveled up in recent years.[119] It is now too uncommon to have a major impact on the danger of executing innocent defendants. That throws the entire weight of detecting errors onto the reviewing courts; since the discovery of errors takes time, the main burden is on the later stages of the process, and especially on habeas corpus review in the federal court. Recently, resources for post-conviction defense in capital cases have been cut, the bases for review in federal court have been limited, and the process of review has been accelerated.[120] If a defendant obtains evidence of his innocence late in the day—after the deadlines for raising the appropriate legal claims have passed—the hurdles to obtaining a hearing, not to mention relief, are extraordinarily high.[121] Perhaps these new rules, like many procedural reforms, will have little effect on actual practice. But if they do, the direction of change is inevitable: Fewer mistakes will be caught even among those cases that remain on track to execution, and more defendants will be killed by the state in error.

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118. CARRINGTON, *supra* note 5, at 123.

119. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post*-Furman *Capital Cases*, 27 U. RICH. L. REV. 289 (1993); Neal Walker, *Executive Clemency and the Death Penalty*, 22 AM. J. CRIM. L. 266 (1994).

120. The most important recent development in this area was the passage in April 1996 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which included substantial amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, and to related statutory provisions, that greatly limit the availability of federal habeas corpus as an avenue of review in capital cases.

121. *See, e.g.*, Delo v. Schlup, 513 U.S. 298 (1995); Herrera v. Collins, 506 U.S. 390 (1993); *see also* Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1827 (1998).