The Risks of Death: Why Erroneous Convictions are Common in Capital Cases (Symposium: The New York Death Penalty in Context)

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The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases

SAMUEL R. GROSS†

I. DEATH IS DIFFERENT

As the Supreme Court has said, time and again, death is different: It is "different in kind from any other punishment imposed under our system of criminal justice;"1 it "differs more from life imprisonment than a 100-year sentence differs from one of only a year or two;"2 and so forth. Traditionally, this observation has justified special procedural protections for capital defendants. Justice Harlan put it nicely nearly forty years ago: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case."3 A central purpose of this special attention to

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This article draws heavily on the published work of Hugo Bedau, Michael Radelet and Constance Putnam. I acknowledge a debt to all three, and a special debt of gratitude to Michael Radelet, who was as generous with time and advice as his many friends have come to expect. I am also grateful for comments from Hugo Bedau, Phoebe Ellsworth, Andrea Lyon, Daniel Polsby, Lauren Poper, James Rollin, Kent Syverud, Frank Zimring and the participants at the March, 1996 symposium on the New York State death penalty at the Law School of the State University of New York at Buffalo; for excellent research by Alexander Sierck; and to Kristen Precht, for a wonderful combination of helpfulness, friendliness, and humor.

3. Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); see also Beck v. Alabama, 447 U.S. 625, 637 (1980). More recently, the Supreme Court has decided several cases in which the distinction cuts the other way; e.g. Barefoot v. Estelle, 463 U.S. 880 (1983) (special summary procedures appropriate in capital habeas corpus appeal because the state cannot begin to execute the sentence until after completion of review). See also McCleskey v. Kemp, 481 U.S. 279, 347 (1986) (Blackmun, J., dissenting) ("The Court today seems to give a new meaning to our recognition that death is different. Rather than requiring 'a correspondingly greater degree of scrutiny of the capital sentencing determination,' [citation omitted] the Court relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny under the Equal Protection Clause."); Boyd v. California, 494 U.S. 370, 388 (1989) (Marshall, J., dissenting) ("I have long shared this Court's assessment that death is qualitatively different from all other punishments [citations omitted] but I have never understood this principle to mean that we should review death ver-
capital cases is to prevent the conviction and execution of innocent defendants. Until recently, most judges, lawyers and scholars were willing to believe that the system worked as intended: that wrongful capital convictions were rare, and wrongful executions virtually non-existent. In the last decade, that optimistic view has become increasingly implausible.

The major work that has challenged this comfortable orthodoxy is a study of wrongful convictions in "potentially capital cases" by Professors Hugo Bedau and Michael Radelet. The first published version of this work appeared in 1987; it listed 350 such wrongful convictions, from 1900 through 1985, including 139 death sentences and 29 executions. In 1992 Professors Bedau and Radelet, together with Ms. Constance Putnam, published their findings in book form. By then the catalogue had been extended to 416 miscarriages of justice, from 1900 through 1990. Some of the cases on their list are controversial, including several of the executions: Bruno Hauptmann, Joe Hill, Nicola Sacco and Bartolomeo Vanzetti. For these cases, there are some writers who maintain that the defendant was in fact guilty. But the precision of Bedau and Radelet's judgment in every case hardly matters; it's the overall pattern that tells the story. In the great majority of their cases

dicts with less solicitude than other criminal judgments.

4. For example, as late as 1978 Frank Carrington wrote: "our 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." FRANK CARRINGTON, NEITHER CRUEL NOR UNUSUAL 123 (1978).


6. Bedau and Radelet define a "potentially capital case" as a prosecution for a crime for which the death penalty was available in the jurisdiction (i.e., homicides and a small number of rapes in several southern states), or for which the death penalty would have been unavailable 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 non-capital homicides. Id. at 31.

7. Id. at 36.

8. MICHAEL RADELET ET AL., IN SPITE OF INNOCENCE (1992) [hereinafter RADELET, BEDAU & PUTNAM].

9. Bedau & Radelet, supra note 5, 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 1980's 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. Id. at 74-75 n.274.

the error has been admitted or is beyond dispute.\textsuperscript{11} 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.\textsuperscript{12} In any event, a compilation such as this can only be a list of illustrations of the problem, not a catalogue of errors. As Bedau and Radelet readily admit, nobody knows how many miscarriages of justice have gone entirely undetected.\textsuperscript{13}

The problem that Bedau and Radelet illustrate is central to any debate on the use of the death penalty. The risk of executing an innocent person poses a serious, perhaps unanswerable challenge to retributive justifications for capital punishment. Formal arguments for this claim are somewhat elaborate,\textsuperscript{14} and some writers try to deny it,\textsuperscript{15} but the essence of the position is easy: It's one thing to satisfy our demand for retribution by killing a guilty murderer—it's a debatable practice, but arguably just. It's quite another to do so by killing an innocent defendant—or even one who might be innocent, because if we do that often enough some of those we kill will be innocent, even if we don't know which ones. It's no surprise that executions of innocent defendants, or of defendants who were widely believed to be innocent, have played major parts in successful movements to abolish the death penalty, from Michigan in 1846\textsuperscript{16} to England in 1965.\textsuperscript{17} And in those jurisdictions that have retained the death penalty, the danger of fatal

\begin{enumerate}
\item Bedau \& Radelet, \textit{supra} note 5, at 47.
\item Id. at 27.
\item Id.
\item Ernest van den Haag, \textit{In Defense of the Death Penalty: A Practical and Moral Analysis}, in \textit{The Death Penalty in America} (Hugo Bedau ed. 3d 1982) 323, at 324-25. Professor van den Haag eludes to the problem that executing innocents poses to retributive justifications for capital punishment by shifting smoothly from an argument based on retribution to one based on deterrence. \textit{Id.} at 325. Deterrence might justify erroneous executions, but the extensive body of evidence that has accumulated on the issue does not support the claim that the death penalty deters homicides more than life imprisonment. \textit{See infra} note 61.
\item Bedau \& Radelet, \textit{supra} note 5, at 77 (citing N.Y. TIMES, Oct. 19, 1966, at 19, col. 3).
\end{enumerate}
errors is a major argument for extreme care in the investigation, defense, trial and review of capital cases.  

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, but I will address a related issue: Why do they happen in death penalty cases? I will argue that it is no coincidence—that the nature of capital cases multiplies the likelihood of error.

It certainly looks as though miscarriages of justice are far more likely to occur in capital cases than in other felony prosecutions. By 1987 Bedau and Radelet had assembled information on more erroneous convictions in capital cases in America in this century than all other collections of such errors in all criminal cases, combined. Since then, similar errors keep coming to light, including a steady stream of defendants who have been exonerated and released from death row. 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. In 45% of Rattner’s cases the offense was murder, and in 12% the penalty was death. By comparison, homicides (of all sorts) make up a fraction of 1% of all arrests in this country, and about 3% of arrests for crimes of violence. Murder and non-negligent homicide account for 1.4% of all criminal convictions, about 8% of convictions for violent crimes, less than 3% of all commitments to prison, and about 10% of commitments to prison for crimes of violence. Death sentences account for about 2% of all murder convictions, less than two-tenths of 1% of all convictions for violent crimes, and perhaps three-hun-
dredths of 1% of all criminal convictions. In other words, capital cases are heavily over-represented among known miscarriages of justice—5 to 1 or 10 to 1 or 100 to 1 or more, depending on which comparison seems most telling.

There is an obvious competing explanation for this striking disproportion. We pay more attention to homicides than to other crimes, more to first degree murders than to other homicides, and more to capital cases than to other first degree murders. Therefore, 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. Indeed, since we are so much more careful in trying and reviewing cases, we not only detect and correct more errors, we also prevent many errors from occurring in the first place. The net effect (the argument goes) is that capital cases are less error-prone than other prosecutions, appearances to the contrary notwithstanding.

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 as a complete explanation for the apparent abundance of errors in capital cases, this hypothesis strikes me as implausible. For one thing, many of the known miscarriages of justice—capital and non-capital alike—were discovered by sheer chance. If chance were the only factor, the known cases would be representative of the entire set; since it's 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 murders were over represented in the set of all known errors by a factor of five or ten or a hundred.

For the moment, I will address the other side of this problem: the special factors that produce errors in capital cases. At the end of part III and in the Conclusion, I will return to the possible offsetting effects of added care at trial and on review, which may help us to catch mistakes after they've been made.

24. Id. at 486, Table 5.48, 590-91, Tables 6.74, 6.76.
25. It is also an extremely pessimistic hypothesis, because it implies that there are thousands and thousands of undiscovered cases of defendants who were wrongly convicted of robbery, burglary, assault, and other crimes, and who could have been exonerated if we had investigated their crimes with as much care as we devote to murders.
26. Edwin M. Borchard, Convicting the Innocent, Errors of Criminal Justice (1932) at xix; Bedau & Radelet, supra note 5, at 70; Gross, supra note 19, at 422.
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 non-capital crime, or acquitted altogether; 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. 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.

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.

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’m not concerned with any of these types of errors. Like Bedau and

27. 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, 98.7% of death row prisoners, and 99.7% of prisoners executed in this country since 1967 are men. Sourcebook 1994, supra note 22 at 342, Table 3.121; NAACP Legal Defense and Educational Fund, Death Row U.S.A., Winter 1995, [hereinafter Death Row U.S.A.].


30. Bedau and Radelet, supra note 5, at 36.

31. Not that these other errors are unimportant. As Professor Charles Black has pointed out, they too are a predictable consequence of our system of administering capital
Radelet, I shall limit my focus to convictions of "the wrong person": a defendant who did not do the act that caused the death or deaths for which he was convicted.

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; (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 for 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 consequence of those errors. The causes in the second group imply that the death penalty itself undermines the accuracy of our system of adjudication, that it "tends to distort the course of the criminal law." 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." If that's 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. THE PRODUCTION OF ERRORS

A. Investigation

1. Clearance Rates and Pressure on the Police. We often talk of a miscarriage of justice as an error at trial, but that's a mistake. The error occurs much earlier, in the investigation of the crime, when the police identify the wrong person as the criminal. If


32. Bedau and Radelet, supra note 5, at 42.
34. FELIX FRANKFURTER, OF LAW AND MEN 81 (1958).
they gather enough evidence against this innocent suspect, the error will ripen into a criminal charge; if that charge survives the formal and informal processes of pre-trial screening, it will go to trial and a jury may confirm the mistake by a wrongful conviction. For the police, the issue is: What factors make mistakes more likely? For the prosecutor, the judge, and the jury the issue is: What factors reduce the likelihood that they will correct police errors?

Most crimes are never solved. In 1993, a mere 21% of all serious crimes known to the police were “cleared”—which usually means that a suspect was arrested; of serious violent crimes, 44% were cleared. But even these low figures only tell half the story. Most crimes are not “known to the police”—in 1993, only 35% of all crimes, and 42% of crimes of violence, were reported. In other words, only about 18% of all crimes of violence are solved by the police, including about 13% of robberies, 18% of rapes, and 6% of burglaries.

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'll be more likely to do so if he thinks there's a good chance that the criminal will be caught. If 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 will usually be 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's it. If a suspect doesn't emerge from this process it is unlikely that the case will ever be prosecuted. 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 strongest.

Homicides are different. First, almost every homicide is re-

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35. Sourcebook 1994, supra note 22, at 405, Table 4.23. The “serious crimes” included in this figure are those on the Federal Bureau of Investigation’s uniform crime reporting “index”: murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny and motor vehicle theft. Of these, all but burglary, larceny and motor vehicle theft are “serious violent crimes.” Arson is also an “index” crime, but it’s not included in this tabulation because the data are insufficiently complete.
36. Id. at 245, Table 3.32.
37. Id. at 245, Table 3.32, 406, Table 4.23.
ported to the police when the body of the deceased person is found. 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. The risks of death

Second, most homicides known to the police are cleared—66% in 1993, more in previous years. Overall, the proportion of all homicides that are solved is about four times higher than the comparable proportion for other violent crimes. A study of robbery investigations in Chicago in 1982-83, by Franklin Zimring and James Zuehl, provides an excellent illustration: 13% 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 57% of robbery killings. 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.

Many homicides, perhaps most, are easy to investigate. Most homicides are committed by relatives, friends or acquaintances of the victim, and many if not most occur during arguments or brawls. In a typical ordinary homicide—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 non-homicidal crimes. The relatives of the victim care more, the prosecutor cares

38. See Samuel R. Gross and Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REv. 27, at 51 n.98 (comparing homicides reported to the police to vital statistics data on mortality from homicide, which are taken from death certificates).
40. E.g., FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1952, at 43 (clearance rate for murder and non-negligent homicide in 1952 was 94.9%); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1961, at 14 Chart 8 (clearance rate for murder and non-negligent homicide in 1961 was 93.1%).
41. 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 Seven-Elevens, 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 3 or 5 or 10 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.
43. SOURCEBOOK 1994, supra note 22, at 334, Table 3.111, 341, Table 3.119.
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. The police spend more time, they are more persistent, they have more resources at their disposal, and they catch more of the criminals. 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 which also increase the likelihood that the murder will be treated as a capital case.

The murder of 10-year-old Jeanine Nicarico is a good example. 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, 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—over 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.

44. Maurice Possley, The Nicarico Nightmare, Admitted Lie Sinks Cruz Case, Chi. Tm., Nov. 5, 1995, at A12. All the information on the Nicarico case in the following paragraph comes from Mr. Possley's article.
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 he 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. It's 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'd be most likely to do it for capital murder.\footnote{45}

2. **Eyewitness Identification.** Most miscarriages of justice for crimes other than homicide are caused by eyewitness misidentifications. In Rattner's sample of wrongful convictions, 52% of the errors for which the cause could be determined were caused by misidentifications, and other researchers concur that eyewitness error is by far the most common cause of convictions of innocent defendants.\footnote{47} On the other hand, eyewitness error was a factor in

\footnote{45. Peter Applebome, Alabama Releases Man Held on Death Row for Six Years, N.Y. TIMES, Mar. 3, 1993, at A1.}

\footnote{46. There is an important historical exception to this pattern. Before Coker v. Georgia, 433 U.S. 584 (1977), the death penalty was available as a punishment for rape in several southern states. In practice, the death penalty for rape was used almost exclusively to punish black men who had been convicted of raping white women. Marvin E. Wolfgang and Marc Riedel, "RAPE, RACIAL DISCRIMINATION AND THE DEATH PENALTY," in Hugo A. Bedau and Chester M. Pierce, ed.'s, CAPITAL PUNISHMENT IN THE UNITED STATES 99-121 (1976). One aspect of this discrimination was that some black men were falsely accused of rape by white women, and sentenced to death, when in fact no crime had occurred at all because there had been no sexual contact whatever, see Bedau & Radelet, supra note 5, at 148 (the "Scottsboro Boys" case), or because sexual relations had been consensual, see id. at 127 (the case of Jess Hollins).

\footnote{47. Rattner, supra note 19, at 291.}

\footnote{48. E.g., REPORT OF COMMITTEE OF INQUIRY INTO CASE OF ADOLPH BECK 62 Parl. Papers Sec. 2315 (1905); Felix Frankfurter, THE CASE OF SACCO AND VANZETTI 30 (1927); Borchard, supra note 26, at xiii (1932); Judicial Council of the State of New York, Fourteenth Annual Report of the Judicial Council of the State of New York (1948), at 229-68; Patrick M. Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); Wade v.
only 16% of Bedau and Radelet's cases of errors in potentially capital prosecutions. This disparity may not prove that there is a systematic difference in the causes of errors between capital and other non-capital cases—as Bedau and Radelet point out, the samples are too unsystematic for firm conclusions—but it certainly does suggest it. If we assume that among the murder cases in Rattner's sample—which make up 42% of the total—eyewitness misidentifications caused 17% of the errors (a slightly higher proportion than Bedau and Radelet report), that implies that over 80% of the errors in non-murder cases were due to misidentifications.

No doubt the main reason for this difference is the absence of a live victim in most homicides. 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. Frequently they are corroborated or lead to other evidence that greatly reduces the likelihood of error—fingerprints, stolen property, reliable confessions, etc. 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. Murderers are even more likely to be known to their victims but that may not always help because in the words of the immortal cliche,


49. Bedau & Radelet, supra note 5, at 57, 61 n.184.
50. Id.

51. Unfortunately, Rattner does not report the cause of error by category of crime. We could arrive at about the same 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% (24/135). Gross, supra note 19, at 413. Using those figures, the estimates are: 21% of errors in murder cases are caused by misidentifications, and 78% of errors in non-murder cases.
52. Borchart, supra note 26, at 70; Bedau & Radelet, supra note 5, at 61 n.184.
53. See Richard Gonzalez et al., Response Biases in Lineups and Showups, 64 J. PERSP. & SOC. PSYCHOL. 27 (1993) (contrary to popular impression, one-on-one on the scene "showup" identifications may lead to few erroneous identifications).
54. See Gross, supra note 19, at 432-40.
56. Id. at 341, Table 3.119.
"dead men don’t talk.” The absence of eyewitness evidence in many homicides drives the police 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 leading cause of error in erroneous capital convictions, and false confessions are the third most common cause.57

So far I’ve compared homicides to other crimes of violence—crimes to which there are usually eyewitnesses. Other crimes, however, typically have no eyewitnesses—burglary, for example. Erroneous convictions may well occur in burglary cases, but if so they are rarely discovered and reported. Only one of a sample of 136 proven misidentifications was a burglary,58 and Rattner does not even list the crime as a category for his sample of erroneous convictions. Eyewitness evidence may play a role in solving an occasional burglary—a homeowner may catch a glimpse of the fleeing criminal, and later identify his picture—and once in a while (in the absence of determinative physical evidence) this may lead to errors. The same thing may happen in those homicides in which the killer is not immediately known; indeed it is more likely, since killing is more often a crime of passion rather than of calculation. These are chance events, unforced errors. If the burglar is not easily identified, that’s usually the end: hence a clearance rate for burglary of only 13% of crimes known to the police.59 In homicide investigations the police work to solve the hard cases as well, and they often succeed. But in the process they force more errors—of the same sort, and other types—as they press on against increasing odds.

3. *Perjury by the Real Killers, and by Others.* The killer who blames his crime on others is a familiar character in fiction. The most famous, no doubt, is Macbeth, who planted bloody daggers on Duncan’s grooms, and then killed them himself in a supposed fit of vengeful rage. The model for modern type of deceitful killer, however, is Mark Twain’s Injun Joe, from *The Adventures of Tom Sawyer,* who murdered young Dr. Robinson and then pinned the killing on hapless drunk Muff Potter.60 Similar things happen in real life. Some criminals implicate innocent defendants in order to divert suspicion from themselves. In other cases, false witnesses

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who may have had no role in the crime lie for money or for other favors from the authorities. Both of these 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’s 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’s concrete. The death penalty as an abstract prospect does not seem to deter many homicides. Before the crime, the killer—if he thinks about it at all—no doubt expects to escape scot free; he’s 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 vs. death, as opposed to less time vs. more time. But that may not be necessary: if he helps break a capital case, he may walk. For example, in December 1976 David Harris was arrested in Vidor, Texas, in connection with the murder of Dallas patrolman Robert Wood, and promptly blamed the killing on Randall Dale Adams, a passing acquaintance with whom he had spent most of the day leading up to the murder. Harris admitted that he stole the car from which the patrolman was shot, was present at the murder, and kept the stolen car afterwards. He was certainly liable for auto theft, and possibly as an accessory to murder. Instead, after Adams was convicted, all charges against Harris


63. Id.
THE RISKS OF DEATH

were dropped.  

Fourth, if the witness is lying to get favors unrelated to the crime at issue, he'll do much better if it's 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. Langley came within half an hour of electrocution, but was exonerated four years later and received a full pardon. His cellmate didn't have to wait that long; after his perjurious testimony, unrelated charges against him were dropped.

Fifth, it's easier to lie about a capital case than most other crimes of violence: there's 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 35% of their erroneous capital convictions, while Rattner lists perjury as the cause of only 11% of his errors. But recall that 45% of Rattner's cases are murders. If perjury was 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. 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

64. Id.  
65. Radelet & Bedau, supra note 5, at 137-38.  
66. 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), at 142 (the case of Margaret and Jesse Lucas, Illinois, 1909), at 158 (the case of Albert Sonders, Alabama, 1917), at 121 (the case of Gerald Growder, Michigan, 1931), at 114 (the case of James Foster, Georgia, 1956), at 110 (the case of George De Los Santos, New Jersey, 1975), at 113 (the case of Neil Ferber, Pennsylvania, 1982).  
67. Bedau & Radelet, supra note 5, at 57.  
68. Rattner, supra note 19, at 291.  
69. Beth Hawkins and Kristin Solheim, The Wrong Man, TUCSON WEEKLY, 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.
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'd be prosecuted for the murder and 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.

Despite these developments, Carriger remains on death row. He has come close to execution on several occasions while his attorneys have fought for a new trial. Under the circumstances, this seems a modest goal, since, at a minimum, the new evidence that has turned up since the trial raises grave doubts about Carriger's guilt. But if Robert Shaw hadn't been killed, none of this would ever have happened in the first place. 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. Confessions. A typical robbery investigation is resolved by an eyewitness identification; a typical homicide investigation is resolved by a confession. Many confessions are 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 about physical evidence, about witnesses, about statements by other suspects; they pretend that 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, to sympathize, to excuse; they play on the suspect's fears, his biases, his loyalty to family and friends, his religion; they exhaust the suspect and wear him down; in some cases, they use violence, even torture. 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's extremely time consuming. It's 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 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've mentioned: these are the cases that the police are most anxious to solve, and yet, because the victim is dead, they frequently lack eyewitnesses.

As with perjury, false confessions are a much more common cause of errors for homicides than for other crimes. They were a cause of 14% of Bedau and Radelet's errors in homicide and capi-
tal cases, but only 8% of the errors reported by Rattner. Since 45% 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, but by no means unique. On May 26, 1978, 4-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 over a hundred possible suspects, including "every known pervert in town," to no avail. One of them was Melvin Reynolds, a 25-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. Four years later, Reynolds was released when another man—Charles Hatcher—confessed to three murders, including that of Eric Christgen. As the St. Louis Post-Dispatch put it in an editorial: "The Reynolds case says something about confessions and police methods used to extract them, even when these methods fall short of outright physical brutality. Under the stress of constant harassment, individuals can reach breaking

73. Bedau & Radelet, supra note 5, at 58.
74. Rattner, supra note 19, at 291.
75. Note that comparing one set of proven miscarriages of justice to another probably understates the difference between homicides and capital cases on the one hand, and other criminal prosecutions on the other, since those lesser cases that result in errors will include a disproportionate number of cases that are similar to homicides in that the crimes are horrifying or receive extensive publicity, and as a result are the subject of exhaustive investigations.
76. Radelet, Bedau & Putnam, supra note 8, at 10-15; Bedau & Radelet, supra note 5, at 155. All the information about the Reynolds case in this paragraph is based on these two sources.
77. See Richard Jerome, Suspect Confessions, N.Y. Times, Aug. 13, 1995, Sec. 6, at 28.
point."

B. Plea Bargaining and Dismissal

Most prosecutions are resolved without trial. Eighty to 90% of convictions result from guilty pleas, usually after plea bargains, and at least 80% of defendants who are not convicted obtain pre-trial dismissals rather than acquittals. In other words, most of the work of sorting criminal cases after arrest is done pre-trial, by the exercise of prosecutorial discretion to dismiss, to reduce charges, or to recommend or agree to a particular sentence. The direct impact of this pre-trial process is much more important to the accuracy of criminal dispositions than anything that happens later on. And yet, in the most important cases—murders, and especially capital murders—pre-trial screening may be distorted in ways that produce two distinct types of error.

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. Nonetheless the Supreme Court has held that coercion of that sort does not violate the due process clause. One of the few qualifications on this general rule is a restriction on the form of death penalty statutes. While it is permissible for a prosecutor to ask for death and then let the defendant plead guilty in return for a lesser penalty—even if the defendant continues to deny that he is guilty—a statute that permits the defendant to avoid the risk of execution by pleading guilty is unconstitutionally coercive.

One attack on plea bargaining is that the threat is too effective, that it drives some innocent defendants to plead guilty along

78. Sourcebook 1994, supra note 22, at 480, Table 5.49.
79. E.g., Sourcebook 1994, supra note 22, at 482, Table 5.28 (dispositions of criminal cases in U.S. District Courts); Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1993 Table 5.73 (1993) [hereinafter Sourcebook 1993].
with the mass of guilty ones.\textsuperscript{84} That may happen with some regularity for innocent defendants who are offered light deals: time-served, diversion, 6-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 know of exactly one reported miscarriage of justice based on a guilty plea for a non-homicidal crime—and that was a peculiar case, a defendant who pled guilty to a crime he did not commit along with one which he did commit.\textsuperscript{65} The available collections of known errors are hardly representative samples of the universe of erroneous convictions, and errors based on guilty pleas are probably less likely to be discovered than those based on trials.\textsuperscript{86} 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\textsuperscript{87} list 16 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.\textsuperscript{88} In 1990, he was falsely implicated in the rape murder of Taunja Bennett by his girl friend, Laverne Pavlinac, who apparently was afraid of him and anxious to be rid of him. In the process, Ms. Pavlinac became entangled in her own lies, and claimed to have participated in the killing. 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. The Portland Oregonian summed up the case:

\begin{quote}
\end{quote}

\textsuperscript{84} E.g., Alschuler, supra note 80, at 713-16; Kenneth Kipuis, Criminal Justice and the Negotiated Plea, 86 ETHICS 93 (1976).
\textsuperscript{85} Gross, supra note 19, at 415 n.62 and accompanying text (the case of James Willis).
\textsuperscript{86} Id. at 415.
\textsuperscript{87} Radelet, Bedau & Putnam, supra note 8.
But there was, indeed, one lesson in this weird case that does bear remem-
bering. The threat of the death penalty led an innocent man to forgo his
day in court and accept a lesser sentence in exchange for not fighting the
charge. Prosecutors, defense attorneys and judges need to recognize that
risk and ensure the death penalty threat isn't made in a shaky case to exact
a guilty plea.

2. Failures to Dismiss Charges Against Innocent Defend-
ants. The major filter that may prevent a charge based on ques-
tionable evidence from turning into a conviction is prosecutorial
discretion to dismiss. Overall, dismissals of felony charges outnum-
ber acquittals about 4 to 1. Many cases are dismissed because of
weak evidence despite the fact that the prosecutor is convinced
that the defendant is guilty; other cases are dismissed because the
prosecutor is convinced of the defendant's innocence, or has at
least come to doubt his guilt. For homicides, and particularly in
capital cases, both sorts of dismissals are less likely.

A prosecutor might dismiss a weak case (or offer a deal that's
tantamount to dismissal) simply to improve her win/loss ratio at
trial, but the major incentive is to conserve resources. Trials are
time consuming and expensive; they are a scarce resource. Since
most cases cannot be tried, it is obviously sensible to try to restrict
trials to cases where the outcomes will be useful—i.e., convictions.
If possible, likely losses at trial are avoided through plea bargain-
ing; if not, they may be dismissed even if the prosecutor is con-
vinced of the defendant's guilt. Regardless of their belief in the
defendants' guilt, prosecutors focus on the easiest cases—the ones
with the best evidence—since those are the cases where their lim-
ited resources will have the greatest impact. But homicides are dif-
ferent. Homicides (and other notorious crimes) are the cases for
which resources are conserved. A dead loser will still be dismissed,
but what if it's merely likely that the defendant will acquitted? If
it's a robbery, the prosecutor may dump the case and try another;
if it's a murder, she's more likely to forge ahead.

Prosecutors lose a much higher proportion of murder trials
than other felony trials, about 30% vs. about 15%. As Robert
Scott and William Stuntz point out, the most likely explanation
is that in murder cases they are willing to go to trial with compara-
tively weak evidence. The main effect of this extra effort is that

89. Editorial, Justice Done Finally, PORTLAND OREGONIAN, Nov. 28, 1995, at C6.
90. See supra note 79.
91. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL
JUSTICE STATISTICS 1990, at 526, Table 5.51.
guilty defendants are convicted who otherwise would never even be tried. But in some cases the evidence is weak because the defendant is 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's 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 that is available to obtain a conviction. 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. Prosecutors have widely varying views on how to apply this vague standard, from those who say that they will never prosecute unless they 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. Whatever the prosecutor's position in the abstract, an actual decision to dismiss a serious charge that would probably have resulted in a conviction is always difficult—especially if the crime has attracted a lot of attention, or if a victim, or several, were killed.

On October 8, 1962, John Stinson, a banker in Evansville, Indiana, was robbed at gunpoint. Six months later, by sheer chance, Charles Del Monico—a reputed gangster—was identified as the robber when a witness saw his picture in a newspaper after he had been indicted for extortion. Eventually six witnesses identified Del Monico, apparently all in error: he had credible alibi witnesses who said he was in Miami at the time of the robbery, he passed several polygraph and "truth serum" tests, and there was no evidence corroborating the eyewitness identifications. On the eve of trial, the prosecutor, U.S. Attorney Richard Stein dismissed the charges. In answer to an angry challenge from the victim and his friends, Stein agreed that Del Monico would probably have been convicted at trial. Nonetheless, Stein felt compelled to dismiss because he was persuaded that Del Monico was innocent by the lack of corroboration of the identifications, and by the mass of inadmissible polygraph and truth serum evidence: "We were afraid of a miscarriage of justice." This was a gutsy move. But would Mr. Stein have

95. Id. at 498.
done the same if John Stinson had been killed? Or would he have decided to say: "Let the jury decide"?

The problem is not just public pressure. The evidence of innocence in the Del Monico case did not arrive on the prosecutor's door step on its own; it was presented by his attorneys. That's the rule in cases where prosecutors dismiss because they believe the defendant is innocent. Since everybody agrees that innocent defendants should not be charged, for cases in which the defendant is innocent there is no conflict between the sides. The trouble is identifying the cases in which that applies. The defense brings evidence to the prosecution, often at the cost of some tactical advantage at trial, in order to persuade the prosecutor that this is one of those cases. If there happens to be persuasive, independent evidence of innocence, no problem; but even when there isn't, the defendant himself does know if he's been wrongly accused. But there's the rub: as Scott and Stuntz point out, in the absence of persuasive corroboration, there is no way an innocent defendant can signal his innocence—not by saying so, not by rejecting plea bargains and insisting on trial—that a guilty defendant cannot duplicate. The most valuable source of information is also the least credible.

Judge Frank Easterbrook, in a comment on Scott and Stuntz's article, argues that the prosecutor's difficulty is mitigated by the role of the defense attorney: "Just as investment bankers may put their reputations behind hard-to-verify claims of corporate operations, so lawyers may put their reputations behind proffered information. . . . Prosecutors take seriously information coming from reputable counsel. Guilty defendants cannot copy the signal of innocence sent by careful honest lawyers." There's something to this—defense attorneys do fill this role—but it's an imperfect system at best. It only works if the innocent defendant has a careful, honest and reputable lawyer—by no means a universal condition—and if the prosecutor will listen. In many capital cases, the last condition is undermined by the nature of the pre-trial process.

If the prosecutor insists on the maximum available penalty, then of course there can be no deal. This is a possible scenario in any prosecution, but it's rare: there's usually something the state is willing to give up to get the defendant to plead guilty. In many death cases, however, the prosecutor knows from the start that she wants the death penalty. As a result, there is no plea bargaining: there's 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 that it's true, since (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 is the only pre-trial move left. As far as this client is concerned, there's nothing to lose by making it. And, since a client's life is at stake, the defense attorney may be driven to make the claim whether or not she believes it. More important, the prosecutor knows that the defense attorney may feel obliged to argue that the defendant is innocent, whether or not she thinks it's true. 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, and especially not that her client has been wrongly accused.\footnote{99. There may also be cases in which a capital defendant insists on his innocence and refuses a plea bargain that's offered, and the prosecutor reads that refusal as a stronger signal of possible innocence than a similar move by a non-capital defendant. That could lead to a further investigation, and perhaps even a dismissal, that would not have occurred if the charges had been less extreme. This effect (if it occurs) would not "offset" the tendency to take questionable capital cases to trial: it would change the outcomes in a different subset of capital prosecutions. The net impact (by comparison to non-capital felonies) would depend on the frequency of errors that are generated on the one hand, and avoided on the other. See infra note 115 and accompanying text. In this situation, the signal of innocence—unwillingness to accept a plea—is one that a guilty capital defendant could easily duplicate, if it was given serious weight by the prosecutor. Scott and Stuntz, supra note 80, at 1967. Therefore, prosecutors are likely to discount its importance, despite the added risk for a defendant who faces a death sentence at trial. It is also a difficult signal to read, since the defendant can frequently change his mind and accept the plea bargain until very late in the process.}

C. Trial

An innocent defendant who goes to trial faces a high risk of conviction. The best generalization about juries 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 that 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, to arrest and to prosecute.100

This is bad news for homicide defendants. Whether it's because prosecutors take weaker cases to trial101 or because they insist on the maximum penalty,102 homicide defendants are more likely to face a jury than other criminal defendants. In 1992, for example, 12% of robbery convictions across the country were obtained at trials, of which 8% were jury trials, while 41% of murder convictions were after trial, including 33% that went to jury trial.103 In other words, since pre-trial 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 pre-trial 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; 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.

100. See Gross, supra note 19, 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.
101. See supra notes 90-96 and accompanying text.
102. Supra note 99 and accompanying text.
103. Sourcebook 1994, supra note 22, at 486, Table. 5.49.
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. Many, perhaps most of these notorious crimes are homicides, and especially the unusual and heinous homicides which are likely to be charged as capital crimes. In those cases, most jurors will have heard all sorts of things about the case before they got to court, many of them inadmissible, misleading and inflammatory. They may have seen or heard or read police officers or other government officials declare the defendant guilty. They may have witnessed or felt a general sense of communal outrage. All this will make them more likely to convict. Courts may attempt to mitigate the impact of pre-trial publicity by various means—most effectively by changing the location of the trial—or they refuse to do so. As a result, the records of erroneous convictions include scores of cases in which publicity and public outrage clearly contributed to the error—from the convictions of Leo Frank in 1913 and the Scottsboro Boys in 1931, to the conviction of Rolando Cruz and Alejandro Hernandez in 1985.

b. Death Qualification. In capital cases, juries decide the sentence as well as determine guilt or innocence. As a result, the jury selection process includes a unique procedure, “death qualification,” that is designed to ensure that the jury is qualified for the sentence phase. Most jurors who are strongly opposed to the death penalty, and some who are strongly in favor, are excluded at the outset. Many studies have shown that these exclusions make the jury more likely to convict. In addition, the process of question-

104. E.g., Mu'Min v. Virginia, 500 U.S. 415 (1991) (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).
105. Bedau and Radelet, supra note 5, at 115.
106. See supra note 46.
107. See supra note 44.
ing jurors about their willingness to impose the death penalty before the defendant has been convicted tends to create the impression that guilt is a foregone conclusion, and the only real issue is punishment.\footnote{110}

c. \textit{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. If the defendant does not plead guilty, either because no plea bargain is offered or because he was unwilling to take it, the same pressure will be felt at trial. It 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. It 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.\footnote{111}

d. \textit{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.\footnote{112} In criminal trials the problem is worse, since the burden of persuasion is proof beyond a reasonable doubt. In a close criminal case the jury is supposed to release a defendant who is in their opinion, probably guilty. This is a distasteful task under any cir-


\footnote{111. \textit{c.f.} Stephen Bright, \textit{Counsel For the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer}, 103 YALE L.J. 1835 (1994).}

cumstances, but it becomes increasingly unpalatable—and unlikely—as we move up the scale from non-violent crime, to violent crime, to homicide, to aggravated grisly murder.

2. Factors Which Decrease the Likelihood of Conviction.

a. Quality of 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 their defenders 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.

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 the United States Supreme Court acknowledges this possibility and held that a juror could not automatically be excluded from service because of this reaction:

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 death penalty may affect what their honest judgment of the facts will be or what they deem to be a reasonable doubt. Such assessments and judgments are inherent in the jury system. . . .

To the extent that 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 one direction and forces that push in the other, it is sometimes possible to say that they cancel out. Not here. A sailboat that keeps getting hit by gusts from the east is no less likely to capsize if there are also gusts from the west.

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 une-

114. Id. at 50.
ven at best. Many capital defendants do not have quality representation, by any standard.\textsuperscript{115} And the anxiety that jurors may feel when a defendant's life is at stake will be relieved if a jury decides (as they often do in deliberations on guilt) that he will not be sentenced to death. If they do get that far, the competing impulse—to not 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 don’t balance out errors on the other. In capital trials, one particular type of error—an uncommon one—is overwhelmingly important: conviction of an innocent defendant. Given the nature of the problem, I hazard to add one more metaphor: If you’re building a seawall, adding height to one part won’t counteract cutting away at another.

IV. CONCLUSION: CATCHING ERRORS

The basic conclusion is simple. The steady stream of errors that we see in cases in which defendants are sentenced to death is a predictable consequence of our system of investigating and prosecuting capital murder. And behind those cases, there is no doubt a much larger group of erroneous convictions in 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. Isn’t it likely that all these mistakes are caught and corrected somewhere in that exacting process? The answer, I’m afraid, is No. At best, we could do an imperfect job of catching errors after they occur, and in many cases we don’t really try. As a result, most miscarriages of justice in capital cases never come to light.

Judging from the errors that are discovered, three factors are usually responsible for a defendant’s exoneration, separately or in combination: Attention, Confession, and Luck.

1. 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

\textsuperscript{115} See Stephen Bright, supra note 109.
counsel on the post-appellate collateral review, while most defendants have none. These advantages may help explain the high proportion of death sentences among all miscarriages of justice. But there is another side to this coin. Many capital defendant who are convicted in error are not sentenced to death, very likely most. 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've 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, his attorney said that "only the death sentence had allowed Mr. McMillian to receive adequate representation," which eventually uncovered the plot against him. If McMillian had merely been sentenced to life imprisonment, most likely he would never have been heard from again.

2. Confession. In most cases in which miscarriages of justice are uncovered, the real criminal confesses to the crime. In the common scenario, the true murderer is arrested and imprisoned for another crime—sometimes a similar homicide—and confesses while in prison. For example, Melvin Reynolds confessed falsely, under intense pressure, to the rape-murder of a 4-year-old boy; he was released when the real criminal was arrested and confessed to three murders, including the one for which Reynolds was imprisoned. Similarly, Rolando Cruz and Alejandro Hernandez, each of whom had been convicted twice for the killing of Jeanine Nicarico, were freed ten years after another man—convicted child-killer Brian Dugan—confessed that he had committed the murder alone.

3. 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

116. See supra text accompanying note 25.
117. See supra note 45 and accompanying text.
118. Applebome, supra note 45, at B11.
119. Gross, supra note 19, at 421; Arye Rattner, supra note 19, 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, etc.—as separate causes, when they are often triggered by such confessions.
120. See supra note 76 and accompanying text.
121. See supra note 44 and accompanying text.
Randall Dale Adams’ case came when documentary film maker 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’ case, The Thin Blue Line, which was released in 1988; the movie drew national attention to the case and resulted in Adams’ release in 1989, twelve years after he had been sentenced to death.

Paris Carriger’s case illustrates how all three factors can influence a single case. Although his representation at trial was shamefully inadequate, since his death sentenced Carriger has been represented by increasingly skillful attorneys, on appeal and in state and federal habeas corpus proceedings. These lawyers have been able to bring the deep problems in his case to the attention of the courts, although so far, without ultimate success. The relative prominence of the case also produced a lucky break. When Carriger appeared in a TV documentary about Arizona’s death row, one of the hundreds of thousands of viewers recognized the case: he had heard the state’s chief witness, Robert Dunbar, brag that he had done the killing and framed someone else for it. The viewer called Carriger’s lawyers, who used that evidence in a state court hearing challenging the conviction. In the course of that hearing, Dunbar—who by then was in prison for other crimes—appeared in court and confessed that he was the killer, and that he had lied at Carriger’s trial. Three weeks later, Dunbar retracted his confession, and the case settled into a long-term muddle: hearings, appeals, execution dates, stays, hearings, execution dates, stays. At this writing, the case is pending before the Ninth Circuit Court of Appeals; the issue, apparently, is whether it is necessary to determine whether evidence of Dunbar’s confession would have influenced the trial judge’s decision on penalty.

Carriger may yet be executed, despite grave doubts about his guilt. On the other hand, his death sentence may be vacated, in which case, I expect, the courts will be content to let it rest at that. That he was convicted by an admitted perjurer and that he may well be entirely innocent, these facts will carry little weight if all he faces is life imprisonment.

The basic cause for the comparatively large number of errors

123. See supra notes 62-64 and accompanying text.
125. See supra note 69 and accompanying text.
in capital cases is a natural and laudable human impulse: We want murderers to be caught and punished. In some cases that impulse drives police and prosecutors to lie and cheat, but more often it simply motivates them to work harder to catch killers and to convict them. It works: More cases are cleared, more murderers are convicted. But harder cases are more likely to produce errors—still exceptions, no doubt, but not as rare as for other crimes, where the cases that are prosecuted are mostly skimmed off the top. If there were some general method for identifying the errors, we wouldn’t have this problem in the first place. But of course, there isn’t. Instead, the errors that we do discover advertise the existence of others that we don’t. What are the odds that an innocent prisoner will run into a movie producer who is struck by his story? What if the real killer is killed in a car crash, or dies from a drug overdose, or is never arrested, or never confesses?

Attention and quality representation do improve an innocent defendant’s chances. They help get hearings in court, they increase visibility which produces opportunities for lucky breaks, 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. Resources for post conviction defense have been cut back, the bases for review in federal court have been limited, and the process of review has been accelerated. Perhaps these changes will have little effect in practice. But if they do, one likely consequence is that fewer mistakes will be caught, even among those cases that remain on the track to execution, and that more defendants will be killed by the state in error.

128. 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.