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CONVICTING THE INNOCENT: WHEN JUSTICE GOES WRONG

The Ohio State University

Ph.D. 1983

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CONVICTING THE INNOCENT: WHEN JUSTICE GOES WRONG

DISSERTATION

Presented in Partial Fulfillment of the Requirements for  
the Degree Doctor of Philosophy in the Graduate  
School of The Ohio State University

By
Arye Rattner, B.A., M.A.

* * * * *

The Ohio State University
1983

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CHAPTER ONE

CONVICTING THE INNOCENTS: WHEN JUSTICE GOES WRONG

Regarding the law of evidence, Morgan (1948) stated:

Our system does not guarantee either the conviction of the guilty or the acquittal of the innocent. Certain safeguards are erected which make it more difficult to convict the innocent than to acquit the guilty, but all that our system guarantees is a fair trial. It is a price which every member of a civilized community must pay for the erection and maintenance of machinery for administering justice, that he may become the victim of its imperfect functioning.

This study concerns individuals wrongfully accused and convicted of major felony offenses and subsequently exonerated as innocent. Wrongful conviction is inevitable in the American criminal justice system. From the witches in Salem to the most recent miscarriage of justice, there is solid evidence of inherent problems and errors in the administration of criminal justice. U.S. Senator Philip Hart of Michigan, a proponent of the abolition of the death penalty, indicated in testimony in 1967 that "during the period of 1889 to 1927 of 406 persons sent to execution to Sing Sing, 50 were found upon reconsideration to have been sentenced in error" (Congressional Record, 1967).

For the purpose of this study a data file was generated which now consists of 205 cases reported in the past and collected and discussed
in articles and books in addition to more recent cases of individuals, mostly unknown to the public and to criminologists, who have been wrongfully accused and convicted of major felonies and subsequently exonerated as innocent.

Literature from the beginning of the century as well as current documents provide us with evidence about innocent men and women who have been tried and convicted of capital crimes in all areas of the United States (MacNamara, 1970). Such cases include penniless, friendless men as well as those from higher socioeconomic strata, who have been punished for crimes they did not commit. Four early, and major, published works on the subject of wrongful conviction include a study of 80 cases describing false accusation (Radin, 1964); an analysis of 65 cases of wrongful conviction resulting from various errors in criminal justice (Borchard, 1932); a general account of 34 cases of convicted innocents (Frank and Frank, 1957); and a description of similar cases published by Gardner (1952), in his book Court of Last Resort. In addition various newspapers and public documents contain valuable information concerning such cases.

As early as 1892 a front page article of the Daily Nebraskan reported the story of Jackson Marion, the convicted murderer of John Cameron. After conviction, Mr. Marion was hanged in the yard of the county jail in Beatrice, Nebraska. Ten years later John Cameron, the "murder victim" was found alive in another city. The late Jackson Marion had been a victim of misidentification and wrongful conviction.
Investigation revealed that Jackson was never involved in any murder, and certainly not that of Cameron (Daily Nebraskan, August 4, 1892).

Almost a hundred years later, in April 1980 in the State of Ohio, Bradley Cox was convicted of several rapes and aggravated burglaries in Fairfield and Athens counties, Ohio, and was sentenced to 56 to 200 years in prison. Jon B. Simonis, who once lived near Lancaster, Ohio, later confessed to these crimes while in jail in Louisiana. After 20 months in prison, Bradley Cox was proved innocent beyond any doubt.

Most of the information on available cases, however, is essentially descriptive rather than analytic. This applies also to some of the causes célèbres such as the Dreyfus and Scottsboro cases, that have rocked America and other countries. In his book, Radin (1964) distinguishes among wrongful conviction attributable to errors of eyewitness identification, public pressures, bias caused by prior criminal record, prosecutorial errors and false confession. No existing research, to our knowledge, has analyzed the way in which the criminal justice system and its functions interact with society to produce miscarriages of justice, nor has any study examined the ability of the system to correct its own errors.

Despite the fact that our system of justice has partially returned to its earlier concerns with victims, no existing research has focused on the victim of wrongful conviction. One such case which never received much attention was discussed by Sara R. Ehrmann (1962) in her article "For whom the Chair Waits." In this particular case an innocent Virginia man, convicted and sentenced to death in 1943, served
nine years before given his freedom. During the fight to gain his release, which was led by a New York newspaper editor, Governor Battle of Virginia stated that the man was a "victim" of a gross miscarriage of justice.

Based on this study and other sources of information, we know that there are many more victims of wrongful conviction than have been documented or suspected. Given our commitment to the due process model, and the presumption of innocence, wrongful conviction has to be rated as the most serious error our system of justice can make. It makes no practical difference to the victim whether the error leading to the wrongful conviction was unintentional or malicious. As Packer (1968) has observed, our system can tolerate factual errors, but never legal errors. What is more, with the renewed application of the death penalty in the name of social defense, and with the prospect of as many as three executions per week in the next few years, the issue of the "false positives" is all the more pressing.

At the outset of this study, several major points should be made clear:

(1) There is no certain way to determine how many "false positives" occur in our criminal justice system. Estimates in the literature range from very few cases to as many as 20 percent of all convictions—a chilling number in a system predicated on due process and the presumed legal innocence of suspects and arrestees.
(2) A key problem in over 57 percent of the false convictions examined is that of misidentification. This usually involves victim error in the mistaken identification of the accused.

(3) Our preliminary findings suggest the principle that the criminal justice system, in its various stages beginning with police investigation and culminating with the court of appeals, tends to ratify earlier errors made at lower levels of the system. I shall further argue that the higher the level the case reaches, the less chance that the error will be corrected.

In the following chapters I will examine the theoretical and practical issues involved in wrongful conviction. I will devote special attention to the following research questions:

(1) What types of errors leading to wrongful conviction occur in the criminal justice process, and what is the estimated prevalence of false convictions?

Klemke and Tiedman (1981) identify four types of false accusation: (1) pure error; (2) intentional error; (3) legitimized error; and (4) victim based error. Edward Radin (1964), Edwin M. Borchard (1932), and Jerome Frank (1957) suggest that related factors include misidentification, false confession, perjury, and the suppression of information. Detailed analyses of all cases included in our data base enable us to determine much more precisely the types of errors, their patterns, frequencies and importance in producing wrongful conviction.
(2) Who is most likely to be falsely convicted?

Studies of wrongful conviction have shown that people with prior criminal records are at greater risk of being falsely convicted. They are more likely to have their photographs picked out of the "mug files," and they may be more vulnerable on the stand. Also, some critics of the legal system charge that defendants who do not have the funds to hire a lawyer may be more likely to be wrongfully convicted. Those who cannot afford an attorney and do not have the resources to support extensive legal research and to bring various expert witnesses to court must depend on a public defender. The public defender system has been criticized for many reasons, including the allegedly poor quality of representation in the defense of their all too numerous clients. However, systematic research by Casper (1971) suggests that public defenders are as effective as private counsel. Moreover, our own data indicate that in at least two cases known to us (the Cox case and the Pay case), both in Ohio, the efforts of a public defender led to the exoneration of people who had been wrongfully convicted.

Poor clients—by whomever represented—are liable to being "victimized," especially if they have prior records. Rich clients, again however represented, can more easily present an image of respectability than can their poor counterparts, and are likely to be more articulate on the witness stand. Therefore, it may well be that the public defender has often been unfairly blamed for convictions of the poor. Available data will be examined in order to identify any relationship between the above mentioned parameters and false
conviction and to identify any existing relationship between the quality of defense and wrongful conviction. These analyses will be presented with the knowledge that our sample consists of known cases, and our inability to select our population randomly or to be certain that it is representative may limit the generalizability of our findings.

(3) How does the public affect the criminal justice process and contribute to false conviction?

Lofton (1966) describes how the press shapes its content according to public demand and the public's taste for crime news. The press may both reflect and shape public opinion on the subject of crime and punishment. Both public opinion and media coverage exert an impact on all segments of criminal justice administration. Even though there is an absence of empirical research concerning the impact of the press and other mass media on the criminal justice system, Lofton (1966) concludes that the attitude taken by the public in response to a "crime wave," and reflected in the press, "gives an advantage to the prosecution and militates against the law's traditional presumption that an accused is innocent until proven guilty" (Lofton, 1966:193). If Lofton is correct, then a major protection afforded the accused may in fact be eroded, thus making public fear and public pressure indirect contributors to wrongful conviction. The extent to which the public is concerned about "false positives" (wrongful conviction of the innocent), as opposed to "false negatives" (acquittal of the guilty) is
unknown and should be a proper subject of inquiry in subsequent research.
CHAPTER TWO

THE NATURE AND EXTENT OF WRONGFUL CONVICTION

Historical Overview

For the purpose of this study, "wrongful conviction" will be narrowly defined as a case in which a person was convicted and imprisoned for a crime he did not in fact commit and for which his conviction was later officially acknowledged to be in error. Official acknowledgment of error includes cases where a pardon was granted based on new evidence, a new trial was permitted and the defendant found not guilty, based on overwhelming evidence and not on technicality or the contradiction of reasonable doubt, or appellate court review proved innocence beyond doubt.

A review of cases and literature on wrongful conviction yielded no certain way to determine how many false positive cases occur each year. Most of the authors who have written about this problem were convinced that such convictions of the innocent were not infrequent. Radin (1964) quotes a highly respected judge, whom he does not name, as estimating that there might be as many as 14,000 false convictions in the U.S. in any given year, which would represent approximately a 5 percent error. However, the definition of wrongful conviction used by the judge is legalistic and involves reasonable doubt as to guilt.
While this would be wrong from the vantage point of the American system of criminal justice, it ought not to be assumed that these are all false positives. Radin states:

If we accept the judge's figure that doubt exists in 5 percent of the cases, that still leaves the astonishing total of 14,000 people who may be innocent and yet are convicted of serious crimes every year.

A voluminous but scattered literature on the miscarriage of justice reveals a total of about 400 cases, most of them in the United States. These are almost invariably people who have spent time either in prisons or in jails awaiting trials or serving shorter sentences. Convicted innocents who received suspended sentences, probation, or jail terms of less than six months (particularly time served while awaiting trials) probably have never been counted in the estimates made. Those cases that have been discussed in the literature, in legal documents, and in newspapers, are probably the proverbial "tip of the iceberg." They are usually the most serious, and therefore attract the attention of the public or other supporters who provide help in establishing innocence.

A striking similarity was found between our own study on wrongful conviction and another conducted in England (Brandon and Davies, 1973). In *Wrongful Imprisonment: Mistaken Convictions and Their Consequences*, the authors of that study indicate that they considered as wrongful convictions those cases where free pardons were granted or where cases were specifically referred by the Home Secretary to the Court of Appeal and the convictions subsequently overturned. Cases involving legal
technicalities were excluded from the study. This British study generated a data file consisting of 70 cases of wrongful conviction which occurred between the years 1950 and 1970. The data includes 52 cases of wrongful conviction later granted a pardon and 18 cases that were referred to the Court of Appeal, which overturned the conviction.

An important and highly controversial issue confronting researchers attempting to estimate the extent of wrongful conviction is "how big is the iceberg?" In their efforts to reach some estimation regarding the extent of the problem, the authors of the British study on wrongful imprisonment examined another group of cases where miscarriages of justice had occurred, even though unproved. While the researchers were able to conclude that there might be other types, and more cases, of wrongful conviction, it was impossible to reach any estimation of the magnitude of the problem.

Thus, legal authorities in England have been attempting their own estimations regarding the problem. A minimum estimate is made by 'Justice' in its tenth annual report:

In criminal cases, an analysis has been made of several hundred cases spread over a period of three years. This was done mainly by law students. Their evaluations have been checked, and all cases except those which could be classified as highly convincing or probably true were eliminated. These remaining cases (ninety-three in all) amounted to 15 percent of the complaints received, but the true figures could well be higher, because it sometimes turns out that happenings on the first consideration which might be regarded as impossible did in fact occur.

Although it was stated that the researchers did not in fact believe everybody who told them that he was wrongfully imprisoned, estimations
of these kind run the risk of being highly subjective. It is for this reason that the present study will focus only on the "hard cases"—those cases that meet our rigid criteria of wrongful conviction.

Brandon and Davies (1973) stated that the most frequent errors that emerged from their analyses of wrongful imprisonment were:
unsatisfactory identification (in cases involving confrontation between the accused and the witness); confession made by the feebleminded and the inadequate; certain joint trials; perjury (especially in cases involving sexual or quasi-sexual offenses); badly conducted defense; and criminals as witnesses.

An analysis of 50 cases of wrongful conviction examined in the British study reveals the following offense patterns: violence against persons (3, or 6%); sexual offenses (3, or 6%); breaking and entering (13, or 26%); larceny and stealing (14, or 28%); receiving (2, or 4%); frauds, and related crimes (2, or 4%); robbery (6, or 12%); assaults (1, or 2%); taking a motor vehicle without the owner's consent (2, or 4%), and malicious or willful damage (4, or 8%).

For the most part, the British study also showed that people who were wrongfully imprisoned represented a cross-section of those who were normally sent to jail and prison. Specifically, most of the subjects of that study had previous records of committing the kinds of crime for which they were later wrongfully convicted.

Although most of the documented cases of wrongful accusation and conviction occurred in the 20th century, it would be grossly inaccurate to regard this phenomenon as being peculiar to modern times. As early
as the 16th century an inquisitorial system was used to obtain confessions from those accused of making pacts or covenants with the devil (witchcraft). Those individuals were accused of manipulating supernatural forces for antisocial and non-Christian ends, and therefore were labeled as "witches" (Currie, 1968). Because of the safeguards in the inquisitorial system (e.g., the conception of proof, testimony of two eyewitnesses to a criminal act), it was almost impossible to obtain a conviction for witchcraft. Therefore, pressure for a conviction (by a confession) at any cost began to build. Such pressure was manifested in the avoidance of the safeguards prescribed by the system. This led to further breakdown of systemic standards and procedures. Esmein (1913), in his book entitled A History of Continental Criminal Procedures, states that in order to insure convictions, prisoners were not provided with information on their cases, the proceedings were held in secret, and those prisoners who were stubborn enough to deny guilt were almost never released. To make this control mechanism even more effective, legal counsel was often prohibited and less rigorous standards of proof were accepted in court. The emergence of a societal willingness to become oppressive and repressive toward an individual, group, or subculture within a society may, then, lead to an increasing power to accuse and convict, even if such convictions are erroneous.

During the 1890's, a wave of anti-Semitism broke out in France. This anti-Semitic mood contributed to the arrest of Captain Alfred Dreyfus. Dreyfus, a Jewish artillery officer assigned to the General
Staff, was wrongfully convicted of treason in 1894. While some of the evidence indicated that military information had been given to Germany by an artillery officer, there was no reasonable evidence to link Dreyfus to the act of treason.

In *The Proud Tower*, Tuchman (1962) describes Captain Dreyfus as "besides fitting the requirements, was a Jew, the eternal alien; a natural suspect to absorb the stain of treason." He was described as a person who was not liked by other officers. His personality as well as his physical characteristics were immediately described by the officers as fitting the image of a spy.

In order to fully understand the Dreyfus affair it is necessary to place it in the context of 19th century European history. The emergence of anti-Semitism as a political and social force was a result of a built-in tension between classes and nations at this time. Fears and social conflicts resulted from the emergence of industrialization, imperialism, and the power of money as against the decline of the countryside and socialism. Under these circumstances, anti-Semitism was a classic outlet. The Jews in France, as well as those living in many other places in Europe, became scapegoats to redirect discontent away from the governing class. The Dreyfus affair is just one example of the efforts to drive the Jews out of the army and the ruling class. The increasing marginality of Jews helped encourage the officers who were responsible for the inquiry in the case to make up for the lack of proof and evidence by constructing and fabricating information. Eventually, due to the efforts of a group of individuals who were
anxious to uncover a miscarriage of justice, some new material was discovered which was not shown to the defense during the trial. Accumulated information ultimately identified the actual culprit in the Dreyfus case.

Wrongful conviction due to racial injustice also occurred in the United States in the 1930's. One of the most infamous examples was the Scottsboro case. Eight of the nine Scottsboro boys, who ranged from 12 to 19, were sentenced to death in the electric chair. Appeals, retrials and out of court developments continued for 19 years before the last defendants were freed on parole. All of this occurred despite the fact that Ruby Bates, one of the two white women who first accused the black defendants, recanted her testimony during a retrial in 1933 and said that in fact no rape had ever occurred.

While such infamous and shocking cases as Dreyfus and Scottsboro illustrate the gross injustices which result from wrongful conviction, it is neither the famous cases nor the political ones that are the subject matter of this study. Rather, the focus here is on the largely unknown and anonymous who are punished for conventional crimes they did not commit. In addition to attempting to estimate the prevalence of wrongful conviction, this study will address a number of other important questions. The central issue, however, may be put rather succinctly: What goes wrong in a criminal justice system that apparently has so many safeguards against wrongful conviction, that has created the world's most elaborate system to protect defendants, and that has given us Powell, Miranda, Gideon, and Mapp?
Causes of Wrongful Conviction

Most of the extant compendia of cases are descriptive, even anecdotal. In these descriptions, the major causes of error can usually be found, but the authors themselves have not attempted to analyze their work to determine the causes (and in many instances the combination of causes) that resulted in the conviction of an innocent defendant. Only eyewitness misidentification appears to be a consistent factor in a large majority of false positive cases.

Becker (1973) uses two variables, deviance and public perceptions of the deviance, to create a four-type system: the conformist unsuspected of deviance, the secret deviant, the known deviant, and the falsely accused. Becker's is a labeling perspective and is related to "knowaboutness," rather than judicial accusation. No criminal justice system can work without false accusation; otherwise, an indictment would be tantamount to a conviction. That a false accusation followed by exoneration leaves doubt and stigma in its wake is a serious problem, one which is outside the scope of this study. While our false positives would fall within the scope of Becker's falsely accused, the latter also include those suspected or accused of noncriminal deviance. A three-variable system along dimensions somewhat similar to Becker's was developed by Sagarin and Kelly (1965) and includes self perception, knowaboutness, and the judgment of self as to the hostility with which the activity is regarded by others. Like Becker, Sagarin and Kelly do not focus on the criminal activity and the criminal trial. Klemke and Tiedeman (1981) do have such a focus in a study of four types of
criminal justice system errors, which they describe as (1) pure, unintended, unwanted or "real accident," (2) intentional, (3) legitimized, and (4) victim based. In their summary the authors take the position that in understanding the phenomenon of false accusation, the labeling perspective is indispensable. While this may be the case, other perspectives (e.g., critical criminology) seem equally plausible. The types of errors uncovered in their study do not appear to be either mutually exclusive or exhaustive.

Data generated by this study, as well as other inquiries into this problem, have resulted in the identification of twelve sources of error. Although these are described separately, it should be noted that they frequently operate in combination with each other to produce wrongful conviction.

Eyewitness Misidentification

By far the greatest number of errors involves misidentification by one or more eyewitnesses, who may either have no doubt whatsoever about the accuracy of their testimony or may have some slight or lingering question in their own minds but nevertheless feel sufficiently confident that they are willing to testify against a defendant. In a memorandum on admissibility of expert testimony regarding eyewitness identification (State of Delaware v. Bernard T. Pagano, Delaware Superior Ct., Wilmington, 1979), Robert Buckhout has stated: "There has been a growing awareness of the unreliability of eyewitness identification which has created a troublesome situation since juries appear to give greater weight to testimony regarding identification of
a criminal defendant by an eyewitness than to almost any other kind of evidence."

In another case, Judge Lumbard of the Second Circuit Court observed:

"Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence (Jackson v. Fogg)."

Despite the steps taken by courts and the growing awareness of the unreliability of eyewitness identification, such serious errors continue to surface. According to data generated by the present study, this source of error may account for 52 percent of wrongful convictions. Mistaken identification ranges from very close resemblances to almost a complete lack of similarity between the falsely accused and the actual perpetrator.

Police and Prosecutorial Overzealousness

This category includes cases in which police and/or prosecutors are convinced of the guilt of the suspect (later the defendant), and seek to buttress their case by prompting, suggesting and/or concealing evidence. It is sometimes said that the police lie easily and frequently on the witness stand. If this is true, it is most likely motivated by the desire to strengthen a case against a defendant whose guilt, in the mind of the police officer testifying, is established beyond a reasonable doubt, but whom a jury might well acquit, particularly because of some evidence that has not been admitted. It
is true that a police officer's exaggerating, concealing, or fabricating may actually weaken his case by opening the door to damaging cross-examination, but this is a chance that he is often willing to take, partly because he is aware that the prosecutor will be there to protect him when the cross-examination occurs.

Probably the single most important contribution to false conviction made by prosecutors is their failure to advise the defense of exculpatory evidence. Frank and Frank (1957) recount the Riley case, in which the defendant was convicted of forgery and was disbarred, only to be completely exonerated later. From the outset of the case, the prosecution had been advised by an expert witness in forged documents, who pointed out that the signature in question was not that of Riley. The expert was not called to the stand and the defendant, himself an attorney, was not informed of this crucial piece of potentially exculpating evidence (Frank and Frank, 1957).

Much eyewitness misidentification is also due to encouragement, suggestion, and prompting by police, including cases in which the police show pictures of a suspect to a witness prior to a lineup, implanting in the mind of the victim or other witness a photographic image that is going to coincide with one person he or she will see at the lineup itself.

**Police and Prosecutorial Bad Faith**

The fine line separating enthusiasm for vigorous, aggressive law enforcement and prosecution and bad faith against a defendant cannot always be discerned. These include cases such as *Miller v. Pate*, where
the prosecutor brought as evidence a pair of man's undershorts that had been found a mile from the crime scene. The prosecutor alleged that they belonged to the accused and were heavily stained with blood of the same type as that of the victim. A chemist testifying for the state swore that these were the facts. The defendant denied the shorts were his. The alleged bloodstains were the only link in the circumstantial chain that connected the defendant to the shorts and the victims. The defendant was convicted by a jury.

At the Supreme Court level the prisoner petitioned for a writ of habeas corpus. A microanalyst who appeared for the petitioner testified that the brown stain which the prosecution built its case upon was not blood, but paint. The prosecution admitted having known that the stains were paint. This fact was unknown to the defense all this time and, furthermore, the request to examine the shorts was rejected. The Supreme Court indicated that the prosecution had deliberately misrepresented the truth (Miller v. Pate).

Community Pressure for Conviction

In a period of high crime and great public outcry against criminals, and a period when group pressures are felt in the courtroom upon jurors and jurists, conviction rates are likely to be higher. Racism in the United States, particularly but not solely in the South, has resulted in verdicts against blacks when there was at least reasonable doubt. In response, blacks and other minority groups have tried to exert pressure in cases involving white defendants being tried for crimes against blacks, particularly when they appear to have been
racially motivated. Certainly there has been pressure by women's groups, both "feminist" and others, in cases of rape.

Instances of community and group pressure and prejudice against an accused are sometimes handled by calling for a change of venue, but even if granted, moving a trial to a new location does not always result in a trial atmosphere which is free of the same pressures.

Pressure from the public, sometimes fanned by newspaper publicity as in the Sheppard case, can be viewed as an expression of democratic participation in the criminal justice process. It can make the system more responsive to social needs, urgings, and feelings of large numbers of residents. It can serve as watchdog, lest corruption and malfeasance in the system go unmentioned. It can thus result in prosecution of cases that warrant pursuit, but that might otherwise be dropped because of the standing and influence of the accused and his family, or of the finding of not guilty when the spotlight is on the court. It is this same pressure that may be at work in murder, rape, and other cases in which a fair and open minded jury cannot be obtained.

Knowledge of Criminal Record

The information as to the past criminal record of the accused may be divulged when the defendant voluntarily takes the stand, or may be brought out through the questioning of other witnesses for the defense. In some instances, it is common knowledge in the community and among jurors.
Jurors are unlikely to believe in the innocence of people with arrest records, and guilt or innocence may not be the crucial factor in the rendition of the verdict. If one is conceived of as evil there is no loss, it is reasoned, and there may even be social good in punishment. Guilt or innocence of a specific charge becomes a minor, if not irrelevant, issue in such cases.

False Accusations

False accusations actually fall into two categories: (1) those where a crime actually occurred and someone is deliberately and falsely accused (sometimes by the actual perpetrator), and (2) those in which there never was a crime. There exist several documented cases where innocent men actually served prison terms for "murders" that were not committed and the alleged "victims" subsequently turned up alive and well. Another illustration of false accusation involves cases where children have admitted making an accusation "just for fun" (Frank and Frank, 1957:193-94).

Plea Bargaining

Perhaps the least publicized aspect of the wrongful conviction process is the role often played by plea bargaining. Numerous convicted innocents have agreed to negotiated guilty pleas, although they still protested their innocence to counsel and to others.

The probable reason that few such instances come to public attention is that these persons are usually given probation, suspended sentences, or sentences limited to time already served. Hence there is
little motivation on the part of family, friends, lawyers and others to pursue a case further, hampered by a plea that amounts to and is usually accompanied by a confession in court. Because of crowded calendars, courts are most reluctant to permit the revocation of a guilty plea and the pursuit of a case that might result in an acquittal, even though a change in the other direction is neither uncommon nor discouraged.

Why would an innocent person decide to plead guilty? Consider the following case: A man in Richmond, Virginia, who pleaded guilty to first degree murder just minutes before a jury found him not guilty, said he switched his plea out of fear that he would follow Frank Coppola to the electric chair (Citizen Journal, Sept. 15, 1982). In an experiment that used a role playing procedure, it was found that defendants are more likely to accept a plea bargain when relatively many charges had been filed against them or when the severity of punishment upon the conviction was great (Gregory, 1978).

If a man is unable to make bail and is offered immediate release, with nothing more serious than a minor criminal record (in a community where such records are not uncommon and not highly stigmatizing), and either with no further correctional supervision or some pro forma occasional reporting not unlike what many others of his peers are doing, then the appeal of a plea bargain becomes difficult to resist. In addition, being found not guilty in court is not at all certain, even where the defendant knows himself to be guiltless. Alibis are difficult to establish, eyewitnesses can swear to their confidence in
an identification although they may be wrong; an assigned lawyer may not have the time or funds for a good investigation; or an attorney unconvinced of the innocence of the client may be unable to proceed with enthusiasm.

An attorney typically feels some pressure from prosecutors and other court personnel to play the game of speedy disposal of cases (Heumann, 1978). Unwilling to bargain in one case, he may be offered little opportunity to bargain in another where he desires to enter a guilty plea. If his client has a criminal record, he informs him of the difficulty in placing him on the stand.

It appears, based on preliminary observation, that guilty pleas may make up the largest single category of convicted innocents who receive relatively mild jail terms or community corrections, whereas eyewitness errors account for the largest number of those going to prison for long periods of time.

**Inadequate Defense**

While most of the landmark cases involving the right to counsel were concerned with having legal representation, whether at trial (Gideon v. Wainwright, Arginger v. Hamlin, etc.), or during the pretrial stage (Escobedo v. Illinois, Miranda v. Arizona), it was the adequacy of counsel that was at issue in the most significant breakthrough case, Powell v. Alabama. In the case of Ozzie Powell, one of the Scottsboro boys, the fact that the defendant did have some representation, although most inadequate for a capital case, is often overlooked.
A false conviction based on inadequacy of counsel is difficult to establish. Despite the image of "lawyer against lawyer" which is conveyed by the adversarial system, lawyers are usually quite reluctant to accuse another lawyer of mishandling a case. Lawyers assigned anew, or on appeal, are not eager to pursue this strategy to gain a reversal, preferring instead to raise what had formerly been overlooked as newly discovered evidence, for example.

Such cases as appear in the literature do not generally show a defense attorney in league with prosecutors or working against the interests of a client. Rather, the counsel for the defense is more likely to have been inexperienced, harried, overworked, having little or no funds for investigative work, and sometimes un receptive to a client's wishes because of a belief in the defendant's guilt and in the futility, even self-destructiveness, of the pursuit of the line of defense suggested by the accused. Some types of errors made by defense attorneys include failure to make discovery motions or to pursue them vigorously; poor judgment as to placing a defendant on the stand; and failure to challenge vigorously the contentions made by the prosecution in court.

**Judicial Error**

While most trial errors are not reversible, and even reversible errors do not necessarily indicate that there is a false positive, such errors may contribute to the incorrect verdict.

Judicial errors are seldom alone in accounting for a false positive. They are almost invariably combined with mistaken
identification in good faith, circumstantial evidence, inadequate
counsel, suppression of exculpatory evidence by the prosecution, or
deliberate police or prosecutorial impropriety.

Voluntary and Deliberate False Confession

There are only a few cases in which a false confession, given
voluntarily, has led to conviction and eventual exculpation. Motivation for false confession may include the deliberate shielding of another (such as a brother or a lover), or it may derive from psychological and emotional problems. In at least two cases, defendants who pleaded guilty and confessed to murder in court later sought to repudiate their confessions, on the grounds that they were not voluntarily given, and were given because it permitted them to avoid execution. In both instances, the Supreme Court refused to allow new trials (Brady v. United States, and North Carolina v. Alford).

Mental Incompetency of the Accused

It is part of the accepted criminal procedure of Anglo-American law that a person should not stand trial unless mentally competent at the time of trial, so that he can understand the nature and gravity of the proceedings and can assist counsel in his own defense. While there have been serious abuses of the rule requiring competency to stand trial (e.g., prolonged confinement in a mental hospital in lieu of trial and regardless of guilt or innocence), the demand that an accused have the mental capacity to stand trial remains intact.
Several known cases of false conviction involve persons of low IQ, generally in the range of dull to mildly retarded. These defendants were unable to inform their attorneys of salient facts that might have exonerated them, and were unable to make a satisfactory impression on the witness stand. Although defense attorneys have sometimes appealed to a jury to take into account a low IQ, there is little reason to assume that juries fully appreciate the impact of this impairment on the development of a case. A more likely assumption, perhaps, is that because of the defendant's low intelligence, he might well be the one who committed the crime as charged.

More detailed analyses of known cases of wrongful conviction suggest that the above-listed sources of error can be further refined. For the purpose of this analysis, the following typology seems appropriate:

**Major Types of Errors**
- a. judicial errors
- b. police errors
- c. witness errors
- d. prosecutorial errors

**Major Types of Witness Error**
- a. accidental eyewitness misidentification
- b. intentional eyewitness misidentification
- c. intentional false witness allegations
- d. unintentional false witness allegations
Major Types of Judicial Error

a. judicial decisions affected by bias
b. judicial neglect of duty
c. technical errors in judicial decisions

Major Types of Police and Prosecutorial Error

a. inadequate investigation
b. technical errors
c. intentional manipulation of evidence

Finally, it should be noted that the nature and extent of false conviction must be viewed within two large frames of reference: (a) the American legal system, its various levels and procedures; and (b) American society, its values and its relationships with the criminal justice system.
CHAPTER THREE

METHODOLOGY

This study is designed to develop a conceptual framework to explain the phenomenon of wrongful conviction. Insofar as can be determined, no other study concerning this problem has ever been conducted in the United States. A British study that was described earlier (Brandon and Davies, 1973) examined some 70 cases which occurred in England between 1950-1970. A statistical analysis conducted as a part of that study includes a series of variables (i.e., court, date of conviction, nature of offense, sentence, date of release, and time served). Alas, attempt was made in that study to compare patterns of offenses of those who have been wrongfully convicted and those in the general inmate population. The study concluded that the relative proportions of offenses committed by those who have been pardoned and the general inmate population are generally very similar (Brandon and Davies, 1973:264). Of the other works devoted to wrongful conviction, some involve only a single case and some a descriptive, journalistic report of a group of cases (see chapters 1 and 2).

Despite serious constraints, both quantitative and qualitative analyses were utilized in this study. A two stage analysis was conducted. First, retrospective analyses of both old and recent legal
cases were sampled. Second, survey research via questionnaires, including a significant concentration on Ohio criminal justice system officials, was conducted. This chapter sets forth the methodology and research tools that have been used in these two stages.

Analysis of Legal Cases

One primary objective of this study is to develop a more sophisticated theoretical framework in order to explain the phenomenon of wrongful conviction. Theory construction and verification should be viewed as an ongoing process. The data used for these analyses consisted of legal cases collected from books, documents, and newspaper clippings. For this reason, this study should be classified as exploratory in nature.

Literature on qualitative analysis indicates that in an area where qualitative analysis is likely to remain a dominant mode of inquiry, content analysis is suitable (Dun and Swierczek, 1975). This method was found suitable and useful in developing and constructing grounded theory in the social science area, especially when based on past experience. Another version of this method is called the "case survey method" (CSM) which is mainly concerned with the analysis of qualitative evidence in a reliable manner. This method enables the reviewer to note the various characteristics found in policy studies and then to aggregate the frequencies of occurrence of these experiences. This classic case survey method has been carried a step forward by using a group of trained reader-analysts who respond to tightly structured questions, so that the answers are aggregated later.
for analytic purposes. This method enables one to overcome problems of reliability, exclusion of cases, and differentiation between weak and strong cases. The effect of this method would probably have been very small in our study, since in most cases the background as well as the main characteristics have been laid out in an explicit way. Nevertheless, the author has no doubt that CSM represents a useful methodological approach which improves reliability.

The first step in case survey studies is defining the unit of analysis and the universe of the phenomenon under investigation. Our conceptualization of wrongful conviction was put in the form of questions for the purpose of selecting cases. The following questions have been used as rules and guidelines for the inclusion and exclusion of cases:

1. Did the case occur after 1900?
2. Did the case culminate in a conviction?
3. What type of error was involved in the case?
4. What is the nature of the offense?
5. What sentence was imposed?
6. If imprisoned, what was the length of time served?
7. Was the innocence established by exoneration? If yes, on what evidence was the exoneration based?
8. Was there any reparation made to the victim of wrongful conviction?
9. Was the conviction based on a jury decision? If not, indicate the nature of the adjudicatory decision process.
(10) What was the race of the accused?

(11) In what year did the conviction take place?

Questions 1 and 2 served as leading criteria in the selection of cases for further study, and insured that these cases would correspond as closely as possible to our rigid definition. In other words, only those cases culminating in a conviction after 1900 and wherein innocence was later established by exoneration, have been included in the study.

One problem in this type of study is the handling of missing data. Lucas (1974) argues that the fact that a case does not provide enough information might be used as a criterion for exclusion. Since one of the principal purposes of our study was to examine the prevalence of the phenomenon, we could therefore not afford to exclude cases on the basis of this criterion.

Another problem which was confronted in this research was a temporal bias. About 45 percent of our cases occurred in the period 1920-1939. This is mainly because two of the major published case sources are books which appeared during the 1930s and the 1950s. Another large group of cases, 21.5 percent, is based on cases occurring between 1960 and 1980. These cases have been drawn from computerized searches and retrieval services based on the last 20 years. Despite this bias, the comprehensive search for cases of this type enabled us to take advantage of a great strength of this method—i.e., historical continuity, as opposed to the more common ahistorical research design.

The following major information searches were carried out:
(1) An Ohio State University Mechanized Information Search (MIC). This is a retrieval type search based on key terms related to the subject. Articles and books related to wrongful conviction and other related issues defined by us were identified by this search.

(2) The New York Times computerized search. This is a computerized search of articles in the New York Times and other major newspapers and magazines, based on key terms defined prior to the search.

(3) NCJRS search. This is the National Criminal Justice Reference Service's computerized search, also based on key terms defined prior to the search.

(4) A manual search of all major criminological, criminal justice, social, and behavioral science abstracts in The Ohio State University's library system.

All cases selected for data analysis in this study have been aggregated into a data base stored in The Ohio State University's computer system and analyzed with the assistance of SPSS programming. Due to the highly qualitative/exploratory nature of the data in this study, no attempt was made to conduct any statistical analysis beyond the presentation of aggregated data in the form of absolute frequencies and relative and adjusted percentages.

**Questionnaire Construction**

Based on a preliminary analysis of secondary data, a questionnaire was constructed which included four major components: (1) information
about wrongful conviction in general, and specifically in the current jurisdiction of the respondent; (2) estimation of the magnitude of wrongful conviction; (3) rank ordering of the types of errors leading to wrongful conviction; and (4) open ended questions related to the identification of potential policy implications and methods for improving the administration of justice.

To increase the reliability of the questionnaire and to minimize measurement errors and bias, the split-half method was utilized. Two forms of the questionnaire (Forms A and B) (Appendix B) were mailed randomly to the sample populations summarized in Table 1.

The use of a single large representative state such as Ohio serves to "control" for legal code, while still allowing for great diversity of settings. The State of Ohio, which provided the setting for the primary data collection, is the seventh largest state in the United States, with a population of 10,794,419 (Census of Population and Housing, April 1, 1980). The criminal justice system in Ohio is fairly representative of American criminal justice (see Appendix D).

Franklin County is the second largest county in the State of Ohio, with a population of 869,109 people as of April 1, 1980. The remaining 87 counties that have been surveyed encompass a wide range of demographic, sociological, and economic variables. The counties include highly urban areas (e.g., Cleveland, Cincinnati, Toledo, Akron, Dayton, and Youngstown) as well as both rural, highly agricultural areas and semi-rural settings.
TABLE 1
SAMPLE POPULATIONS FOR MAILED QUESTIONNAIRE

<table>
<thead>
<tr>
<th>Population</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presiding judges of county common pleas courts (Ohio)</td>
<td>88</td>
</tr>
<tr>
<td>County prosecuting attorneys (Ohio)</td>
<td>88</td>
</tr>
<tr>
<td>County public defenders (Ohio)</td>
<td>28</td>
</tr>
<tr>
<td>County sheriffs (Ohio)</td>
<td>88</td>
</tr>
<tr>
<td>Chiefs of police (major Ohio cities)</td>
<td>7</td>
</tr>
<tr>
<td>State attorneys general (50 states, District of Columbia, American Samoa, Guam, and Puerto Rico)</td>
<td>54</td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td><strong>353</strong></td>
</tr>
</tbody>
</table>
For the purpose of questionnaire analysis survey data were aggregated as follows: (1) the entire population; (2) occupational subgroups (state attorneys general, judges, county prosecutors, county public defenders, and law enforcement officers).

The findings of both the legal case analysis and the survey are presented in the following chapter.
Analysis of Wrongful Conviction Cases

An intensive literature search that began in the fall of 1981 revealed the following major sources that include cases of wrongful conviction:

(2) Edward D. Radin, *The Innocents*, 1964;
(3) Erle Stanley Gardner, *Court of Last Resort*, 1952;
(4) Jerome and Barbara Frank, *Not Guilty*, 1957;
(6) Sarah Ehrmann, "For Whom the Chair Waits," *Federal Probation*, March 1962; and
(7) newspaper clippings and legal documents from many parts of the United States.

Table 2 indicates the number of cases meeting the specified criteria and selected for the study from each of these sources.

A total of 205 cases were selected from the sources listed above. For the most part, these are compendia of cases and do not provide any detailed analyses of wrongful conviction. Thus, the cases reflect the
<table>
<thead>
<tr>
<th>Source</th>
<th>f</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Radin</td>
<td>60</td>
<td>29.3</td>
</tr>
<tr>
<td>Borchard</td>
<td>54</td>
<td>26.3</td>
</tr>
<tr>
<td>Frank</td>
<td>29</td>
<td>14.1</td>
</tr>
<tr>
<td>Gardner</td>
<td>13</td>
<td>6.3</td>
</tr>
<tr>
<td>Block</td>
<td>1</td>
<td>0.5</td>
</tr>
<tr>
<td>Loftus</td>
<td>2</td>
<td>1.0</td>
</tr>
<tr>
<td>Ehrmann</td>
<td>5</td>
<td>2.4</td>
</tr>
<tr>
<td>Newspaper Clippings and Legal Documents</td>
<td>41</td>
<td>20.0</td>
</tr>
<tr>
<td><strong>N=205</strong></td>
<td></td>
<td>100.0</td>
</tr>
</tbody>
</table>

**TABLE 2**

DISTRIBUTION OF WRONGFUL CONVICTION CASES IDENTIFIED THROUGH INFORMATION SEARCHES
diverse occupational range of those who collected and published them. These include a noted jurist, Judge Frank, who was FDR's trusted adviser and a judge of the U.S. Circuit Court of Appeals; a journalist; a psychologist specializing in the errors of eyewitness identification; an attorney with a distinguished career as a detective; and the Executive Director of the American League to Abolish Capital Punishment (Sara Ehrmann). The cases are therefore described in a non-uniform manner, though all represent true instances where the slogan "innocent until proven guilty" did not hold true.

The 205 cases found in the literature occurred in a period of 83 years. In order to avoid major problems in comparability, only cases occurring in this century were included. Table 3 exhibits the distribution of the cases between 1900 and 1982.

More than 46 percent of the cases occurred between 1920 and 1939. This temporal skewing is attributable to earlier published works on the subject, such as the major works of Borchard (1932), Frank (1957), and Gardner (1952) that focused on cases from that era.

Probably the least publicized cases are those wherein the wrongfully convicted person received some penal sanction other than imprisonment. It is apparent that felony offenses will be overrepresented among those cases that have been publicized as false positives.

Nearly 45 percent of the cases known to us involve wrongful conviction for murder. Following the Uniform Crime Reports (UCR), we have included under this category first degree murder, second degree
TABLE 3

DISTRIBUTION OF CASES BY DECADE OF CONVICTION

<table>
<thead>
<tr>
<th>Year</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1900-1909</td>
<td>8</td>
<td>3.9</td>
<td>4.1</td>
</tr>
<tr>
<td>1910-1919</td>
<td>13</td>
<td>6.3</td>
<td>6.6</td>
</tr>
<tr>
<td>1920-1929</td>
<td>46</td>
<td>22.4</td>
<td>23.4</td>
</tr>
<tr>
<td>1930-1939</td>
<td>45</td>
<td>22.0</td>
<td>22.8</td>
</tr>
<tr>
<td>1940-1949</td>
<td>20</td>
<td>9.8</td>
<td>10.2</td>
</tr>
<tr>
<td>1950-1959</td>
<td>24</td>
<td>11.7</td>
<td>12.2</td>
</tr>
<tr>
<td>1960-1969</td>
<td>5</td>
<td>2.4</td>
<td>2.5</td>
</tr>
<tr>
<td>1970-1979</td>
<td>28</td>
<td>13.7</td>
<td>14.2</td>
</tr>
<tr>
<td>1980-1982</td>
<td>8</td>
<td>3.9</td>
<td>4.1</td>
</tr>
<tr>
<td>Data Missing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>3.9</td>
<td></td>
</tr>
</tbody>
</table>

N=205 100.0 100.0
murder, murder, manslaughter, and attempted murder. The second most frequent category in our sample was robbery. This type of crime, which usually occurs in the presence of the victim in order to obtain property or something of value, includes both armed robbery and unarmed robbery. Nearly one-third (30.5 percent) of the false positives were convicted for this category of offenses.

Forcible rape, which is defined by the UCR as the carnal knowledge of a female through the use of force or the threat of force (Reckless, 1973), accounts for 12.2 percent of our sample. This includes forcible rape, attempted rape, and sexual attack. However, when a distinction is made between older cases (1900-1960) and more recent cases (1961-1982), 35.7 percent of the cases in the latter period involve forcible rape. This does not necessarily indicate any change in patterns of offenses that involve wrongful conviction because, as indicated earlier, the group of cases identified in this study is not demonstrably representative of the universe of this phenomenon. Therefore, no inference concerning overall changes in patterns can be conclusively drawn.

Forgery was the next most common offense, involving 7.1 percent of the cases of wrongful conviction. These cases include negotiating forged checks; passing forged checks; forgery, and conspiracy to defraud.

Of the 205 cases of wrongful conviction, 3 percent were charged with larceny and theft, another 2 percent were found guilty of assault,
and one case (0.5 percent) involved wrongful conviction for arson. Table 4 summarizes these data.

Given the controversy surrounding the use of capital punishment, as reflected in Furman v. Georgia and ensuing legislative efforts to comply with higher court dicta concerning a constitutional death penalty, the issue of "false positives" is all the more salient. Table 5 indicates that more than 10 percent (N=21) of this sample of wrongful convictions were sentenced to death. In most of these cases it was only by chance that these people were not executed. In 8.7 percent (N=15), the death sentence was commuted to life imprisonment, and in 3.5 percent (N=6) the person was exonerated before the execution could be carried out.

In 34 percent (N=59) of the cases, a life sentence was imposed on an innocent man. In more than 4 percent of the cases (N=7) innocent men were sentenced to periods between 55 and 200 years. Almost 10 percent (N=17) of the cases in the study involve a sentence of 25 to 50 years, and 7 percent (N=12) of those known to have been wrongfully convicted, were sentenced to periods between 16 and 20 years.

Table 5 indicates that even in the three shortest sentence categories, the sentences were quite lengthy for an innocent person to endure. Eighteen (10.5%) were sentenced to periods between 11 and 15 years; 6.4 percent (N=11) were sentenced to imprisonment to 6 to 10 years; and 11 percent of our cases (N=19) involved a period of imprisonment that varied between 1 and 5 years.
<table>
<thead>
<tr>
<th>Offense</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>88</td>
<td>42.9</td>
<td>44.7</td>
</tr>
<tr>
<td>Robbery</td>
<td>60</td>
<td>29.3</td>
<td>30.5</td>
</tr>
<tr>
<td>Forcible Rape</td>
<td>24</td>
<td>11.7</td>
<td>12.2</td>
</tr>
<tr>
<td>Forgery</td>
<td>14</td>
<td>6.8</td>
<td>7.1</td>
</tr>
<tr>
<td>Larceny-Theft</td>
<td>6</td>
<td>2.9</td>
<td>3.0</td>
</tr>
<tr>
<td>Assault</td>
<td>4</td>
<td>2.0</td>
<td>2.0</td>
</tr>
<tr>
<td>Arson</td>
<td>1</td>
<td>0.5</td>
<td>0.5</td>
</tr>
<tr>
<td>Offense Unreported</td>
<td>8</td>
<td>3.9</td>
<td>-</td>
</tr>
</tbody>
</table>

N=205 100.0 100.0
## TABLE 5

**DISTRIBUTION OF CASES OF WRONGFUL CONVICTION BY SENTENCE LENGTH**

<table>
<thead>
<tr>
<th>Sentence</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death, commuted to</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>life imprisonment</td>
<td>15</td>
<td>7.3</td>
<td>8.7</td>
</tr>
<tr>
<td>Death, exonerated</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>before execution</td>
<td>6</td>
<td>2.9</td>
<td>3.5</td>
</tr>
<tr>
<td>Life Imprisonment</td>
<td>59</td>
<td>28.8</td>
<td>34.3</td>
</tr>
<tr>
<td>150-200 years</td>
<td>2</td>
<td>1.0</td>
<td>1.2</td>
</tr>
<tr>
<td>55-99 years</td>
<td>5</td>
<td>2.4</td>
<td>2.9</td>
</tr>
<tr>
<td>25-50 years</td>
<td>17</td>
<td>8.3</td>
<td>9.9</td>
</tr>
<tr>
<td>16-20 years</td>
<td>12</td>
<td>5.9</td>
<td>7.0</td>
</tr>
<tr>
<td>11-15 years</td>
<td>18</td>
<td>8.8</td>
<td>10.5</td>
</tr>
<tr>
<td>6-10 years</td>
<td>11</td>
<td>5.4</td>
<td>6.4</td>
</tr>
<tr>
<td>1-5 years</td>
<td>19</td>
<td>9.3</td>
<td>11.0</td>
</tr>
<tr>
<td>Other (sentence not identified)</td>
<td>41</td>
<td>20.0</td>
<td>4.7</td>
</tr>
<tr>
<td>N=205</td>
<td></td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
For those wrongfully convicted, length of imprisonment is determined in many cases by the fiscal resources available to them. Hiring a highly qualified lawyer to conduct a new examination of the evidence and the circumstances and to handle the various procedures needed for a new trial or an appeal is obviously a significant constraint. Thus, in many cases, those who cannot afford to pay a private attorney and do not have the resources to retain various expert witnesses, must depend on a public defender, investigation by a criminal justice agency, or perhaps a confession by the actual offender.

Table 6 exhibits the distribution in length of imprisonment for our sample of "false positives."

**Types of Errors**

Several types of errors leading to wrongful conviction have been identified in this study. The most frequent error, based on data available to us, was that of eyewitness misidentification. This type of error accounts for more than 52 percent of all cases (N=100). Other major factors leading to wrongful conviction include perjury by witnesses, perjury by criminal justice officials, and coerced confession. Table 7 summarizes the distribution of cases according to types of errors.

**Exoneration**

Several types of exoneration are indicated in Table 8. In 40.5 percent of the cases (N=77) the actual culprit's confession was leading
# TABLE 6
DISTRIBUTION OF TIME SERVED IN KNOWN CASES OF WRONGFUL CONVICTION

<table>
<thead>
<tr>
<th>Time in Prison</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>24-27 years</td>
<td>7</td>
<td>3.4</td>
<td>4.3</td>
</tr>
<tr>
<td>16-20 years</td>
<td>4</td>
<td>2.0</td>
<td>2.5</td>
</tr>
<tr>
<td>10-15 years</td>
<td>15</td>
<td>7.3</td>
<td>9.4</td>
</tr>
<tr>
<td>6-10 years</td>
<td>19</td>
<td>9.3</td>
<td>11.9</td>
</tr>
<tr>
<td>1-5 years</td>
<td>87</td>
<td>42.4</td>
<td>54.4</td>
</tr>
<tr>
<td>Less than 1 year</td>
<td>28</td>
<td>13.7</td>
<td>17.5</td>
</tr>
<tr>
<td>Unknown (missing data)</td>
<td>45</td>
<td>22.0</td>
<td>———</td>
</tr>
</tbody>
</table>

N=205  100.0  100.0
TABLE 7
DISTRIBUTION OF TYPES OF ERROR CONTRIBUTING TO WRONGFUL CONVICTION

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eyewitness mis-identification</td>
<td>100</td>
<td>48.8</td>
<td>52.3</td>
</tr>
<tr>
<td>Perjury by witness</td>
<td>21</td>
<td>10.2</td>
<td>11.0</td>
</tr>
<tr>
<td>Negligence by criminal justice officials</td>
<td>19</td>
<td>9.3</td>
<td>9.9</td>
</tr>
<tr>
<td>Pure error&lt;sup&gt;1&lt;/sup&gt;</td>
<td>16</td>
<td>7.8</td>
<td>8.4</td>
</tr>
<tr>
<td>Coerced confession</td>
<td>16</td>
<td>7.8</td>
<td>8.4</td>
</tr>
<tr>
<td>&quot;Frame up&quot;&lt;sup&gt;2&lt;/sup&gt;</td>
<td>8</td>
<td>3.9</td>
<td>4.2</td>
</tr>
<tr>
<td>Perjury by criminal justice official</td>
<td>5</td>
<td>2.4</td>
<td>2.6</td>
</tr>
<tr>
<td>Identification by police due to prior criminal record</td>
<td>3</td>
<td>1.5</td>
<td>1.6</td>
</tr>
<tr>
<td>Forensic error&lt;sup&gt;3&lt;/sup&gt;</td>
<td>3</td>
<td>1.5</td>
<td>1.6</td>
</tr>
<tr>
<td>Other errors (missing data)</td>
<td>14</td>
<td>6.8</td>
<td>——</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N=205</td>
<td></td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

<sup>1</sup>In some cases despite the good faith of police, prosecutors and witnesses and despite the fact that everybody was correct, a "sardonic fate" as Radin (1964) defines it seemed responsible for the reason leading to wrongful conviction.

<sup>2</sup>There are cases where initially a plot to frame an innocent man was committed either by witnesses or by criminal justice officials.

<sup>3</sup>This type of error occurred in some of the early cases at the beginning of the century. In some instances a wrongful identification of a skeleton led to a wrongful conviction of murder despite the fact that no murder was committed, or where in some other instances the lack of developed forensic techniques led to the findings that a murder was committed whereas the victim committed suicide.
<table>
<thead>
<tr>
<th>Category Label</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pardon based on new evidence</td>
<td>49</td>
<td>23.9</td>
<td>25.8</td>
</tr>
<tr>
<td>Habeas Corpus</td>
<td>9</td>
<td>4.4</td>
<td>4.7</td>
</tr>
<tr>
<td>Actual culprit confessed</td>
<td>77</td>
<td>37.6</td>
<td>40.5</td>
</tr>
<tr>
<td>New trial</td>
<td>9</td>
<td>4.4</td>
<td>4.7</td>
</tr>
<tr>
<td>Exonerated by Court of Appeals</td>
<td>4</td>
<td>2.0</td>
<td>2.1</td>
</tr>
<tr>
<td>Conviction set</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>aside by court</td>
<td>39</td>
<td>19.0</td>
<td>20.5</td>
</tr>
<tr>
<td>Paroled</td>
<td>3</td>
<td>1.5</td>
<td>1.6</td>
</tr>
<tr>
<td>Missing</td>
<td>15</td>
<td>7.3</td>
<td>——</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N=205</td>
<td></td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
to the exoneration of the wrongfully convicted person. The next most common way of exoneration was by a pardon granted by the governor of the state, 25.8 percent (N=49). In such cases, the pardon was based on new evidence. In 20.5 percent (N=39) the conviction was set aside by a court.

Compensation

Due to the doctrine of sovereign immunity, there is no common law cause of action against the state arising from wrongful conviction. However, reparation may be made, either by authorization in a special bill or by some other procedure taken by the state. According to Table 9, in only 17.1 percent of the cases was some sort of compensation given.

Since our sample of cases consisted mainly of felony charges, the primary adjudicatory body, as reflected in Table 10, was the jury. However, in about one of every twenty cases where information was available, the decision was made by a judge and in one case, by a three judge panel.

Questionnaire Analysis

In December 1982, 353 questionnaires (Appendix B) were mailed to the sample population described earlier (see page 37). A second wave of questionnaires were mailed during February 1983 to those who had not responded to the initial request for information. The respondents were informed that anonymity would be assured.
<table>
<thead>
<tr>
<th>Compensation</th>
<th>f</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>35</td>
<td>17.1</td>
</tr>
<tr>
<td>No</td>
<td>53</td>
<td>25.9</td>
</tr>
<tr>
<td>Not indicated</td>
<td>117</td>
<td>57.1</td>
</tr>
<tr>
<td><strong>N=205</strong></td>
<td></td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td>Method of Adjudication</td>
<td>f</td>
<td>%</td>
</tr>
<tr>
<td>------------------------</td>
<td>----</td>
<td>-----</td>
</tr>
<tr>
<td>One judge</td>
<td>10</td>
<td>4.9</td>
</tr>
<tr>
<td>Three judges</td>
<td>1</td>
<td>0.5</td>
</tr>
<tr>
<td>Jury</td>
<td>171</td>
<td>83.4</td>
</tr>
<tr>
<td>Not indicated</td>
<td>23</td>
<td>11.2</td>
</tr>
<tr>
<td></td>
<td>N=205</td>
<td>100.0</td>
</tr>
</tbody>
</table>

TABLE 10
DISTRIBUTION OF CASES BY METHOD OF ADJUDICATION
Following these two waves of mailing, 229 questionnaires, constituting a response rate of approximately 64%, were returned to us. Although all 229 questionnaires were included in the data analysis, not all of them were completed and usable to the same degree. Three categories of response have been identified: (1) those who completed and responded to all items; (2) those who responded partially but for reasons not stated left some items blank; and (3) those who returned the questionnaire and indicated in writing that they did not wish to participate in the survey. Reasons for refusal varied from "wrongful conviction has never occurred in my jurisdiction" to "I have strong suspicion that each year in Ohio, at least one or two dozen persons are convicted of crimes of which they are innocent" or in a more extreme case where it has been stated:

I am deeply disappointed that my old university is even remotely involved in this type of venture. Aren't there more pressing topics in this world that your efforts can be funneled to?

Due to the importance of all these types of response in a study of this nature, all responses have been included in our data. Incomplete items and questionnaires returned without information have been counted as "missing data," since these questionnaires actually represent responses to our survey but provide no usable data for analysis. Special attention is paid to a group of questionnaires returned by state attorneys general indicating that the Office of the State Attorney General in those states is not a jurisdiction, and therefore they do not have any information about the subject.
Tables 11 and 12 refer to the background of the respondents (questionnaire items 1 & 2). Within the general population, the range in years of experience in current position held was 31 years and the median was almost 6. When total experience in the administration of justice is considered, the range is 40 years and the median is 12.5.

In response to item 3, "How many cases of wrongful felony conviction, followed by exoneration beyond doubt, have you ever heard about," 44.6 percent (N=86) indicated that they had never heard about such a case. In addition, 16 percent (N=31) said that they had heard about 1 case; 17.6 percent (N=34) had heard about two cases; and 12.4 percent (N=24) had heard about 3-5 cases of wrongful conviction (Table 13).

When asked about firsthand knowledge of wrongful conviction cases, 12.7 percent (N=26) indicated that they do have firsthand knowledge about such cases. In response to Item 5, 11 percent (N=24) indicated that these cases have occurred in their current jurisdiction. Tables 14 and 15 report the findings from these two items.

When data are analyzed by position, 18 percent (N=9) of the Ohio county prosecutors responding to our survey had heard about one case of wrongful conviction. At the national level 28 percent (N=7) of our sample of attorneys general have heard about one such case (see Appendix A, Tables 35 and 36).

The highest percentage of those indicating they have never heard about a case of wrongful conviction (52.7 percent) occurred among law
<table>
<thead>
<tr>
<th>Years</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 5</td>
<td>95</td>
<td>41.5</td>
<td>46.6</td>
</tr>
<tr>
<td>6 to 10</td>
<td>64</td>
<td>27.9</td>
<td>31.4</td>
</tr>
<tr>
<td>11 to 20</td>
<td>39</td>
<td>17.0</td>
<td>19.1</td>
</tr>
<tr>
<td>21 to 30</td>
<td>5</td>
<td>2.2</td>
<td>2.5</td>
</tr>
<tr>
<td>31 to highest</td>
<td>1</td>
<td>0.4</td>
<td>0.5</td>
</tr>
<tr>
<td>Missing</td>
<td>25</td>
<td>10.9</td>
<td>--</td>
</tr>
</tbody>
</table>

N=229 100.0 100.0
**TABLE 12**

RESPONDENT'S YEARS OF EXPERIENCE IN ADMINISTRATION OF JUSTICE

<table>
<thead>
<tr>
<th>Years</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 5</td>
<td>34</td>
<td>14.8</td>
<td>16.5</td>
</tr>
<tr>
<td>6 to 10</td>
<td>59</td>
<td>25.8</td>
<td>28.6</td>
</tr>
<tr>
<td>11 to 20</td>
<td>63</td>
<td>27.5</td>
<td>30.6</td>
</tr>
<tr>
<td>21 to 30</td>
<td>33</td>
<td>14.4</td>
<td>16.0</td>
</tr>
<tr>
<td>31 to 40</td>
<td>16</td>
<td>7.0</td>
<td>7.8</td>
</tr>
<tr>
<td>Missing</td>
<td>23</td>
<td>10.0</td>
<td>—</td>
</tr>
</tbody>
</table>

N=229 100.0 100.0
### TABLE 13

**ALL CASES KNOWN TO CRIMINAL JUSTICE OFFICIALS**

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>86</td>
<td>37.6</td>
<td>44.6</td>
</tr>
<tr>
<td>1</td>
<td>31</td>
<td>13.5</td>
<td>16.1</td>
</tr>
<tr>
<td>2</td>
<td>34</td>
<td>14.8</td>
<td>17.6</td>
</tr>
<tr>
<td>3-5</td>
<td>24</td>
<td>10.5</td>
<td>12.4</td>
</tr>
<tr>
<td>6-10</td>
<td>10</td>
<td>4.4</td>
<td>5.2</td>
</tr>
<tr>
<td>11-20</td>
<td>4</td>
<td>1.7</td>
<td>2.1</td>
</tr>
<tr>
<td>21+</td>
<td>3</td>
<td>1.3</td>
<td>1.6</td>
</tr>
<tr>
<td>Missing/refused to respond</td>
<td>37</td>
<td>16.1</td>
<td>——</td>
</tr>
</tbody>
</table>

**N=229**

100.0 100.0
### TABLE 14

**RESPONDENT'S PERSONAL KNOWLEDGE OF WRONGFUL CONVICTION**

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>$f$</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>177</td>
<td>77.3</td>
<td>86.8</td>
</tr>
<tr>
<td>1</td>
<td>18</td>
<td>7.9</td>
<td>8.8</td>
</tr>
<tr>
<td>2</td>
<td>7</td>
<td>3.1</td>
<td>3.4</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>0.4</td>
<td>0.5</td>
</tr>
<tr>
<td>Missing</td>
<td>26</td>
<td>11.3</td>
<td></td>
</tr>
<tr>
<td>N=229</td>
<td></td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Number of Cases</td>
<td>f</td>
<td>% (relative)</td>
<td>% (adjusted)</td>
</tr>
<tr>
<td>-----------------</td>
<td>----</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>0</td>
<td>177</td>
<td>77.3</td>
<td>87.6</td>
</tr>
<tr>
<td>1</td>
<td>15</td>
<td>6.6</td>
<td>7.4</td>
</tr>
<tr>
<td>2</td>
<td>8</td>
<td>3.5</td>
<td>4.0</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>0.4</td>
<td>0.5</td>
</tr>
<tr>
<td>Missing</td>
<td>28</td>
<td>12.2</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N=229</td>
<td>100.0</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>
enforcement officers (N=29) (Appendix A, Table 37). Following them were the presiding judges of common pleas courts in Ohio (N=22, or 47.8%) (Appendix A, Table 33).

Among state attorneys general, 26.7 percent (N=8) reported cases of wrongful conviction in their current jurisdiction. Sixteen percent of the prosecutors (N=8) and 6.1 percent of the judges also acknowledged that cases of wrongful conviction had occurred in their current jurisdiction. Finally, although 25.1 percent of participating public defenders reported cases of wrongful conviction in their jurisdiction, they represent only 3 known cases of wrongful conviction.

The next part of the questionnaire attempted to estimate the magnitude of the phenomenon of wrongful conviction by surveying the entire population and analyzing by each occupational group.

Nearly half of those responding to Item 7 (N=84, or 44%) indicated that wrongful conviction never occurred in their jurisdiction, whereas 56 percent (N=107) said that wrongful conviction occurs, but seldom. Table 16 reports the findings by occupation of respondent.

Table 16 and Fig. 1 suggests that the higher the stage of processing in the criminal justice system, the greater the tendency to recognize the problem of wrongful conviction, and vice versa. Indeed, Fig. 1 displays an inverse relationship between the hierarchical stage in the system and the acceptance/denial of the problem.

Respondents also were asked to estimate the frequency of the phenomenon in percentages. Nearly two-thirds of those responding
TABLE 16
FREQUENCY OF WRONGFUL CONVICTION IN RESPONDENT'S JURISDICTION

<table>
<thead>
<tr>
<th>Category</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Sample</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>84</td>
<td>36.7</td>
<td>44.0</td>
</tr>
<tr>
<td>Seldom</td>
<td>107</td>
<td>46.7</td>
<td>56.0</td>
</tr>
<tr>
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<td>38</td>
<td>16.6</td>
<td></td>
</tr>
<tr>
<td><strong>N=229</strong></td>
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<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td><strong>Judges</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>20</td>
<td>36.4</td>
<td>45.5</td>
</tr>
<tr>
<td>Seldom</td>
<td>24</td>
<td>43.6</td>
<td>54.5</td>
</tr>
<tr>
<td>Missing</td>
<td>11</td>
<td>20.8</td>
<td></td>
</tr>
<tr>
<td><strong>N= 55</strong></td>
<td></td>
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<td>100.0</td>
</tr>
<tr>
<td><strong>Public Defenders</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>5</td>
<td>23.8</td>
<td>29.4</td>
</tr>
<tr>
<td>Seldom</td>
<td>12</td>
<td>57.1</td>
<td>70.6</td>
</tr>
<tr>
<td>Missing</td>
<td>4</td>
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</tr>
<tr>
<td><strong>County Prosecutors</strong></td>
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<tr>
<td>Never</td>
<td>23</td>
<td>43.4</td>
<td>48.9</td>
</tr>
<tr>
<td>Seldom</td>
<td>24</td>
<td>45.3</td>
<td>51.1</td>
</tr>
<tr>
<td>Missing</td>
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<td>11.3</td>
<td></td>
</tr>
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<tr>
<td>Never</td>
<td>7</td>
<td>17.1</td>
<td>23.3</td>
</tr>
<tr>
<td>Seldom</td>
<td>23</td>
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<td>76.7</td>
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<tr>
<td>Missing</td>
<td>11</td>
<td>26.8</td>
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</tr>
<tr>
<td><strong>N= 41</strong></td>
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<tr>
<td></td>
<td>Never</td>
<td>Seldom</td>
<td>Missing</td>
</tr>
<tr>
<td>------------------</td>
<td>-------</td>
<td>--------</td>
<td>---------</td>
</tr>
<tr>
<td>N</td>
<td>29</td>
<td>49.2</td>
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<tr>
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<td>45.3</td>
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<tr>
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</tr>
<tr>
<td>N= 59</td>
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<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>
Figure 1. Frequency of Wrongful Conviction in Respondent's Jurisdiction (a)

(a) While another category of respondents (county public defenders) was included in the sample, their responses have been omitted since their structural status in this hierarchy is insufficiently defined.

(b) Presiding judges of county common pleas courts in Ohio.
(N=117, or 63.3%) estimated that wrongful conviction occurs in their jurisdiction. A majority of these respondents (N=105, or 56.8%) estimated that such cases represent less than 1 percent of all felony convictions, while 12 (6.5%), thought that such false positives occurred in 1-5% of all felony convictions in their jurisdictions.

Findings reflected in Table 17 support our earlier statement that the respondent's position in the criminal justice hierarchy is directly related to recognition of the wrongful conviction phenomenon.

Estimates of the magnitude of wrongful conviction increase significantly when the focus shifts from "my jurisdiction" to the national level. When asked about the frequency of the problem in the U.S., only 5.6 percent (N=10) indicated that it never occurs, whereas when asked about their jurisdiction, 36.8 percent have indicated that wrongful conviction never occurred. When asked to estimate the problem quantitatively, 20.3 percent (N=36) indicated that it occurs in 1-5 percent of all felony convictions (Table 18).

When asked to compare the probability of wrongful conviction occurring in their jurisdiction vs. the rest of the U.S. (Item 11) 66.5 percent of the respondents (N=115) indicated that the probability in their jurisdiction is less than elsewhere. Thus, 32.4 percent believe that their jurisdiction is about the same as elsewhere, and 1.1 percent (only 1 respondent) indicated that the probability of wrongful conviction in his jurisdiction is greater than elsewhere (Table 19).
<table>
<thead>
<tr>
<th>Category</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>68</td>
<td>29.7</td>
<td>36.8</td>
</tr>
<tr>
<td>Less than 1%</td>
<td>105</td>
<td>45.9</td>
<td>56.8</td>
</tr>
<tr>
<td>1-5%</td>
<td>12</td>
<td>5.2</td>
<td>6.5</td>
</tr>
<tr>
<td>Missing</td>
<td>44</td>
<td>19.2</td>
<td>-</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td><strong>Judges</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>17</td>
<td>30.9</td>
<td>40.5</td>
</tr>
<tr>
<td>Less than 1%</td>
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<td>41.8</td>
<td>54.8</td>
</tr>
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<td>1-5%</td>
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<td>3.6</td>
<td>4.8</td>
</tr>
<tr>
<td>Missing</td>
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<td>23.6</td>
<td>-</td>
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<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
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<tr>
<td><strong>Public Defenders</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>1</td>
<td>4.8</td>
<td>5.9</td>
</tr>
<tr>
<td>Less than 1%</td>
<td>12</td>
<td>57.1</td>
<td>70.6</td>
</tr>
<tr>
<td>1-5%</td>
<td>4</td>
<td>19.0</td>
<td>23.5</td>
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<tr>
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<td>4</td>
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<td><strong>100.0</strong></td>
</tr>
<tr>
<td><strong>County Prosecutors</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td>22</td>
<td>41.5</td>
<td>46.8</td>
</tr>
<tr>
<td>Less than 1%</td>
<td>22</td>
<td>41.5</td>
<td>46.8</td>
</tr>
<tr>
<td>1-5%</td>
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<td>5.7</td>
<td>6.4</td>
</tr>
<tr>
<td>Missing</td>
<td>6</td>
<td>11.3</td>
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<td></td>
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<tr>
<td></td>
<td></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
<tr>
<td></td>
<td>Never</td>
<td>Less than 1%</td>
<td>1-5%</td>
</tr>
<tr>
<td>----------------</td>
<td>-------</td>
<td>--------------</td>
<td>------</td>
</tr>
<tr>
<td><strong>Attorneys General</strong></td>
<td>4</td>
<td>20</td>
<td>2</td>
</tr>
<tr>
<td>Less than 1%</td>
<td>9.8</td>
<td>48.8</td>
<td>4.9</td>
</tr>
<tr>
<td>1-5%</td>
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<td></td>
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<td><strong>N= 41</strong></td>
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<table>
<thead>
<tr>
<th></th>
<th>Never</th>
<th>Less than 1%</th>
<th>1-5%</th>
<th>Missing</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Law Enforcement Officers</strong></td>
<td>24</td>
<td>28</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Never</td>
<td>40.7</td>
<td>47.5</td>
<td>1.7</td>
<td>10.2</td>
</tr>
<tr>
<td>Less than 1%</td>
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<tr>
<td>1-5%</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td><strong>N= 59</strong></td>
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<td>100.0</td>
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</tr>
</tbody>
</table>
TABLE 18
ESTIMATION OF WRONGFUL CONVICTION IN THE U.S.

<table>
<thead>
<tr>
<th>Category</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>10</td>
<td>4.4</td>
<td>5.6</td>
</tr>
<tr>
<td>Less than 1%</td>
<td>127</td>
<td>55.5</td>
<td>71.8</td>
</tr>
<tr>
<td>1-5%</td>
<td>36</td>
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<tr>
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<td>2.3</td>
</tr>
<tr>
<td>Missing</td>
<td>52</td>
<td>22.7</td>
<td></td>
</tr>
<tr>
<td>N=229</td>
<td></td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
RESPONDENTS' ESTIMATES OF PROBABILITY OF WRONGFUL CONVICTION
(OWN JURISDICTION VS. U.S.)

<table>
<thead>
<tr>
<th>Category</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than Elsewhere</td>
<td>119</td>
<td>52.0</td>
<td>66.5</td>
</tr>
<tr>
<td>About the Same</td>
<td>58</td>
<td>25.3</td>
<td>32.4</td>
</tr>
<tr>
<td>Greater than Elsewhere</td>
<td>1</td>
<td>0.9</td>
<td>1.1</td>
</tr>
<tr>
<td>Missing</td>
<td>51</td>
<td>22.2</td>
<td>—</td>
</tr>
</tbody>
</table>

N=229 100.0 100.0
Respondents were also asked to rank order the various types of errors leading to wrongful conviction. In Item 13 respondents were asked to rank order the major types of errors on a scale of 1="most frequent" to 4="least frequent." The findings, as shown in Table 20, indicate that 78.6 percent (N=125) ranked witness errors as the most frequent type; 13.9 percent (N=22) ranked police errors as the most frequent and 67.7 percent (N=107) ranked police errors as the second most frequent. Third in order was prosecutorial error, and the least frequent was judicial error.

Tables 21-23 report the rank order estimates of error by occupation of respondent.

Witness errors were ranked by more than 70 percent of the respondents in each occupational group as the most or the second most frequent type of error. As indicated earlier, police errors were ranked second.

Although prosecutorial errors were ranked as the third most frequent error by the entire sample, judges ranked this error higher in comparison to other occupational groups. More than 35 percent (N=11) ranked this error as the most frequent or second most frequent error (Table 24).

Finally, there was great consensus that judicial errors were the least likely type of error. Judicial errors were ranked by more than 80 percent of each group as the least frequent error.

In the next set of items (14a, 15a, and 16a) respondents were asked to rank order subcategories of the types of errors. Table 25 indicates
### TABLE 20

**ESTIMATES (RANK ORDER) OF TYPES OF ERROR LEADING TO WRONGFUL CONVICTION**

<table>
<thead>
<tr>
<th>Rank Order</th>
<th>Judicial Error</th>
<th>Police Error</th>
<th>Witness Error</th>
<th>Prosecutorial Error</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>f %</td>
<td>f %</td>
<td>f %</td>
<td>f %</td>
</tr>
<tr>
<td>1</td>
<td>6 3.8</td>
<td>22 13.9</td>
<td>125 78.6</td>
<td>5 3.2</td>
</tr>
<tr>
<td>2</td>
<td>10 6.4</td>
<td>107 67.6</td>
<td>17 10.7</td>
<td>22 14.1</td>
</tr>
<tr>
<td>3</td>
<td>32 20.5</td>
<td>11 7.0</td>
<td>11 6.9</td>
<td>100 64.1</td>
</tr>
<tr>
<td>4</td>
<td>108 69.2</td>
<td>18 11.4</td>
<td>6 3.8</td>
<td>29 18.6</td>
</tr>
</tbody>
</table>

Mean=3.55  Mean=2.1  Mean=1.34  Mean=2.9

The errors were ranked on a scale of 1="most frequent," 4="least frequent."
### TABLE 21

**RANK ORDER OF JUDICIAL ERROR BY RESPONDENT'S OCCUPATION**

<table>
<thead>
<tr>
<th>Rank Order</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>-</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>9.7</td>
<td>2</td>
<td>12.5</td>
<td>-</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>6.5</td>
<td>3</td>
<td>18.8</td>
<td>7</td>
</tr>
<tr>
<td>4</td>
<td>26</td>
<td>83.9</td>
<td>10</td>
<td>62.5</td>
<td>28</td>
</tr>
</tbody>
</table>

| | Mean=3.7 | Mean=3.3 | Mean=3.5 | Mean=3.5 | Mean=3.4 |

This error was ranked on a scale of 1="most frequent," 4="least frequent."
TABLE 22
RANK ORDER OF POLICE ERROR BY RESPONDENT'S OCCUPATION

<table>
<thead>
<tr>
<th>Rank Order</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>f  %</td>
<td>f  %</td>
<td>f  %</td>
<td>f  %</td>
<td>f  %</td>
</tr>
<tr>
<td>1</td>
<td>7 22.6</td>
<td>4 25.0</td>
<td>5 11.4</td>
<td>5 21.7</td>
<td>1 2.3</td>
</tr>
<tr>
<td>2</td>
<td>17 54.8</td>
<td>12 75.0</td>
<td>33 75.0</td>
<td>15 65.2</td>
<td>30 68.2</td>
</tr>
<tr>
<td>3</td>
<td>6 19.4</td>
<td>- ---</td>
<td>1 2.3</td>
<td>1 4.3</td>
<td>3 6.8</td>
</tr>
<tr>
<td>4</td>
<td>1 3.2</td>
<td>- ---</td>
<td>5 11.4</td>
<td>2 8.7</td>
<td>10 22.7</td>
</tr>
<tr>
<td>Mean=2.0</td>
<td>Mean=1.7</td>
<td>Mean=2.1</td>
<td>Mean=2.0</td>
<td>Mean=2.5</td>
<td></td>
</tr>
</tbody>
</table>

This error was ranked on a scale of 1="most frequent," 4="least frequent."
### TABLE 23
RANK ORDER OF WITNESS ERROR BY RESPONDENT'S OCCUPATION

<table>
<thead>
<tr>
<th>Rank Order</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>20</td>
<td>62.5</td>
<td>11</td>
<td>68.8</td>
<td>5</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>18.8</td>
<td>1</td>
<td>6.3</td>
<td>33</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>12.5</td>
<td>2</td>
<td>12.5</td>
<td>1</td>
</tr>
<tr>
<td>4</td>
<td>2</td>
<td>6.3</td>
<td>2</td>
<td>12.5</td>
<td>5</td>
</tr>
</tbody>
</table>

|             | Mean=1.6 | Mean=1.6 | Mean=2.1 | Mean=1.3 | Mean=1.2 |

This error was ranked on a scale of 1="most frequent," 4="least frequent."
<table>
<thead>
<tr>
<th>Rank Order</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>f</td>
<td>%</td>
<td>f</td>
<td>%</td>
<td>f</td>
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<td>6.5</td>
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<td>2</td>
<td>9</td>
<td>29.0</td>
<td>1</td>
<td>6.3</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>19</td>
<td>61.3</td>
<td>11</td>
<td>68.8</td>
<td>26</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>3.2</td>
<td>4</td>
<td>25.0</td>
<td>13</td>
</tr>
</tbody>
</table>

Mean=2.5   Mean=3.1   Mean=3.1   Mean=3.0   Mean=2.9

This error was ranked on a scale of 1="most frequent," 4="least frequent."
TABLE 25
RANK ORDER OF WITNESS ERRORS

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Mean</th>
<th>Rank Order</th>
</tr>
</thead>
<tbody>
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<td>Accidental Eyewitness Misidentification</td>
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<td>1</td>
</tr>
<tr>
<td>Intentionally False Witness Allegation</td>
<td>2.4</td>
<td>2</td>
</tr>
<tr>
<td>Unintentionally False Witness Allegation</td>
<td>2.7</td>
<td>3</td>
</tr>
<tr>
<td>Intentional Eyewitness Misidentification</td>
<td>3.1</td>
<td>4</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1="most frequent," 4="least frequent."
that within the category "witness errors," accidental eyewitness misidentification was ranked as the most frequent error. The second most frequent error was that of intentional false witness allegations, following was unintentional false witness allegations, and the least frequent error was intentional eyewitness misidentification.

Table 26 indicates similar patterns of rating the various types of errors within the category of "witness errors." At all levels of the criminal justice system, accidental eyewitness misidentification has been ranked as the most frequent error.

When ranking types of errors within "judicial errors," 62.9 percent (N=88) ranked "technical errors in judicial decisions" as the most frequent error, and 53.3 percent (N=73) ranked "judicial decisions affected by bias" as the least frequent error. More than 50 percent (N=70) ranked "judicial neglect of duty" as the second most frequent error (Table 27).

Data in Table 28 show consistency in the ranking of various types of judicial errors. Thus, technical errors are regarded as the most frequent, followed by errors related to judicial neglect of duty. The least frequent type of judicial error is thought to be biased decisions.

Three categories have been identified within "police errors," 71.9 percent (N=110) indicated that inadequate investigation is the most frequent error. Fifty and seven-tenths percent (N=76) indicated that technical errors are the second most frequent category, and 72 percent
TABLE 26
RANK ORDER OF WITNESS ERRORS BY OCCUPATION OF RESPONDENT

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accidental Eyewitness</td>
<td>1.3</td>
<td>1.3</td>
<td>1.8</td>
<td>1.5</td>
<td>1.8</td>
</tr>
<tr>
<td>Misidentification</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intentional Eyewitness</td>
<td>2.9</td>
<td>3.2</td>
<td>3.6</td>
<td>3.2</td>
<td>3.1</td>
</tr>
<tr>
<td>Misidentification</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unintentionally False</td>
<td>2.7</td>
<td>2.5</td>
<td>2.8</td>
<td>2.8</td>
<td>2.7</td>
</tr>
<tr>
<td>Witness Allegations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intentionally False</td>
<td>2.8</td>
<td>3.0</td>
<td>2.2</td>
<td>2.2</td>
<td>2.4</td>
</tr>
<tr>
<td>Witness Allegations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The categories were ranked on a scale of 1="most frequent," 4="least frequent."
### TABLE 27
RANK ORDER OF JUDICIAL ERRORS

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Mean</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision Affected by Bias</td>
<td>2.3</td>
<td>3</td>
</tr>
<tr>
<td>Judicial Neglect of Duty</td>
<td>2.2</td>
<td>2</td>
</tr>
<tr>
<td>Technical Errors in Judicial Decision</td>
<td>1.4</td>
<td>1</td>
</tr>
</tbody>
</table>

The categories were ranked on a scale of 1="most frequent," 3="least frequent."
### TABLE 28

**RANK ORDER OF JUDICIAL ERRORS BY OCCUPATION OF RESPONDENT**

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Judges Mean</th>
<th>Judges Rank</th>
<th>Public Defenders Mean</th>
<th>Public Defenders Rank</th>
<th>County Prosecutors Mean</th>
<th>County Prosecutors Rank</th>
<th>State Attorneys General Mean</th>
<th>State Attorneys General Rank</th>
<th>Law Enforcement Officers Mean</th>
<th>Law Enforcement Officers Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision Affected by Bias</td>
<td>2.3</td>
<td>3</td>
<td>2.2</td>
<td>3</td>
<td>2.3</td>
<td>3</td>
<td>2.5</td>
<td>3</td>
<td>2.2</td>
<td>2</td>
</tr>
<tr>
<td>Judicial Neglect of Duty</td>
<td>2.2</td>
<td>2</td>
<td>2.1</td>
<td>2</td>
<td>2.0</td>
<td>2</td>
<td>2.2</td>
<td>2</td>
<td>2.3</td>
<td>3</td>
</tr>
<tr>
<td>Technical Errors in Judicial Decision</td>
<td>1.4</td>
<td>1</td>
<td>1.6</td>
<td>1</td>
<td>1.7</td>
<td>1</td>
<td>1.3</td>
<td>1</td>
<td>1.6</td>
<td>1</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1="most frequent," 3="least frequent."
(N=108) ranked intentional manipulation of evidence as the least frequent error (Table 29).

Table 30 reports the rank ordering of various types of "police errors", by occupational groups.

The various types of "police errors" were ranked by occupational groups in the criminal justice system, in an almost consistent manner. Interestingly, law enforcement officers ranked technical errors as the most frequent type of police error.

Finally, respondents were asked to rank order several types of "prosecutorial errors". Among the entire sample, 64.7 percent (N=97) ranked inadequate investigation as the most frequent error; 51.0 percent (N=77) ranked technical errors as the second most frequent; and 78.5 percent (N=117) ranked intentional manipulation of evidence as the least frequent error among this category (Table 31).

A similar pattern of ranking the various categories of prosecutorial error was revealed when these findings were analyzed by respondent's occupation (Table 32).

Inadequate investigation was ranked as the most frequent error by all levels of the criminal justice system. Technical errors were ranked second and intentional errors, the least frequent type, according to our respondents.

The preceding review of 205 known cases of wrongful conviction and findings from questionnaires distributed to criminal justice officials indicate that a variety of factors operating within the criminal
### TABLE 29

**RANK ORDER, TYPES OF POLICE ERRORS**

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Mean</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate Investigation</td>
<td>1.3</td>
<td>1</td>
</tr>
<tr>
<td>Intentional Manipulation of Evidence</td>
<td>2.6</td>
<td>3</td>
</tr>
<tr>
<td>Technical Errors</td>
<td>1.9</td>
<td>2</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1="most frequent," 3="least frequent."
<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate Investigation</td>
<td>1.3</td>
<td>1.3</td>
<td>1.3</td>
<td>1.1</td>
<td>1.4</td>
</tr>
<tr>
<td>Intentional Manipulation of Evidence</td>
<td>2.6</td>
<td>2.2</td>
<td>2.6</td>
<td>2.7</td>
<td>2.8</td>
</tr>
<tr>
<td>Technical Errors</td>
<td>2.0</td>
<td>2.4</td>
<td>2.0</td>
<td>1.9</td>
<td>1.7</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1="most frequent," 3="least frequent."
TABLE 31
RANK ORDER, TYPES OF PROSECUTORIAL ERRORS

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Mean</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate Investigation</td>
<td>1.3</td>
<td>1</td>
</tr>
<tr>
<td>Intentional Manipulation of Evidence</td>
<td>2.7</td>
<td>3</td>
</tr>
<tr>
<td>Technical Error</td>
<td>1.8</td>
<td>2</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1 = "most frequent," 3 = "least frequent."
TABLE 32
RANK ORDER, TYPES OF PROSECUTORIAL ERRORS, BY OCCUPATION OF RESPONDENT

<table>
<thead>
<tr>
<th>Types of Errors</th>
<th>Judges</th>
<th>Public Defenders</th>
<th>County Prosecutors</th>
<th>State Attorneys General</th>
<th>Law Enforcement Officers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>Rank</td>
<td>Mean</td>
<td>Rank</td>
<td>Mean</td>
</tr>
<tr>
<td>Inadequate Investigation</td>
<td>1.3</td>
<td>1</td>
<td>1.4</td>
<td>1</td>
<td>1.3</td>
</tr>
<tr>
<td>Intentional Manipulation of Evidence</td>
<td>2.6</td>
<td>3</td>
<td>2.2</td>
<td>2</td>
<td>2.7</td>
</tr>
<tr>
<td>Technical Errors</td>
<td>1.9</td>
<td>2</td>
<td>2.3</td>
<td>3</td>
<td>1.7</td>
</tr>
</tbody>
</table>

The errors were ranked on a scale of 1="most frequent," 3="least frequent."
justice system and its environment contribute to false conviction. These and related issues will next occupy our attention.
These findings are based on comparing the pattern of response of the total population as presented in Table 17, and Table 18.
CHAPTER FIVE

ERRORS IN EYEWITNESS IDENTIFICATION

By far the greatest number of errors leading to wrongful conviction involve identification by an eyewitness or victim who may have no doubt whatsoever about the accuracy of his testimony or, if there is some slight or lingering question in his own mind, he nevertheless feels sufficiently confident that he is willing to testify against a defendant.

A key problem in over 52 percent of the false convictions examined in this study was that of misidentification. This type of error mainly consists of erroneous identification of the accused by the victim or an innocent bystander of the crime. Most of these errors occurred in cases involving robbery, rape, murder, and check fraud. As indicated by Borchard (1932), juries seem disposed to credit the veracity and reliability of the victim of an outrage more than almost any amount of contrary evidence. Factors such as the disturbed emotional status and state of shock of the victim, distorted powers of perception, inability to retain information during stressful situations, and biased expectations contribute to the problem of unreliability of eyewitness identification and pose a serious problem in the criminal justice system and its basic procedures. A review of the various criminal
justice procedures through an analysis of 65 cases in which innocent individuals had been accused, prosecuted and convicted, led Borchard to make the following statement:

Perhaps the major source of these tragic errors in an identification of the accused is by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these convictions. Juries seem disposed more readily to credit the veracity and reliability of the victim 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 the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in twelve other cases, the resemblance, while fair, was still not at all close (Borchard, 1932:xiii).

The cases where eyewitness identification errors led to false accusation do indeed indicate the hazards involved at this level of criminal justice processing. Even though there is no clear evidence whether there were errors in the identification of Sacco and Vanzetti, that controversial case might illustrate some of the problems in the eyewitness identification process. The trial of Sacco and Vanzetti, who were accused of armed robbery and murder, opened in May 1921. Five eyewitnesses had been introduced by the prosecution. One of the
witnesses testified in the preliminary hearing that her opportunity to see the robbers was limited. Another witness told the policeman that she had not seen the faces of the robbers. Another witness, who was at the place when the crime was committed, said that all he could see was the gun, and he ducked. Reports indicate that not a single person could initially identify Sacco and Vanzetti, but the repeated showing of the photographs to various witnesses produced the identification. Even though a strong alibi was presented during the trial, the jury believed the eyewitnesses over the alibi witnesses (Feuerlicht, 1977). Sacco and Vanzetti were executed in the electric chair in August, 1927.

The debate over the case of Sacco and Vanzetti led to the identification of a few of the key problems with regard to eyewitness testimony.

(a) Why did uncertain witnesses make positive identifications?
(b) Were these witnesses influenced by the police, and if so, why?
(c) What caused the jurors to believe the eyewitnesses in the face of a plausible alibi? (Feuerlicht, 1977).

In his writing about erroneous identification, Hans Gross (1911:98) has stated:

Once a man who claimed, in spite of absolute darkness, to have recognized an opponent who punched him in the eye, was believed, simply because it was assumed that the punch was so vigorous that the wounded man saw sparks by the light of which he could recognize the other . . .

Students of eyewitness identification and legal testimony have long known that relying on eyewitness identification is the most convincing
testimony on one hand, but nevertheless also a deceptive source of evidence on the other hand.

As early as 1800 Jeremy Bentham stated that "witnesses are the eyes and the ears of justice" (Wall, 1965). The extent to which these eyes and ears become defective is shown in the following case.

On the night of October 12, 1980, a teen-age girl became a rape victim while hitchhiking on the Pacific Coast Highway in Seattle, Washington. The description of the rapist that was given to the police was of a bearded man about six feet tall who was wearing a three piece, cream colored suit. In addition, a description of a royal blue compact car with a temporary license plate displayed in the rear window, and beginning with the numbers 667 or 776, was given by the rape victim to the police. Armed with this description, police searched the area and found one Steven Titus, who became the only suspect in the case.

Titus, who was driving a 1981 light blue Chevette, was spotted by police outside a restaurant, not far from the rape scene, from which he had just emerged with his fiancee after having a drink. Titus, after being questioned, agreed to allow police to take his photograph. On the following day, his photo was identified by the victim from a montage compiled by police. Titus was also subsequently identified by the victim in court.

Titus "failed" a polygraph test which, although never used against him in court, caused the prosecution to file charges against him. Despite an alibi that was supported by a friend of his who "passed" a polygraph test, and despite the fact that experts from the Washington
State Crime Laboratory testified that fingerprints and other evidence they processed failed to show that the victim was in Titus's car, Titus was nevertheless convicted. With the exception of a reckless driving citation, Titus had never been in trouble before this arrest and conviction.

Due to the continuing and restless efforts of a Seattle Times reporter who was convinced of Titus's innocence, a new investigation was conducted which ultimately led to the confession and conviction of a 28-year old man who had actually committed the rape for which Titus was convicted. The rape victim, when confronted by the actual culprit, started to cry and said that she could not understand how she could have made such a mistake. The actual culprit looked like Titus and drove a light blue 1981 Ford Fiesta with a similar temporary license tag number. Steven Titus's conviction was overturned in Superior Court on the same day he was to have been sentenced. A victim of wrongful conviction, Titus lost a career that took him five years to build and he now draws unemployment checks (The Seattle Times, Special Reprint, 1982). The Seattle Times reporter, Paul Henderson, whose investigation of the charges and evidence against Titus led to the exoneration, was awarded the 1982 Pulitzer Prize for special local reporting.

The Titus case is not the only recent one in which resemblance to the actual culprit led to the conviction of an innocent man. Another that has received nationwide attention is that of William Jackson, a Columbus, Ohio, man who spent almost five years in prison for two rapes he didn't commit. William Jackson was cleared of the rape and burglary
charges only after another Columbus man, Dr. Edward Jackson (not related), was indicted on 36 charges, including the two rapes for which William Jackson was convicted. The two victims initially indentified William Jackson through a mug shot album. Based on these positive identifications, he was convicted and sentenced to 14 to 50 years in the maximum security prison at Lucasville. Both Dr. Jackson and William Jackson are black. Local newspapers, carrying photos, showed both with trimmed Afro haircuts, similar facial shapes and mustaches, and partial beards. Both men are about 6 feet tall and of medium build (New York Times, September 24, 1982).

As in these two cases there are a number of others where resemblance to the guilty party is a key factor in the identification and conviction of the wrong person. Our concern would be somewhat lessened if eyewitness misidentification occurred only in those instances where a striking similarity exists between the actual culprit and the accused. However, this is not the actual situation. Borchard (1932) in his book Convicting the Innocent, discusses 29 cases of mistaken identity. Eight of those involve little resemblance between the actual culprit and the wrongfully convicted, and in twelve others the resemblance was not close. In one of these cases, Commonwealth v. Andrews (1913), Andrews was identified by seventeen people and was convicted of uttering bad checks. Only the fact that more bad checks continued to be passed after his conviction led to the arrest and confession of the actual culprit.
While our study was in progress, a man in Galveston, Texas, who was
convicted of a stabbing and was sentenced to life in prison, was found
innocent after new evidence indicated that the crime was committed by a
mass murderer, Carl Eugene Watts, who admitted slaying eleven other
women in Texas (Houston Chronicle, August 15, 1982). Thus, it did not
come as a surprise to us when we learned that in this case, as well as
in many others, the victim of wrongful conviction did not bear any
resemblance to the actual culprit. Being a full foot taller than the
true criminal, Howard Ware Mosley was nevertheless positively
identified as the assailant. As we shall see, the Mosley-Watts error
is the most glaring case of eyewitness misidentification but not the
only one that has occurred in recent years. It is frequently true, in
such instances, that total reliance is placed on key eyewitness
testimony.

Factors Contributing to Eyewitness Misidentification

Our analyses of 205 cases of wrongful conviction indicate that
factors contributing to eyewitness misidentification can be collapsed
into three major categories: (1) psychological factors—these factors
are related to the victim's or bystander's disturbed emotional status
and/or state of shock, distorted powers of perception, inability to
retain information during stressful situations, and the inability to
retrieve information from the memory's storage system; (2) systemic
factors—these are related to the various functions of the criminal
justice system (e.g., procedures used for mug shot and line up
identifications, "suggestions" introduced during investigation and
identification; and (3) societal factors—factors related to structural and personal biases, prejudicial expectations, and cross-racial identification, all of which may contribute to the unreliability of eyewitness identification and pose a serious problem in the administration of criminal justice process.

Identification and Misidentification: Psychological Factors

When we experience an important event we do not simply record that event in our memory as would a videotape recorder. Theoretical analysis of how perception becomes memory divides the process into three stages:

(1) acquisition stage: the perception of the original event in which information is encoded, laid down, or entered into a person's memory system;

(2) retention stage: the period of time that passes between the event and the eventual recollection of the particular piece of information; and

(3) retrieval stage: the phase during which the person recalls stored information (Loftus, 1979:20-110).

Various factors have an important impact on the human memory when a complex event is experienced. During the acquisition stage, the observer has to decide on which aspect of the visual stimulus he should focus. The hierarchy of factors that influence this decision in important events has not been adequately studied. During the retention stage, the witness may be involved in other activities that can cause powerful and unexpected changes in the functioning of the witnesses'
memory. The last stage, when the witness must retrieve items from the long term memory, is influenced not only by information acquired during the original event, but also by events that occurred during the retention stage (Crowder, 1976).

One group of factors influencing acquisition, retention, and retrieval is known as event factors. These are inherent in the incident itself. An important one at this level is the amount of exposure time. Studies and experiments indicate that the less time a witness has to look at something or be exposed to an event, the less accurate the perception. One of the earliest studies in this area (Whipple, 1909) found that an eyewitness should be able to recall an event more accurately when that event transpired and was observed over a longer period of time.

An experiment by Laughery and his colleagues (1971) was designed to measure the ability of subjects to identify a target face eight minutes after they had been exposed to its picture. One group was exposed to the picture of the target for ten seconds, and the other viewed the target face for thirty-two seconds. Subjects who viewed the target face longer were somewhat more accurate. In the later identification, 57 percent identified the face correctly, whereas among those who viewed the face for a shorter time only 47 percent identified the face correctly. The time that passed from the exposure to the identification process was only eight minutes—much less, of course, than is the case in typical criminal events.
Given the types of offenses represented in our study (45 percent involve murder; 12.2 percent, forcible rape; and 30.5 percent, robbery) and the increasing demands on urban police forces, it is hardly surprising that the elapsed time between the criminal act and the questioning of a victim or a witness will virtually always exceed eight minutes. In addition, where conviction is based in part on a lineup or on in-courtroom identification, these procedures may occur weeks, even months, after the crime was committed. Research on eyewitness identification has produced compelling evidence that postevent information has an even more detrimental impact on the memory's retention and retrieval ability (Loftus et al, 1978). In an experiment conducted by Loftus, information that could be considered similar to leading and nonleading questions during an investigation was given to the subjects in both "immediate" and "delayed" sequences. The results indicate that when information is given immediately after the event, performance was quite high, with almost 90 percent accuracy. The level of performance dropped gradually as the time interval increased. After a period of two days, subjects were performing at about 50 percent accuracy. Thus, as indicated by Loftus, many were simply guessing at that point. In the same experiment, leading and misleading information was also introduced. The findings of the experiment show that when "leading" information (consistent with the event) was given, 70 percent of the subjects were correct. When misleading information (not consistent with the event) was introduced
after an interval of a week, only 20 percent of the subjects were correct on the identification test. Loftus concluded:

This experiment shows that in general, longer retention intervals lead to worse performance; consistent information improves performance and misleading information hinders it; and misleading information that is given immediately after an event has less an impact on the memory than misleading information that is delayed until just prior to the test (Loftus, 1979:66).

In addition to what has been described, factors inherent in the incident itself have been found to reduce the witness's ability to report and identify accurately. These have been identified by Loftus (1979) as event factors.

Various studies (Cattell, 1895; Buckhout, 1977; Buckhout et al., 1975) have analyzed the type of detail or the type of event that is recalled. Facts such as height and weight of the suspect, the amount of time that the incident lasted, color, and shape were found to be unequal in ease of perception and recall. The findings tend to indicate that there are errors in estimating the duration of the incident, and in estimating height, weight, color, shape, and so forth. The problems which occur in initially perceiving the information will later cause difficulties in recalling this information.

Whether an event was violent or nonviolent was found to have a significant effect on one's ability to recall the event. Clifford and Scott (1978) found that the ability to recall events was significantly worse for those who had seen a violent act than for those who viewed a nonviolent act. Their conclusion was that testimony about an
emotionally loaded incident should be treated with greater caution than testimony about a less emotional incident.

Leippe, Wells and Ostrom (1978) have argued that the seriousness of a crime might influence eyewitness accuracy. They have implied that motivating effects have an impact on the memory encoding process. In other words, a serious crime may result in greater motivation to attend actively to the physical appearance of the criminal than would a crime that appears trivial or innocuous. These authors also indicate that in serious crimes (violent crimes and other serious felonies) witnesses may have a greater desire to remain uninvolved than would witnesses to trivial crimes. In such cases, witnesses may pay less attention and may even ignore the criminal.

Factors that contribute to the unreliability of eyewitness identification affect witnesses as well as victims. Stress was found to be an important factor with regard to the ability to perceive a complex event, such as when a person's life is threatened. In such instances, there is an immediate response that includes increases in heart rate, respiration, and blood pressure and a dramatic increase in the flow of adrenalin and of available energy, making the person capable of running fast, fighting, lifting enormous weight, and taking the steps necessary to ensure his safety and survival (Buckhout, 1974). Studies of behavior under extreme stress tend to show that people are less capable of remembering details when subjected to such stress. In such conditions, people tend to pay more attention to their own well-being than to other elements in the surrounding environment. Ellison
and Buckhout (1981) indicate that even among highly trained people, observation under stress deteriorates. In addition to the stress that was found to contribute to the unreliability of memory function, some physical conditions have been examined as well. Witnesses who are old, sick or tired may suffer from various dysfunctions that can influence the accuracy of memory.

Other factors in the process of eyewitness testimony that were found to contribute to false accusation are related to the other phases of the memory function: retaining the information and retrieving the information from the memory. Factors related to the retention stage were discussed earlier in the context of post-event factors. Thus, time passage after witnessing an important event and the interviewing information that the witness is exposed to during that time, might affect a witness's memory and, in some cases, even cause nonexistent details to become incorporated into previously acquired information.

The last stage, retrieving information from memory, must be discussed in the context of its interaction with those who are in charge of obtaining the information for the criminal justice system. Another important focus in this stage is the relationship between communicating with the witness and retrieving information.

An important study by Feingold (1914) indicates that changing the setting and the environmental conditions, from the original crime scene to the place where the investigation or the lineup takes place, might affect recognition. The conclusions of his study suggest that:

the proper way to obtain a successful recognition is not to bring the witness into the police station but to bring the supposed lawbreaker to the scene of the
crime and have the witnesses look at him precisely in the same surroundings and from the same angle at which he saw him originally (Feingold, 1914:39-51).

Even though the practical implications of this study may not be very realistic, they tend to support the assumption about the unreliability of eyewitness identification.

**Systemic Factors**

Our concern up to this point has been psychological factors of eyewitness identification and their interaction with the criminal justice system. However, these are not the only variables contributing to "false identification." Other, systemic, factors may also play a critical role.

The purpose of this section is to examine the reliability of police handling of "show-up," "photo-identification," and "lineup identification."

How various modes of identification as well as traditional lineup contribute to the unreliability of eyewitness identification could be exemplified in the case of *Delaware v. Pagano* (1979). Most of the material regarding the process of eyewitness identification has been analyzed and written by Buckhout, who served as an expert witness on eyewitness identification in the case.

Although "no glaring constitutional errors would conflict with then existing law," to use Buckhout's language, it is necessary to follow the steps that were taken in the process of identification in this case, in order to understand how they contribute to the unreliability of eyewitness identification.
The first step taken in the Pagano case was the construction of a composite drawing. Anonymous callers alerted the local police that the drawing looked very much like Father Pagano. Based on this information, he was kept under surveillance. At a certain point in the investigation of the series of armed robberies, police brought two of the eyewitnesses with them while they staked out a club attended by the suspect. When Father Pagano came out of the club, the police and the witnesses moved closer to him so that the witnesses could see him. In his expert testimony, Professor Buckhout indicated that this type of one-on-one show-up has an error potential of 50 percent and is inherently biased since witnesses are given no other choices. This type of show-up might undoubtedly influence the identification process.

The next stage of the Pagano identification process involved two sets of photo identification. In both of them, the photos of the other men differed significantly in age, hair style, and clothing from that of Father Pagano. As a final step, a lineup was conducted, in which seven of the eight witnesses positively identified Father Pagano. Finally, during the in-court identification, all witnesses identified the defendant, who was ordered to stand trial for armed robbery and was subsequently identified in front of the jury by all the witnesses.

An in-depth analysis completed by Buckhout, in collaboration with the defense attorneys, emphasized the following points:

1. The composite drawing prepared by the police and published in the local newspaper might have created some problematic conditions. In those cases where the witness has only a fragmentary description of
the criminal and is missing some items in his memory, he might, under pressure of the investigator, complete these missing items. Literature on this subject (Buckhout and Greenwald, 1979) indicates that in such cases witnesses tend to complete an image in a stereotyped manner (stereotyped details of the suspect's race, hair style, expression, and so forth). This image, when widely disseminated, will cause other people, including other potential witnesses, to fit the description and match it to their memory.

(2) The one-on-one show-up conducted during investigations is inherently unreliable. Wall (1965) describes it as the most grossly suggestive identification procedure ever used by the police. Despite the high degree of suggestion that exists when such an identification is taking place, the courts have in many cases affirmed convictions based on these methods. Defendants were brought, handcuffed, in front of victims and witnesses and victims were told not to worry about making an identification when confronted alone in a room with the suspect, and so forth (People v. Kid, 1934; People v. Barad, 1936; State v. Landeros, 1955).

(3) Photo identification may also incorporate a great deal of suggestion. Pagano's photo was included along with photos of eight other men who differed from him in significant respects (clothing, hair style, and age). The background in Pagano's photo was also distinct from all others.

(4) The series of lineups conducted shortly before the opening of the trial, although seemingly fair and reasonable and although the
defendant was represented by counsel, apparently involved bias in that the attention of the witnesses was directed to the suspect. Pagano was standing in the lineup with his hands folded, a possible nonverbal cue to his priestly status, when of course all witnesses knew at that time that the defendant was a priest. The fact that the photo of the defendant had been shown to all witnesses more than once creates a major bias in the process of identification, since it becomes impossible to ascertain whether the identification emanates from the witness's memory of the crime or as a result of the frequent showing of the picture (Buckhout, 1979).

It was only by chance that on the morning Buckhout was scheduled to testify as an expert witness on eyewitness identification, another man who appeared in court and was charged with several robberies, also confessed to the robberies attributed to Pagano. The actual culprit bore a striking resemblance to Pagano.

Several issues that pose serious problems to the functioning of the criminal justice system are suggested by the Pagano case, as well as other cases involving errors of eyewitness identification.

In at least 3.1 percent of the cases in our data base, the initial identification of the suspect was through a mug shot.

The court, in United States v. Williams (1979), has indicated that even if this type of identification begins as a permissible procedure, it might later, at the stage of arrest, affect the lineup. Thus, in Simmons v. United States (1968), the majority of the Court held that:

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have
obtained only a brief glimpse of a criminal, or may have seen him under poor conditions... This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the person's pictures committed the crime. Regardless of how the initial misidentification comes about, the witness therefore is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Nevertheless, the court in Simmons did not rule out the use of photo identification. It stated that "a conviction based on eyewitness identification at the trial, following a pretrial identification by a photograph, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (Simmons v. United States, 390 U.S. 377 (1968)).

Researchers have noted that the process of having a victim or an eyewitness search through a mug shot album or series of photos compiled by police might impair the person's memory. Davies and colleagues (1979) have demonstrated in a series of experiments that the accuracy of face recognition is significantly affected by exposure to earlier pictorial stimuli. The main concern with regard to photo identification is that any corporeal identification of the accused might actually be based on the witness's or victim's recollection of the photo and not his remembrance of the guilty party. Dramatic
results were found in an experiment that was conducted by Brown and colleagues (1977). In this study, which was a simulation of a photo identification and a lineup, subjects viewed a group of "criminals" and were told that they would be required to pick them out from a mug shot and a lineup. About an hour after they viewed the criminals, the subjects viewed mug shots and a week later were asked to participate in a lineup identification. The results indicate that of those persons who were not seen before, 8 percent were wrongly identified. Hence, when a person's picture was earlier presented as a mug shot, his chances of being wrongly identified increased to 20 percent. In a second stage of the experiment, the subjects viewed the "criminals" without being told that they would have to identify them later. Under these circumstances, among those who were not seen before, 18 percent were wrongly identified; more strikingly, among those whose mug shot was presented prior to the lineup, 29 percent were wrongly identified. Loftus (1979) attributes the problem of photo biased lineup identification to the general problem of unconscious transference. The identified person in a lineup will look familiar simply because his photo was seen earlier, and this familiarity may be mistakenly related to the crime rather than to the photo identification.

A form of corporeal identification that can lead to mistaken identification is the "lineup." Although it has been claimed by legal experts and researchers that a "lineup," conducted fairly, is the best available method of accurate pretrial identification, there are some hazards of mistaken identification associated with this method. A
major source of bias occurs when a witness is informed that the suspect was in the lineup. These dynamics were present, in part, in the identification of Father Pagano, since extensive publicity was given to the suspect prior to his "lineup" identification. In other cases a "lineup" may be held several months after a crime was committed, and it can therefore lead to poor memory function and other problems which have been discussed. Under certain circumstances a "lineup" can be suggestive and biased if the suspect's physical appearance is unique. Wall (1965), in his discussion of this subject, describes an unfair and biased "lineup" in which a suspect who was a member of one race was included with members of another racial group.

By far the most serious problem with a "lineup" identification is the fact that once an identification is made in a lineup, the criminal justice system (i.e., police, prosecutor, judge and the jury) may become convinced of the defendant's guilt, despite the possibility of mistaken identification. The extent of absurdity in some "lineup" identifications is indicated in the following statement:

Lawyers who have had experience with police 'line-ups' are perfectly familiar with the fact that mistakes in identification are very frequent. Time and time again witnesses bona fide identify persons in a 'line-up' as offenders, when such persons could not possibly have participated in the offence, because they were in jail when the offence was committed. But often the accused man has been unlucky in not being in jail when the offence was committed, and therefore unable to furnish such an iron-clad alibi (Wall, 1965:64).

Studies concerning the recognition and identification of faces different from our own, and certainly those of other races, strongly
challenge our ability to recognize persons of another race (Malpass and Kravitz, 1959). The inability to recognize persons of other races may have social and legal implications. In a series of experiments, the researchers were trying to obtain two measures of recognition: the number of correct identifications and the number of false identifications. The results indicate that in identifying persons of other racial groups, more false identifications were made than in identifying persons of their own race. In another study conducted by Brigham and Barkowitz (1978), (1) false identifications were more common when both blacks and whites identified members of the other race; (2) the errors and false identifications further increased when cross-racial identification was made by highly prejudiced people; and (3) experience with persons of the other race reduced the number of false identifications. Such studies suggest that the more heterogeneous a society becomes, the more difficulties its members have in cross-racial identification. Therefore, the chances of wrongful conviction due to misidentification probably increase in such conditions.

In addition to the impact of cross-racial identification, another issue is that of expectations, or the tendency to see what we want or need to see (Loftus, 1979). Four types of expectations which impact upon perception have been identified:

(1) cultural expectations or stereotypes;
(2) expectations from past experience;
(3) personal prejudices; and
Cultural expectations are the beliefs held by a large number of people within a cultural context. A study by Allport and Postman (1974) indicates that most people file away some stereotypes on the basis of which they make perceptual judgments, which lead not only to prejudice but to a more efficient decision. In the experiment, subjects were shown a scene of a New York subway train filled with people. Two men were standing up and talking to each other: a black man wearing a tie and a white man holding a razor blade. More than half of all subjects asked to report their perceptions of the photo indicated that the black man, not the white, held the razor.

Expectations are based on the important role that past experience plays in perception. For example, two men are seen leaving the scene of an apartment they just burglarized. A witness gets a close view of one of the men and recognizes him as an acquaintance. Although she did not get as good a look at the other man, she identified him as being a very close friend of the first man. This hypothetical case described by Loftus (1979) indicates how expectations based on past experience may lead to mistaken identification.

Temporary biases have been identified as playing an important role in various sorts of incidents. The ways in which temporary biases interact with the function of memory has also been described by Loftus (1979). In an experiment Scipola had the subjects identify words shown to them very briefly. Before the words were presented to them, each group was told that the words would be related to certain topics. The
subjects tended to perceive the ambiguous words according to their expectations. The study indicated that people will convert ambiguous words into words that are more appropriate to their momentary expectations. Momentary biases may also be associated with perceptions of photographs. There are two hypotheses regarding the impact of temporary biases on perceptual activity. Some psychologists believe that expectations cause a real change in what a person perceives. The second hypothesis is that expectations do not affect perception itself, but rather affect how we interpret the visual information. In both cases there is an impact on what one claims to have seen.

Eyewitness Identification and the Legal System

Despite the serious problems and hazards caused by the use of eyewitness identification in the criminal justice system, criminal justice officials tend to rate eyewitness testimony as the most crucial kind of evidence that can be brought to trial (Lavrakas and Bickman, 1975). Brigham (1981) reports the findings of an analysis based on a questionnaire mailed to criminal justice officials in the State of Florida. The questionnaire was constructed to elicit information from attorneys directly involved with eyewitness evidence. It was mailed to public defenders, attorneys in state attorney's offices in 20 state judicial circuits, and a sample of private criminal defense attorneys. Some 59 percent of the attorneys in the state attorney's offices, 42 percent of attorneys in the public defender's offices, and 7 percent of private criminal defense attorneys indicated that they were involved in photo lineups once a week or more. Live lineups were encountered much
less frequently, with less than 7 percent of the entire sample experiencing them once a week or more.

By inference, based on the frequency of use of such eyewitness identification procedures, our criminal justice system may face an increasing number and rate of erroneous identifications and a corresponding elevation in the probability of convicting innocent men and women. Our survey indicates that 78.4 percent of the population surveyed ranked witness error as the most frequent type of error, and within this category, 60.4 percent ranked "accidental eyewitness misidentification" as the most frequent error leading to wrongful conviction (see Tables 20 and 25). Even though the "gatekeepers" of the system (prosecutors and judges) ranked eyewitness misidentification as the most frequent error (62.5 percent of the judges and 84.1 percent of the prosecutors), it is still considered to be the most crucial kind of evidence that can be brought to trial.

Never before 1967 had the Supreme Court addressed the difficulties and hazards associated with eyewitness identification. In the Wade trilogy (United States v. Wade (1967); Gilbert v. California, (1967); Stovall v. Denno, (1967)), the Court's concern with regard to eyewitness identification was summarized as follows:

The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents a suspect to witnesses for identification. A commentator has observed that the instance of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single
factor—perhaps it is responsible for more errors than all other factors combined. [Wall, Eye-Witness Identification in criminal cases, 26.] Suggestions can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

In another case, Judge Lumbard of the Second Circuit stated that:

Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence (Jackson v. Fogg, 1978).

In the Wade case the defendant was charged with robbery of a federally insured bank. Although a defense attorney was appointed to represent the defendant, FBI agents arranged a lineup without notifying the attorney. Wade was identified by two witnesses who were bank employees. These two witnesses identified Wade in court as the one who committed the crime. An appeal was filed by Wade's attorney on the ground that the attorney was not present at the pre-trial identification. Wade's conviction was reversed by the United States Court of Appeals for the Fifth Circuit, indicating that a conviction based on a lineup, in the absence of the defense attorney, violates the Sixth Amendment right to counsel. The United States Court of Appeals, in hearing the case, expressed its concern about the problems of eyewitness misidentification and its dangers. The court indicated that since showups or lineups are critical stages, the suspect is entitled to have counsel. This, indicated the court, is necessary to avoid or
reduce any element of suggestion in a police showup or lineup, and therefore, to minimize the chances of identifying the wrong man.

In a second case decided on the same day, Gilbert v. California, the Court examined whether the in-court identification of the defendant was tainted by a lineup identification that was conducted by the police without notice to the defendant's counsel. The Supreme Court decided to grant Gilbert a new trial. The court, in doing so, indicated that if the prosecution introduces an unfair, tainted lineup identification during the trial, it will not be allowed a later opportunity to show that this testimony had an independent source.

The third case in this trilogy was Stovall v. Deno, where the defendant was sentenced to death after being convicted of murder. The victim's wife, who was stabbed and hospitalized for surgery, identified Stovall as the assailant when he was brought handcuffed, as the only black man, to her hospital room. She later made a positive in-court identification. Although in this particular case, the showup was an imperative of circumstances, the Court indicated that unnecessarily suggestive procedures may lead to denial of due process. Three important conditions are implied by Stovall. A pretrial identification must be excluded if: (1) the identification procedure was so suggestive as to violate due process; (2) no exigent circumstances existed to justify that suggestive procedure; or (3) the prosecution was unable to show that the courtroom identification originated independent of the impermissibly suggestive procedure (Woocher, 1977).
Unfortunately, the safeguards against eyewitness identification given by the Wade trilogy have been eroded by the same criminal justice system that has imposed them. In *Kirby v. Illinois* (1972) a plurality of the Supreme Court affirmed Kirby's conviction of robbery and held that the right to counsel as indicated in Wade is applicable only after a formal indictment or arraignment. Kirby was arrested along with a companion and taken to a police station. Some items that were found in their possession had been stolen in a recent robbery. One of the robbery victims who was brought to the police station identified the suspects as the robbers. No attorney was present during the process of identification. At a later trial in an Illinois court, the defendants were again identified by the victim and were convicted of the robbery. The conviction was subsequently affirmed by the Supreme Court, indicating that the right to counsel as indicated in Wade applies only after a formal indictment. Sobel (1982), in his comprehensive analysis of cases involving eyewitness identification errors, indicates that counsel is especially necessary in those cases where there is not enough evidence for a formal arraignment or indictment but a showup or a lineup is held anyway. The erosion in the Wade safeguards, beginning with Kirby, has resulted in a retreat from even the most minimal due process. The main issues at stake have been whether the identification process is reliable; whether counsel should be present at prearraignment identification; whether the confrontation between the victim and the accused is suggestive; and whether other conditions could cause a distortion in memory or perception.
Such was the case in Neil v. Biggers (1972). In this rape case, the victim was attacked in a dimly lit kitchen and then taken by the attacker to a moonlit area and raped. The defendant, Biggers, was convicted of rape based on a showup and voice identification at a police station, which took place seven months after the rape. The court accepted the victim's claim that she had a very good look at the culprit, indoors and outdoors (under a full moonlight). The Supreme Court held that despite the suggestive conditions, the identification was reliable, and it affirmed the conviction. At issue here is whether suspect's due process rights are violated if police are encouraged to conduct a lineup or showup before any formal judicial proceedings, thus depriving the defendant of his right to counsel and virtually ignoring the possibility that eyewitnesses may err.

Thus, a number of paradoxes seem to exist in a criminal justice system that has built so many safeguards against wrongful conviction. A system that has created a more elaborate procedure to protect defendants than any other system in the world, a system that has given us Powell, Miranda, Gideon, and Mapp, has also given us Kirby, Biggers, Ash, and other "false positives" every year.
Sixty-seven percent of the criminal justice officials who responded to our questionnaire ranked "police errors" as the second most frequent error contributing to wrongful conviction. Within the category of "police errors," 71.9 percent of the respondents ranked inadequate investigation as the most frequent type of error; 50.7 percent of the respondents ranked technical errors as second most frequent; and intentional manipulation of evidence was ranked as the least frequent error by 72.0 percent of the respondents.

Our detailed analyses of many cases of wrongful conviction have revealed that seldom is one type of error the only one in a particular case. In many cases it is difficult to ascertain (1) whether police error or any other kind of error (e.g., eyewitness error, perjury by witness) led to a wrongful conviction, (2) whether misconduct by police was negligent or malicious, and (3) whether acting in bad faith contributed to the conviction of an innocent man.

Even if a case appears at first glance to involve an error of eyewitness identification or perjury by a witness, a careful examination sometimes reveals police malfeasance or bad faith. Two major impediments in uncovering such errors include the fact that (a)
police departments as well as other criminal justice agencies do not often take appropriate measures to eradicate corruption, malpractice and unethical conduct, and (b) in many cases, law enforcement officers are immune from lawsuits.

In the category of police errors are cases where law enforcement officers were convinced of the guilt of a suspect and sought to buttress their case by prompting, suggesting, and presenting evidence in a less than objective manner; cases where eagerness to get a conviction led to carelessness and negligence during the investigation and subsequently to the conviction of the wrong person; and cases where perjury as well as manipulation and fabrication of evidence were committed.

Despite the difficulties in distinguishing between enthusiasm and bad faith in investigating and prosecuting an innocent person, our attention has focused as much as possible on cases where malice and bad faith appear to have led to a conviction.

In his article "Discipline in American Policing," MacNamara (1981) presents four categories of police disciplinary problems:

1. Offenses committed by an officer in a personal, non-job related capacity (e.g., wife-beating, assaulting a neighbor, drunken driving, adultery, nonpayment of debt, smoking marijuana, shoplifting);

2. Administrative offenses (e.g., late report, drunk on duty, off post, improper uniform, disrespect to a superior);
(3) Excessive zeal (e.g., use of excessive force, warrantless search or seizure, coercive interrogation, illegal detention where no malice or personal profit was involved);

(4) Abuse of police status (e.g., extortion; prejudicial actions against minorities; deliberate false arrest or false charges; faked evidence; perjury; selling, destroying, or divulging police information).

Cases of wrongful conviction examined in this study involve mainly overzealousness and abuse of police status. The last category is described by MacNamara as the most serious disciplinary problem because it is subversive to the essential and fundamental mores of police services. These disciplinary offenses include changing testimony in criminal prosecutions, maliciously framing innocent persons or protecting guilty ones.

Complaints about law enforcement carelessness, lawlessness and corruption have been voiced on many occasions. A U.S. Supreme Court Justice has stated:

Far too many cases come from the states to the Supreme Court presenting dismal pictures of official lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and downright brutality. (Brennan, 1961:20-21)

In eight cases of seventy-one described in the book The Innocents (Radin, 1964), the cause of wrongful conviction was either misconduct or brutality by police. In a 1964 case, an innocent man was convicted of first degree murder on the basis of evidence that was introduced
against him. As with all death sentences, this case received a mandatory review by the Court of Appeals in New York. In its decision the majority of the Court held that "it plainly appears that the defendant did somehow sustain substantial physical injuries while in close custody of police officials." It was found that the innocent man had been beaten steadily for hours by detectives until he agreed to sign a false confession (Radin, 1964).

Radin (1964) also describes a Detroit case involving police eagerness to solve a major wave of holdups and robberies of drugstores and gas stations. In one of the cases where a man was shot to death the police announced that the crime was solved. A young woman had been arrested in connection with the crime. Based on her testimony, three men were charged with the robbery of the drugstore. Although claiming innocence, the three were convicted and sentenced to life imprisonment. An investigation carried out by a private attorney revealed that the woman had lied during the trial and the police had made a deal with her—they would let her go free if she would lead them to the three men involved in the crime. She later indicated that her earlier testimony reflected what the police wanted her to say. The new investigation and the confession of the actual offender led to the exoneration of the innocent men.

In another book concerning wrongful conviction, Borchard (1932) describes how police errors have led in various ways to the conviction of innocent men. In 16 cases of the 65 described by Borchard, overzealousness by the police played a major role in the conviction of
innocent men. Gross negligence by police was described as another reason for this type of injustice, and in two cases evidence of innocence had been suppressed by police. Borchard notes that except for suppression of evidence, the cases primarily reflect the environment in which police operate; thus, "undiscriminating 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" (Borchard, 1932:xv).

Coerced confession is frequently mentioned in the literature on the role of the police in erroneous or false convictions. This error may occur when police do not have too much physical evidence linking a suspect to a crime and/or when the public demands a solution to a crime or a series of offenses. Such may be the case of George Whitmore, a 20 year old black man who was arrested in New York in 1964 and charged with attempted rape. An intensive twenty-two hour interrogation by the police led to a confession, not only to the alleged attempted rape but also to three other murder cases that had received enormous publicity and which police were eager to solve. Whitmore was cleared of the murders and the attempted rape after it was revealed that the confession was extracted under pressure. The defendant was beaten during the interrogation and a District Attorney stated that "brainwashing, hypnosis, fright ... made him give an untrue confession" (Lofton, 1966).

Although only 1.6 percent (n=3) of the cases in our data are listed under the category of "identification by police due to prior criminal
record," the literature on wrongful conviction indicates that such information as records on prior offenses, arrests, and photos in a mug shot album lead police, in some cases, to make an incorrect decision. Borchard (1932) indicates that in 22 cases examined in his book, prior criminal record was part of the reason for convicting an innocent man.

In developing an "organizational deviance" perspective on police misconduct, Lundman (1980) employed a set of factors including their judgment of the "social value" of those they encounter. Thus, when a citizen with low "social value" is encountered by police officers, this is more likely to "justify" the use of brutality and lawlessness. The same might also be true during an investigation of someone with a prior criminal record. Sometimes the alleged justification for misconduct, even filing charges against an innocent man, is the belief that even if the suspect is not guilty in this case, he probably is in many other cases.¹

Being aware of all the problems that a suspect might have beginning with his arrest and culminating with the conviction, the Supreme Court provided our criminal justice system with safeguards to protect due process. Powell v. Alabama (1932) is one of the first cases in which the United States Supreme Court stated that the denial of the right to counsel under certain circumstances, in state proceedings, is a violation of due process of law, as it is guaranteed by the Fourteenth Amendment. In another case, Gideon v. Wainwright (1963), the Supreme Court held that the state is obliged to provide the defendant with counsel in all cases except petty ones. Reinforcing Gideon, the
Supreme Court in *Escobedo v. Illinois* (1964) extended the right to counsel to preliminary proceedings in state cases, and stated that failure to do so can lead to reversal of a conviction.

The last in the series of the due process cases was *Miranda v. Arizona* (1966) in which the Supreme Court decided that a suspect has a right to counsel during the interrogation by police, and thus interrogation should not go on without a lawyer present if the suspect desires.

Despite the safeguards provided by the criminal justice system convicting an innocent person either by manipulation of evidence or perjury by a law enforcement officer is not a phenomenon that has been eliminated. The following cases indicate that these types of police errors are not only part of criminal justice history, but exist also within its current operation.

A 28 year old man was released in December 1980 from a death row cell in Georgia after he was convicted and sentenced to die for the slaying of two people. Mr. Banks, who had been wrongfully convicted, had been hunting when he discovered two bodies. He ran to a nearby roadway and flagged down a motorist to call the police. At his trial, the prosecutors introduced as evidence shells from his gun, indicating that they were found at the scene of the murder. A private attorney who was hired by the defendant, who proclaimed his innocence, proved that the shells were left over from a fire-test conducted with the defendant's gun a day after the murder by a county detective. In establishing his client's innocence the attorney called seven witnesses
who had described hearing rapid-fire, not single-shot, gunfire. Authorities in Henry County, Georgia, claimed that there was no proof of intention to influence the case and refused to file any charges against the detective. Even if the county's legal position was correct, the case represents gross negligence that led to 5 years' imprisonment of an innocent man (New York Times, December 24, 1980).

In another recent case that has received much attention, a coerced confession was obtained in clear violation of the defendant's rights under both the State and Federal Constitutions. During the summer and fall of 1979, a series of rape-robbery incidents took place in Lancaster, Ohio. Bradley Cox, 20 years old, a resident of Lancaster, Ohio, was arrested in January, 1980, in that city and charged with possessing a stolen car with stolen license plates. Cox had been absent without leave from his Marine Corp camp in North Carolina and had also been arrested in North Carolina in 1979 for renting a car and not returning it. He was released on bond and left the state without paying the bondsman. When arrested in Ohio, Cox was driving a car that was stolen from Texas. Within hours after his arrest on the theft charges, Cox was linked to the rape cases in Lancaster. Neither the transcripts nor an interview with Cox and his attorney revealed why and how Cox was originally considered a suspect in the rapes. Following his arrest Bradley Cox was transported to the Ohio Highway Patrol headquarters in Columbus for a polygraph examination. The defendant was placed in a chair and was interrogated repeatedly for seven hours. He was continuously attached to the polygraph machine and never allowed
to leave the room or even get out of the chair. At the end of this seven hour session, Bradley Cox signed a confession of guilt in the rape cases.

Several issues are clear from the trial documents and the transcripts of the interrogation. The defendant did not know any details about the rape cases, but the interrogators actually "coached" him on these details by asking him leading questions. Some of the questions asked by the interrogators contained information that only the police and the rapist knew. During the interrogation promises and inducements were made in order to gain Cox's cooperation. Bradley Cox testified that he was told that they would not charge him with rape, but only with robbery if he would cooperate. Knowing also that Cox was very frightened of going back to North Carolina to serve a sentence, patrol personnel promised him that if he confessed to the rapes they would not send him back to North Carolina or to Texas. By the end of the seven hour polygraph/interrogation session Cox confessed to crimes he did not commit. 2

Our analysis of the documents in our files shows the following:

1. The confession obtained at the conclusion of the polygraph session was achieved by police in an improper and coercive manner.

Several court decisions indicate that a confession, similar to a waiver of right, has to be made in a knowing, intelligent, and voluntary manner in order to be admissible as evidence against the defendant (Miranda v. Arizona; Brady v. Maryland; State v. Karrow). The main purpose of these safeguards is to assure a valid confession
and also to deter police from improper practices (State v. Cron; Rogers v. Richmond).

(2) Promises and inducements were made along with other false statements about the purpose of the interrogation. The courts have ruled that conducting a polygraph examination in an improper manner, which adds to the coercive environment created by the polygraph machine itself, can be sufficient grounds for the exclusion of such a confession (People v. Zimmer, 1972). The courts have also held that threats and coercive factors make a post-polygraph confession inadmissible (People v. Leonard, 1977).

Thus, the harassment, threats, and promises that were employed during the seven hour interrogation brought an innocent 20 year old man to the point where he was willing to confess to offenses which he did not commit. In an interview that was conducted with Bradley Cox for the purpose of this study, Cox stated:

Well, I confessed. I confessed to everything in that interrogation. I confessed to all the rapes and everything, in the deal that I wouldn't be sent back down south.

As a result of his confession, Bradley Cox was convicted by a jury and was sentenced to a 56 to 200 year prison term. Cox spent nearly two years at the Lebanon Correctional Institution on the rape and robbery charges before another man confessed to the crimes in question. The eventual exoneration of Cox, in this instance as a result of Jon B. Simonis's confession, is but one of two cases solved by Simonis's confession. In addition, a 42 year old Orange, Texas, man who had been convicted of a 1979 rape was also released in December 1981 as a result
of Simonis's confession. Since our data are limited, we do not know how many other people may have been erroneously convicted of rapes and robberies actually committed by Simonis, who eventually confessed to at least 77 crimes in 11 states (Columbus Dispatch, December 6, 1981).

Some of the recent cases of wrongful conviction included and discussed in this study involve more than one offense. In some cases there were wrongful convictions for crimes committed in the same geographical area (e.g., the Jackson cases involved a series of rapes in Columbus, Ohio; the Cox case, rapes and burglaries in Fairfield and Athens County; the Mosley case, 11 southeast Texas killings; the Titus case, a series of rapes in the Seattle area). This suggests that as public pressure builds to solve serious crimes, police may respond to this pressure by deviating from the normal rules of conduct.

Lundman (1980), in his discussion of police misconduct, adopts the perspective of organizational deviance, wherein a deviant action is the product of organizational, rather than individual, factors. While it is difficult to apply this notion to our concept of wrongful conviction and even more difficult to identify the conditions under which an action would be the result of organizational deviance, our study does suggest that the concept of "occupational deviance" may explain some police actions contributing to wrongful conviction.

"Occupational deviance" may perhaps most fruitfully be examined through Merton's anomie theory. The zeal to succeed through aggressive and ruthless competition may lead police (as well as other actors in the criminal justice process) to commit serious errors, even if they
stay within the rules of the system. Robert K. Merton (1957) calls to our attention the fact that:

When however, the cultural emphasis shifts from the satisfaction deriving from competition itself to almost exclusive concern with the outcome the resultant stress makes for the breakdown of the regulatory structure (Merton, 1957:157).

Some of the cases examined in this study indicate that police departments lack firm boundaries and clear rules as to what are legitimate and what are forbidden modes of attaining success. The zeal to succeed in solving major crimes can lead to ethical and normative breaches in police behavior.

Further exploration and application of Merton's approach toward anomie can be carried out via his typology of modes of individual adaptation (Merton, 1957). In a society or a community where crime is rising and public demand to solve the problem is increasing correspondingly, a "war against crime" may become a cultural or "semi-cultural" goal. The eagerness of police to comply with public demands and the temptation for political figures and political candidates to exploit citizen fears through demagogic and rhetoric actions, can also lead enforcement officers to deviate from institutionally approved methods. This, according to Merton, reflects an "innovative" mode of adaptation and is considered to be a form of deviant behavior. A close review of those cases in our sample involving police error offers some evidence for the hypothesis that internal or external pressures to solve crime(s) contributes to deviant behavior by criminal justice personnel.
One such case of wrongful conviction followed by exoneration, in which perjury and falsification of evidence by police officers contributed to the conviction of an innocent man, was the Titus case, discussed in Chapter 5. After a second rape had occurred in a period of 6 days in the same area of Seattle, police arrested Steven Titus as the suspected rapist. Titus was initially identified by the victim of the second rape. Our analysis of the case suggests that there was no evidence to link Titus to the rape that occurred that evening. Therefore, police may have been motivated to "strengthen" the case, secure a conviction, "solve" the most pressing crime problem in the area, and gain public approval. The police accomplished all of this in the following manner:

(1) During the initial investigation, Titus told police that on his way from his parents' house to his home he took a certain route. Police, in their reports of the investigation and in their testimony, made their "facts" fit the route Titus took in order to place him closer to the crime scene.

(2) The officer who first stopped Titus near the crime scene later testified that a certain item described by the rape victim was found in the front seat of Titus's car. However, this item was not mentioned on a list that had been prepared by another officer immediately after Titus was stopped.

(3) A critical point in the trial involved testimony that tire tracks belonging to the rapist's car were photographed at the rape scene. At the last moment, the police detective changed his testimony and
said that these were not the tracks of the rapist's car. The victim told him, he said, that the rapist's car had driven straight in and out of the lane, whereas the tracks photographed showed a right turn. This last minute change was made only after police found that the photographed tire tracks at the scene did not match the tires of Titus's car. Based on this falsified and fabricated evidence, Steven Titus was convicted.

It is evident from the Titus case, as well as from other cases of wrongful conviction, that police often operate in an efficient way if efficiency, as in Packer's (1968) view, implies that the criminal justice system often takes "shortcuts"; hence, its goals shift very quickly and drastically from quality to quantity.

The Titus case suggests the absolute need for representation by counsel at each level of the criminal justice process and especially at the initial entry into the system. It also suggests that private goals harbored by police investigators, interrogators and technicians may supercede and outweigh system constraints. Good people, to invert Wilson's dictum, may do evil if such evil is tied to a higher cause.
FOOTNOTES

1 The "social value" concept will be more fully explored later and will be incorporated in our concept of "marginality."

2 Bradley Cox also pleaded guilty to another rape in Athens County, as part of a plea bargain. This process, as well as related judicial errors, will be discussed in Chapter 7.
Our main concern up to this point has been with various participants in the criminal justice system, (e.g., victims and innocent bystanders as eyewitnesses; police officials) and their role in convicting an innocent person. However, the consequences of criminal justice procedures are mainly influenced by the way the system determines the guilt or innocence of those charged with crimes. Our concern in this chapter extends to the roles played by other components of the criminal justice process (prosecutors, juries, judges, public defenders) play in convicting innocent people. Since our analysis extends beyond judges, we prefer to label this as the "adjudicatory process."

In his book, The Cause of Popular Dissatisfaction With the Administration of Justice, Roscoe Pound (1963) describes the criminal trial in the U.S. as an adversarial procedure. This is a method of dispute settlement that requires that all persons who turn to formal law to settle their differences must behave as enemies. "They must fight—generally the harder the better."

Some of the cases of wrongful conviction examined in this study illustrate that a great deal of discretionary power is exercised by the
prosecutor and is often used to win a conviction, rather than to do justice for all.

The prosecutor, who plays a vital role in the criminal process, is required by law and ethical constraints to refrain from suppression and falsification of evidence. The special responsibilities of the prosecutor, as indicated in Rule 3.8 of the ABA's Model Rules of Professional Conduct, are:

1. To refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

2. To make a reasonable effort to assure that the defendant has been advised of the right to counsel and has been given reasonable opportunity to obtain counsel;

3. Not seek to obtain from an unrepresented defendant a waiver of important pretrial rights, such as the right to a preliminary hearing; and

4. To make a reasonable effort to seek all evidence, whether or not favorable to the defendant, make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor (American Bar Association, Commission on Evaluation of Professional Standards, May 30, 1981).

Still some misconduct and lawlessness by prosecutors is probably as old as the criminal justice system itself. As early as 1892 Newell (1892:6) defined malicious prosecution as a:
Judicial proceeding, instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it. In strictness the prosecution might be malicious, that is brought from unlawful motives, although founded on good cause.

The temptation to suppress and to falsify evidence sometimes proves irresistible. The fact that our criminal justice process is, to some extent, an occasion for the prosecution to prove the accused's guilt beyond a reasonable doubt rather than a search for the truth, is reflected in the following case. In Miller v. Pate the prosecutor brought as evidence a pair of men's undershorts that had been found a mile from the crime scene. The prosecutor alleged that they belonged to the accused and were heavily stained with blood which was the same type as that of the victim. A chemist testifying for the state swore that these were the facts. The defendant denied that the shorts were his. The alleged bloodstains were the only link in the circumstantial chain that connected the defendant to the shorts and to the victim. The defendant was convicted by a jury.

At the Supreme Court level, the prisoner petitioned for a writ of habeas corpus. A microanalyst who appeared for the petitioner testified that the brown stain upon which the prosecution built its case was paint, not blood. The prosecutor admitted having known in advance that the stains were paint. This fact was unknown to the defense, furthermore, a defense request to examine the shorts was rejected. The Supreme Court ruled that the prosecution had deliberately misrepresented the truth (Miller v. Pate, 1967).
A series of miscarriages of justice of this type is described by Lofton (1966). In one case where a new trial was granted to a man convicted of murder sixteen years earlier, it was found that the key witness in the trial was induced to testify against him by the district attorney who in return, promised to drop the charges against his wife. In another case, a murder conviction in 1961 was overturned after a finding that the prosecutor at the first trial had covered up perjury by a key witness. In another (1964) case, a new trial was granted to two men convicted of rape after it was revealed that the prosecutor suppressed evidence with regard to the emotional instability of the victim, who had also made subsequent allegations of rape directed at other persons while the defendants were awaiting trial on her initial allegations.

Devoting a whole chapter to the role of prosecutors in various cases of wrongful conviction, Radin (1964) stated that:

The most shocking injustices are those caused by district attorneys who willfully abuse the power of their office. While such cases do not happen frequently, they occur more often than they should (Radin, 1964:35).

Among the seven cases detailed by Radin, some can indeed be described as "shocking injustices." In a 1920 case in Waukegan, Illinois, a prosecutor who was a Ku Klux Klan member prosecuted a black man for rape. This took place despite the fact that the alleged victim did not identify the victim and even claimed that she had not seen him before. A later investigation by a Chicago lawyer indicated that the prosecutor had received a report from a medical expert showing that the
alleged victim was a virgin and that no rape had ever taken place. It took fully 29 years to establish the defendant's innocence in this case, where a conviction was achieved by suppression and falsification of evidence due to the personal bias of the prosecutor. This, according to Freedman (1967), is not the only known case of this type. "One could cite numerous such instances, perhaps not as flagrant, but equally unethical."

In his article "The Professional Responsibility of the Prosecuting Attorney," Freedman (1967:1034) discusses six ethical problems rising from prosecutorial practice:

(a) motives for prosecution relate to other matters than commission of a crime for which a defendant is prosecuted;

(b) plea-bargaining tactics beyond court supervision;

(c) covering up police misconduct and perjury;

(d) intentional suppression of evidence;

(e) precluding resolution of important issues by depriving the courts of jurisdiction;

(f) taking advantage of ineffective defense counsel.

Although our empirical data do not permit us to draw definitive conclusions, we think that during a period of rapidly increasing crime, a defendant who has a prior criminal record of serious offenses might lead the prosecution to more easily rationalize illicit actions. A prosecutor might argue that this "notorious" criminal, even if he is not guilty of the current offense, undoubtedly has committed many other serious offenses for which he was not charged.
An anecdote which may illustrate this point involved a candidate for local office in a small suburban community who had distributed a piece of campaign literature. In listing his qualifications and achievements, he mentioned that he had once served as an assistant district attorney and, while in office, had tried over seven hundred cases, losing only five (Radin, 1964). Since the prosecutor's office is often viewed as a stepping stone to political advancement a "high batting average" looks impressive at first glance, which makes some prosecutors very anxious and concerned about obtaining convictions—perhaps even more than they are concerned about the actual guilt or innocence of the defendant. Hence, a defendant with a previous criminal record may be at higher risk of being wrongfully convicted when identified by police and when prosecuted by an ambitious prosecutor.

While most studies of wrongful conviction, descriptive as they are, examine what seem to be intentional and malicious prosecutorial errors, our study tends to suggest that this is not necessarily the major type of prosecutorial error leading to wrongful conviction. Even if these errors are more frequent than we currently know, a thorough examination of the problem suggests that the chances of learning about these errors are slim, since we have been unable to find a single instance where attorneys or prosecutors have been held liable for their abuse of power in knowingly convicting an innocent person.
The Ratification of Error

Our study suggests that a more useful perspective in analyzing the contributions of prosecutors to wrongful conviction might be termed the "ratification of error." Indeed, our findings suggest that it is not the intentional manipulation of evidence that is the major prosecutorial error. Our survey respondents ranked malicious error as the least frequent, whereas "inadequate investigation" was ranked as the most frequent error, with "technical error" being regarded as the second most frequent type. The same pattern was observed in rank ordering prosecutorial error by the various occupational groups within the criminal justice system.

These data encouraged us to explore further whether "inadequate investigation" can be perceived as negligence or misconduct by prosecutors in our criminal justice system or whether it is attributable to other organizational or societal dysfunctions. Our literature review on the professional responsibilities and conduct of prosecutors (Nissman and Hagen, 1982; ABA Project on Standards for Criminal Justice, 1971) indicates that there is no requirement that an investigation must be conducted by the prosecutor prior to deciding whether to prosecute or even prior to the trial. This implies that in order to make a decision related to guilt or innocence, a prosecutor often relies heavily or entirely on "facts" and evidence provided by the police. The lack of adequate investigation, in a criminal justice system operating under heavy caseload pressures, might culminate in the ratification of an error committed at a lower level.
The commission of an error while relying on a flow of information from lower levels is not unique to the criminal justice system. In discussing the "limits of organization," Arrow (1974) develops an explanation of the likelihood of such "unnecessary" error. The reason for such failures, according to Arrow, is the overload of information. Thus, an individual cannot be aware of all that is relevant, and the uncertainty that exists affects his decision-making capability. In further developing his thesis of efficiency loss and the value of responsibility, Arrow (1974:75) stated that:

The efficiency loss due to informational overload is increased by the tendency in that situation to filter information in accordance with one's preconceptions. It is easier to understand and accept information congruent with previous beliefs than to overcome cognitive dissonance.

We may therefore suggest that in a criminal justice system preoccupied with the ideology of "war against crime," it will be easier for a prosecutor to assume that information and evidence transferred to him after police investigation indeed indicates the guilt of the defendant. This may enhance our understanding of "error ratification" in processing a case through the criminal justice system.

The Role of Plea Bargaining in Convicting the Innocent

Although the "war" on crime became a major problem only in the twentieth century, one of the most commonly used tools to cope with system overload, the plea bargain, was used as early as 1804. In Commonwealth v. Battis (1804), the court indicated that a plea bargain should not be induced by promises, persuasion, hopes for a pardon. An
overview of the historical origins of plea bargaining takes us back as far as seventeenth century England, where the process originated as a means of mitigating harsh punishment.

In Shelton v. United States, (1957), the Fifth Circuit of the United States Court of Appeals reversed a conviction based on a questionable plea bargain and stated that:

A correct statement of the applicable rule might be: a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

Plea bargaining, which has been diverted from its origins, became a useful tool in our criminal justice system—a system that finds itself under heavy docket pressures and unable to try all cases. As plea bargaining became more common, defendants and criminals were also more willing to plead guilty by bargaining either in order to "get it over with" as soon as possible and reduce the uncertainty, or in the hope that pleading guilty would lead to reduced punishment.

The use of the plea bargain has been carried to a point where perhaps 90 percent of all cases that are prosecuted involve guilty pleas as a result of plea bargaining. Given the difficulties of assessing the magnitude of plea bargaining in various jurisdictions across the U.S. and the difficulties in keeping records of dispositions by guilty pleas, the validity of studies related to plea bargaining is
somewhat questionable. In a study carried out by Jones (1979) the rate of defendants who pleaded guilty without trial was 90 percent; in five other jurisdictions studied at the same time convictions via trial were obtained in not more than 20 percent of the cases. Other empirical studies show that rates of plea bargaining vary from 13 percent to 90 percent, depending on the jurisdiction and other factors (rural/urban; type of crime; felony or misdemeanor; etc.) (Cleary, 1979, 1980; McIntyre and Lippman, 1970; Carney and Fuller, 1969).

An important factor influencing the prevalence of wrongful conviction by plea bargain is the type of offense (Kalven and Zeisel, 1966). The authors argue that the rates of conviction via plea bargaining is higher among misdemeanants than among felons. The study indicates that the percentage of guilty pleas in murder cases was 34 percent, in forgery it was 90 percent, and in cases involving charges of auto theft it was 89 percent.

With the return of the death penalty and the prospect of three executions per week in the next few years, it seems likely that more people charged with murder will plead guilty to a reduced charge. If this occurs, the issue of "false positives" occurring as a result of plea bargains may become even more pressing. A relevant case which illustrates this concern occurred recently in Richmond, Virginia. A man who pleaded guilty to first degree murder just minutes before a jury found him not guilty, indicated that he switched his plea out of fear that he would follow Frank Coppola to the electric chair. This dramatic case, where the defendant switched his plea just three minutes
before the jury returned with a "not guilty" verdict, strongly
underscores our concern that in facing capital punishment, innocent
defendants may plead guilty in return for sentencing considerations
(Columbus Dispatch, September 26, 1982).

The contributions of plea bargaining to wrongful conviction is not
a new issue, of course. Radin (1964) describes some cases where
defendants confessed and accepted plea bargains in order to avoid
execution. Wertheimer (1979) discusses the idea of abolishing plea
bargaining because it impedes justice. Plea bargaining, indicates
Wertheimer, emphasizes conviction rather than the principle of justice.
As a result, the sentence will be lenient (and therefore "unjust") if
the defendant is guilty, and certainly unjust if the defendant is
innocent.

Several studies involve experiments that examine the plea
bargaining process in a controlled manner while trying to identify
variables that can affect the decision to accept or reject a plea
bargain. The first experiment used a role playing procedure to
identify these variables. Of 143 students playing the role of innocent
defendants, 18 percent accepted the plea bargain, whereas 83 percent of
the "guilty" accepted. Two other main effects were revealed.
Defendants were more likely to accept a plea bargain when (1) a
relatively large number of charges had been filed against them, or (2)
when the severity of the punishment upon conviction would be great.
However, further analysis revealed that these effects were present for
"guilty" defendants only. The author concludes that further research
should concentrate on how much decisional freedom a defendant has, given the influence of a defense attorney's recommendations, the defendant's background, and the severity of the penalty (Gregory, 1978).

Plea bargaining and its effects have been studied in England through interviews with defendants who have been convicted and sentenced before the Birmingham Crown Court (Baldwin, 1978). Of a total sample of 450 defendants, those who unsuccessfully contested their cases were far less likely than either of the other groups to receive noncustodial sentences. Late plea changers received the lightest sentences and were least likely to be incarcerated. Persons who pleaded not guilty were sent to prison for longer terms than were other incarcerated defendants (Baldwin, 1978). The differences, which were highly significant statistically, support the impressions of the interviewed plea changers and indicate that sentencing discounts represent an extremely powerful inducement to pleading guilty. The interviews also suggested that the inducement is sufficiently strong to lead some innocent defendants to plead guilty. Moreover, Baldwin (1978) stated that a system of justice based on rewards and disincentives cannot accurately distinguish between guilt and innocence.

In yet another British study (Baldwin, 1977), the author indicates that the injustices encountered are produced by a system which gives too little protection to the innocent and too often sacrifices the needs of the defendant to the requirements of bureaucratic efficiency.
How innocent defendants might be persuaded to accept a plea bargain and subject themselves to punishment for crimes they did not commit, is in fact shown in the Bradley Cox case discussed earlier. After confessing under pressure to the rape in Fairfield County, Cox, an innocent defendant, was faced with more charges in Athens County. He pleaded guilty to those charges as part of a plea bargain agreement with the prosecutor in Athens County. In exchange for the plea, Cox was promised an opportunity for early parole. Under the agreement, Cox was eligible for parole after serving three years and two months in prison. Had he not pleaded guilty, Cox would have risked having to wait 9 1/2 years before being eligible for his first parole hearing. The powerful inducement effect of the plea bargain clearly led to Cox's guilty plea, even though he was totally innocent. The fact that Cox would have risked waiting 9 1/2 years for his first parole hearing was a major factor in his decision. This suggests that as state legislatures increase mandatory sentence lengths, inducements to plea bargain, even if innocent, may increase.

It is quite easy to become convinced that plea bargaining is a useful tool in the criminal justice process. Since plea bargaining is defined as the process whereby the defendant agrees to plead guilty as part of an agreement with the court or with the prosecutor, the usual effect of such an agreement is that a trial is indeed avoided. Thus, if plea bargaining is properly executed, the bargained plea should accurately reflect the point at which the expectations of the prosecutor and those of the defendant intersect, and the sentence or
charges should be reduced in proportion to the probability of conviction. Plea bargains can eliminate the costs of trials and can make the judicial system appear more certain and fair (Bashara and Gardner, 1978). The greatest advantage of plea bargaining is the reduction in court congestion. Data analysis based on court records from the 1970's in Michigan indicates that elimination of plea bargaining would have led to the need for 70 judges instead of 20 at the time of the study (Barbara and Gardner, 1978).

Much less attention has been given to plea bargaining under duress. Some have argued that a prosecutor's proposal to plead guilty in return for a relatively lenient sentence is analogous to the decision to accept a gunman's proposal to spare one's life in exchange for one's money. Wertheimer (1979), while criticizing this analogy, nevertheless considers abolishing plea bargaining since it is unjust if the defendant is guilty, and unjust if innocent.

In-depth literature and documentary research has further indicated the relationship between plea bargaining and "false positives." As one observer has noted:

Only the innocent lose—together with all the rest of us. For under plea bargaining, the innocent always receive punishment without warrant, while the guilty receive less than the law applied, would require (Strick, 1977:55)

Although there is a dearth of empirical evidence, it seems likely that negotiated guilty pleas make up the largest single category of convicted innocents—i.e., those who receive relatively mild jail terms, probation, or other community-based sanctions, and therefore
don't attract as much attention as the more sensational cases of those who have been sentenced to longer periods. Policy implications and future research recommendations related to this issue will be addressed in the last chapter.

The Jury

Another segment of the criminal justice system that has been found to contribute to miscarriages of justice on occasion is the jury. Frank (1957) discusses three models of the jury's function:

(1) The main theory is that the jury merely finds the facts, that it must not and does not concern itself with the legal rules, but faithfully accepts them from the trial judge.

(2) A more sophisticated theory is that the jury not only finds the facts but in its deliberation in the jury room uses legal reasoning to apply those facts to the legal rules it learned from the judge.

(3) The realistic model is based on what anyone can learn by questioning the average person who has served as a juror—namely, that often the jury is neither able to, nor do they attempt to, apply the instructions of the court; they are more brutally direct.

It is clear from examining the literature on the jury's function that the decision making process is the crucial point in their duty. The process might be affected by many variables, as has been noted:

Jurors are themselves witnesses—witnesses of what goes on at the trial. They must determine the facts of the case from what they see and hear, that is, from the words and demeanor of the testifying witnesses. The jurors are, then, witnesses of the witnesses.
Now if those who testify are not to be likened to scientific observers, no more are jurors. They may make mistakes similar to those of the testifying witnesses. They may misunderstand, or forget, some of the testimony. Think of the effect of inattentiveness alone. A witness ignored or forgotten is not "psychologically present;" his testimony is absent "psychology." Inattention may, then, mean that a fact is not comprehended; it is therefore out of the case, for all practical purposes. But that fact may be most important as proving the defendant's innocence (Frank, 1957:223).

How crucial jury behavior can be is indicated in a review of the literature. Some studies, dating back as early as the 19th century, deal with sociological and psychological research, confirm the effect of the size of the jury. Studies related to group dynamics (Gelfand, 1977) have shown that in small groups, even a very weak interaction among members produces some coercive effects; the more complex the problem, the greater the tendency to conform. For example, for a hung jury to result, a substantial minority must be willing to hold out. First ballot constellations from which hung juries are likely to result show a 6-6 vote is 15 percent of the time likely to end in a hung jury, while a 2-10 split (with 10 undecided) is likely to end in hung jury just 7 percent of the time. Thus, a group of four or five jurors must consistently hold out if no decision is to be reached. Mathematical models which have been developed (Gelfand, 1977) estimate the probabilities of conviction for juries of various sizes. These models all show that one and one-half times as many innocent defendants will be convicted and twice as many guilty defendants acquitted by 6-member juries as opposed to 12-member juries.
In another article Gelfand (1977) presents a statistical model concerning the use of 6 and 12 member juries. The author notes that jury size may affect performance in two ways: (1) smaller juries may be less reflective of the community, and (2) smaller juries may have poorer problem-solving skills since they will have input from fewer individuals. In discussing the results of a statistical model of jury decision-making processes, he indicates that for 12-member juries, the probability of convicting an innocent person is .0221, while the probability of acquitting a guilty person is .0615. For a 6-member jury, these errors are increased by more than 50 percent, with the probabilities rising to .0325 and .1395, respectively.

Despite the fact that 83.4 percent of the cases of wrongful conviction in our sample involve conviction by jury, it is simply impossible to conclude, in any particular case, that the jury has direct and/or sole responsibility for the conviction of an innocent person. In each of these cases, the jury has ratified an error produced earlier in the criminal justice process.

The Role of the Judge

Finally, as we "approach the bench" in our assessment of the processes involved in wrongful conviction, it is worth noting the cultural expectation that justice will be done by the judge and/or by the jury. This belief follows from an old concept of justice whereby innocent men and women would be rescued by the gods while going through an ordeal of water, fire, or poison, in order to prove their innocence. (Guilt or innocence in ordeals was determined by the degree of injury
sustained.) While only luck was involved in the "determination of guilt" in those days, it is still possible in 1983 to look upon those who have been wrongfully convicted as the unlucky. Although 83.4 percent of the cases in our sample were found guilty by a jury, rather than judge, there are indications that judges, too, are involved in the conviction of innocent persons.

Virtually none of the cases reviewed by us proves the direct responsibility of a judge for wrongful conviction. This, however, may be attributable to their high position in the criminal justice system:

Because of the privileged position they occupy, judges are peculiarly immune from public and press scrutinizing of their off-the-bench conduct. Yet even judges at times yield to the kinds of temptation that cause other men to be brought before them as defendants. Several cases of dishonest judges have made headlines in recent years (Lofton, 1966:232).

While this and similar statements fail to expose the involvement of judges in convicting innocent persons, our survey population has not ruled out the possibility of judges contributing to such type of injustice. However, almost 70 percent of our respondents ranked judicial errors as the least frequent of all errors. A similar pattern emerged when the rank order of "judicial error" was examined according to occupational groups. Nearly 84 percent of the judges themselves ranked "judicial error" as the least frequent type, and more than 60 percent of all respondents in each occupational group reached the same conclusion (see Table 21).

The three types of judicial errors identified by us are: (1) decision affected by bias; (2) judicial neglect of duty; and (3)
technical errors in judicial decisions. Although "technical errors" were ranked as the most frequent type of judicial error leading to wrongful conviction, it is our belief that the actual problem lies within the process of judgment and its arbitrariness. The decision making as part of the judgment, in matters of both factual and circumstantial evidence, lacks clear and consistent standards. Hence, by trying to decide whether to prefer the testimony of a "reliable" eyewitness or the alibi of a defendant (sometimes with a prior criminal record), are judges or juries relying upon any standards to guide them in their judgement? Our review of cases indicates that in those instances where eyewitness identification, police coercion or brutality, confession under duress, and so forth, are involved, judges and juries have behaved quite arbitrarily, thus making mistakes inevitable. Black (1974) has stated that:

It is my assertion in this book that in one way or another, the official choices—by prosecutors, judges, juries, and governors . . . that divide those who are to die from those who are to live are on the whole not made, and cannot be made, under standards that are consistently meaningful and clear, but that they are often made, and in the foreseeable future will continue often to be made under no standards at all or under pseudo-standards without discoverable meaning. My further (and closely connected) assertion is that mistake in these choices is fated to occur (Black, 1974:21).

In the aforementioned case of Bradley Cox, it was found that:

(1) The trial court erred in holding admissible a confession obtained after a polygraph examination conducted in an improper and coercive manner by police.
(2) The trial court erred in holding admissible a confession obtained after a polygraph examination where defense counsel was misinformed as to the nature and purpose of said examination.

There are no clearcut standards or guidelines to assist a judge in his decision whether to hold certain testimony or evidence admissible. Moreover, in those cases where all facts and evidence have been clearly and explicitly presented to judges via transcripts of the investigation and other data, error can still result. We also think it likely that judicial decisions are more subject to error as a result of public pressure where judges are selected via the ballot box.
The actual rate of wrongful conviction in the American criminal justice system probably cannot be completely known. However, as the preceding analysis of 205 cases and the responses of 229 criminal justice officials have indicated, various factors operating within the criminal justice system and its environment contribute to false conviction. While 52 percent of the errors in our sample of cases were found to be related to eyewitness misidentification, it has also become clear to us that these errors (i.e., "false positives") are not simply a direct function of the psychological factors discussed earlier. In addition, it appears to us that there is a relationship between social structural factors and the phenomenon of wrongful conviction.

There are various factors affecting the relationship between the public and the legal system that might contribute to false conviction. Local influence, according to Block (1963), is one of them. An example concerns Charles F. Stielow and Nelson Green, both convicted of murder in a small community in upstate New York. After the arrest of these two men, the Governor of New York State, having doubts about the case, ordered the establishment of a special investigation team headed by a leading attorney. The team reported that Stielow was innocent, and
then they named the actual culprit. The evidence was presented before a grand jury, but they rejected the argument and refused to reexamine the case. The role that the public played in this case was influential in the decision not to reopen the case. "The jury's decision reflected the attitude of the community that found satisfaction in the guilt of the two men; they didn't wish to reverse the conclusion" (Block, 1963). The townpeople felt that they had heard too much about this case for too long, and they were enraged that more than $75,000 of public funds had been expended, even though the money had been used to correct a miscarriage of justice (Block, 1963).

A group of 15 cases discussed by Borchard (1932) illustrates the fact that public interest and passions are easily aroused in criminal cases, especially in small communities. In these cases public pressure had an effect on the verdicts. In all 15 cases, the wrong person was convicted. The case of James Foster, cited by Radin (1964), is another example where public feelings against the suspect had been aroused so strongly that he could not be held in the local jail for fear of a lynch-mob (Radin, 1964:54). Another 13 cases were described by Radin (1964) in a chapter titled "Hue and Cry: The Customary." Reasons for wrongful conviction, as described in the chapter, include gossip which developed in the local communities and reached the point where criminal justice officials acted on erroneous information very likely to satisfy popular demand for conviction during a crime wave in a local community.

Various societal and organizational factors are involved in such witchhunts and may contribute to wrongful conviction.
This need to convict, especially among law enforcement officers and prosecutors, might be examined through the zeal to succeed, which is an important factor within a criminal justice system, let alone in a system that is highly influenced by political power. The zeal to succeed through aggressive and ruthless competition may lead criminal justice officials to operate in a manner that disregards the problem of whether they stay within the rules. Robert K. Merton (1957) calls to our attention the fact that:

The social structure we have examined produces a strain toward anomie and deviant behavior. The pressure of such a social order is outdoing one's competitors. So long as the sentiments supporting this competitive system are distributed throughout the entire range of activities and are not confined to the final result of "success" the choice of means will remain largely within the ambit of institutional control. When however, the cultural emphasis shifts from the satisfaction deriving from competition itself to almost exclusive concern with the outcome the resultant stress makes for the breakdown of the regulatory structure (Merton, 1957:157).

The criminal justice system, similar to other governmental agencies, operates within certain boundaries and rules of professional conduct. However, the zeal to succeed, which becomes even more powerful in an adversarial system, can under certain circumstances lead to brutality and corruption among the different levels of the system. The central tendency towards anomie as described by Merton can lead to an unrestrained desire to win a case, that may result in perjury by police officers or may lead to the withholding of information by law enforcement officers and/or by the prosecutor. The fact that the criminal justice system is in many ways a politicized system encourages
public pressure. Criminal justice officials and employees may resort to illicit innovations which Williams (1955) called "norms of evasion."

We can look upon violation of laws and rules of professional conduct as deviant and/or criminal activity occurring in an anomic environment. However in order to place criminal justice officials' behavior within Merton's "Typology of Modes of Individual Adaptation" (innovation) it is important to consider some broader social perspectives that will enhance our understanding of why some institutional means are occasionally rejected in our criminal justice system.

For this purpose, broader social perspectives may be considered in society's "war" on crime. The failure to prevent crime and deviance through traditional means has led to an increasing number of ultraconservative political groups and policy makers who advocate sweeping anticrime proposals. Examples of recently proposed policy shifts include the abolition or major modification of the exclusionary rule; prohibiting state prisoners from using writs of habeas corpus to have federal courts review the legality of their convictions; wider use of the death penalty; expanded authority for wiretapping; and adoption of selective incapacitation as a means of deterrence. Further, stories such as that below suggest that in order to accomplish crime control, "innovative" approaches are being used by some criminal justice representatives:

The trial of seven white New Orleans policemen accused of beating blacks in a hunt for an officer's killer began today... Four people died in the police crackdown (New York Times, March 8, 1983).
Two police officers are under federal indictment for beating a prisoner into making a confession and thus denying him his civil rights (Lorain Journal, August 15, 1964).

These cases represent but a small sample of police misconduct or crimes that have been revealed to us during our study. It is evident from some of the cases that under the circumstances of a growing disjunction between society's goal to reduce crime and the capacity of the criminal justice system to achieve this goal through legitimate means, more lawlessness and misconduct will prevail, leading toward more injustice and wrongful conviction. The illegitimate innovations which have been described, together with other consequences, may be the result of a change in social values, a change in value in a criminal justice environment similar to that described by Packer (1968):

The value system that underlies the Crime Control Model is based on the proposition that repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom...

In order to achieve this high purpose, the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime (Packer, 1968:158).

In order to deal with suspects and defendants in an efficient way, according to Packer, strong emphasis is placed on the presumption of guilt. This is important, especially when the system has to deal with an increasing number of criminals. The most reliable indicators of
probable guilt in the crime control model are the processes used by the police and the prosecution:

Once a man has been arrested and investigated without being found to be probably innocent, or to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested.

This, in fact, relates very closely to the "principle of distance" and the "ratification of error" concepts developed in this study. A close examination of these concepts and the functions of the criminal justice system in Packer's crime control model enables us to use a metaphor of a manufacturing line without quality control. Perhaps 90 to 95 percent of the cases are moved routinely from station to station—from police to prosecution to plea bargain, in a continuing stream. Few are plucked from the assembly line for close scrutiny. Therefore, errors are hard to be detected anywhere along the line. Under these conditions the chances of erroneous conviction are enhanced, and there is a low probability of such errors being revealed.

If the crime control model, to use Packer's metaphor, resembles a production line, then "the due process model looks very much like an obstacle course":

The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error. People are notoriously poor observers of disturbing events—the more emotion arousing the contest, the greater the possibility that recollection will be induced by physical or psychological coercion so that the police end up
hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as police are not). Considerations of this kind all lead to a rejection of informal fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. Even then, the distrust of fact-finding processes that animates the Due Process Model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available in case facts have been overlooked or suppressed in the heat of the battle (Packer, 1968:163).

Not surprisingly, the change in values as reflected in the two models can be fully examined in changes which occurred between the Warren Court and the Burger Court. Part of these changes, however, are related to one of the more pressing subjects of this dissertation—i.e., the right to counsel in matters involving eyewitness identification. In 1967, while expressing a Constitutional concern about the dangers of the use of eyewitness identification in the criminal process, the Warren Court ruled in United States v. Wade that an arrested suspect has a constitutional right to have a lawyer present at a police lineup in front of eyewitnesses (see Chapter 5). Less than six years later, in Kirby v. Illinois (1972), the Burger Court interpreted Wade in a different way, stating that Wade applies only to those cases where the identification took place after a formal indictment. By creating a distinction of pre- and post-indictment the U.S. Supreme Court has effectively held that no lawyer or counsel is guaranteed by the Sixth Amendment if the lineup is prior to the
identification. This would appear to open the door for police to conduct a lineup before formal charges are filed, thus avoiding the presence of counsel. By "immunizing" all pre-indictment identification, the U.S. Supreme Court has removed the defendant's protection needed at a most crucial point. This, in Kamisar's words, is "in some way more depressing than anything else the Burger Court has done in the criminal procedure era" (Zion, 1982).

While some of the states were trying to reverse the Burger Court trend by granting citizens and defendants more protection, further efforts are also being made to minimize the safeguards protecting defendants. This can be seen in the issue of jury instructions. In several cases instructions were designed to focus the attention of the jury on the problems of eyewitness identification (e.g., United States v. Telfaire). In a recent lecture, Elizabeth Loftus (1983) illustrated how such instructions have been modified by the judge to a point where no protection was provided to the defendant. The original instructions were designed by Loftus to lay out the dangers in eyewitness identification in the following way:

Eyewitness testimony is one of the major elements in this case...

In evaluating this testimony we should take into account the following facts:
1. extreme stress and fear causing a destruction in the memory...

One judge, after not permitting Loftus to read the instructions to the jury, decided to do it by himself, but only after he modified it as follows:
You should take into account that stress may or may not affect eyewitness testimony that a police officer may or may not be more reliable than an ordinary citizen.

It is evident that such instructions do not fulfill Loftus's intent. Although not yet tested empirically, it seems evident that the greater the public's concern with and fear of crime, the greater will be the appeal of the crime control model and the greater the probability of committing a false positive error.

Further examination of the relationship between the social climate and the criminal justice system suggests several other explanations whereby public pressure can contribute to an increasing number of wrongful convictions. One of the questions that comes to mind is whether society is willing to tolerate more false positives (wrongful convictions) in exchange for an increased sense of deterrence and public safety. The mass media may be viewed as an "intervening variable" between public pressure and the criminal justice system.

A classic example of societal willingness to tolerate "false positives" as a result of a "crime wave" is described in a Trenton, New Jersey murder case (Lofton, 1966). In 1948 a New Jersey paper launched a campaign for capital punishment because of what it called an intolerable crime wave, exemplified by the killing of an old man. In an editorial entitled "The Idle Electric Chair," the Trenton Times noted that there had not been an electrocution in the state in more than two years. As a result of this editorial, police officers organized a special squad with orders to shoot, kill, or arrest any
"suspicious-looking" person. In another editorial, there was a demand that police solve the cases "through one means or another."

Within a few days six suspects, all blacks, were arrested without warrants. All of them had alibis for the murder of the elderly man, and there were no witnesses to the crime. They were all convicted by a white jury and were sentenced to death. An editorial published after the trial said that, "The verdict seems to have stunned the entire city, but the local press had not helped forestall the outcome" (Lofton, 1966:12). Finally through the efforts of the ACLU, four of the defendants won acquittal in a second trial and the fifth won his freedom after commutation of his sentence. The sixth died in prison. In this case, as in many others, innocent men were victims of the public hysteria created or exacerbated by the press.

The criminal justice system does not operate in a vacuum. In addition to the injustices most directly attributable to the system itself, we suspect that by injecting public morals and fears, the probability of false conviction increases. Conviction of an innocent man may reflect the public's willingness to tolerate more "false positives"—the defendants who become victims sacrificed by society. The idea that the criminal justice system is the mirror of public morality and public concern about crime is reflected in all the stages of the system. Lofton (1966) has stated that no law enforcement agency can protect itself from the pressure which the public exerts. A review of the literature suggests that when the public demand for solving crime problems increases, there is a tendency for carelessness and
lawlessness to increase as well. Under these circumstances law enforcement agencies may be willing to respond to the public's demand for harsh treatment and punishment. Negligence and corruption on the part of various agencies in the system will increase the probability of unjust conviction. Although not examined empirically, some of our data (cases of wrongful conviction) suggest that wrongful conviction occurs when a series (at least two) of offenses of the same or similar type have occurred in a certain community or a geographical area. This is illustrated in the Bradley Cox case, where rapes were committed in Fairfield and Athens County in Ohio; in the famous Jackson case where a series of 36 rapes and sexual assaults were committed in the Columbus, Ohio area; in the Mosley case where a Galveston, Texas, man was convicted in a stabbing death and sentenced to a life term only to be exonerated after new evidence indicated that the crime had been committed by a man who also admitted to the slaying of eleven others; the Steven Titus case, wherein the wrong man was convicted after at least two rapes were committed under identical circumstances in the same area of Seattle. The lack of sufficient, accurate data precludes our generating more scientific documentation about the ways in which the public and the criminal justice system may interact to produce wrongful convictions.

It is evident, from an historical review of the phenomenon, that the victim of wrongful conviction is not a new one in our criminal justice system. However, very little has been written so far about those victims themselves. At least part of our data tend to indicate
that it is not only how people perceive and visualize the various scenes—thus identify or misidentify other people, but it is also how those who are wrongly identified are perceived by the entire society.

Two sociological perspectives tend to collaborate in the explanation of structural bias and its relationship to wrongful conviction—the study of The Stranger in George Simmel's (1971) work *On Individuality and Social Forms* and *The Marginal Man* by Stonequist (1937). In his discussion of the stranger, Simmel introduces two simultaneous factors, nearness and distance. In other words, "the stranger" presents a synthesis of detachment and attachment. Simmel is referring to those people who are elements of society but at the same time are confronted by it. This perspective may be useful in understanding the readiness of society to convict somebody who hasn't committed a crime, as long as he belongs to the group of strangers. Simmel indicates that the detachment from the social environment is what makes someone a stranger. Without referring to Simmel's ideas, both Borchard (1932) and Radin (1964) clearly describe cases of strangers—new immigrants who were wrongly convicted. Radin (1964:26) suggested that a language problem led to the wrongful conviction of a Puerto Rican, but the pervasive question to be answered is why all these immigrants who were Polish, Irish, Arab, Mexican, and Puerto Rican were wrongly identified in the first place. Despite their efforts to become part of the American society, they remain socially detached and therefore run a high risk of being wrongly identified. As we can see from Stonequist's discussion of the marginal man, our
victims of wrongful conviction do not have to be new immigrants in order to become strangers. Stonequist indicates that a physical race is a mark of identification which facilitates the focusing of racial prejudice and is related to reduced social contact, and the marginal man belongs to a subordinate group.

In fact, some of the causes célèbres mentioned earlier in this study provide some support for the idea of people-processing according to social stereotypes and extralegal characteristics. The conviction of Captain Dreyfus, as analyzed by Tuchman (1962), was not simply a plot to frame an innocent man. The wrongful conviction of a Jewish officer charged with treason in the French army was a result of deep-seated prejudice. Increasing anti-Semitism in 1894 made Captain Dreyfus, who was an "eternal alien," fit the requirement of a spy and "a natural suspect to absorb the stain of treason" (Tuchman, 1962). Another cause célèbre, the Scottsboro case, was an offspring of the economic and social system in the South, which was at the time based upon racism and class exploitation. The wrongful conviction of nine black boys who took a ride on an Alabama freight train was nothing but a mirror of the mistreatment and prejudice experienced by blacks in the South.

The phenomenon of class control and wrongful accusation has been studied for many years. Studies of police decision making received increasing attention when it was shown the decision making by police and other social control agents are affected by nonlegal
characteristics. Terry (1967) indicated in his study that Mexican-American, blacks, and lower income youths are more likely to receive severe dispositions. Black and Reiss (1970) found that arrest rates among blacks are higher than among white juveniles, for the same type of behavior. In a 1971 experiment, results indicated that a sticker of a "Black Panther" placed on cars of drivers with outstanding driving records, evoked false labelling and increased the number of traffic citations received by the experimental group, who swore to drive according to legal regulations.

A further investigation of the impact of social control on wrongful accusation and conviction reveals that even in cases of people from higher socioeconomic strata, their current status or activity can create a misleading environment. This was the case of Father Pagano who was falsely identified as a robber (see Chapter 5). In addition to being wrongly identified by the witnesses, he was described by gossips as an un-priestly maverick, was abandoned by his church superiors, and he was referred to as "a known liar." There is no doubt that his background did not help him to establish his innocence, but led only to further determination by police and the prosecution that Father Pagano was the actual culprit. This case is simply another illustration of the fact that it is not only the act of misidentification that leads to wrongful conviction, it is also socioeconomic status and other background characteristics on which stereotypes and wrongful judgments are based.
As the preceding discussion has indicated, various factors operating within the criminal justice system and its environment contribute to false conviction. Societal structure and heterogeneity have been found to be major contributors to the increase in "false positive" cases.
CHAPTER NINE

SUMMARY AND POLICY IMPLICATIONS

This study, based on a review of 205 cases and data elicited from 229 criminal justice officials (Chapter 4), demonstrates that:

1. Wrongful conviction is probably a low-incidence phenomenon.

2. Fifty-two percent of wrongful convictions in this study involve errors of eyewitness identification.

3. Eleven percent of the cases involve perjury by witnesses and 9.9 percent involve negligence by criminal justice officials.

4. In more than 10 percent of the cases, innocent people were sentenced to death. In 8.7 percent, the death sentence was commuted to life imprisonment and in 35 percent, the person was exonerated before the execution could be carried out.

5. Nearly two-thirds of those responding to our survey (63.3%) believe that wrongful conviction occurs in their jurisdictions.

6. A majority of these respondents (56.8 percent) estimated that such cases represent less than 1 percent of all felony convictions, while 6.5%, thought that such false positives occurred in 1 - 5 percent of all felony convictions in their jurisdiction.

7. Findings reflected in Tables 16 and 17 and Fig. 1 suggest that the higher the stage of processing represented by a given respondent's
occupation (police, prosecutor, judge) the greater is his tendency to recognize the problem of wrongful conviction.

Despite this attempt to conduct a thorough investigation, the problem identified by an earlier writer still persists:

No one knows how many innocent men erroneously convicted of murder, have been put to death by American governments . . . (O)nce a convicted man is dead, all interest in vindicating him usually evaporates (Frank, 1957:248).

Although we are at the conclusion of this exploratory study, we must emphasize that we still do not know the answer to Judge Frank's control question concerning how many "false positives" occur in our criminal justice system. We do know that earlier estimations of wrongful conviction (Radin, 1964; Brandon and Davies, 1973) are much higher than the estimates of our sample of 229 criminal justice officials. Our current data base of 205 cases of wrongful conviction and the responses of 229 criminal justice officials provide the best (though still not satisfactory, by any means) basis for understanding the dynamics of wrongful conviction, but we are convinced that it is not a frequent occurrence when viewed in the context of all cases.

The majority of our respondents indicated that wrongful conviction is a "low incidence" phenomenon (less than 1 percent of all felony convictions). While some people may argue that this "low incidence" estimate, coupled with the fact that we have identified only 205 "pure" cases of wrongful conviction (innocent beyond doubt), shows that this is not an important problem, it is clear to me that this and other studies represent only the proverbial "tip of the iceberg," in terms of
the total number of cases. As noted earlier, in cases involving the execution of innocent men, there is usually less interest in continuing investigation, since no possibility of release exists. Also, in cases where innocent men and women were convicted of a misdemeanor, fined and/or sentenced to probation or some other minor punishment, they never found it necessary to seek vindication. These types of cases will probably never come to public attention and thus we will not be able to know the real magnitude of the phenomenon.

Types of Offenses and Sentencing

The distribution of cases of wrongful conviction according to type of offenses (Table 4) shows that 87.4 percent of the cases involve violent felonies. The distribution according to sentence (Table 5) further indicates that 84.3 percent were sentenced to not less than 6 years. Among those, 34.3 percent were sentenced to life and 12.2 percent were sentenced to death. Although no innocent man was executed in this century, to our knowledge, only chance has saved some of them from death. One of them was Isidore Zimmerman, who in 1939 came within two hours of being executed when the Governor of New York decided to commute his sentence. Several other cases where death sentences were commuted within a matter of hours or days from the scheduled executions, were described by Judge Frank. These cases provide some support for the contention that "such instances demonstrate the intolerably monstrous nature of any death sentence." Moreover, with the return to fashion (and legality) of the death penalty and the prospect of up to three executions per week in the next few years, it
should be evident that as long as errors occur in the criminal justice system, irrevocable punishments should not be permissible as a part of public policy.

Types of Errors

As early as 1918 Wilder B. Wenworth stated that:

Cases of mistaken identity are alarmingly frequent, and . . . criminal history is full of cases in which, by relying upon such uncertain testimony, innocent men have been compelled to serve long terms of imprisonment, or to submit even to extreme penalty of the law (Wilder B. Wenworth, 1918).

Despite the scientific knowledge that has been accumulated since then, and despite the fact that 78.6 percent of the criminal justice officials who responded to our survey are aware of the unreliability of this type of evidence, it still constitutes a major source of error (52 percent of the cases included in our analysis involve some sort of eyewitness identification error). While it is evident that most of the inherent dangers of eyewitness testimony are related to the fallibility of the human memory, it is also clear that the criminal justice system cannot operate without eyewitness identification evidence. Therefore, some of the policy implications proposed in this chapter will adopt a prophylactic approach, thus minimizing the risks of error while at the same time preserving eyewitness identification evidence.

In eleven percent of the cases, where perjury by vengeful witnesses led to the conviction of innocent men, there was perhaps not much that either the police or the prosecution could do. In some of these cases, circumstantial evidence led to the admission of perjured evidence. In
these cases, even the jury was not aware of the unreliability of the evidence. Hence if some doubt arises with regard to questionable evidence, it is possible that group dynamics may create a coercive environment which in turn allows unreliable evidence to have an influential impact on the jury's deliberation. It is possible under such circumstances that the decision of a judge may lead to the conviction of an innocent man; however the possibility of acquitting a guilty person remains, too.

Our sample of 205 cases of erroneous conviction includes very few cases, (8.4 percent, or N=16) in which absolutely no malice can be attributed to criminal justice officials. These are the cases which are categorized as "pure errors." In those cases, despite the good faith of police, prosecutors, and witnesses and despite the fact that everybody was "correct," a "sardonic fate," as Radin (1964) defines it, was responsible for the wrongful conviction.

Negligence by criminal justice officials was found to be a contributing factor in 9.9 percent of the cases. Perjury by officials constituted an additional 4.2 percent of the errors. This latter type of "error" is, of course, one of the most frightening and threatening which could possibly occur. It is regrettable that the criminal justice process, even when well-managed, produces such errors. It is much more regrettable that there are criminal justice officials and employees who would intentionally help convict an innocent person.

Yet most of the errors stem from the broader environment of operation. Two major concepts have been related to this problem:
(1) the politicization of the criminal justice system and (2) "societal tolerance" (how many innocent men is the public ready to convict in return for a false sense of deterrence?). Conversely, how many guilty people, walking free on the street, is the public ready to accept in order to prevent even one innocent person from being convicted? We have set forth the proposition that as crime increases, society will be willing to tolerate more "false positives."

Although only 3 cases (1.6 percent) were strongly linked to the accused's prior criminal record, this type of error becomes critical when introduced either (1) to a witness (e.g., through a "mug shot" album) or, (2) to the jury during the process of the trial.

The 1.5 percent (N=3) of the cases categorized as forensic errors were old ones which occurred at the beginning of the century, and those errors were attributable to the underdeveloped status of the forensic sciences in those days. However, in light of a recent New York Times article, (70 percent of 240 crime laboratories operated by local, state, and federal government failed to perform even a simple blood test correctly), one questions the status of the forensic sciences even today. Information which was based on a three year LEAA study indicates that less than half the laboratories could match paint samples without errors! While these kinds of mistakes may make it possible for a clever killer to get away with murder, as indicated by authorities, it can also make it possible for an innocent person to be wrongfully convicted.
Exoneration

While the 205 cases known to us presumably do not represent the universe of wrongful convictions, they probably represent those people who were lucky enough to establish their innocence and to be exonerated either by a pardon granted to them or as a result of the confession of the actual culprit. While doubt may still exist in some people's minds even after exoneration, in more than 40 percent of our cases the actual culprit did eventually confess. In some other cases the media, which often played an important role in the conviction, also helped to establish the innocence of a man who was wrongly convicted. In at least one major case which gained nationwide attention, the Titus case in Seattle, a series of articles by one of the reporters led to the discovery of eighteen discrepancies during the criminal justice process, resulting in police officers being accused of fabricating evidence. This case, which culminated in Titus's exoneration, also brought the 1982 Pulitzer Prize for Investigative Journalism to the reporter. A close examination of the Bradley Cox case, the Jackson case, and the Mosley and Watts cases reveals that front page stories in Sunday newspapers can play a major role in uncovering such errors. Many newspapers, in their sensation-seeking approach, have perhaps exacerbated the problem of wrongful conviction by creating, or at least orchestrating, tremendous pressure on criminal justice authorities to "get their man." On the other hand, editorial calls for thorough investigations have in some cases subsequently led to a happy ending.
The Magnitude of the Phenomenon

Several studies, as indicated earlier, have attempted to estimate the magnitude of the phenomenon of wrongful conviction. Utilizing the estimations of criminal justice officials who responded to our questionnaire, as well as other data sources, we developed our own estimate. According to the U.S. Department of Justice (Sourcebook of Criminal Statistics—1980), the total number of people arrested and charged for index crimes in 1978 was 2,284,400. According to FBI information, 3 out of 4 were convicted. This suggests that even when using the most conservative criteria (0.5 percent error of all convictions), our criminal justice system may produce about 8,500 false positives each year! The huge volume of criminal cases each year in the U.S. assures that even a "low incidence" phenomenon such as wrongful conviction will generate a large number of cases.

Indeed, more than 56 percent of our respondents agreed that wrongful conviction occurs in their jurisdiction at a rate of less than 1 percent (Table 17). However, when asked to estimate the magnitude of the phenomenon in the U.S., 72 percent estimated a rate of less than 1 percent, while more than 20 percent indicated that wrongful conviction occurs at a rate of 1-5 percent. A close examination of the questionnaire responses suggests that a somewhat defensive approach was taken by some of the criminal justice officials in their responses. This might be understandable from the perspective of an official trying to underestimate the problems in his own agency. However it has created some reasonable doubt in my mind concerning the reliability of
such measures. This will remain unclear until some other, more accurate methods will be developed to estimate the magnitude of the phenomenon.

It is, however, evident from the data (Table 17) that the higher the stage of processing represented by a given respondent’s occupation (police, prosecutor, judge) the greater is his tendency to recognize the problem of wrongful conviction, and vice versa (see Fig. 1). Indeed, these findings display an almost direct linear relationship between the hierarchical stage in the system and the recognition of the problem.

Compensation

It has become clear from this study that in the majority of the cases where, as a result of wrongful conviction, innocent men have lost their families, opportunities to pursue a career, and have been humiliated, no compensation has been provided for such suffering. Rosen (1976) stated that "the United States has lagged far behind many nations in its failure to compensate the innocent victims of erroneous criminal accusations."

The following is but one of the personal stories reflecting insufficient compensation.

A Queens man who spent 24 years in New York prisons for a murder state officials have since conceded he did not commit was awarded $1 million in compensation yesterday by the State Court of Claims. But the man, Isidore Zimmerman, who came within hours in 1939 of being executed, said he was "very unhappy" that the judge, Joseph Modugno, rejected his claim for $10 million.
'I should have gotten much more because what I sacrificed can never be replaced' said Mr. Zimerman, a 66 year-old retired doorman . . . In 1937 Mr. Zimerman, then 20, was one of seven young men charged with taking part in the robbery of a Lower East Side restaurant during which a police officer was killed. Convicted of first degree murder, he spent nine months on death row. Two hours before he was scheduled to be executed Gov. Herbert H. Lehman commuted the sentence to life in prison.

In 1962 the State Court of Appeals overturned his conviction on the grounds that a prosecutor in the office of Thomas E. Dewey, the Manhattan District Attorney, had deliberately used perjured testimony and had suppressed evidence that might have proved Mr. Zimerman's innocence (New York Times, May 31, 1983).

The underlying principles of compensation for the wrongfully convicted were addressed as early as 1938 when the Congress enacted a law "to grant relief to persons erroneously convicted in courts of the United States." However no compensation could be granted to the wrongly convicted at the state level. Only three states (California, Wisconsin, and Illinois) have enacted (as early as 1913) compensatory statutes (Borchard, 1941). Compensation for wrongs committed by the federal government, as well as the states, has become an important policy issue in the United States. This has often involved cases where the government was interfering with private rights or where property was damaged. Why this concept was not applied to cases of wrongful conviction is stated by Dean Wigmore:

Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which per se admits that our justice may err. But let us be realists. Let us confess that, of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding
compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable (in Borchard, 1941:207).

Currently, only four states provide for the award of damages as a result of wrongful conviction: California, Wisconsin, Illinois, and New York. In California and Wisconsin, a board may recommend to the legislature an award of compensation, which is not to exceed $10,000 in California and $5,000 in Wisconsin. Although a man may have been exonerated and proved innocent, he must meet the board's requirements, showing that he by himself neither negligently nor intentionally contributed to his conviction. In both Illinois and New York, the courts of claims have jurisdiction to hear suits for compensation for erroneous conviction (California Penal Code 4900-4906; Wisconsin Stat. 285.05; New York Court of Claim Act 9 (3-a); Illinois Rev. Stat. Ch. 37 439.8(c.).). In all other cases where a victim of wrongful conviction is planning to sue the state for wrongful imprisonment, an enabling bill must be passed. This occurred just recently in the State of Ohio, for example. In House Bill 123, Leonard O'Neil was authorized to file a claim against the State of Ohio for loss of education, employment, and general damages that allegedly resulted from 4 years of wrongful imprisonment (O'Neil v. Ohio, 1981). Another recent Ohio case involved William Jackson, who was wrongly convicted for two rapes and was imprisoned for five years. The State of Ohio, through its General Assembly, passed a special bill authorizing compensation for Jackson's wrongful imprisonment (House Bill 124). As this suggests, there is a
special need to establish a procedure to enable victims of wrongful conviction to collect compensation in an efficient and feasible way.

Policy Implications

It is not within the realm of possibility to prevent all wrongful convictions. A system of law that never caught an innocent person in its web would probably be so narrow that it would catch few of the guilty, as well. Some wrongful convictions are inevitable in any criminal justice system. In the investigation of this problem, we have sought primarily to determine the frequency and sources of error; however, we have also identified a number of policy recommendations which, if implemented, could reduce such miscarriages of justice significantly:

(1) Based on proved innocence, by a verdict of acquittal or an appeal, financial compensation should be granted to the victim of wrongful conviction. Compensation should be awarded through one of the following procedures:

(a) the trial judge or jury will be authorized to award compensation simultaneously with the exoneration;

(b) by a compensation board;

(c) through civil action in a court of claims.

Each state should award compensation through one of the means indicated, thus preventing the necessity for victims of wrongful conviction to seek passage of special bills of compensation.¹

(2) Eyewitness identification is an unreliable source of evidence under many circumstances. However, resolving the problem by
eliminating eyewitness testimony can lead to the acquittal of many guilty persons. We therefore suggest that:

(a) in cases where eyewitness identification is the sole evidence and there is no corroborating evidence, a jury or a judge should hear, in a special pretrial session, all information related to the issue and should decide the adequacy, validity, and reliability of the eyewitness identification;

(b) in each case where eyewitness identification is involved, the court should permit the use of expert witnesses and precise, cautionary instructions to juries.

(3) Law enforcement authorities should make special efforts to conduct an investigation of all eyewitnesses and victims as close as possible in time to the event in order to minimize the consequences of memory distortion.

(4) No identification procedure (pre-or-post indictment) should be conducted in the absence of the defendant's attorney.

(5) People at high-risk of being victimized by crime (bank-tellers, gas station attendants, etc.) should be educated to record their observations immediately after the event.

(6) New trials should be granted where reasonable concern about errors exists.

(7) Use of post-conviction appeals for justice by reason of innocence should be made.

(8) Use of post-conviction appeals on the basis of prejudicial error should be permitted.
In addition to the implementation of these policy recommendations, this research has identified a number of issues that need to be studied in the future. A replication of this study should be carried out, involving a nationwide sample of criminal justice agencies, in order to be able to generalize and come as close as possible to an accurate estimation of the problem. A survey of public attitudes concerning "societal tolerance" is necessary, as are in-depth case studies in order to assess the relationship and the impact of the public on the criminal justice system. Finally, cross-cultural replications of this study will contribute to a better understanding of the problem in a cultural context and environment. The investigation of the problem in countries with different criminal justice systems (without a jury, criminal justice official nominated, etc.) can lead to the isolation of unique components in each system that contribute to the problem of wrongful conviction, and thus to the elimination of these problems.

In conclusion, this study has demonstrated the relationship among psychological, social-structural, and organizational factors contributing to the phenomenon of wrongful conviction. Further study is required concerning "societal tolerance" of wrongful conviction, as well as the internal dynamics of criminal justice organizations before we can better understand how our criminal justice system can reach a point "beyond which even justice becomes unjust" (Sophocles, Electra).
1. Recommendations regarding compensating innocent people have been addressed by Rosen (1976).

2. Extensive recommendations regarding the use of eyewitness testimony in the criminal process have been presented in 1976 to the British parliament in a report by Lord Devlin (1976).
### Table 33

**Wrongful Convictions Known About by Judges**

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>22</td>
<td>40.0</td>
<td>47.8</td>
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<tr>
<td>1</td>
<td>6</td>
<td>10.9</td>
<td>13.0</td>
</tr>
<tr>
<td>2</td>
<td>7</td>
<td>12.7</td>
<td>15.2</td>
</tr>
<tr>
<td>3-5</td>
<td>5</td>
<td>9.1</td>
<td>10.9</td>
</tr>
<tr>
<td>6-10</td>
<td>2</td>
<td>3.6</td>
<td>4.3</td>
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<tr>
<td>11-20</td>
<td>3</td>
<td>5.5</td>
<td>6.5</td>
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<tr>
<td>21</td>
<td>1</td>
<td>1.8</td>
<td>2.2</td>
</tr>
<tr>
<td>Missing cases</td>
<td>9</td>
<td>16.4</td>
<td>——</td>
</tr>
</tbody>
</table>

N= 55 100.0 100.0
### TABLE 34

**WRONGFUL CONVICTIONS KNOWN ABOUT BY COUNTY PUBLIC DEFENDERS**

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
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</thead>
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</tr>
<tr>
<td>2</td>
<td>3</td>
<td>14.3</td>
<td>17.6</td>
</tr>
<tr>
<td>3-5</td>
<td>5</td>
<td>23.8</td>
<td>29.4</td>
</tr>
<tr>
<td>6-10</td>
<td>1</td>
<td>4.8</td>
<td>5.9</td>
</tr>
<tr>
<td>Missing cases</td>
<td>4</td>
<td>19.0</td>
<td>——</td>
</tr>
</tbody>
</table>

N = 21 100.0 100.0
TABLE 35
WRONGFUL CONVICTIONS KNOWN ABOUT BY COUNTY PROSECUTING ATTORNEYS

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
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</thead>
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<tr>
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<td>2</td>
<td>11</td>
<td>20.8</td>
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</tr>
<tr>
<td>3-5</td>
<td>8</td>
<td>15.1</td>
<td>16.0</td>
</tr>
<tr>
<td>6-10</td>
<td>5</td>
<td>9.4</td>
<td>10.0</td>
</tr>
<tr>
<td>Missing Cases</td>
<td>3</td>
<td>5.7</td>
<td>——</td>
</tr>
</tbody>
</table>

N = 53  100.0  100.0
### TABLE 36

**WRONGFUL CONVICTIONS KNOWN ABOUT BY STATE ATTORNEYS GENERAL**

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
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</thead>
<tbody>
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<td>48.0</td>
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<td>1</td>
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<td>17.1</td>
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<td>2</td>
<td>4</td>
<td>9.8</td>
<td>16.0</td>
</tr>
<tr>
<td>3-5</td>
<td>1</td>
<td>2.4</td>
<td>4.0</td>
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<tr>
<td>6+</td>
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<td>Missing Cases</td>
<td>16</td>
<td>39.0</td>
<td>——</td>
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</tbody>
</table>

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N= 41 100.0 100.0
### TABLE 37

WRONGFUL CONVICTIONS KNOWN ABOUT BY LAW ENFORCEMENT OFFICIALS

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>f</th>
<th>% (relative)</th>
<th>% (adjusted)</th>
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<td>2</td>
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<td>15.3</td>
<td>16.4</td>
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### Table 38

Wrongful Convictions in Respondent's Jurisdiction (Judges)

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<th>% (Relative)</th>
<th>% (Adjusted)</th>
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<td>1</td>
<td>2</td>
<td>3.6</td>
<td>4.1</td>
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<td>2</td>
<td>1</td>
<td>1.8</td>
<td>2.0</td>
</tr>
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<td>6</td>
<td>10.9</td>
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N= 55  100.0  100.0
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<td>14.3</td>
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<td>2</td>
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<td>% (adjusted)</td>
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<td>--------------</td>
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<td>7.5</td>
<td>8.0</td>
</tr>
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<td>2</td>
<td>3</td>
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</tr>
<tr>
<td>3</td>
<td>1</td>
<td>1.9</td>
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<td>Number of Cases</td>
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<td>% (relative)</td>
<td>% (adjusted)</td>
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<tr>
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<td>----</td>
<td>--------------</td>
<td>--------------</td>
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<td>12.2</td>
<td>16.7</td>
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<td>2</td>
<td>3</td>
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<td>% (adjusted)</td>
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<td>3.4</td>
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<td>3.4</td>
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</table>
APPENDIX B
Dear Attorney General:

We are writing to ask your assistance in a very important research study which we are conducting. This study focuses on a topic which has received very little attention in the past, especially from researchers. The topic of our investigation is "wrongful conviction," i.e., persons who are convicted of felonies and later are exonerated and cleared of the substantive allegation beyond doubt. We wish to emphasize that we are interested only in cases which fit this rigid definition. We are not including in our study any cases where persons allege that they have been wrongfully convicted, but only those who have been officially exonerated and their innocence established.

We have enclosed a brief questionnaire which is designed to collect valuable information from knowledgeable persons such as yourself whose position brings them into contact with a large number of criminal cases. We respectfully request your help in our efforts to collect information on this topic. Your responses will be treated in absolute confidence; our project is concerned with overall patterns of responses and no individual or his/her response will ever be identified. You will note that a code number is at the top of the first page of your questionnaire. This is only to allow us to know which questionnaires are missing, so that we can send a reminder later, where indicated. Once your questionnaire has been received, the code number will be cut off and destroyed, leaving no way of identifying individual respondents.

If you have any questions about the questionnaire, or the study in general, please contact either of us at any time. Our telephone number, between 8:00 a.m. and 5:00 p.m., is (614) 422-7468. When you have completed the questionnaire, simply enclose it in the separate self-addressed, stamped envelope and return it to us. If you would like a summary of our findings when our study is completed (Summer, 1983), please check the appropriate box on the last page of the questionnaire.
We thank you in advance for your valuable assistance in our efforts to better understand an important question concerning the administration of justice.

Sincerely,

C. Ronald Huff, Ph.D.
Director and Associate Professor

Arye Rattner, M.A.
Graduate Research Associate
Form A
1. How many years have you been in your current position? __________

2. How many years of experience do you have in positions involving the administration of justice? __________

3. How many cases of wrongful felony conviction, followed by exoneration beyond doubt, have you ever heard about (whether or not you were personally involved in the case)? __________

4. For how many cases of this type do you have firsthand information as a result of your position in the administration of justice? __________

5. How many cases of this type have occurred in the jurisdiction in which you presently work? __________

6a. How many cases of this type have occurred in your jurisdiction during 1981 or 1982? __________

6b. For these 1981-82 exonerations of wrongful felony convictions, please list the case citations:

6c. For these 1981-82 cases, what factors were involved in discovering and correcting these miscarriages of justice?

<table>
<thead>
<tr>
<th>Factor</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. confession of actual offender</td>
<td></td>
</tr>
<tr>
<td>b. additional investigation by police</td>
<td></td>
</tr>
<tr>
<td>c. additional investigation by prosecutor</td>
<td></td>
</tr>
<tr>
<td>d. additional investigation by public defender</td>
<td></td>
</tr>
<tr>
<td>e. appeals court discovery of substantive error</td>
<td></td>
</tr>
<tr>
<td>f. additional investigation by private attorney</td>
<td></td>
</tr>
</tbody>
</table>
7. How frequently do you think wrongful felony conviction occurs in your city/county/state?
   
a. never _________  
b. seldom _________  
c. often _________  
d. very often _________

8. I would estimate that wrongful felony conviction occurs in my city/county/state in about _____% of all felony convictions.
   
a. never  
b. less than 1%  
c. 1 - 5%  
d. 6 - 10%  
e. 11 - 15%  
f. 16 - 20%  
g. 21 - 25%  
h. more than 25%

9. How frequently do you think wrongful felony conviction occurs in the U.S. generally?
   
a. never _________  
b. seldom _________  
c. often _________  
d. very often _________

10. I would estimate that wrongful felony convictions occurs in the U.S. in about _____% of all felony conviction.
    
a. never  
b. less than 1%  
c. 1 - 5%  
d. 6 - 10%  
e. 11 - 15%  
f. 16 - 20%  
g. 21 - 25%  
h. more than 25%

11. Compared to the probability of wrongful felony conviction in the U.S. generally, the probability of wrongful felony conviction in my city/county/state is _________.
    
a. less than elsewhere  
b. about the same as elsewhere  
c. greater than elsewhere

12. Preliminary analyses of known cases suggest that there are four major categories of errors in cases of wrongful felony conviction. Based on your knowledge and experience, please rank-order these four categories (listed randomly) according to your estimate of the frequency of these errors (1 = most frequent, 4 = least frequent):
    
a. prosecutorial errors = _____  
b. judicial errors = _____  
c. police errors = _____  
d. witness errors = _____
13a. Within the category, "witness errors," please rank-order the following types of errors (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 4 = least frequent):

a. unintentionally false witness allegations = #
b. intentional eyewitness misidentification = #
c. intentionally false witness allegations = #
d. accidental eyewitness misidentification = #

13b. Are there any other types of witness error not listed above? If so, please list and indicate how you would rank these, compared with the four types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 4 types in 13a)</th>
</tr>
</thead>
</table>

14a. Within the category, "judicial errors," please rank-order the following types of error (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

a. technical errors in judicial decisions = 

b. judicial neglect of duty
   = 

c. judicial decisions affected by bias
   = #
14b. Are there any other types of judicial error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 14a)</th>
</tr>
</thead>
</table>

15a. Within the category, "police errors," please rank-order the following types of error (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

a. intentional manipulation of evidence = #_____
b. technical errors = #_____
c. inadequate investigation = #_____

15b. Are there any other types of police error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 15a)</th>
</tr>
</thead>
</table>
16a. Within the category, "prosecutorial errors," please rank-order the following types of errors (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

a. technical errors = 

b. intentional manipulation of evidence = 

c. inadequate investigation = 

16b. Are there any other types of prosecutorial error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 16a)</th>
</tr>
</thead>
</table>

17. Our study is also concerned with identifying potential policy implications and methods for improving the administration of justice. For each of the following components of the criminal justice process, please indicate your ideas and suggestions for reducing the probability of wrongful conviction. If you need additional space, please use the reverse side of this page and/or attach additional pages.

a. law enforcement
(Question 17 continued)

b. prosecution

c. judiciary
18. Would you like to receive a summary of the findings of this study when it has been completed?

Yes _____

No _____
1. How many years have you been in your current position? __________

2. How many years of experience do you have in positions involving the administration of justice? __________

3. How many cases of wrongful felony conviction, followed by exoneration beyond doubt, have you ever heard about (whether or not you were personally involved in the case)? __________

4. For how many cases of this type do you have firsthand information as a result of your position in the administration of justice? __________

5. How many cases of this type have occurred in the jurisdiction in which you presently work? __________

6a. How many cases of this type have occurred in your jurisdiction during 1981 or 1982? __________

6b. For these 1981–82 exonerations of wrongful felony convictions, please list the case citations:

6c. For these 1981–82 cases, what factors were involved in discovering and correcting these miscarriages of justice?

<table>
<thead>
<tr>
<th>Factor</th>
<th># cases involving each factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. confession of actual offender</td>
<td></td>
</tr>
<tr>
<td>b. additional investigation by police</td>
<td></td>
</tr>
<tr>
<td>c. additional investigation by prosecutor</td>
<td></td>
</tr>
<tr>
<td>d. additional investigation by public defender</td>
<td></td>
</tr>
<tr>
<td>e. appeals court discovery of substantive error</td>
<td></td>
</tr>
<tr>
<td>f. additional investigation by private attorney</td>
<td></td>
</tr>
</tbody>
</table>
7. How frequently do you think wrongful felony conviction occurs in your city/county/state?
   a. never ___________ c. often ___________
   b. seldom ___________ d. very often ___________

8. I would estimate that wrongful felony conviction occurs in my city/county/state in about _____% of all felony convictions.
   a. never e. 11 - 15%
   b. less than 1% f. 16 - 20%
   c. 1 - 5% g. 21 - 25%
   d. 6 - 10% h. more than 25%

9. How frequently do you think wrongful felony conviction occurs in the U.S. generally?
   a. never ___________ c. often ___________
   b. seldom ___________ d. very often ___________

10. I would estimate that wrongful felony convictions occur in the U.S. in about _____% of all felony convictions.
    a. never e. 11 - 15%
    b. less than 1% f. 16 - 20%
    c. 1 - 5% g. 21 - 25%
    d. 6 - 10% h. more than 25%

11. Compared to the probability of wrongful felony conviction in the U.S. generally, the probability of wrongful felony conviction in my city/county/state is ___________.
    a. less than elsewhere
    b. about the same as elsewhere
    c. greater than elsewhere

12. Preliminary analyses of known cases suggest that there are four major categories of errors in cases of wrongful felony conviction. Based on your knowledge and experience, please rank-order these four categories (listed randomly) according to your estimate of the frequency of these errors (1 = most frequent, 4 = least frequent):
    a. judicial errors = __
    b. police errors = __
    c. witness errors = __
    d. prosecutorial errors = __
13a. Within the category, "witness errors," please rank-order the following types of errors (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 4 = least frequent):

a. accidental eyewitness misidentification = #
b. intentional eyewitness misidentification = #
c. unintentionally false witness allegations = #
d. intentionally false witness allegations = #

13b. Are there any other types of witness error not listed above? If so, please list and indicate how you would rank these, compared with the four types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 4 types in 13a)</th>
</tr>
</thead>
</table>

14a. Within the category, "judicial errors," please rank-order the following types of error (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

a. judicial decisions affected by bias = #
b. judicial neglect of duty = #
c. technical errors in judicial decisions = #
14b. Are there any other types of judicial error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 14a)</th>
</tr>
</thead>
</table>

15a. Within the category, "police errors," please rank-order the following types of error (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

- inadequate investigation = 
- intentional manipulation of evidence = 
- technical errors = 

15b. Are there any other types of police error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 15a)</th>
</tr>
</thead>
</table>
16a. Within the category, "prosecutorial errors," please rank-order the following types of errors (listed randomly) according to your estimate of their frequency in cases of wrongful felony conviction (1 = most frequent, 3 = least frequent):

a. inadequate investigation = #

b. intentional manipulation of evidence = #

c. technical errors = #

16b. Are there any other types of prosecutorial error not listed above? If so, please list and indicate how you would rank these, compared with the three types above:

<table>
<thead>
<tr>
<th>Type of Error</th>
<th>Rank (compared with 3 types in 16a)</th>
</tr>
</thead>
</table>

17. Our study is also concerned with identifying potential policy implications and methods for improving the administration of justice. For each of the following components of the criminal justice process, please indicate your ideas and suggestions for reducing the probability of wrongful conviction. If you need additional space, please use the reverse side of this page and/or attach additional pages.

a. law enforcement
(Question 17 continued)

b. prosecution

c. judiciary
18. Would you like to receive a summary of the findings of this study when it has been completed?

Yes ______

No ______
A general view of The Criminal Justice System in Ohio

This chart seeks to present a simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from the pattern shown here. The different weights of line indicate the relative volumes of cases disposed of at various points in the system, but this is only suggestive since nationwide data of this sort exists. The Challenge of Crime in a Free Society, from "The President's Commission on Law Enforcement and Administration of Justice," 1967, pp. 6 & 9 (modified for Ohio by Anderson Publishing Company).

1. May continue until trial.
2. Administrative record of arrest. First step at which temporarily release on bail may be available.
4. Preliminary hearing of evidence against individual. Charge may be reduced. No further hearing for misdemeanors in some systems.
5. Charges filed by prosecutor on basis of information submitted by police or citizen, alternative to grand jury indictment; often used in felonies, almost always in misdemeanors.
6. Review whether evidence against defendant sufficient to justify trial. Some states have no grand jury system; others advise use it.
7. Appearance for plea; defendant admits guilt to judge or jury trial at judge's discretion. Often not at all in other cases.
8. Charges may be reduced at any time prior to trial to reduce for plea of guilty or for other reasons.
9. Plea of guilty if judge decides feasibility of further court action.
10. Written agreement, plea bargain, commuting, conditional plea, etc., for cases where additional handling not needed.
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