Lost Lives: Miscarriages of Justice in Capital Cases

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LOST LIVES

Miscarriages of Justice

— by Samuel R. Gross

in Capital Cases
The following article is based on a paper delivered at the National Conference on Wrongful Convictions and the Death Penalty, held at Northwestern University Law School in November. At deadline time the complete version was in press for 61 Law & Contemporary Problems (1999).

One of the longstanding complaints against the death penalty is that it “distort[s] the course of the criminal law.” 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 claims behind the argument that capital convictions of innocent defendants are very rare.

(1) Erroneous convictions are rare in capital prosecutions of any sort, and their danger 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 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) 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 78 percent of robberies and 52 percent of aggravated assaults in the United States were committed by strangers, compared with only about 25 percent of homicides. As a result, most homicides present no real question about the identity of the criminal, and no real risk of mistake.

(3) Homicides, and capital homicides in particular, get far more attention than other crimes. This 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.”

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 don’t 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, in which he documented 65 of these cases that never happen. Since then, several other compilations of proven erroneous convictions have been published, and new cases continue to surface with regularity.

Nobody knows the true number of mistaken convictions. Since 1992 at least 53 defendants — mostly convicted rapists — have been exonerated by DNA identification evidence; most of them were released after spending years in prison. 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’s anybody’s guess how many other innocent prisoners haven’t 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. These 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 —
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.

is true. That reduces the field considerably. Unfortunately, the ease with which most homicides may be solved does relatively little to increase the accuracy of decision-making in capital homicide cases, since 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 capital murders. For example, a study of homicide prosecutions from 1976 through 1980 in Georgia, Florida, and Illinois found that while only 17 percent to 22 percent of all the homicide victims in those states were killed by strangers, 55 percent to 71 percent of the death sentences were returned in this comparatively rare set of cases.

The third step in the argument — that capital cases get an extraordinary amount of attention — is also certainly true. But for the purpose of minimizing the risk of erroneous convictions and executions that attention is a two edged sword at best: It generates many more mistakes than we would see 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 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 non-intuitive statement is the core of my argument. I will develop it later, after defining my terms and offering a brief discussion of the large volume of evidence that has accumulated that mistaken convictions in capital cases do occur on a regular basis. Finally, I will review what we might do and what we in fact do to minimize these tragedies.

I. 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.

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II. How often are innocent people sentenced to death?

It's anybody's guess how many of the 3,365 prisoners on death row 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's quite a few. The major work in this area 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 Constance Putnam, published their findings in the book In Spite of Innocence. 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. For these cases, there are other 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 the error has been admitted or is beyond dispute. And 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.

In any event, a study on this issue: a compilation of cases and controversy, published a book in 1990.

One of the cases on their list is that of Radelet and his colleagues list is 7.34 years; the median time is between six and seven years. 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. (4) Some cases in which innocent death row prisoners have been released — perhaps most — are not in the sample. Over a quarter of the total number of cases (18/68) are from Florida; California, which has the largest death row in the country — 477 compared to 389 in Florida — has only two cases; and Texas, which has executed more prisoners than any other state — 144 compared to 39 for Florida — has only six. The reason for this disproportion, as the authors point out, is that Professor Radelet works in Florida and has maintained detailed data on every capital prosecution in the state. 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 would be much higher. 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 collections of such errors in all capital cases combined. 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. In 45 percent of Rattner's cases the offense was murder, and in 12 percent the penalty was death. By comparison, homicides (of all sorts) make up a fraction of 1 percent of all arrests in this country, and about 3 percent of arrests for crimes of violence. Murder and non-negligent homicide account for 1.3 percent of all criminal convictions, about 7 percent of convictions for violent crimes, less than 3 percent of all commitments to prison, and about 10 percent of commitments to prison for crimes of violence. Death sentences account for about 2 percent of all murder convictions, less than two-tenths of 1 percent of all convictions for violent crimes, and perhaps three hundredths of 1 percent 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.

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 other crimes, and more to capital cases than other homicides, we would be likely to detect more errors among homicide convictions than among other felonies — and especially among the most aggravated felonies — 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 non-capital alike — were discovered by sheer chance. If chance were the only factor, the known cases would be representative of all errors; 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 the actual proportion of errors in murder cases were over-represented 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's possible, I suppose,
that erroneous convictions are just as common in other criminal cases. It's 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 non-capital homicides, and dozens of thousands or more equally questionable convictions for robbery, burglary, and assault. But 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?

III. 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's 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.


Most crimes are never solved. In 1995, a mere 21 percent of all serious crimes known to the police were "cleared" — which usually means that a suspect was arrested; of serious violent crimes, 45 percent were cleared. But even these low figures only tell half the story. Most crimes are not "known to the police" — in 1995, only 36 percent of all crimes, and 42 percent of crimes of violence, were reported. In other words, only about 18 percent of all crimes of violence are solved by the police, including about 14 percent of robberies, 18 percent of rapes, and 7 percent 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. 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's it. If a suspect doesn’t 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 strongest.

Homicides are different. First, almost every homicide is reported to the police when the body of the deceased person is found. Second, most homicides known to the police are cleared — 65 percent in 1995, 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 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 57 percent 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.

As we have noted, many homicides are easy to investigate. 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 non-homicidal 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 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 12 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.

2. Evidence.

Most miscarriages of justice are caused by eyewitness misidentifications. In Rattner’s sample of wrongful convictions, 52 percent 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. On the other hand, eyewitness error was a factor in only 16 percent of Bedau and Radelet’s cases of errors in potentially capital prosecutions — which suggests that among the non-murder cases in Rattner’s sample, over 80 percent of the errors 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 help because, in the words of the immortal cliche, “dead men don’t talk.”

Eyewitness identifications are also very uncommon in burglary cases, but the upshot is different. There are very few erroneous convictions based on misidentifications, but since there are also few burglary prosecutions based on non-eyewitness evidence, there are few errors of any sort, and few convictions. The clearance rate for reported burglaries is only 13 percent. 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 leading cause of error in erroneous capital convictions, and false confessions are the third most common cause.

Perjury. From Macbeth to Mark Twain’s Injun Joe, the killer who blames his crime on others is a familiar character in fiction. Similar things happen in life.
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’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 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 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.

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 percent of their erroneous capital convictions, while Rattner lists perjury as the cause of only 11 percent of his errors. But recall that 45 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. 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’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.

In December 1997, the Ninth Circuit Court of Appeals en banc ordered that Carriger be retried or released. As of this writing, he remains in custody awaiting retrial. He came close to execution on several occasions in the 20 years since his arrest. 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. But if Robert Shaw hadn’t been killed, 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.

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 straight-forward 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, 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 guilt, 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 percent of Bedau and Radelet's errors in homicide and capital cases, but only 8 percent of the errors reported by Rattner. Since 45 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, 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 — 14 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 confession 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.

B. Pre-Trial Screening

Most prosecutions are resolved without trial. Eighty to 90 percent of convictions result from guilty pleas, usually after plea bargains, and at least 80 percent 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. This pre-trial 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. 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. 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 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. The available collections of known errors are hardly representative samples of the universe of erroneous convictions, and errors based on guilty pleas are undoubtedly less likely to be discovered than those based on trials. 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 rarely plead guilty when doing so entails a substantial term of imprisonment, except in capital prosecutions. Radelet, Bedau and Putnam 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. In 1990, he was falsely implicated in the rape murder of Taunja Bennett by her girfriend, Laverne Pavlinac, who apparently was afraid of him and anxious to be rid of him. In the process, Pavlinac became entangled in her own lies, and claimed to have participated in the killing. Both were charged with murder. Pavlinac recanted her confession but was convicted and sentenced to life in prison. Following her conviction, 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 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 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 — i.e., 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 focus on the easiest cases first — the ones with the best evidence — since 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’s merely likely that the defendant will be 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 percent vs. about 15 percent. 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 comparatively weak evidence. The main effect of this extra effort is that guilty defendants are convicted who otherwise would never be tried. But in some cases 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’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 innocence 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 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. But this is always a discretionary choice, and 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. It is bound to be much more difficult — and unlikely — 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 didn't 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 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 and money and prestige they have committed to it.

A prosecutor can always discount the defense attorney's claim that her client is innocent: This is hardly a non-partisan 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 pre-trial contact between the prosecutor and the defense attorney takes place in the context of plea bargaining. But in many capital cases — 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 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 the client is innocent may be the only pre-trial move available. As far as this client is concerned, there may be nothing to lose by making it, and, since 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 that the defense attorney may feel obliged to argue that the defendant is innocent, whether or not she thinks it’s 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 the client has been wrongly accused.

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 sort innocent defendants that the prosecutors have missed? Given these limitations, it is unrealistic to expect juries to systematically correct errors in the earlier decisions to investigate, to arrest and to prosecute.

This is bad news for homicide defendants. Whether it’s because prosecutors take weaker cases to trial or because they insist on the maximum penalty, homicide defendants are more likely to face juries than other criminal defendants. For example, in 1988, 33 percent of murder cases in the 75 largest counties in the United States went to trial, compared to 5 percent of all felony prosecutions and 9 percent of all violent felonies. In 1994, 15 percent of robbery convictions across the country were obtained at trials, of which 10 percent were jury trials, while 42 percent of murder convictions were after trial, including 35 percent that went to jury trial. 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 don’t 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, 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.

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 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 got to court, many of them inadmissible, misleading, and inflammatory. They may
have seen or 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 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 may refuse to do so. Not surprisingly, 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 convictions of Rolando Cruz and Alejandro Hernandez in 1985.

**Death Qualification.** In capital cases, juries decide the sentence as well as determine guilt or innocence. To accommodate this function, the 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. Many studies have shown that these exclusions produce juries that are more likely to convict. 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 the only real issue is punishment.

**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. 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; 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.

**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. 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 circumstances, 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 that decrease the likelihood of conviction.**

**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.

**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* (448 U.S. 38 [1980]), the United States Supreme Court acknowledged this possibility and held that a juror could not automatically be excluded from service because of this reaction. 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. 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. And the anxiety that 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 — 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. The same is true of decisions on guilt and innocence: Mistakes in one direction in some cases 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're building a seawall, adding height to one part won't make up for 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 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 death 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 death 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.

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. 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 capital defendants 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
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 wouldn’t have this problem in the first place. But of course, there isn’t. Instead, the errors that we have discovered advertise the existence of others that we’ve missed.

McMillian was released after six years on death row for a murder for which he had been framed by local enforcement officials, his attorney said that “only the death sentence had allowed Mr. McMillian to receive adequate representation, which eventually uncovered the plot against him.” 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.

Confessions. 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 before trial or 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 Charles Hatcher was arrested and confessed to three murders, including the one for which Reynolds was imprisoned. Similarly, John Sorovnske and Laverne Pavlinac were both freed in 1995 after Keith Jesperson confessed to the murder for which they were falsely convicted. But sometimes luck takes a different route. Absolute.

Lack. 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’ 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, 12 years after he had been sentenced to death.

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 to 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 wouldn’t have this problem in the first place. But of course, there isn’t. Instead, the errors that we have discovered advertise the existence of others that we’ve missed. How often will an innocent prisoner run into a movie producer who is struck by his 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; 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” — has shriveled up in recent years. 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 habeas corpus review in the federal court. Recently, resources for post-conviction defense in capital cases have been cut, the basies for review in federal court have been limited, and the process of review has been accelerated. 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. Perhaps these new rules will have little effect in 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, more innocent homicide defendants will remain in prison, and more defendants will be killed by the state in error.

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