

## *Introductory Chapter*

**T**HE present collection of sixty-five criminal prosecutions and convictions of completely innocent people exemplifies the manner in which these mistakes in the administration of justice occur. The cases fall into certain groups. The particular errors are so typical that it seems permissible to draw certain inferences from them in order that their repetition may be minimized and, if possible, avoided.

Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these convictions.<sup>1</sup> Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony. These cases illustrate the fact that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives, not necessarily stimulated originally by the accused personally—the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus doubts are resolved against the accused. How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases<sup>2</sup> the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in twelve other cases,<sup>3</sup> the resemblance, while fair, was still not at all close. In only two cases<sup>4</sup> can the resemblance be called striking.

Dean Wigmore has suggested<sup>5</sup> a more scientific method, based on the psychology of recognition, for effecting identifications. He proposes the use of the talking film, by which body, motions, and voice of the subject shall be recorded in numerous poses, the pictures then to be presented to viewers in a series of perhaps twenty-five similar films, selected from

a classified stock of one hundred types of men and women on file, the viewers to indicate recognition by the pressure of an electric button. When it is realized how unreliable the haphazard methods of identification have frequently proved to be, it will be apparent that more scientific methods of identification must be devised.

There are a few cases,<sup>6</sup> including cases of alleged rape—a type intentionally omitted from this collection—where the issue of guilt turns mainly upon the veracity of the prosecuting witness and of the accused. But little scientific study has yet been made of the problem of lying witnesses or of defective powers of observation and of the effect of suggestion in criminal cases.

In thirteen of the cases<sup>7</sup> no crime at all was committed, and in three other cases<sup>8</sup> the commission of any crime is doubtful. In the balance of the cases, a crime appears to have been committed, but it was not committed by the accused.

Erroneous convictions on circumstantial evidence exclusively, that is, in the absence of identification and perjury, are not many, yet enough to be disturbing. Of the eleven cases of this type here recorded,<sup>9</sup> eight involve charges of murder in the first degree and convictions of murder in the first or second degree.

No one will suggest that circumstantial evidence should be excluded as a form of evidence. On the contrary, it is often convincing and conclusive. That it is, nevertheless, often misleading and unreliable, the cases here reported attest. Chief Justice Shaw, in his celebrated charge to the jury in *Dr. Webster's case*, said:

The advantages [of circumstantial evidence] are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.<sup>10</sup>

Cases of circumstantial evidence into which entered a mistaken identification are fifteen in number.<sup>11</sup> Cases of circumstantial evidence in which perjury was an ingredient are eleven in number.<sup>12</sup> Cases in which the perjury of prosecuting or other witnesses, taking advantage of circumstantial evidence, natural or manufactured, was the main factor in the conviction are not inconsiderable—fifteen.<sup>13</sup> Among them are four for murder in which the alleged “murdered” person later turned up alive and well.<sup>14</sup> In fourteen cases the victim was “framed” by hostile witnesses.<sup>15</sup>

There is not much that the prosecuting or judicial machinery can do to prevent some of these particular miscarriages of justice. In many of the cases just mentioned, the prosecuting attorney was obliged to take the evidence as presented to him, including the uncontrollable perjury of vengeful witnesses, and lay it before the jury without realization of its worthlessness. Yet in only a few of the cases can it be said that no fault, carelessness, or overzealousness can be charged to the prosecution. In this group we may, by liberality, list sixteen cases.<sup>16</sup> In a very considerable number, the zealotry of the police or private detectives,<sup>17</sup> or the gross negligence of the police in overlooking<sup>18</sup> or even suppressing<sup>19</sup> evidence of innocence, or the prosecution's overzealousness<sup>20</sup> was the operative factor in causing the erroneous conviction. Such lapses from the impartial enforcement of the law are hardly excusable. Yet, without making any claim to generalization, it is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an indiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon a person accused.

Especially is this the case where the accused has been previously convicted or has had unfortunate experiences with the criminal law. Evidence of a prior conviction is often

fatal to an accused person,<sup>21</sup> and the prejudice it is calculated to create in the minds of the jury is doubtless one of the main reasons why prosecutors insist upon such evidence. Baffled by crime waves, the result of conditions the public seems unwilling to recognize and face, there has been a growth in public impatience not only with the technicalities of the law, by which so many guilty criminals escape conviction, but also with the normal processes of the law, designed to safeguard the accused against injustice. For example, in connection with the growing prevalence of "Baumes law" statutes, punishing second, third, and fourth offenders with progressively drastic sentences, a trial may open, as in the Nedza case, with the introduction by the prosecution of evidence of the accused's prior conviction. Though this is prohibited in many states, a clever prosecutor often succeeds in evading the law. The accused's case is thereby grievously if not hopelessly prejudiced, and a conviction on the presently charged offense much facilitated. Inasmuch as prior convictions affect the severity of the sentence only and do not constitute proof of guilt of the present crime, such evidence should be reserved exclusively for the judge *after* the jury brings in its verdict.

Even where it is not possible to introduce certificates of prior conviction, many prisoners often refuse to take the witness stand in order to avoid questions by the prosecutor concerning their previous record. To prevent the prejudice which such questions obviously inspire in the minds of the jury, English law permits questions as to a previous conviction under exceptional circumstances only, such as the fact that there is a direct relation between the earlier and the present crime, as in forgery and counterfeiting, or where the accused himself raises the issue of his good character.<sup>22</sup> Justice could be promoted in the United States by similar precautions and restrictions.

For the reason just mentioned, it is not true to say that only guilty persons avail themselves of the constitutional privilege against self-incrimination by refusing to testify. While the subject deserves the fullest consideration before action is taken to repeal the privilege, it seems probable that

the privilege is not an essential condition of the impartial administration of justice and that it does not afford to the accused the protection assumed. On the contrary, it is probably responsible for many abuses, not least of all the "third degree," which subjects accused persons to far more brutal and intolerable ordeals than any obligation to tell the truth in open court. Refusal to take the stand—under circumstances where an explanation from the accused is naturally expected—even if it cannot be commented upon by judge or prosecutor, inevitably affects the jury unfavorably; but in addition, the accused's known privilege of refusing to testify influences the police to exact "confessions" which, whether true or not, stigmatize the system of obtaining them as a public disgrace. The Report of the President's Commission on Lawlessness in Law Enforcement should awaken the public to the impropriety of such a system of securing "confessions." Even if the end is sometimes useful, as in eliciting the names of confederates, that does not excuse or justify the means. But even before the constitutional privilege against self-incrimination can be repealed, safeguards protecting the prisoner from duress can be established, by prohibiting the use in evidence of all confessions made to the police, by disciplinary measures, and by insuring that all questioning of the accused shall be carried on only before a magistrate and witnesses, perhaps in the presence of phonographic records, which shall alone be introduced as evidence of the prisoner's statements.<sup>23</sup>

In several of the cases in this collection a species of third degree or undue influence produced "confessions" from the accused—confessions which constituted a material factor in their convictions. Notable among these are the cases of Johnson in Wisconsin and Stielow in New York, both men of poor intelligence, influenced by promises of forthcoming advantage to themselves. The confessions in the Boorn and Butler and Yelder cases are explainable only on psychological grounds and have no special interest. The Lyons confession, coming after the conviction, is in the main amusing. While confessions may often seem conclusive, they must be carefully examined. Persons charged with crime are not in-

frequently of defective or inferior intelligence, and, even without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result. State's Attorney Homer Cummings, in the Connecticut case of Israel, who under pressure confessed the murder of a priest, but whom Mr. Cummings refused to try, said:

It was the opinion of the physicians that any confession made by the accused was totally without value, and they were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation and suggestion, in due course he would be reduced to such a mental state that he would admit practically anything that his interrogators desired. They further stated that this was a common phenomenon with certain types of people, and that where such people are subjected to interrogatories, accusations or suggestions from persons of stronger will, the lesser mind will ultimately succumb and accept the conclusions of the more powerful intellect.<sup>24</sup>

Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In fourteen of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious.<sup>25</sup> This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked.

In eight of the murder cases<sup>26</sup> recorded here, no crime was committed at all. Nobody was murdered. The convictions rested upon perjury or circumstantial evidence and were later shown to have been without foundation. In six of the cases,<sup>27</sup> the person alleged to have been murdered turned up hale and hearty some time after the supposed murderer had entered upon his sentence in the penitentiary. In several of the cases the convicted prisoner, later proved innocent, was saved from hanging or electrocution by a hairbreadth.<sup>28</sup>

Only by rare good fortune were some of the sentences of hanging and electrocution commuted to life imprisonment or indictments for first-degree murder modified by verdicts of second-degree murder, so that the error could still be corrected.<sup>29</sup> How many wrongfully convicted persons have actually been executed, it is impossible to say. But that these cases offer a convincing argument for the abolition of the death penalty, certainly in cases of convictions on circumstantial evidence, can hardly be gainsaid.<sup>30</sup>

The unreliability of so-called "expert" evidence is disclosed by eight striking<sup>31</sup> cases. It seems clear that there is a necessity for publicly employed impartial experts who have no more interest in the case than the judge. Wisconsin has such a statute providing for experts to be appointed by the court, after notice and hearing.<sup>32</sup>

The errors here recorded were uncovered in various ways:

1. In the case of peculiarly original crimes, by the fact that they continued to be perpetrated after the wrong person was in custody.<sup>33</sup>

2. By the corroborated confessions of guilty third persons or of prosecuting witnesses.<sup>34</sup>

3. By the substantiated confessions of one or more accomplices in a joint crime, by which all the guilty participants were named or identified and thus the wrongfully accused person proved innocent.<sup>35</sup>

4. By sheer good luck, by which the police or the prosecutor or the governor discovered that the wrong man was caught and convicted.<sup>36</sup> How many unfortunate victims of error have no such luck, it is impossible to say, but there are probably many.

After discovery of clear error, police, prosecutor, and court have in many cases shown commendable zeal in undoing the wrong.<sup>37</sup>

Some of the more detailed factors which resulted in the wrongful convictions are mentioned in the comments after each case. Proof that an alibi or collateral testimony offered by the accused was false, though in fact the accused had nothing to do with the crime, was extremely prejudicial, if

not fatal, in several cases.<sup>38</sup> Chief Justice Shaw in the Webster case exhibited profound knowledge of human nature when he said:

. . . an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books, and cited here yesterday [John Graham], of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive, afterwards, proved conclusively that he was not guilty of the murder.<sup>39</sup> [Graham was in fact executed, before the child (his daughter, not his niece) reappeared.]

The fact that a person accused of robbery of money was shown to have had no money after the crime should have been a factor in demonstrating the innocence, for example, of Galindo, Nedza, and Stielow, though it seems to have been disregarded by the police and prosecution. The fact that witnesses are often persuaded to make identifications by suggestion of the police is evidenced in the cases of Nedza, Sullivan, and Zambino, where a single photograph was exhibited to a distant witness, and in the cases of Flood, McKinney, and Nedza, where the accused was dressed according to the description of the culprit and forced to perform antics attributed to the guilty man.

In the majority of these cases the accused were poor persons, and in many of the cases their defense was for that reason inadequate. The practice of assigning attorneys or the inability to engage competent attorneys makes it often impossible for the accused to establish his innocence. The establishment of a Public Defender paid by the county or state would do much to remedy this source of injustice.<sup>40</sup>

The Committee on Public Defenders of the New York State Bar Association reported in 1930 as follows:

In the opinion of your committee, the present system of assigned counsel to represent accused persons is a total failure, it is not fair to the accused person, it creates a public disrespect for the administration of the criminal law, it does not promote justice, and

it places an innocent prisoner at a distinct disadvantage in obtaining that fair trial which is guaranteed to all by our laws.

We believe further, that the best interests of such accused persons and of society in general would be promoted by the establishment in the state of New York by law, of *elected* public defenders, for the present at least, in the more populous counties of the state, and in such other counties from time to time, as may be deemed advisable.<sup>41</sup>

The expense frequently incurred in proving a person's innocence, as is manifest in the Andrews, Kimball, Stielow, and other cases, and the fact that relatively few convicted persons can assume such a burden, makes it seem desirable that, for certain cases in which the suspicion of error is strong, an independent public investigating committee be established, which shall become part of the judicial machinery, and which may be invoked at the request of the trial judge or the governor or the board of pardons, as the case may be. The haphazard investigations now often instigated are hardly adequate or efficient. The expense to the state would not be great and the opportunity of correcting error considerable.

There should be a review by an appellate court on the facts as well as on the law, in cases of felony or at least in capital cases, as there is in New York and New Jersey and in England and Scotland. Appeals for errors of law only often defeat the interests of justice, not only in granting new trials on technicalities where no substantial injustice can be shown, but in refusing to set aside an unjust verdict merely because technical compliance with formal rules is established. The Court of Criminal Appeal in England and Scotland, fittingly enough, came into being through the egregious errors and negligence manifested in the Beck and Slater cases. In nearly all our states the appellate courts can reverse a conviction only for errors of law.<sup>42</sup> They are bound by the jury's finding of fact, however wrong they may consider the conclusion. Many of the convictions recorded in this volume, though utterly mistaken, were affirmed by the highest courts of the state. Contrary to the European practice generally, evidence of miscarried justice or perjury discovered after final judgment is in many American jurisdic-

tions no ground for a new trial, because appellate courts maintain their incompetence to consider it. A petition for executive clemency becomes then the only available remedy. There is no good reason why the courts should not remain open to correct substantial errors in the administration of justice.

The trial judge, though deprived of much discretion by his statutory inability to comment upon the weight or credibility of the evidence,<sup>43</sup> still has much power to pass on motions for new trials. Except for technical legal errors, his discretion in this matter is usually unreviewable. The Massachusetts Judicial Council in its *Third Annual Report*<sup>44</sup> commented upon this defect in the judicial system as follows:

A single judge of the Superior Court now presides over murder trials and passes not only on questions of law involved in the trial of the indictment, but upon mixed questions of law and fact arising on motions for a new trial. The Supreme Judicial Court on appeal passes only on questions of law. As the verdict on such an indictment involves the issue of life and death, we think the responsibility too great to be thrown upon one man. If he errs in any matter of discretion as distinguished from law, the result is irreparable. Even if he is right, his decisions may be challenged, especially in a time of public excitement and there is no tribunal to establish the fact that he is right. It is vital that our Courts do justice; it is also vital that people know that they do justice.

While the Supreme Court may determine that, as matter of law, there was no evidence of guilt sufficient to warrant the submission of the case to the jury, yet if there was such evidence it is beyond the power of the Supreme Court to pass upon its weight and to hold that the verdict of the jury was not justified upon the facts.

It is true that the decisions of the trial judge upon matters of discretion, may be reversed if there has been what is called an "abuse" of discretion, that is to say if "no conscientious judge acting intelligently could have honestly taken the view expressed by the trial judge." It is needless to say that such an abuse will so rarely be found by the Supreme Court to have existed that there is no real appeal from that judicial fact.

It follows that the final decision of many of the most important questions which arise in connection with a murder trial, as in other cases, is committed so far as the courts are concerned to a single judge of the Superior Court. An unjust decision by him upon such a question can be redressed by the governor and council alone, upon

an application for a pardon or commutation of the sentence. The power of the executive to intervene in an appropriate case is highly important and should by no means be curtailed. The attempt to evoke its exercise is sure to be made, not infrequently, so long as it can be rightfully urged that important questions in the case have been passed upon only by a single judge. When the appeal to the governor is made, as matters now stand, there are bound to be cases where he will feel it necessary to make a thorough and painstaking investigation, either personally or through selected agents. In England, before the creation of the Court of Criminal Appeal, the Home Secretary, in whom is vested the executive power of clemency, occasionally found it advisable to have murder cases thoroughly investigated and reviewed, in his behalf, by one or more competent persons selected by him.

Such investigations by the executive, involving, as they are apt to do, something in the nature of a retrial of the case, are extremely burdensome, and in many ways objectionable. The occasion for them can be reduced to a minimum if we alter the system by which murder trials are presided over by a single judge and the appellate court passes only on questions of law.

The New York statute might well be adopted in other states. It reads:

When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.<sup>45</sup>

The English Court of Criminal Appeal Act of 1907 provides that any person convicted on indictment may appeal to the Court of Criminal Appeal, as of right, on a legal question and with the leave of the appellate court or upon the certificate of the trial judge, on any question of fact or on any other ground which appears to the court to be sufficient. The statute further provides:

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.<sup>46</sup>

Thus, the English Court of Criminal Appeal may quash the conviction without ordering a new trial, if they think the conviction constitutes a miscarriage of justice.<sup>47</sup>

Finally, if, in spite of these practical precautions against error, an innocent man is convicted of crime, and it is later established that he had no connection with it, the least that the State can do to vindicate itself and make restitution to the innocent victim is to grant him an indemnity, not as a matter of grace and favor but as a matter of right. On a few occasions Parliament in England has by special act made such grants, as, for example, in the cases of Slater (£6,000), Beck (£5,000), and Habron (£500);<sup>48</sup> and several states of the United States have taken similar action, as in the cases of Purvis (\$5,000, Mississippi), Phillion (\$5,000, Utah),<sup>49</sup> Evans and Ledbetter (\$4,533.36 and \$3,313.39, respectively, California), Wilson (\$3,500, Alabama), Brown (\$2,492, Florida), Rohan (\$1,692, California), Usher (\$1,000, Massachusetts), Murchison (\$750, Alabama), Walker (\$500, Mississippi), and Henry (\$431.81, Florida).<sup>50</sup> But such action is spasmodic only, and not all persons have the necessary influence to bring about legislation in their behalf. Although California, North Dakota, and Wisconsin provide for such relief by general statute,<sup>51</sup> the statutes, probably by reason of their apparent novelty, have been narrowly construed and but little has been accomplished by them.<sup>52</sup> Inasmuch as the present volume has for one of its main objects the introduction of such statutes in all American jurisdictions, state and Federal, a somewhat more technical examination of this problem will be undertaken in a concluding chapter.

## NOTES

1. *Mistaken identity*. The number of victims or witnesses who identified the accused as the guilty man is indicated after the names of the cases as follows: Andrews, 17 witnesses (p. 1); Beck, 14 (p. 8); Boyd, 8 (p. 23); Broughton, 3 (handwriting) (p. 29); Collins, 7 (p. 46); Flood, 3 (p. 63); Galindo, Hernandez, and Mendival, 4 (p. 74); Greenwald, 5 (p. 80); Everett Howell, 5 (p. 100); Frank Howell, 1 (p. 105); Lee, 4 (p. 136); Nedza, 5 (p. 170); Pezzulich and Sgelirrach, 3 (p. 181); Preston, 1 (p. 194); Purvis, 1 (p. 210); Shannon and Clements, 3 (p. 218); Stain and Cromwell, 10 (p. 236); Sullivan, 7 (p. 257); The "Sydney Men"—Berdue, 3 (p. 268); Thorvik and Hughes, 4 (p. 281); Toth, 1 (p. 286); Wood, 5 (p. 317); Barbera, 2 (p. 328); Berner, 5 (p. 330); Klass, 3 (p. 349); Slyter, 1 (p. 360); Ward, 8 (p. 364); Willis, 4 (p. 367); Zambino, 3 (p. 370).

2. Andrews (p. 1); Greenwald (p. 80); Hess and Craig (p. 94); Nedza (p. 170); Purvis (p. 210); Sullivan (p. 257); Thorvik and Hughes (p. 281); Jacobs (p. 347).

3. Beck (p. 8); Boyd (p. 23); Collins (p. 46); Frank Howell (p. 105); Kimball (p. 123); McKinney (p. 158); Powell (p. 186); The "Sydney Men"—Berdue (p. 268); Barbera (p. 328); Berner (p. 330); Willis (p. 367); Zambino (p. 370).

4. Lee (p. 136); Thornton (p. 277).

5. Note in 25 *Illinois Law Review* 550 (January, 1931).

6. Chesterman (p. 338); Hicks (p. 345); McManus (p. 353); Sands (p. 357).

7. *No crime committed*. Boorn (p. 15); Butler and Yelder (p. 40); Dabney (p. 51); Evans and Ledbetter (p. 59); Johnson (p. 112); Lyons (p. 148); Vaught, Stiles, and Bates (p. 294); Walker (p. 304); Wilson (p. 309); Chesterman (p. 338); Hicks (p. 345); McManus (p. 353); Sands (p. 357).

8. *Commission of crime doubtful*. MacGregor (p. 153); Stain and Cromwell (p. 236); Woods and Miller (p. 321).

9. *Circumstantial evidence*. Boorn (p. 15); "Frenchy" (p. 67); Habron (p. 86); Hess and Craig (p. 94); Johnson (p. 112); Krueger (p. 131); Lyons (p. 148); MacGregor (p. 153); Woods and Miller (p. 321); Chance (p. 332); Usher (p. 362).

10. *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295, 312 (1850).

11. *Circumstantial evidence and mistaken identity*. Andrews (p. 1); Galindo, Hernandez, and Mendival (p. 74); Hess and Craig (p. 94); Frank Howell (p. 105); Kimball (p. 123); Krueger (p. 131); McKinney (p. 158); Nedza (p. 170); Powell (p. 186); Shannon and Clements (p. 218); Slater (p. 228); Stain and Cromwell (p. 236); Sweeney (p. 262); Thornton (p. 277); Berner (p. 330).

12. *Circumstantial evidence and perjury*. Brown (p. 33); Butler and Yelder (p. 40); Dabney (p. 51); Evans and Ledbetter (p. 59); Murchison (p. 165); Prevost (p. 201); Stain and Cromwell (p. 236); Sweeney (p. 262); Walker (p. 304); Wilson (p. 309); McManus (p. 353).

13. *Perjury, circumstantial evidence contributing*. Brown (p. 33); Butler and Yelder (p. 40); Dabney (p. 51); Evans and Ledbetter (p. 59); Leshner, Garvey, and Rohan (p. 141); Thorvik and Hughes (p. 281); Vaught, Stiles, and Bates (p. 294); Walker (p. 304); Wilson (p. 309); Chesterman (p. 338); Gunter (p. 342); Hicks (p. 345); McManus (p. 353); Sands (p. 357); Zambino (p. 370).

14. Butler and Yelder (p. 40); Dabney (p. 51); Vaught, Stiles, and Bates (p. 294); Wilson (p. 309).

15. "Frame-ups." Brown (p. 33); Butler and Yelder (p. 40); Dabney (p. 51); Evans and Ledbetter (p. 59); Lesher, Garvey, and Rohan (p. 141); Prevost (p. 201); Vaught, Stiles, and Bates (p. 294); Walker (p. 304); Wilson (p. 309); Chesterman (p. 338); Gunter (p. 342); Hicks (p. 345); McManus (p. 353); Zambino (p. 370).

16. *Prosecution not at fault.* Boorn (p. 15); Evans and Ledbetter (p. 59); Kimball (p. 123); McKinney (p. 158); Nedza (p. 170); Olson (p. 176); Pezzulich and Sgelirrach (p. 181); Powell (p. 186); Shannon and Clements (p. 218); Sisson and Sullivan (p. 224); Thornton (p. 277); Barbera (p. 328); Chance (p. 332); Hicks (p. 345); Slyter (p. 360); Usher (p. 362).

17. *Overzealousness of police.* Andrews (p. 1); Beck (p. 8); Boyd (p. 23); Flood (p. 63); "Frenchy" (p. 67); Galindo, Hernandez, and Mendival (p. 74); Habron (p. 86); McKinney (p. 158); Preston (p. 194); Slater (p. 228); Thorvik and Hughes (perjury by sheriff) (p. 281); Toth (p. 286); Sands (frame-up) (p. 357). *Detectives.* Johnson (p. 112); Stielow and Green (p. 245); Hicks (frame-up) (p. 345); Klass (p. 349). See also E. J. Hopkins, *Our Lawless Police* (New York: Viking Press, 1931).

18. *Gross negligence of police.* Andrews (p. 1); Boyd (p. 23); Broughton (p. 29); "Frenchy" (p. 67); Galindo, Hernandez, and Mendival (p. 74); Greenwald (p. 80); Habron (p. 86); Johnson (p. 112); Slater (p. 228); Sullivan (p. 257).

19. Beck (p. 8); Preston (p. 194).

20. *Overzealousness of prosecution.* Beck (p. 8); Boyd (p. 23); Broughton (p. 29); "Frenchy" (p. 67); Galindo, Hernandez, and Mendival (p. 74); Habron (p. 86); Lyons (p. 148); MacGregor (p. 153); Preston (p. 194); Prevost (p. 201); Slater (p. 228); The "Sydney Men"—Berdue (p. 268); Wilson (p. 309).

21. *Prior convictions or unsavory record.* Broughton (p. 29); "Frenchy" (p. 67); Galindo, Hernandez, and Mendival (p. 74); Hess and Craig (p. 94); Everett Howell (p. 100); Johnson (p. 112); Lee (p. 136); Lesher, Garvey, and Rohan (p. 141); McKinney (p. 158); Nedza (p. 170); Olson (p. 176); Powell (p. 186); Preston (p. 194); Slater (p. 228); Stain and Cromwell (p. 236); Sweeney (p. 262); Chance (p. 332); Klass (p. 349); Slyter (p. 360); Usher (p. 362); Ward (p. 364); Willis (p. 367).

22. Four exceptions are listed in Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), § 1 (e); Halsbury, *The Laws of England* (London, 1909), IX, 404.

23. See, however, the critical article of Bates Booth, "Confessions, and Methods Employed in Procuring Them," 4 *Southern California Law Review* 83 (December, 1930).

24. 15 *Journal of Criminal Law and Criminology* 406, at 416 (November, 1924). Of special interest is Mr. Cummings' analysis of the evidence adduced against Israel.

25. *Community opinion demanding a conviction.* Such a factor was conspicuous in the convictions of Boorn (p. 15); Boyd (p. 23); Brown (p. 33); Butler and Yelder (p. 40); Dabney (p. 51); Galindo, Hernandez, and Mendival (p. 74); Johnson (p. 112); MacGregor (p. 153); Purvis (p. 210); Stain and Cromwell (p. 236); Stielow (p. 245); The "Sydney Men"—Berdue (p. 268); Toth (p. 286); Wilson (p. 309).

26. *No murder committed.* Boorn (p. 15); Butler and Yelder (p. 40);

Dabney (p. 51); Lyons (p. 148); MacGregor (p. 153); Vaught, Stiles, and Bates (p. 294); Walker (attempted murder) (p. 304); Wilson (p. 309). Probably Woods and Miller (p. 321) could be added.

27. "Murdered" person reappears. Boorn (p. 15); Butler and Yelder (p. 40); Dabney (p. 51); Lyons (p. 148); Vaught, Stiles, and Bates (p. 294); Wilson (p. 309).

28. *Hairbreadth escapes from execution*. Brown (p. 33); Dabney (p. 51); Hess and Craig (p. 94); Purvis (p. 210); Slater (p. 228); Stielow and Green (p. 245); The "Sydney Men"—Berdue (p. 268); Wilson (p. 309).

29. *Commutations prevented execution*. Brown (p. 33); Hess and Craig (p. 94); Lyons (p. 148); McKinney (p. 158); Purvis (p. 210); Stielow and Green (p. 245); Toth (p. 286); Woods and Miller (p. 321).

30. See the cases of Brown (p. 33); Hess and Craig (p. 94); Lyons (p. 148); Purvis (p. 210); Stielow and Green (p. 245); Toth (p. 286).

31. *Unreliability of "expert" evidence*. Andrews (p. 1); Broughton (p. 29); "Frenchy" (p. 67); Krueger (p. 131); Prevost (p. 201); Stielow and Green (p. 245). See Mr. Cummings' analysis in the Israel case, 15 *Journal of Criminal Law and Criminology* 406 (November, 1924), and Mildred Gilman's account of the Hoffman case, *New Republic*, June 12, 1929, p. 90.

32. The constitutionality of this statute was upheld in the case of *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930), commented on in 26 *Illinois Law Review* 82 (May, 1931). See also Wigmore, *Evidence*, § 563.

33. *Same crimes continue after conviction*. Andrews (p. 1); Beck (p. 8); Broughton (p. 29); Collins (p. 46); Greenwald (p. 80); Lee (p. 136); Sullivan (p. 257); Berner (p. 330).

34. *Corroborated confessions of others*. Brown (p. 33); Galindo (p. 74); Hess and Craig (p. 94); Frank Howell (p. 105); McKinney (p. 158); Murchison (p. 165); Purvis (p. 210); The "Sydney Men"—Berdue (p. 268); Walker (p. 304); Barbera (p. 328); Chance (p. 332); Chesterman (p. 338); Hicks (p. 345); Klass (p. 349); Willis (p. 367).

35. *All participants in joint crime accounted for*. Flood (p. 63); Everett Howell (p. 100); Sisson and Sullivan (p. 224); Sweeney (p. 262); Thorvik and Hughes (p. 281); Wood (p. 317).

36. *Sheer luck discloses error*. Leshner (p. 141); Nedza (p. 170); Jacobs (p. 347); Klass (p. 349); Slyter (p. 360); Usher (p. 362).

37. *Prosecution aids in disclosing error*. Andrews (p. 1); Evans (p. 59); Greenwald (p. 80); Frank Howell (p. 105); Leshner (p. 141); Nedza (p. 170); Pezzulich (p. 181); Sweeney (p. 262); Barbera (p. 328); Jacobs (p. 347); Klass (p. 349); Slyter (p. 360); Usher (p. 362).

38. *False alibi though innocent*. McKinney (p. 158); Preston (p. 194); Thorvik and Hughes (p. 281). See also Anderson case, *United States Attorney General's Report, 1914*, p. 349; Hoffman case, *New Republic*, June 12, 1929, p. 90.

39. *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295, 317 (1850).

40. M. C. Goldman, *The Public Defender* (2d ed.; New York, 1919); Samuel Rubin, "The Public Defender an Aid to Criminal Justice," 18 *American Journal of Criminal Law* 346 (November, 1927).

41. 14 *Journal of the American Judicature Society* 195 (April, 1931). The system of Public Defenders is now in force in Connecticut, Minnesota, Nebraska, Tennessee, Virginia, and in certain California cities. The Connecticut system provides for the appointment of a Public Defender by the superior court of each county, the Public Defender submitting at the end of each term a bill for reasonable compensation, which the court is au-

thorized to allow. In Los Angeles, the Public Defender is appointed after competitive civil-service examination under a salary fixed by the Board of Supervisors. The Los Angeles Public Defender, the first such office in the country, has a skilful staff which has established an excellent reputation. A voluntary Defenders Committee was organized in New York in 1917 as a branch of the New York Legal Aid Society. Its usefulness is limited by lack of funds and staff. In Illinois and other states, no provision is made for paying assigned counsel. In Chicago a system of voluntary Defenders is aided by the Northwestern University Law School under a small endowment. The work is now reinforced by a professional Defender paid by the county commissioners. In other states, such as Michigan, appointed counsel are paid by the public, but the system has proved extremely expensive.

42. The rules for appeal in criminal cases in American states are summarized in the *Proposed Code of Criminal Procedure* (American Law Institute, 1930), pp. 597, *et seq.* Only in a few states, such as Louisiana, Michigan, Pennsylvania, Rhode Island, and Wisconsin, can a new trial be granted on the ground that an accused was prejudiced in his defense and a failure of justice has occurred. *Ibid.*, pp. 348-349. See also *Report on Criminal Procedure*, No. 8, National Commission on Law Observance, June 9, 1931, p. 44.

43. This defect in our system of criminal trials, which often leaves the jury without appropriate guidance from the judge, has been the subject of much comment in proposals for reform. Professor Morgan, in his report to the committee of the Commonwealth Fund, on "The Laws of Evidence, Some Proposals for Its Reform," says:

"At present in some forty-two states the trial judge is prohibited by constitution, statute, or controlling decision from commenting upon the weight or credibility of the testimony. . . . In some states he may review the evidence, but he must not indicate his opinion about it; and in none of them can he say a word as to the credibility of a particular witness. In some half dozen states the court has the privilege of comment. . . . In the federal courts the privilege is unimpaired. . . . The prevailing practice is unwise and it should be provided by statute:

"The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof." See also "Province of the Judge in Jury Trials," 12 *Journal of the American Judicature Society* 76 (October, 1928).

44. Public Document No. 144, November, 1927, p. 40.

45. New York Code of Criminal Procedure, § 528.

46. Pendleton Howard, "The English Court of Criminal Appeal," 17 *American Bar Association Journal* 149 (March, 1931); Lord Hewart, address before the Canadian Bar Association, August 24, 1927, *London Times*, August 25, 1927; Third Report of the Judicial Council of Massachusetts, *op. cit.*, p. 131.

47. See the recent case of William Herbert Wallace, 23 *Crim. App. Rep.* 32 (May, 1931), in which the conviction of a husband for the murder of his wife was quashed because guilt, in the view of the court, was "not proved with that certainty which is necessary in order to justify a verdict of guilty."

48. Other English cases of miscarriage of justice in which indemnities were granted are: Barber, 1858, £5,000; Galley, 1881, £1,000; two men in Brooks case, 1882, £500 each (Best, *Evidence* [11th ed., 1911], p. 584). Sib-

ley, *Criminal Appeal and Evidence* (London, 1908), p. 266, reports that between 1880 and 1883 twelve persons were released by the Home Secretary on the ground of their innocence. The Home Secretary, Gladstone, reported that there had been twelve cases within a period of twenty years in which indemnities varying from £1 to £5,000 had been paid. *London Times*, June 7, 1907, noted in Sibley, *op. cit.*, p. 267. The Barber, Galley, and Habron cases are described by Sibley, *op. cit.*, pp. 268, *et seq.*

49. Utah—Laws 1931, c. 64, p. 271. The \$5,000 was granted for the ordeal of having been mistakenly extradited and tried for murder, though in fact Phillon was acquitted.

50. Florida—Laws 1911, p. 62.

51. California—Stats. 1913, p. 245; North Dakota—Laws 1917, c. 172, § 1; Wisconsin—Stats. 1913, c. 189.

52. California did not apply the statute until 1930, and has granted indemnity in two cases only: Evans and Ledbetter (p. 59) and Rohan (p. 141). The Rohan case was first dismissed on the ground that the conviction was not erroneous, because it was the result of a jury's verdict. This curious interpretation of the word "erroneous" was on rehearing changed.

Wisconsin has had approximately twelve applications for indemnity under the statute. Miss Alice Kelly of the Wisconsin Legislative Reference Library advises that in only one case, the Hammond case (1926), an erroneous conviction for abduction, was compensation awarded—\$888.30 plus \$78.00 for expenses. In another case, Eli J. Long (1921), the court discharged a life prisoner for murder on newly discovered evidence, but because the court and not the Governor's pardon had cut short his term, compensation was denied. The Wisconsin Legislature in 1927 passed a bill allowing Long \$2,750, but it was vetoed by the Governor on the ground that the statute extends only to persons who serve their imposed term of imprisonment and not to those who merely serve time pending appeal. On both grounds, this construction seems unduly narrow and the possibility of its repetition should be removed by amendment of the statute. In three other cases, also, the claim was denied because the convicted person did not serve his entire sentence but was released on reversal of the conviction upon retrial, or by a higher court. Compensation in such cases, if the convicted person is completely innocent and without fault, should be provided for, as it is in Europe generally. In four other cases, the claim was based upon the fact that prisoners undoubtedly guilty were held in prison, after the expiration of their sentences, to serve the unexpired portions of former sentences for which they were on parole at the time when their offenses were committed; but compensation was denied, the Compensation Board taking the view that the law was not applicable to such cases, even when the Supreme Court held that the former sentences had expired and that the further imprisonment was illegal. In that view, the Board seems to have been correct. In the Johnson case (p. 112), compensation was denied because Johnson was said to have contributed to his imprisonment by a plea of guilty, a plea induced, however, by third-degree methods, which might well have served to excuse the prisoner, for the State's injury is only increased by forcing him into a false confession and plea of guilty. In another case, the prisoner's claim of innocence was not believed by the Board; and in another case, the matter was not carried to a hearing.

North Dakota does not appear to have had any applications under its statute.