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USING PARROTS TO KILL MOCKINGBIRDS: YET ANOTHER RACIAL PROSECUTION AND WRONGFUL CONVICTION IN MAYCOMB

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I. INTRODUCTION

With the publication of Nelle Harper Lee's timeless classic *To Kill a Mockingbird*¹ in 1960, "the lyrical songbird of the title had strong competition as critics and readers worldwide sang the praises of the young Alabama author and her (first and only to date) remarkable novel."² Critics heralded *Mockingbird* as "the best first novel of the year" and "a first novel of . . . rare excellence."³ Several major book clubs, including the Literary Guild and Reader's Digest, selected it as their feature.⁴ Critics called Harper Lee a "fresh writer with something significant to say, South and North."⁵ The following year, Lee won the prestigious Pulitzer Prize for fiction;⁶ and, in 1962, a movie based on the novel received an Academy Award.⁷

Of all the praise Lee has received, she is most proud of

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

2. Southern Living Gallery, *Editor's Note to HARPER LEE, TO KILL A MOCKINGBIRD* 3 (Oxmoor House, Inc. 1982) (1960) (contains a summary of many of the earliest literary critiques of the novel).

3. *Id.* at 3.

4. *Id.* at 3.

5. *Id.* at 3.

6. *Id.* at 3.

7. *Id.* at 3.

Mockingbird's reception throughout the South.⁸ Readers could not resist attempts to identify every character in their own small towns from Alabama to Texas. And, even for readers outside the South, the book had a universality and authenticity that captivated them and made it an international bestseller.

The novel and the film were enormous commercial successes.⁹ Undoubtedly, the racial milieu of the 1950s and 1960s had much to do with their success. Racial bias and antagonism were then at the forefront of public consciousness and many Americans, Black and non-Black, could no longer reconcile national pronouncements of freedom and equality with apartheid in the United States.¹⁰

When Lee published *Mockingbird*, the codified and customary second-class citizenship of Blacks in the United States was under attack in education, voting, housing, employment, and public accommodations. Just the mention of school integration, interracial sex or marriage, or voting rights for Blacks caused a lynch-mob atmosphere, and in many American cities, including Birmingham, Selma, Montgomery, Tuscaloosa, Anniston, Jackson, Oxford, and Little Rock, White resistance to change was cruel and swift.¹¹

What is the reader to make of Lee's novel today, after three decades of additional civil rights legislation? Is the book simply a love story?¹² Or does Lee intend her readers to think about

8. *Id.* at 4.

9. Some reports state that *Mockingbird* has sold over 30 million copies. See Linda Grant, *In Search of Harper Lee*, THE INDEPENDENT, Dec. 15, 1991, at 36.

10. See generally THE EYES ON THE PRIZE CIVIL RIGHTS READER (Clayborne Carson et al. eds., 1991) [hereinafter EYES ON THE PRIZE] (containing documentary evidence of the civil rights struggle in the United States between 1954 and 1990). There is also a 14-part videocassette series that parallels EYES ON THE PRIZE.

11. Alabama was one of several Southern states that became the stage for the most decisive and shocking confrontations of the civil rights movement. When the national networks showed the world the face of racism, they showed the vicious attacks on Blacks at Kelly Ingram Park and the Edmund Pettus Bridge. The images of Jim Clark and Eugene "Bull" Connor and their baton-wielding policemen, police dogs tearing at the clothing of demonstrators, and the pummeling of American citizens with fire hoses and tear gas shocked the conscience of the nation. See EYES ON THE PRIZE, *supra* note 10, at 147-62, 204-27.

For an informative discussion of riots in Tuscaloosa in response to the enrollment of Autherine Lucy, and later, Vivian Malone and James Hood at the University of Alabama, see E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR 71-91, 213-37 (1993).

12. Lee described the book as a love story, pure and simple. Southern Living

how, if one is Black, one's race can negatively influence treatment within the criminal justice system? Does she defend the folks who control the dispensation of unequal justice? Whatever her intentions, in *Mockingbird* Lee writes about the paradigm racial prosecution in which a Black male is accused of raping a White female and an all-White jury convicts the defendant based on weak, circumstantial evidence or in the face of substantial contradictory evidence.

While Lee's prosecution is fictional, there has never been any shortage of similar prosecutions. One of the nation's most celebrated racial prosecutions occurred in 1931 in Scottsboro, Alabama.¹³ What had begun as a complaint by several White hobos who alleged they had been thrown from a train by several Blacks, escalated into allegations of rape by two White women also riding on the train. The women alleged that the nine Blacks, ages thirteen to twenty, had boarded the freight train in northeast Alabama, fought with and thrown several White hobos off the train, and then raped them.¹⁴

Some commentators have speculated that Harper Lee used the *Scottsboro Case* as a model for the trial in *Mockingbird*.¹⁵ The same form of hysteria and hatred directed at the Scottsboro

Gallery, *supra* note 2, at 3.

13. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979). The *Scottsboro Case* was a series of litigations that resulted in convictions and death sentences for eight of the nine defendants. *Id.* at 48. The United States Supreme Court reversed the initial convictions because the defendants had not had appointed counsel assigned well in advance of their trial. *Powell v. Alabama*, 287 U.S. 45 (1932). Later, the Court invalidated another conviction because Blacks had been systematically excluded from the jury. *Norris v. Alabama*, 294 U.S. 587 (1935). In a subsequent trial, defense lawyers presented persuasive testimony from several witnesses, including Ruby Bates, one of the alleged victims, who recanted earlier statements that a rape had occurred. CARTER, *supra*, at 204-34. Nonetheless, the jury of 12 White men deliberated for only five minutes before voting to convict. For the remaining 12 hours of deliberation, the jurors debated whether to impose a sentence of death or life imprisonment. CARTER, *supra*, at 239-40. They selected death by the electric chair. CARTER, *supra*, at 239. During several additional appeals, the Scottsboro Boys, as the defendants became known, spent a total of 104 years in prison for an alleged crime that probably never occurred. CARTER, *supra*, at 413.

14. For a concise discussion of the *Scottsboro Case*, see Dan T. Carter, *A Reasonable Doubt*, in 8 *RACE, LAW, & AMERICAN HISTORY 1700-1990*, at 16-27 (Paul Finkelman ed., 1992) (an 11-volume anthology of scholarly articles).

15. See, e.g., Claudia Johnson, *The Secret Courts of Men's Hearts: Code and Law in Harper Lee's To Kill a Mockingbird*, 19(2) *STUDIES IN AMERICAN FICTION* 129, 130 (1991).

defendants and their lawyers during that litigation appears in several parts of *Mockingbird*. However, there have been so many similar racial prosecutions, especially in the Southeast, that it seems unnecessary to attribute Lee's story to a specific case. It is more important to underscore that many such defendants never made it to court, but instead were summarily shot or lynched; and, if the defendant did receive a trial, it was conducted in the face of threats, intimidation, and mob violence.¹⁶ The racial animus that infected Lee's fictional prosecution lives beyond the novel and influences the kind of justice that is available to criminal defendants. Thus, *Mockingbird* rings familiar as an illustration of the injustice of White racism and how it corrupts access to criminal justice for Blacks.

One cannot read *Mockingbird* without contemplating how many innocent persons have been falsely convicted and condemned to die or sentenced to long prison terms because of racial animus by police, prosecutors, jurors, or judges. While racial animus is by no means the only type of misconduct that impedes judicial fairness, as Justice Anthony Kennedy has written, it "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."¹⁷ The wrongful conviction of Walter McMillian, formerly a pulpwood worker in Harper Lee's hometown of Monroeville, Alabama, is a recent illustration of how racial animus continues to infect criminal investigations, prosecutions, penalties, and appeals in places like Maycomb.¹⁸

The purpose of this Essay is to provoke discussion regarding the persistence of racial animus in the criminal justice system. A further purpose is to identify ways that we can ensure law enforcement officials, lawyers, judges, and jurors check racial animus at the courthouse door.

To help explain my concerns in writing this Essay, I offer

16. See WILLIAM B. HUIE, *WOLF WHISTLE AND OTHER STORIES* 8-16 (1959). For two collections of scholarly articles on lynching in the United States, see *RACIAL VIOLENCE IN THE UNITED STATES* (Allen O. Grimshaw ed., 1969) and *9 RACE, LAW, AND AMERICAN HISTORY 1700-1990* (Paul Finkelman ed., 1992).

17. *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077, 2087 (1991).

18. *McMillian v. State*, 570 So. 2d 1285 (Ala. Crim. App. 1990), *appeal denied*, 594 So. 2d 1253 (Ala. Crim. App. 1991), *remanded*, *Ex parte McMillian*, 594 So. 2d 1288 (Ala.), *McMillian v. State*, 594 So. 2d 1289 (Ala. Crim. App. 1992), *rev'd*, 616 So. 2d 933 (Ala. Crim. App. 1993). See *infra* part IV.

the following hypothetical:

Suppose that a White defendant is indicted for robbery and murder of an eighteen-year-old Black woman in one of the predominantly Black towns in Alabama. The crime is a capital offense in Alabama punishable by death. Suppose further that most of the police investigators, the prosecutor, all but one member of the jury, and the judge in the case are Black. And, suppose the prosecutor removed other potential White jurors from the jury venire by peremptory strikes. Finally, suppose that almost all of the prosecution witnesses are Black and that most of the defendant's alibi witnesses are relatives or long-time friends.¹⁹

Do you think the White defendant in this hypothetical would receive a fair trial, free of racial animus? I think for many readers the reaction would be one of presumptive unfairness. I believe many people are skeptical of the ability of Blacks, whether police officers, prosecutors, jurors, or judges, to act fairly towards a White defendant. Perhaps the skepticism derives from a fear that Blacks will use any opportunity presented to seek vengeance against Whites for past and continuing wrongs. Such skepticism and lack of trust that Blacks can set their passions aside would undoubtedly serve as a basis for challenging the trial's location, the racial composition of the jury, or the selection of a judge.

However, the above hypothetical would be a most rare occurrence in this country. There are very few jurisdictions in which Blacks control the criminal justice process. Yet this hypothetical is commonplace for Black defendants, and there is sparse discussion regarding the fairness of such White-dominated prosecutions. Why are we not openly skeptical of the ability of White police, prosecutors, jurors, and judges to act fairly to-

19. I designed this hypothetical after learning the facts of *McMillian's* case and after another reading of *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that the exclusion of Blacks from sitting on juries violated the Fourteenth Amendment). Justice Strong wrote that

[i]f in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.

Strauder, 100 U.S. at 308.

wards a Black defendant? Why do we presume Whites can be fair in situations that we presume Blacks could or would not? I do not intend these questions as rhetorical. Part of my hope is that we might lay bare the presence of racial animus and the reality of racial dominance in our criminal justice system.

It is misguided to believe that White folks can discard strongly held negative attitudes about Blacks when Whites act as police, jurors, lawyers, or judges in criminal cases with a Black criminal defendant. Additionally, I think Blacks hold substantial antipathy towards and mistrust of Whites, whether in the role of lawyer, juror, judge, or defendant. And because racial polarization is so significant in our society, our criminal justice system cannot operate evenhandedly unless neither Whites nor Blacks have principal control over criminal investigations, the decision to indict or prosecute, jury selection, instructions to the jury, sentencing, or the appellate process.²⁰

Once we admit racial animus into the courtroom, we abandon the presumption of innocence standard that is supposedly central to our jurisprudential traditions. As a result, our criminal justice system loses its integrity. To eliminate racial animus from our criminal justice system, we must first acknowledge its presence and prevalence. Then, we must design new rules and policies that eradicate it from the criminal justice system, root and branch. We need rules that severely punish any agent of the criminal justice system who engages in conduct that taints prosecutions with racial animus. We currently do not take seriously enough the type of injustice portrayed in *Mockingbird* and illustrated alarmingly by wrongful convictions similar to Walter McMillian's.

In Part Two of this Essay, I recall and react to *Mockingbird*.²¹ I explain why the book is at once exhilarating and disquieting. I also explore how conflicting conceptions of law are applied depending on the race of the accused and the race or

20. For a persuasive contemporary argument that racial prejudice still influences jury deliberations, see Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985) (describing the persistent influence of race in determinations of guilt through the examination of observations and statistics from real criminal trials, results of mock jury experiments, and conclusions from general research on racial prejudice).

21. See *infra* notes 28-86 and accompanying text.

class of the alleged victim. In cases where the defendant is Black and the alleged victim is White, a positivistic view of the law is employed by police, prosecutors, judges, and jurors. Under this view, the law is fixed and binds agents of the criminal justice system to a certain course of conduct. However, when the accused is White and the victim is non-White or poor, a natural law theory is applied in a manner that gives police, prosecutors, judges, and jurors recourse to an independent, higher authority instead of a fixed set of rules. This natural law framework enables agents of the criminal justice system to exercise discretion that usually is unavailable under a positivistic view of law.²² These conceptual phenomena permeate Maycomb as crafted by Lee and the large and small cities and towns that we call home.

In Part Three, I comment on the work of others who have documented the hundreds of cases in which innocent persons have been falsely or wrongfully accused, convicted, or condemned for crimes they did not commit.²³ I also briefly review the Supreme Court's erratic and confusing statements concerning racial discrimination within the criminal justice system that culminate in the Court's five to four decision in *McCleskey v. Kemp*.²⁴

In Part Four, I summarize the events which caused Walter McMillian to spend six years of his life on Alabama's Death Row for a crime that prosecutors now say he did not commit.²⁵ I argue that McMillian was convicted because of police and prosecutorial misconduct and because he is Black and the victim was White. But for the work of the Alabama Capital Representation Resource Center, McMillian probably would have been executed.²⁶

In Part Five, I propose that additional laws be enacted to provide greater legal and investigative resources to protect the criminally accused, to punish police and prosecutorial miscon-

22. See *infra* notes 83-86 and accompanying text.

23. See *infra* notes 87-112 and accompanying text.

24. 481 U.S. 279 (1987). See *infra* notes 113-65 and accompanying text.

25. See *infra* notes 166-350 and accompanying text.

26. Since 1988, the Alabama Capital Representation Resource Center, which is located in Montgomery, Alabama, has provided indigent postconviction capital defendants with appellate legal assistance. It was instrumental in reversing Walter McMillian's conviction and death sentence.

duct, and to limit perjury; I also propose limiting the discretion of jurors and judges in capital cases.²⁷

II. *TO KILL A MOCKINGBIRD*

Although Lee has disclaimed that her novel is autobiographical, it is quite clear that she had firsthand knowledge of her subject. The principal characters in *Mockingbird* resemble those persons in Lee's family and community who likely had the most significant influence on her. Additionally, Lee writes from the perspective of an insider. She knows about small Southern towns and what life was and is like there for children and adults. Moreover, a close reading of the book reveals that Lee is quite familiar with law, not just as a set of rules but, as James Boyd White has written, as a complex language or culture.²⁸ Lee's training in law at the University of Alabama, her adoration of her father and his profession, and her research for the book all contribute to the book's effectiveness as literature about the peculiarities of the American criminal justice system, especially when race is a factor.²⁹

Even today, *Mockingbird* remains one of the best and most important books I have ever read. What gives this short book its special status is Lee's exceptional ability to write about race, gender, and class conflicts with a realism that makes the characters and stories seem familiar. Maycomb County could have been in Florida, Georgia, the Carolinas, Tennessee, Mississippi, Arkansas, Texas, or a number of other states. It could be in many states today.

In *Mockingbird*, Lee explores several themes: how children learn racial bias or racial tolerance through family and environment, how boys and girls are socialized differently, how men frequently (but not always) consciously and unconsciously dominate women, the customary and pervasive second-class citizenship of Blacks, the intersectionality of race, class, and gender

27. See *infra* notes 351-63 and accompanying text.

28. See JAMES B. WHITE, *THE LEGAL IMAGINATION* xxxi (1973) (discussing "the professional language of law").

29. Lee was enrolled at the University of Alabama between 1945 and 1949. She left before completing her law degree to become a writer. See *Southern Living Gallery*, *supra* note 2, at 10-12.

hierarchies, and how racial attitudes influence the meaning and application of legal canons such as the presumption that a defendant is innocent until proven guilty beyond a reasonable doubt through judicial proceedings.³⁰

For Lee, the legal system is not just rules or canons, it is also the people who control and implement them. In *Mockingbird* and throughout much of this country, the people who control and implement rules of criminal justice are White. Thus, the book is provocative because it challenges the reader to think about how, within a White-controlled criminal justice system, one's race can influence determinations of guilt or innocence, the penalty sought by the prosecution, or the sentence imposed by a jury or judge.³¹

Mockingbird reflects the prevailing political, social, and economic relationships in the United States. Maycomb resembles our contemporary communities: it is segregated, White men have most of the wealth and influence, women disproportionately maintain the domestic sphere, and an unbelievable percentage of Black men are under the control of the criminal justice system.³² Therefore, its pages are teeming with moral symbolism and contradiction, both sharpened by the ubiquity of racial animus and caste. After yet another reading, this author is left wondering whether equal justice or fair play in the criminal justice system is marked "for [a few] Whites only."

Lee's novel also illustrates the intersectionality of race, gender, and class subordination not only significant during the Depression, but also present today.³³ Thus, one has the impres-

30. Every criminal defendant who pleads not guilty supposedly enters our courts with a presumption of innocence. The Due Process Clause of the Fifth and Fourteenth Amendments "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

31. Professor Johnson discusses not only the disproportionate conviction of Blacks that occurs in a majority White community, but also the disproportionate acquittal of Whites in cases in which Blacks are convicted. See Johnson, *supra* note 20, at 1616-18.

32. In 1989, 25% of all Black males between the ages of 20 and 29 were in prison or under the supervision of the criminal justice system. Matt O'Conner, 29% of Young Black Men Jailed in '89, *Study Says*, CHI. TRIB., Sept. 23, 1990, at A1.

33. See, e.g., KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 143-72, 248-50 (1986) (describing the exclusion of women from the legal profession and legal education and the status of women in the

sion from Lee that in Maycomb, no matter how prominent a woman was, she was still subordinate to men, and no matter how prosperous a Black was, he or she was still in some ways subordinate to the poorest Whites.

Mockingbird is a collection of stories set during the early 1930s and narrated by Jean Louise (Scout) Finch, the six-to-nine-year-old rough, self-styled tomboy who reflects on the events leading up to a violent attack on her and her brother, Jeremy Atticus (Jem) Finch, by the hateful and vindictive Robert E. Lee (Bob) Ewell, which left Jem's arm permanently disfigured. Scout is a rip-roaring storyteller. Her recollections are exhilarating and transport the reader through a broad spectrum of emotions. Few books have made me laugh so heartily and then feel so despondent.

Refreshingly, the characteristics exhibited by Scout are not at all like those we are conditioned to expect in a girl her age growing up in rural Alabama. She is assertive, inquisitive, aggressive, and knows how to fight. She has confidence and self-esteem. She does not allow gender stereotyping to prevent her from thinking for herself and questioning authority, including male authority. Scout is as dynamic and interesting as the stories she relates.

One story is about Scout's family: her father, her brother, the woman who raises her and Jem, and her best childhood friend. Atticus Finch, a member of the state legislature and a local attorney, is Scout's widower father (her mother had died of a sudden heart attack when she was two).³⁴

As a father, Atticus is satisfactory and attentive.³⁵ A part of Scout's story is about how he instilled important values in his children. So, after Scout's traumatic first day at school leaves her disliking her teacher and not wanting to return, Atticus explains that she has to return and that she can never really understand a person until she considers things from the person's point of view by climbing into the person's skin and walking

profession today); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139, 139-52 (arguing that contemporary discussions of antidiscrimination policy treat race and gender as mutually exclusive).

34. LEE, *supra* note 1, at 10-12.

35. LEE, *supra* note 1, at 12.

around in it.³⁶

Calpurnia (Cal) is the Black domestic who is the surrogate mother to Scout and Jem. It is clear that she is an essential part of the Finch home and that it could not operate a single day without her.³⁷ Cal oversees all the household operations while Atticus is working, and she provides Scout and Jem a window into the lives of Negroes who live in a settlement on the outside of town near the town dump. On limited occasions, Cal shows Scout and Jem what it is like to be Black in Maycomb. They acknowledge not only the differences in Cal's church,³⁸ for example, but also how Cal speaks another form of English when she talks to some Blacks.³⁹ Scout and Jem also learn that some Blacks prefer to maintain separate institutions and to exclude Whites; they learn that racial exclusion policies hurt the feelings of those who are excluded.⁴⁰

Finally, there is Charles Baker (Dill) Harris, Scout's diminutive best friend from Meridian who spends his summers in Maycomb. Dill is puzzling because he does not have a father, but his father is not dead.⁴¹ Through Dill, Scout and Jem have a window into the world of a peer from a broken home who is shuffled among relatives during summer vacations. Scout and Dill are also sweethearts, and his letters to Scout assure her that once he is old enough and has the money, he will return to Maycomb for her.⁴²

One Christmas, Scout and Jem receive pellet guns as gifts. With their presents, they receive explicit instructions that Atticus would prefer them to shoot tin cans, but he is sure they will instead shoot birds. Therefore, he tells them they can shoot all the bluejays they can hit, but to remember it is a sin to kill a mockingbird because mockingbirds do nothing but make music.⁴³

The most significant story regards the trial and conviction of

36. LEE, *supra* note 1, at 36.

37. LEE, *supra* note 1, at 31.

38. LEE, *supra* note 1, at 134 (Scout and Jem are shocked when the congregation begins "linin'" the hymns).

39. LEE, *supra* note 1, at 129.

40. LEE, *supra* note 1, at 128-29.

41. LEE, *supra* note 1, at 13-14.

42. LEE, *supra* note 1, at 126.

43. LEE, *supra* note 1, at 98.

Tom Robinson, a Black man who is accused of beating and raping Mayella Ewell, a White woman. Scout tells us that while the local judge would usually assign such a case to a new, inexperienced member of the bar, in this case the judge assigned the case to Atticus.⁴⁴ Implicit in this break from custom is the suggestion that the judge had an agenda, presumably to help Tom. The reader is left wondering why so significant a case, in which a person's life is at stake, would customarily be assigned to inexperienced counsel. Again, Lee demonstrates that she knows of what she writes. In many of the cases regarding wrongful convictions discussed below, one of the common features is inexperienced defense counsel who are paid very little compensation for their work.⁴⁵

Like the mockingbirds they are directed not to disturb, Scout, Jem, and Dill are innocent children spending their summers at the edge of permissible play when Atticus's work causes some of their neighbors to direct their ire first at him and then at Scout and Jem. While Scout and Jem do not appear to share the racial bigotry of many of the adults, it is so ubiquitous that they do not emerge unaffected. It is left to Atticus to explain to them why their sanguine existence in Maycomb has been shattered.

Atticus explains to Scout and Jem that simply by the nature of the work, every lawyer gets at least one case in his or her lifetime that affects him personally.⁴⁶ Atticus knows that people in Maycomb will not be sympathetic to Tom or to him and that Scout and Jem will see the evil ways of their neighbors. He seems certain that he cannot win the case.⁴⁷ Atticus admonishes his children that no matter how bitter things get, their neighbors are still their friends and Maycomb is still their home.⁴⁸

Shortly after his appointment, adults and other children begin to criticize Atticus to Scout and Jem for their father's

44. LEE, *supra* note 1, at 174.

45. For a full, incisive discussion of the significant problems that arise in part because of inexperienced capital defense counsel, see Ruth E. Friedman and Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992).

46. LEE, *supra* note 1, at 83.

47. LEE, *supra* note 1, at 96.

48. LEE, *supra* note 1, at 84.

efforts to defend Tom.⁴⁹ To defend a Black man against the word of Whites was heresy. Even worse, "Atticus aim[ed] to defend him."⁵⁰ Scout and Jem have to endure slurs and taunts from their neighbors who say Atticus lawed for nig—rs and tr—sh.⁵¹ They also encounter a lynch mob prepared to supply its own form of justice for Tom with a bullet or at the end of a rope. Only the shame evoked by the presence of Scout and Jem dissuades the mob from its goal.⁵²

Despite the threat on Tom's life, the trial begins without a change of venue.⁵³ Although there is no medical evidence that a rape occurred,⁵⁴ several people testify about the alleged beating and alleged rape. Heck Tate, the sheriff, testifies that Bob Ewell summoned him to his house regarding the beating and rape of his daughter.⁵⁵ The sheriff reports that when he arrived, he found Mayella had been severely beaten; Mayella accuses Tom not just of the beating, but also of rape.⁵⁶ Tate also says that Mayella had a bruised right eye and bruises completely around her neck.⁵⁷ The nature of her injuries suggested to even the uninitiated that her attacker had use of both hands and led mostly with his left hand. No doctor is called to confirm that a rape or even sexual intercourse had occurred.⁵⁸ Instead, Sheriff Tate accepts the story from Mayella and goes to Tom's house and arrests him.⁵⁹

Bob Ewell and Mayella Ewell perjure themselves when they testify that Tom Robinson had beaten and raped her.⁶⁰ On cross-examination, Atticus effectively challenges the credibility of their testimony by implying that Bob Ewell had beaten Mayella after observing her holding Tom around the waist.⁶¹

49. LEE, *supra* note 1, at 82.

50. LEE, *supra* note 1, at 174.

51. LEE, *supra* note 1, at 112.

52. LEE, *supra* note 1, at 161-65.

53. LEE, *supra* note 1, at 169-77.

54. LEE, *supra* note 1, at 178.

55. LEE, *supra* note 1, at 177-80.

56. LEE, *supra* note 1, at 178.

57. LEE, *supra* note 1, at 179.

58. LEE, *supra* note 1, at 178-79.

59. LEE, *supra* note 1, at 177-80.

60. LEE, *supra* note 1, at 181-200.

61. LEE, *supra* note 1, at 186-89, 193-200.

The linchpin of Atticus's cross-examination of Mayella is the revelation to everyone in the courtroom that Tom had lost the use of his left hand in a cotton gin accident as a child and that Bob uses his left hand when writing his signature.⁶² Therefore, it seems impossible for Tom to have caused Mayella's injuries.

Tom Robinson testifies that Mayella invited him into the Ewell house under the ruse of needing help with a chore and that once inside, she told him she had never kissed a man before so she might as well kiss a nig—r.⁶³ Tom accuses Mayella of tempting him, kissing him, and requesting that he do the same to her.⁶⁴ Tom testifies that when he tried to leave, Mayella blocked the door, and he did not dare try to move her for fear of harming her.⁶⁵ It was about then that Tom saw Bob Ewell and heard him exclaim "you god—mn whore, I'll kill ya."⁶⁶ Tom says he fled because he was scared.⁶⁷

On cross-examination, Tom testifies that he had helped Mayella with chores in the past because he felt sorry for her.⁶⁸ This testimony proved too honest a response for the jury. For them it was impermissible for a Black man to show sympathy or speak of it regarding a White woman. Thus, Tom Robinson's genuine sympathy and honesty were his undoing.⁶⁹

The jury must decide if Tom violated Mayella or if Mayella breached Maycomb's unwritten but strict code against interracial liaisons. In his closing statement to the jury, Atticus summarizes the testimony and questions the credibility of the prosecution's witnesses.⁷⁰ But he seems to understand that all he has is the word of a Black man against the word of two Whites. Atticus knows that the jury cannot possibly be expected to take Tom Robinson's word against the Ewells', and he understands that the "evil assumption[s] . . . that *all* Negroes lie, that *all* Negroes are basically immoral beings, [and] that *all* Negro men are not to be trusted around [White] women," would impact

62. LEE, *supra* note 1, at 197-98.

63. LEE, *supra* note 1, at 206.

64. LEE, *supra* note 1, at 206.

65. LEE, *supra* note 1, at 206.

66. LEE, *supra* note 1, at 206.

67. LEE, *supra* note 1, at 210.

68. LEE, *supra* note 1, at 209, 216-17.

69. LEE, *supra* note 1, at 209.

70. LEE, *supra* note 1, at 214-18.

the jury's deliberations.⁷¹ Here, Lee illustrates brilliantly how racial animus and stereotypes influence credibility determinations. Thus, if there is some consensus among Whites that Black people frequently lie, it is not too surprising that an all-White jury might disregard the sworn testimony of Black defense witnesses. This concern is most acute in places where racial stereotyping is prevalent, and in most of the United States and for most of its history, racial stereotyping has been commonplace.⁷² In the end, Atticus has only one basis for a final appeal to the jury. He turns to Thomas Jefferson and the equality principle.⁷³ He asserts that

there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.⁷⁴

Unfortunately, real and fictional people have a way of carrying their resentments right into the jury box.⁷⁵ The most stirring closing statements about equality do not make equal justice a reality. If White folks can carry their resentments against Black folks into the courtroom, then the presumption of innocence within our criminal justice system is an empty idea.

Lee captures this contradiction poignantly. Atticus tells

71. LEE, *supra* note 1, at 216-17.

72. An important body of writing has emerged regarding the Black image in the White mind. Black slavery in the United States was a declaration of war against Blacks, whether slave or free. It was the ultimate assertion of White supremacy and Black inferiority. Although slavery ended officially almost 13 decades ago, an ideology of racial supremacy persists and for too many Whites there remains an emotional antipathy to the idea of racial equality. Thus, even today in the minds of many, interracial sex or marriage is taboo; Blacks are intellectually inferior and unprepared to attend the same schools as Whites; and Blacks are docile, lazy, or depraved, either because of their nature or because of their previous condition of servitude. See, e.g., GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 3-5 (1971); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1818* (1968). Both books assess the emergence of the ideology of White supremacy and Black inferiority in the United States.

73. LEE, *supra* note 1, at 217.

74. LEE, *supra* note 1, at 218.

75. LEE, *supra* note 1, at 233.

Scout well before the trial begins that he will not win.⁷⁶ He also tells his brother, Jack, that the jury cannot possibly be expected to take Tom's word against the Ewells'.⁷⁷ Thus, Atticus does not appear surprised when Tom is convicted and sent to prison pending an appeal. In "the secret courts of men's hearts,"⁷⁸ Atticus had no case; Tom was a dead man the minute Mayella Ewell pointed an accusing finger at him.

Atticus tries to reassure Tom that he has a good chance of reversal on appeal. But Tom loses hope. One day during the prison's exercise period, Tom attempts to escape and he is shot seventeen times after a warning.⁷⁹ With Tom's death, the mockingbird-sin cycle is complete: Tom had been falsely accused, wrongfully convicted, and killed.

The book concludes with Bob Ewell's attack on Jem and Scout. Boo Radley comes to their rescue, but not before Jem's arm has been broken and he is unconscious.⁸⁰ In this final struggle, Boo either stabs Ewell or, as the sheriff believes, Ewell falls on his own knife.

Interestingly, no trial follows Ewell's death. The sheriff decides that it would be unthinkable to drag Boo into the lime-light for doing his utmost to prevent a crime. That would be a sin. Thus, the sheriff declares that Ewell accidentally fell on his knife.⁸¹ Unfortunately, no such discretion was exercised on behalf of Tom Robinson. Although Atticus protests slightly, he agrees to follow the story set forth by the sheriff.⁸²

The contrast in the manner in which the sheriff handles the alleged rape versus his manner in handling Ewell's death is instructive. After his perfunctory investigation of each event, the sheriff takes completely different actions. He arrests Tom Robinson based on the flimsiest circumstantial evidence; Tom has to endure an all-White jury's evaluation of his innocence. However, Tate exercises independent discretion to close the Ewell-Radley encounter without the usual formality of an investigation or a

76. LEE, *supra* note 1, at 84.

77. LEE, *supra* note 1, at 96.

78. LEE, *supra* note 1, at 254.

79. LEE, *supra* note 1, at 248.

80. LEE, *supra* note 1, at 276-79.

81. LEE, *supra* note 1, at 290.

82. LEE, *supra* note 1, at 290-91.

grand jury hearing. He does not even ask Boo what happened.

One can surmise that Tate's different conduct is more than simply random. I think it can be explained in light of a positivistic versus a natural law theory of criminal justice.⁸³ Under the former, the sheriff, upon receiving the complaint by the Ewells, must proceed to Tom Robinson's home and arrest him. Even if the sheriff has doubts about the Ewells' claims, his duty is to enforce the law. From there, the state treats Tom Robinson as an accused, and the machinery of the criminal justice system is set in motion. So long as Robinson has the benefit of some formal process, Tate and the other agents of the system have done justice. However, under the natural law view, the sheriff exercises near-complete discretion to decide that Bob Ewell had accidentally killed himself by falling on his knife. Justice means something different for Boo. The sheriff says to Atticus, "There's a Black boy dead for no reason, and the man responsible for it's dead. Let the dead bury the dead this time, Mr. Finch."⁸⁴

I wonder if the sheriff would have been so sympathetic if Boo were Black. Said differently, it is unclear why Tom does not evoke the same kind of sympathy from the sheriff that Boo evokes. Justice is served in Boo's case not through a public hearing, but with an agreement that "it'd be sort of like shootin' a mockingbird" to say anything other than that Ewell fell on his knife.⁸⁵ There is something grossly unsatisfying about the lack of sympathy and institutional discretion available for defendants such as Tom Robinson. Tom Robinson was expendable; he was just a Black boy. Thus, even if Boo Radley was acting to protect Scout and Jem, it seems an enormous challenge for people like

83. I am referring to the classic dilemma discussed rigorously by Robert Cover in *Justice Accused*. ROBERT COVER, *JUSTICE ACCUSED* 8-30 (1975). Cover describes how eighteenth and nineteenth century jurists wrestled with their sense of duty and role versus their sense of justice and higher law. Those jurists questioned slavery but enforced the slave laws until they were abolished in 1865. In his introduction, Cover quotes Melville's *Billy Budd* to portray the conflict patterns facing judges: "For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it." *Id.* at 3 (quoting HERMAN MELVILLE, *BILLY BUDD* 110-11 (Univ. of Chic. Press 1962) (1891)).

84. LEE, *supra* note 1, at 290.

85. LEE, *supra* note 1, at 291.

Tate to see people like Tom Robinson as innocent mockingbirds.

Mockingbird, then, is a literary masterpiece that gives voice to the obscure boundary between fictional and real accounts relating to the illusion of racial equality within our criminal justice system, and it poses significant contemporary questions regarding the elusive quest to achieve for everyone the words inscribed across the front of the United States Supreme Court Building: EQUAL JUSTICE UNDER LAW. Is equal justice a charade? Can a presumption of innocence have any meaning for a Black defendant like Tom Robinson in a criminal justice system that has for so long permitted racial animus and double standards against Blacks to infect proceedings? Can it mean anything in a social structure which makes the humanity and culture of Blacks invisible and by which Blacks become caricatures of the most prevalent racial stereotypes?

Too many Black criminal defendants are portrayed as depraved or beast-like brutes with insatiable appetites for White women.⁸⁶ They are presumed guilty and have few resources at their disposal to prove otherwise. And sometimes, even with the best legal assistance, they are convicted because police or prosecutors withhold exculpatory or impeachment information. Put simply, there is so much hate, mistrust, and scapegoating between Blacks and Whites that there are few, if any, effective barriers to the influence of racial animus in the criminal justice system. One result is numerous wrongful convictions, frequently of poor, Black men who cannot afford to hire competent lawyers.

III. RACIAL ANIMUS IN THE CRIMINAL JUSTICE SYSTEM

A. *Wrongful Convictions in the United States*

Imagine you are dreaming:

You hear the news of a horrible crime that shocks and upsets your entire community. During a spring afternoon, a four-year-old child disappears from a local shopping mall. The police and concerned citizens (including yourself) conduct an extensive

86. FREDRICKSON, *supra* note 72, at 275-82.

search for the child. Several hours later, searchers find the child's mutilated body in dense underbrush a few minutes walk from the shopping mall. An autopsy reveals that the child had been sexually abused before he died of suffocation.

The local police go into action and round up over 100 possible suspects, including "every known pervert in town." Suspicion then falls on you. An anonymous tip informed the police that you had been seen at the mall on the fateful day, in the company of a small child resembling the deceased. You eventually confirm that you had been at the mall, and the police request that you submit to a polygraph test. The test indicates that you are not being deceptive and you are released.

The police continue to follow tips and to investigate your background. They discover that you were sexually abused as a child. They also hear a rumor that you had once sexually abused your three-year-old nephew. The police ask you to submit to other tests, including hypnosis.

You oblige the police without at any point consulting a lawyer. You are released, only to be picked up again two months later and questioned for almost fifteen hours at police headquarters. During this final interrogation, you say to the police that you did not kill the child, but you will say you did if they want you to. The police then encourage you to embellish your "confession."

The police declare that the murder has been solved and you are arrested and charged with first degree murder. There is a brief trial. The jury deliberates for seven hours and finds you guilty of second degree murder because jurors did not think your killing was premeditated. You are sentenced to life imprisonment. Pending your appeal, you are repeatedly sexually abused by groups of inmates. The state supreme court denies your appeal.

Three years pass before your community is again shocked by the news of another child's abduction, which occurs very near the location of the abduction for which you were convicted. A day later the police find the naked body of the child. She had been raped and murdered. This time the police find physical evidence on a suspect that matches evidence at the crime scene. The suspect has a thirty-year criminal history involving murder, rape, sodomy, and assault.

Before trial begins in the second case, an FBI officer who had worked on your case meets with the suspect. The suspect confesses to numerous crimes, including the one for which you were convicted. The FBI agent then recalls a conversation with a witness during the investigation of your case who had reported seeing the child you allegedly murdered with an older man. The agent looks across the table and realizes that he is sitting with a person who fits the prior witness's description.

After over forty months, you are released from prison with apologies. You try to re-enter your community and relationships, but you cannot. You seek compensation for false imprisonment, but your claim is dismissed. You wake up in a cold sweat. It was just a nightmare.

Unfortunately, for Melvin Reynolds, the above scenario did occur. He was wrongfully convicted of the 1978 murder of four-year-old Eric Christgen. Luckily for Reynolds, but tragically for eleven-year-old Michelle Steele, the real killer, Charles Hatcher, struck again several years later and implicated himself in the Christgen murder.⁸⁷ Reynolds was then released.

Cases like Reynolds's occur more frequently than we might think. In 1992, Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam collaborated to publish a seminal book about wrongful convictions in capital cases during the twentieth century. *In Spite of Innocence*⁸⁸ is the fruit of some thirty years of intermittent research on wrongful convictions.

In Spite of Innocence begins by recounting the 1989 murder in Boston of Carole Stuart, who at the time was pregnant with her first child.⁸⁹ It was late October when Charles Stuart,

87. See TERRY GANEY, *ST. JOSEPH'S CHILDREN: A TRUE STORY OF TERROR AND JUSTICE* (1989). Charles Hatcher ultimately confessed to the murder, but not before he raped, sodomized, or murdered others throughout the Midwest. *Id.* at 233-37.

88. MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992). See also *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) [hereinafter *Innocence and the Death Penalty*] (staff report). Other hearings were held before the Senate Judiciary Committee on April 1, 1993. In 1993, four condemned men from Maryland, Texas, Alabama, and Oklahoma had their convictions reversed and were released from prison. See *id.* at 7-8.

89. RADELET ET AL., *supra* note 88, at 3-5. All information on the Stuart murder is taken from *In Spite of Innocence*.

Carole's husband, telephoned the police and exclaimed, "My wife's been shot. I've been shot!"⁹⁰ Carole had been shot at point blank range in the face. Charles had been shot in the stomach. Carole and the baby died. Reports of the crime were headline news throughout the country. There was substantial pressure on the local police to solve the crime.

Charles Stuart, recovering from his injuries, described the gunman as six feet tall, Black, and about thirty years old (there is no telling how many Black males fit Stuart's description). The city's police commissioner reported to the media that Stuart's description and fingerprint evidence from the vehicle were yielding good leads. Police search efforts were concentrated around the hospital outside of which the shooting had occurred, especially the public housing projects in the Mission Hill district, home mainly to Blacks and minorities.

Two weeks after the Stuart murders, police arrested Willie Bennett on a traffic offense. He had a previous criminal record, was thirty-nine years old, and Black. Police showed a picture of Bennett to Charles Stuart. They also arranged a line-up with Bennett in it for Stuart to view. Stuart said Bennett looked most like his wife's killer. The police had their guy, and the nation turned to other stories.

One week into the new year, the case suddenly turned even more bizarre. Charles Stuart jumped to his death from a local bridge just after police were informed that Stuart had killed his pregnant wife. The motive for the murder was apparently insurance. Bennett's ordeal ended before any trial. But it seemed routine for the police to attribute the murder to Bennett without any corroborative evidence and only a weak, tainted line-up identification.

The Willie Bennett case is at one end of the continuum of wrongful conviction cases. Although the police were prepared to attribute the crime to Bennett and had made it easier for Charles Stuart to identify Bennett as the murderer, Stuart's brother-in-law implicated Charles. However, it would hardly be fair to say Bennett was not a victim or that the criminal justice system worked. Charles Stuart's second crime was to accuse an innocent person of a murder that he had planned and commit-

90. RADELET ET AL., *supra* note 88, at 3.

ted. And the police not only believed him, seemingly without reservation, but also aided him in implicating an innocent Black defendant.

At the other end of the continuum are cases like that of James Adams.⁹¹ Adams was executed in the Florida electric chair in May, 1984, for the 1973 murder of Edgar Brown. Brown was found badly beaten, apparently during the course of a robbery. The killer had entered Brown's home and beaten him with a fireplace poker. Brown died the next day.

Adams's car had been parked in Brown's driveway and had been seen going to and from the house. One witness identified Adams as the driver of the car; another said that he thought Adams was the driver. A third witness, who had driven up to the house shortly after Brown had returned home on the morning of the murder, testified that he heard a woman shout from inside, "In the name of God, don't do it!"⁹² The witness then saw and spoke briefly with someone leaving the house, but did not identify Adams as the person he saw. The witness also said that the person he saw was darker than Adams and, unlike Adams, had no mustache. When this witness reviewed a police line-up that included Adams he said he was positive that none of the men was the person he had seen leaving the house.

Adams had several prior convictions and had escaped from prison ten months before Brown's murder. He claimed that on the morning of the murder, he had loaned his car to Vivian Nickerson and Kenneth Crowell. Adams said that while they used his car, he remained at the Nickerson's house playing cards.

Vivian Nickerson was only fifteen years old. However, she was very large for her age and had a strikingly masculine appearance. Moreover, she resembled Adams and fit the witness description of the person seen leaving Brown's house better than did Adams. Plus, her voice may have been the one heard by the witness. The police did not show the witness any photos of Nickerson. Nickerson was called as an alibi witness, but she gave testimony at trial that conflicted with what she had said in

91. RADELET ET AL., *supra* note 88, at 5-10. All information on the Adams conviction is taken from *In Spite of Innocence*.

92. RADELET ET AL., *supra* note 88, at 8.

a deposition. However, Adams's counsel did not confront her with the contradiction.

One final blow to Adams's defense was that the State did not disclose exculpatory evidence to the defense. Apparently, Mrs. Brown had found strands of hair clasped in her husband's hand while on the way to the hospital. State forensic experts had compared that hair with samples from Adams and concluded Adams was definitely not the source. The jury did not have all the information available to the State, and Adams's counsel was ineffective at critical junctures. The jury never had access to some evidence that raised substantial doubts about Adams's guilt. Therefore, due process was thwarted.

Was an innocent person executed? We will probably never know because once a defendant is executed there is no forum to evaluate guilt or innocence. There is rarely any effort expended on vindicating the deceased. Radelet, Bedau, and Putnam believe that in at least two dozen cases this century, the evidence similarly suggests that the wrong defendant was executed.⁹³

In Spite of Innocence provides a gripping summary of hundreds of cases similar to the Adams case from across the country in which persons were convicted of heinous crimes that they did not in fact commit and for which most were ultimately exoner-

93. RADELET ET AL., *supra* note 88, at 9-10. No government authority has ever acknowledged that an innocent person has been executed by order of the government. A previous version of the Bedau-Radelet study (Hugo A. Bedau and Michael L. Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987)) has been critiqued by some commentators. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). Markman and Cassell maintain there is no intolerable risk of executing innocent persons and that the benefits of capital punishment outweigh the costs. *Id.* at 121-22 n.3.

Bedau and Radelet responded to this critique in Hugo A. Bedau and Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988). The reply suggests that former Attorney General Edwin Meese, III requested Markman to draft a response to the Bedau-Radelet study. See *id.* at 161 n.1.

Radelet, Bedau, and Putnam also acknowledge the pioneering work of others who have researched the prevalence and causes of wrongful convictions. They reference the work of Jerome and Barbara Frank, Edwin Borchard, Erle Stanley Garner, James McCloskey, and Centurion Ministries, and the case studies of wrongful convictions by Mark Lane, Willard J. Lassers, Nick Davies, and Randall Adams, among others. *In Search of Innocence* contains an extensive bibliography and list of sources relating to studies of wrongful convictions. See RADELET ET AL., *supra* note 88, at 361-84.

ated. The book is compelling because the authors show a special sensitivity to the many victims of such cases, those wrongly accused and their families, and those injured and their families. The 416 case files discussed in the book date from 1900 to 1991 and, in each case, there is some evidence that the wrongful convictions could have been avoided.

The authors do not include cases of wrongful accusation, arrest, indictment, and trial in their estimate of the number of wrongful convictions.⁹⁴ Thus, there is no telling how many cases like Willie Bennett's have occurred. The authors also exclude from the book cases in which there is no dispute about whether the defendant committed the killing. For example, if one is convicted of murder and subsequent evidence suggests self-defense, the authors would not include such a case in the book.⁹⁵ They have included cases that they believe represent miscarriages of justice: those where no crime occurred (person consented to sex or person is not murdered)⁹⁶ and those where a crime occurred, but authorities convict the wrong person.⁹⁷

In about ninety percent of the cases profiled in *In Spite of Innocence*, there is official evidence of governmental error.⁹⁸ This evidence of error includes appellate reversals of convictions, acquittals on retrials, and prosecutorial decisions not to retry cases. In many cases, there was also unofficial evidence suggesting innocence, including evidence of police or attorney misconduct or perjury, that was unavailable or undisclosed at the time of trial, but the defendant was unable to convince a court or the governor that this evidence proved his innocence.⁹⁹

The authors provide an insightful inventory of the factors that lead to wrongful convictions. The two biggest culprits are perjury by prosecution witnesses and mistaken eyewitness testimony.¹⁰⁰ Even Black professionals like Lenell Geter, a twenty-

94. RADELET ET AL., *supra* note 88, at 16.

95. RADELET ET AL., *supra* note 88, at 17.

96. RADELET ET AL., *supra* note 88, at 17.

97. RADELET ET AL., *supra* note 88, at 17.

98. RADELET ET AL., *supra* note 88, at 17.

99. RADELET ET AL., *supra* note 88, at 17-18.

100. RADELET ET AL., *supra* note 88, at 18. The first three chapters discuss cases in which one or both factors were involved. Included is the story of Randall Dale Adams from Texas where perjured testimony from the actual murderer, David Ray Harris, led to Adams's wrongful conviction. Adams was in prison for over 12 years

four-year-old engineer, have been wrongfully convicted based on mistaken identification (all Blacks look alike) or police misconduct.¹⁰¹ Other significant factors include negligent or incompetent police investigation, confessions obtained through police brutality or duress, prosecutorial suppression of exculpatory evidence, police tampering with evidence, suggestive line-ups, and ineffective assistance of counsel.¹⁰² The likelihood of error increases substantially when local passions and prejudices are aroused against vulnerable defendants such as occurred in the wrongful conviction of Clarence Brandley.¹⁰³

The Brandley case illustrates the interplay between the myriad circumstances that lead to wrongful convictions and racial animus. Brandley was convicted of the rape and murder of sixteen-year-old Cheryl Dee Ferguson in Conroe, Texas. The murder occurred on a Saturday morning just before Ferguson's team was to play a volleyball game. She had been last seen going toward the girls' restroom. When she failed to return to the warm-up session, the coach sent other girls to find her, to no avail.

After completing the volleyball game, the team began anew the search for Cheryl. After about two hours, two janitors discovered her dead in the school's auditorium. She was nude except for her socks. Her other clothes were missing. An autopsy revealed Cheryl had been forcibly held, strangled, and raped, possibly after she had lost consciousness or after she had died.

Suspicion first fell on the janitors who found the body, Henry Peace and Clarence Brandley. One of the first police officers to interview Peace and Brandley, according to Peace, said, "One of the two of you is going to hang for this."¹⁰⁴ And then the officer turned to Brandley and added, "Since you're the nig—r,

before his release in 1989. RADELET ET AL., *supra* note 88, at 72. For a full discussion of the Adams case, see RANDALL D. ADAMS ET AL., ADAMS V. TEXAS (1991).

101. For a summary of the Geter story, see MARTIN YANT, PRESUMED GUILTY 15-19 (1991). Fortunately for Geter, his irate, mostly White coworkers refused to believe he was guilty and they raised the money for his defense and ultimate vindication. RADELET ET AL., *supra* note 88, at 17-18.

102. RADELET ET AL., *supra* note 88, at 18-19.

103. RADELET ET AL., *supra* note 88, at 119-36. See NICK DAVIES, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE (1991). All information on the Brandley case is taken from *In Spite of Innocence*.

104. RADELET ET AL., *supra* note 88, at 121.

you're elected."¹⁰⁵ A criminal justice system that acquiesces in this kind of racial animus is not worthy of respect. Brandley's conviction should have been presumptively invalid upon proof of the officer's statement. The statement reflects the environment that produced Brandley's conviction.

Investigators questioned both men and took fingerprints as well as hair and blood samples. Both were subjected to polygraph tests, which they passed. Yet, it was late summer and Conroe was in an uproar over the crime. The police needed to make an arrest. One week after the crime, Brandley was arrested and charged with capital murder. There were five janitors on duty the morning that Ferguson was killed.¹⁰⁶ Brandley, the supervisor, was the only Black janitor.

From the start, Brandley insisted he was innocent. But when police found Ferguson's clothes two days after her murder in a plastic bag in a dumpster behind the school, they found strings on her jeans similar to those from a janitor's mop. The prosecution would also allege that police had found hair samples similar to Brandley's (although the samples were never tested).

Three of the four other janitors provided alibis for each other. The fourth, Peace, who actually found the body, reported that Brandley suggested several times that he should look "real good" around the auditorium.¹⁰⁷ Such circumstantial evidence was enough to arrest Brandley.

Brandley appeared before an all-White grand jury. He could not produce any witness to account for his whereabouts when Ferguson disappeared, but he said he was in his office smoking a cigarette and listening to the radio. He was indicted.

At his first trial, he again faced an all-White jury. Brandley's testimony directly contradicted the testimony of several Whites. The trial ended with a hung jury. The juror who refused to vote for guilt later reported that he had been called a nig—r-lover during jury deliberations. After the trial, that juror continued to experience harassment.

In the second trial, Brandley did not testify. Neither did one

105. RADELET ET AL., *supra* note 88, at 121.

106. In addition to Peace and Brandley, Gary Acreman, John Sessum, and Sam Martinez were also questioned. RADELET ET AL., *supra* note 88, at 121.

107. RADELET ET AL., *supra* note 88, at 123.

of the White janitors, John Sessum. The others testified that only Brandley had keys to the auditorium and supported each other's alibis. New evidence in the second trial suggested that Brandley had an uncontrolled sexual appetite. Also, medical experts testified that Brandley's belt was consistent with whatever was used to strangle Fergeson. Finally, Brandley had a part-time job at a funeral home. The prosecution portrayed him as a necrophiliac. Brandley was convicted of murder and sentenced to death.

While Brandley's lawyers prepared his appeal, they discovered that over one-half of the 309 exhibits used at trial had vanished. For example, photos taken of Brandley on the day of the murder, which the defense alleged would have shown he was not wearing a belt, had disappeared. Also, the hair samples that supposedly were similar to Brandley's had disappeared. Even before the first trial, the spermatozoa taken from Fergeson had been discarded by the county medical examiner. Was it sloppy police work or purposely destroyed evidence?

Four years after his conviction, Brandley's appeal was denied. Brandley was given his first death date: January 16, 1986. That date was canceled after Brandley's lawyers filed a writ of habeas corpus and it was granted.

Just before the habeas hearing, Brandley got his first real break. Brenda Medina from a nearby town came forward with evidence that her former common-law husband, James Dexter Robinson, had confessed to the murder, but at the time she had thought he was just bragging. Medina said she did not learn about the case until early 1986 when a neighbor mentioned it. When Medina went to the prosecutor, she was not believed. Therefore, the prosecutor did not inform the defense about her statement. Fortunately, the lawyer with whom Medina first spoke called the defense lawyers directly. After Medina passed a polygraph test, the defense team took her sworn statement.

John Sessum, who had failed to testify at the second trial, used the habeas proceeding to recant his testimony. This time he said he had seen another of the janitors, Gary Acreman, talking with the victim shortly before the murder and that Acreman had threatened him with trouble if he mentioned anything about it. He also told the court he had been threatened with jail during the second trial if he did not stick with his writ-

ten statement.

Acreman's father-in-law, Edward Payne, testified that on the night of the murder, Acreman had told him where the victim's clothes were hidden. Payne testified that when he tried to report this information to the district attorney, he was told the office was not interested.

Medina testified that James Robinson had confessed to the murder and told her he had to leave town for a while. By the next morning he had in fact left, leaving a pair of blood-stained sneakers. One month before Cheryl's murder, Robinson had been fired from Conroe High School where he had worked as a janitor. Acreman, who had not previously said anything about Robinson's presence at the school on the morning of the murder, then admitted to having seen him briefly that morning. In the face of all this new evidence, Brandley's motion for a new trial was denied and the appellate court affirmed. A new execution date was set.

The case had attracted national attention and in February, 1987, 1000 protestors marched in Conroe on Brandley's behalf. Shortly thereafter, James McCloskey of Centurion Ministries became involved with the Brandley case.¹⁰⁸ McCloskey and the defense team's investigator, Richard Reyna, traveled the state for several weeks talking with witnesses.

Perhaps it was McCloskey's clerical collar, but he and Reyna persuaded Sessum to allow them to videotape his statement. Sessum now said he had seen Acreman and Robinson with the victim and had heard her cries of "No" and "Don't" coming from inside the bathroom.¹⁰⁹

Acreman, when confronted with the statements from Sessum, also agreed to make a statement on videotape. He made several inconsistent tapes, but ultimately accused Robinson and alleged that he had seen Robinson put the victim's clothes in the dumpster. On March 20, 1987, six days before his scheduled execution, Brandley was granted another stay.

At yet another hearing, substantial evidence emerged to suggest that Texas Ranger Styles and others had not tried to

108. RADELET ET AL., *supra* note 88, at 129.

109. RADELET ET AL., *supra* note 88, at 130.

find the murderer but instead had tried to convict Brandley.¹¹⁰ The new judge concluded that Brandley deserved a new trial and that it was very likely Robinson and Acreman had killed Ferguson.

It was a full year before the Texas Court of Criminal Appeals awarded Brandley a new trial. Brandley was finally released, but not because the criminal justice system worked. In fact, it seemed more geared towards Brandley's execution than towards a determination of an error regarding his conviction.

Alarmingly, almost all of the wrongful convictions reported in modern studies were corrected through the efforts of persons outside the criminal justice system: journalists, private detectives, relatives of the prisoner, or organizations dedicated to freeing wrongly convicted persons.¹¹¹

One cannot come away from reading *In Spite of Innocence* and other wrongful conviction studies without substantial concern for the "ineptness, crudity, and unfairness" of the American criminal justice system.¹¹² The public has an enormous tolerance for the types of misconduct illustrated by the conviction of Clarence Brandley. There is a pernicious belief that in cases like Brandley's, the defendants must be guilty of something and therefore it is acceptable if agents of the criminal justice system use illegal tactics against them. That attitude licenses not only misconduct against innocent persons, it creates a culture in which all criminal defendants and their representatives are subject to unwarranted abuse.

B. The Supreme Court's Assessment of Racial Bias in the Criminal Justice System

An important parallel to the significant number of wrongful convictions in the United States has been the Supreme Court's

110. RADELET ET AL., *supra* note 88, at 132-33.

111. See RADELET ET AL., *supra* note 88, at 132-33, 208-11, for a description of the role of Mark Lane in the reversal of James Richardson's wrongful conviction; *see also* MARK LANE, *ARCADIA* (1970) (same); RADELET ET AL., *supra* note 88, at 68-70 (describing film producer Errol Morris's role in the reversal of Randall Adams's conviction).

112. WILLARD LASSERS, *SCAPEGOAT JUSTICE: LLOYD MILLER AND THE FAILURE OF THE AMERICAN LEGAL SYSTEM 2* (1973).

erratic concern for racial bias in the criminal justice system. As early as 1880, the Court held it was unconstitutional to exclude Blacks from a jury venire.¹¹³ The Court wrote that the provisions of the Fourteenth Amendment meant

the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race . . . that no discrimination shall be made against them by law because of their color.¹¹⁴

The Court concluded that where a statute denies Blacks all rights to participate in the administration of the law as jurors, it "is practically a brand upon them, . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."¹¹⁵

The Court has demonstrated a greater tolerance for racial discrimination than the above-quoted text suggests. The Court did not proscribe all forms of discrimination. The Court wrote that a state may confine the selection of jurors to males, freeholders, citizens, certain age groups, or persons having certain educational qualifications.¹¹⁶ Thus, in addition to authorizing facial discrimination against women, the opinion gave States broad discretion to use property and education qualifications as

113. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Under West Virginia law, a Black was not eligible to be a member of a grand or petit jury. The statute was challenged under the recently enacted Fourteenth Amendment. The Court made clear in its opinion that the question for decision was not whether a Black had a right to a grand or petit jury composed in whole or in part of persons of his own race or color. *Strauder*, 100 U.S. at 304. Instead, the question was whether, in the composition or selection of jurors by whom one is to be indicted or tried, all persons of one's race or color may be excluded solely on the basis of race. *Id.*

114. *Id.* at 307. The Court continued:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Id. at 307-08.

115. *Id.* at 308.

116. *Id.* at 309.

bases to continue discriminatory policies against Blacks. States took the hint by adopting procedures that kept juries mostly, if not completely, White. For example, some States adopted a system of jury commissioners who had the authority to identify males over twenty-one years of age who were reputed to be honest, intelligent men of good character for jury service.¹¹⁷

Eight and one-half decades later, the Court reaffirmed the principal doctrine of *Strauder*. In *Swain v. Alabama*,¹¹⁸ a Black man was convicted of the rape of a seventeen-year-old White woman and sentenced to death by an all-White jury in Talladega, Alabama.¹¹⁹ Under Alabama law, three jury commissioners were required to place on the jury roll all male citizens over age twenty-one who were reputed to be honest, intelligent men, esteemed for their integrity, good character, and sound judgment.¹²⁰ Under such procedures, a disproportionate number of Whites were placed on jury rolls.

The Court said, "[W]henever by any action of a State . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied"¹²¹ The Court also wrote that such racial discrimination "is at war with our basic concepts of a democratic society and a representative government."¹²² Finally, and perhaps most significantly, the Court said that "purposeful discrimination may not be assumed or merely asserted. It must be proven, the quantum of proof necessary being a matter of federal law."¹²³

The Court distinguished *Swain* from *Strauder* because in *Swain* there was insufficient evidence that all Blacks were excluded from the jury venire. In *Swain*, the evidence showed that while Black males over twenty-one constituted twenty-six percent of all males in the county, only ten to fifteen percent of the

117. See *Swain v. Alabama*, 380 U.S. 202 (1965), overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986).

118. 380 U.S. 202 (1965).

119. *Swain*, 380 U.S. at 203.

120. *Id.* at 206.

121. *Id.* at 204 (citing *Carter v. Texas*, 177 U.S. 442, 447 (1900)).

122. *Id.* at 204 (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

123. *Id.* at 205 (citation omitted).

grand or petit jury panels drawn from the jury box since 1953 had been Black.¹²⁴ The Court found that the disparity between the number of Blacks in the population and the number actually serving on a jury was too small to establish a prima facie case of invidious discrimination under the Fourteenth Amendment.¹²⁵ The Court reiterated that "[n]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group."¹²⁶ Therefore, *Swain* is significant because it imposed on the plaintiff the burden of proving that the jury selection process was intentionally discriminatory and not just imperfect.¹²⁷

A related development occurred in 1972, when the Court invalidated all state death-sentencing statutes then in effect on the grounds that juries imposed death sentences without sufficient guidelines, standards, and appellate oversight.¹²⁸ At least

124. *Swain*, 380 U.S. at 205. The Court said that since 1953, Blacks had served on approximately 80% of the grand juries, the number ranging from one to three. *Id.* The Court did not find it necessary to explain why it satisfied the Constitution to have so few Blacks in the jury pool and even fewer actually serve on juries.

125. *Id.* at 206.

126. *Id.* at 208.

127. *Id.* at 209. The petitioner in *Swain* also argued that the prosecutor in Talladega County had exercised his peremptory challenges (the process of removing persons from the venire without explanation or justification) to exclude Blacks from serving on petit juries. *Id.* The Court held that "[t]he presumption in any particular case must be that the prosecutor is using the state's challenges to obtain a fair or impartial jury The presumption is not overcome . . . by allegations that . . . all Negroes were removed from the jury . . . because they were Negroes." *Id.* at 222. The Court suggested that to establish a case of prosecutorial misconduct would require proof that the prosecutor systematically exercised peremptory challenges in a series of cases to exclude all Blacks. *Id.* at 223-24.

In 1977, the Court revisited issues similar to those presented in *Swain*. In *Castaneda v. Partida*, 430 U.S. 482 (1977), there was a greater statistical disparity between the general population of persons with Spanish surnames and such persons who were called to serve on grand or petit juries than had been the case in *Swain*. *Partida* proffered evidence that over an 11-year period, while 79% of the persons in the county population had Spanish surnames, only 39% of the persons summoned for grand jury service had Spanish surnames. *Id.* at 494-95. The Court said that such a disparity was sufficient to make out a prima facie case of discrimination and shifted the burden of proof to the state to dispel the inference of discrimination. *Id.* at 496.

128. *Furman v. Georgia*, 408 U.S. 238 (1972). The five Justices in the majority each wrote separate concurrences, providing different theories for their view that the death-sentencing procedures were unconstitutional (Douglas, Brennan, Marshall, Stewart, and White, JJ., concurring). Justices Douglas, Brennan, and Marshall believed that then-operating statutes permitted juries to discriminate on the basis of race in violation of the Equal Protection Clause. *Id.* at 249-50, 255-57 (Douglas, J.,

three members of the Court believed that death-sentencing procedures permitted juries to discriminate against criminal defendants on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ Pending the *Furman* decision, no state could execute a person sentenced to death.¹³⁰

The legislative response to *Furman* was swift. Many states enacted statutes that limited the category of murders in which death sentences could be imposed and codified specific aggravating factors, at least one of which had to be present before a death sentence could be imposed.¹³¹ Most states also bifurcated the guilt and sentencing phases of capital trials.¹³² Finally, most jurisdictions adopted enhanced appellate oversight policies, requiring state appellate judges to review death sentences to assess whether those sentences were based upon similar facts.¹³³ The Court found these types of modifications in death sentencing procedures sufficient to eliminate the constitutional problems identified in *Furman*.¹³⁴

In *Gregg v. Georgia* and its companion cases, the Court rejected the view that the death penalty was an inherently ex-

concurring); *id.* at 293-95 (Brennan, J., concurring); *id.* at 364-66, 368 (Marshall, J., concurring).

For a comprehensive analysis of pre-*Furman* and post-*Furman* death sentencing procedures, see generally DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 7-39 (1990) (evaluating whether states have eliminated the arbitrariness and discrimination that prompted a majority of the Court to invalidate death-sentencing statutes in *Furman* and concluding that while there has been a decline in arbitrariness and discrimination, death sentences are still imposed against defendants whose cases are not among the most aggravated, and the challenge then is whether death sentencing can be limited to the worst offenders).

129. See *Furman*, 409 U.S. at 249-50, 255-57 (Douglas, J., concurring); *id.* at 293-95 (Brennan, J., concurring); *id.* at 364-66, 368 (Marshall, J., concurring).

130. BALDUS ET AL., *supra* note 128, at 9-10.

131. Aggravating circumstances might include, for example, killing a police officer or a vile or atrocious murder. BALDUS ET AL., *supra* note 128, at 22-23.

132. Under such procedures, the jury initially hears evidence solely as to guilt of the defendant. If the jury convicts, the case proceeds (sometimes immediately) with evidence to determine the appropriate sentence. BALDUS ET AL., *supra* note 128, at 23.

133. BALDUS ET AL., *supra* note 128, at 33-34.

134. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). Unfortunately, wrongful convictions have continued despite these reforms. Since 1973, 48 persons have been released from prison (43 from death row) after new evidence of innocence was located. See *Innocence and the Death Penalty*, *supra* note 88, at 2-8.

cessive sentence for aggravated murder.¹³⁵ It also ruled that the Georgia procedure that permits juries to impose a life sentence, no matter what aggravating circumstances existed in a particular case, does not violate the Constitution.¹³⁶ Thus, within a four-year period, the Court suggested that the myriad problems with most states' death sentencing procedures had been eliminated.

The erratic concern reflected by the Court in *Strauder* and *Furman* and their progeny converged in the Court's 1987 decision in *McCleskey v. Kemp*.¹³⁷ Warren McCleskey, a Black man, was convicted of killing a White police officer during the course of a robbery.¹³⁸ Pursuant to Georgia law, the jury found two aggravating circumstances upon which to base McCleskey's death sentence: killing a peace officer engaged in his duties and commission of a murder during a planned robbery.¹³⁹ The jury recommended that McCleskey be sentenced to death, and the trial court agreed.¹⁴⁰ The Supreme Court of Georgia affirmed.¹⁴¹

Ultimately, McCleskey filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, claiming that the Georgia death-sentencing process was administered in a racially discriminatory manner.¹⁴² In support of his claims, McCleskey proffered a statistical study by Professor David Baldus¹⁴³ indicating that defen-

135. *Gregg*, 428 U.S. at 187.

136. *Id.* at 203. Members of the plurality and concurring opinions seemed influenced by the Georgia Supreme Court's statutory duty to review each death sentence. *Id.* at 203, 222-24 (White, J., concurring).

137. 481 U.S. 279 (1987).

138. *McCleskey*, 481 U.S. at 282.

139. *Id.* at 284-85.

140. *Id.* at 285.

141. *Id.*

142. *Id.* at 286. Specifically, McCleskey argued that Georgia's administration of the death penalty violated the Eighth and Fourteenth Amendments.

143. Professors David Baldus, Charles Pulaski, and George Woodworth performed the study and published their findings in a comprehensive book. BALDUS ET AL., *supra* note 128, at 80-139, 198-228, 306-425. The book presents the results of two overlapping empirical studies of post-*Furman* legislative reforms regarding whether new standards and guidelines to channel the exercise of jury discretion were effective and whether comparative proportionality review by state appellate courts assured that death sentencing systems were operating in a consistent, nondiscriminatory fashion. The authors found that although the levels of arbitrariness and racial

dants charged with killing Whites were 4.3 times as likely to receive a death sentence in Georgia as defendants charged with killing Blacks, and that Black defendants were 1.1 times as likely to receive a death sentence as other defendants.¹⁴⁴ The lower federal courts rejected McCleskey's petition.¹⁴⁵ The United States Supreme Court granted a writ of certiorari and affirmed the lower courts by a vote of five to four.¹⁴⁶

As to McCleskey's Fourteenth Amendment challenge, the Court wrote that a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect in his case.¹⁴⁷ The Court found that McCleskey offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relied on the Baldus study.

The Court distinguished prior decisions in which it had accepted statistical studies as proof of discrimination in the context of jury selection and Title VII decisions.¹⁴⁸ The Court reasoned that in capital sentencing cases, each jury or prosecutor is unique and each decision rests on innumerable factors that vary according to each individual defendant and the facts of each offense.¹⁴⁹ Therefore, it would be inappropriate to infer a policy of discrimination by combining the decisions of different juries or prosecutors.¹⁵⁰ The Court concluded that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."¹⁵¹ To prove discriminatory purpose, the Court wrote that McCleskey would have to demonstrate that

discrimination in capital sentencing had declined since 1972, there was still evidence of a racial disparity in the application of the death penalty and of arbitrary, excessive sentences. *BALDUS ET AL.*, *supra* note 128, at 394-425. For a summary of other statewide studies, see *BALDUS ET AL.*, *supra* note 128, at 229-65.

144. *McCleskey*, 481 U.S. at 287. See *BALDUS ET AL.*, *supra* note 128, at 400-08.

145. *McCleskey*, 481 U.S. at 288-91.

146. *Id.* at 291. Justice Powell wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia.

147. *Id.* at 292.

148. *Id.* at 293-96.

149. *Id.* at 294-95 & nn.15-18.

150. *McCleskey*, 481 U.S. at 294-95 & nn.15-18.

151. *Id.* at 297.

agents of the state had followed a course of action in his case "because of," not merely "in spite of," its adverse effects upon an identifiable group."¹⁵²

The Court also rejected McCleskey's Eighth Amendment claim. It reasoned that because his sentence was imposed under Georgia sentencing procedures that focus discretion on the objective circumstances of the crime, the sentence did not offend the Constitution and was not disproportionate within any recognized meaning of the Eighth Amendment.¹⁵³ Moreover, the Court concluded that the Baldus study did not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process.¹⁵⁴ The Court viewed McCleskey's Eighth Amendment legal theory as a challenge to the entire criminal justice system and said there was no limiting principle to his challenge.¹⁵⁵ The Court hinted that its acceptance of McCleskey's claim would open the criminal justice system to challenges from other claimants.¹⁵⁶ Finally, the Court suggested that it was beyond its province to determine the appropriate punishment for particular crimes and thus, McCleskey's claims and statistical studies should have been presented to legislative bodies.¹⁵⁷

The four dissenting Justices accepted the Baldus study's validity and concluded that it proved the Georgia death-sentencing process created an intolerable risk that McCleskey's sentence was influenced by impermissible racial considerations.¹⁵⁸ Justice Brennan recalled how Georgia and other States had operated dual systems of criminal justice as far back as the colonial period, which differentiated between crimes by and against Whites and Blacks, and noted that the Georgia Penal Code had contained separate sections for slaves and free persons

152. *Id.* at 298. Here the Court applied the difficult-to-prove standard set out in cases following *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

153. *Id.* at 307-08 & n.28.

154. *Id.* at 313.

155. *McCleskey*, 481 U.S. at 314-18.

156. *Id.* at 315-17.

157. *Id.* at 319.

158. *Id.* at 325-28 (Brennan, J., dissenting) (Justices Marshall, Blackmun, and Stevens joined in Justice Brennan's dissent).

of color and all other persons.¹⁵⁹ For example, rape of a free White female by a Black was punishable by death; however, rape by anyone else of a White female was punishable by a prison term of two to twenty years.¹⁶⁰ The rape of Blacks was punishable by fine or imprisonment at the discretion of the court.¹⁶¹ Justice Brennan concluded that Georgia's history of racially biased criminal justice and its continuing legacy, reflected in *Furman* and its progeny, buttressed the probative value of the Baldus study and McCleskey's constitutional claims.¹⁶²

After *McCleskey*, it seems clear that an empirically significant risk of racial discrimination against a criminal defendant is not sufficient to prove purposeful discrimination. Justice Brennan says best why *McCleskey* is so troubling.

Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital-sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.¹⁶³

No one should be indicted, prosecuted, convicted, or sentenced to die because of his race or the race of his victim.

The split within the Court regarding the role of discretion and the influence of racial bias in the criminal justice system

159. *Id.* at 329-30 (Brennan, J., dissenting).

160. *McCleskey*, 481 U.S. at 329-30 (Brennan, J., dissenting) (citing GA. PENAL CODE, pt. 4, tit. 1, div. 4 §§ 4704, 4249 (1861)).

161. *Id.* at 330 (Brennan, J., dissenting); GA. PENAL CODE, pt. 4, tit. 1, div. 4 § 4249 (1861). See A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS 24-25 (1978); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2064-66 (1993).

162. *McCleskey*, 481 U.S. at 334-35 (Brennan, J., dissenting).

163. *Id.* at 336 (Brennan, J., dissenting).

goes to the core of the issues raised in wrongful conviction capital murder cases. *McCleskey* appears to create an irrebuttable presumption that agents of the criminal justice system exercise their discretion constitutionally.¹⁶⁴ Such a presumption is indefensible given our history of pernicious racial prejudice and the substantial evidence of its use against Blacks in the criminal justice system. I think that in capital cases in which the races of the defendant and of the victim are different, the presumption should be that agents of the court are unable to control or ignore their racial bias. Empirical data demonstrating a significant racial disparity in the application of a state's death-sentencing procedures should shift to the prosecution the burden to rebut the empirical data. If the state cannot rebut the empirical data, the court should assume that there was an intolerable risk that racial bias influenced the conviction. Such an evidentiary standard would give the state greater incentive to eradicate racial discrimination from the criminal justice system.

In light of *McCleskey* and the myriad case studies on wrongful convictions, one cannot help but wonder if the constitutional guarantees afforded by the Bill of Rights to all criminal defendants have been suspended for some. The precious freedom from unreasonable searches and seizure, the requirement of probable cause for the issuance of a warrant, the privilege against self-incrimination, the prohibition against double jeopardy, the broad protections of the Due Process Clause, the guarantee of a speedy, public trial, the right to confront witnesses, the prohibition against excessive bail, fines, and cruel and unusual punishments, and the right to effective assistance of counsel all supposedly operate to protect us from miscarriages of justice. Yet, these guarantees remain empty words for many accused persons. Says Willard Lassers, "American justice is capable of extraordinary refinement and discernment but it is capable also of gross, shocking and scandalous abuses."¹⁶⁵ The Walter McMillian case is a recent example of unequal justice, and it is a reminder that the boundary between fictional Maycomb and contemporary towns throughout the United States is often opaque.

164. See *id.* at 337 (Brennan, J., dissenting).

165. LASSERS, *supra* note 112, at 2.

IV. THE WRONGFUL CONVICTION OF WALTER MCMILLIAN

In June, 1987, Walter McMillian, a forty-five-year-old pulpwood worker, was charged with the robbery and murder of Ronda Morrison, an eighteen-year-old part-time employee at Jackson Cleaners in the small rural South Alabama town of Monroeville. McMillian is Black and Morrison was White. Morrison had been shot in the back three times, once at close range, apparently as she tried to flee her still unknown assailant(s). The nation learned of McMillian when a story on his case appeared on CBS-TV's program *60 Minutes* on November 22, 1992.

McMillian remained on death row from July, 1987, thirteen months *before* his trial, until his release from prison in March, 1993, when his conviction was reversed and the state declined to retry him.¹⁶⁶ There is probably no way to assess the psychological toll that McMillian has endured. What restitution does the state owe him? Who is responsible for his wrongful conviction? Does he have viable claims against the law enforcement personnel or former prosecutors who fabricated the case against him?

And what about the additional injury to the Morrisons? Morrison's murder was a horrible tragedy. It has been devastating for those who live and work in or near Monroeville, especially her parents, who lost their only child to a violent, premature death. It was a senseless and heinous murder that showed a callous disregard for a precious young life. Yet, our outrage and disdain for the unknown person(s) who killed Morrison should never excuse the wrongful conviction of an innocent person.

Today Morrison's murder is again an unsolved homicide. Morrison's family and friends must again suffer the uncertainty of not knowing who killed her or why. And her killer may yet walk among us.

There are many compelling reasons to tell this story. The most significant reason is that Ronda Morrison should not have died in vain. Her family should know all that the police and

166. See *infra* notes 252-341 and accompanying text.

prosecutors knew when they wrongfully tried and convicted Walter McMillian. The public should know that there is no reason to place total trust in the criminal justice system or its agents because they are fallible and sometimes they knowingly lie to us, suppress evidence, and otherwise violate their duty to uphold the law. Finally, the McMillian case demonstrates how difficult it was for him to move a court to take seriously his claims and proof of his innocence. Whatever one's views regarding capital punishment, if we proceed too swiftly to execute persons convicted of capital murder, we will undoubtedly execute some whose only "crime" is to be Black, poor, or both.

The law enforcement agencies and prosecutors involved in the Morrison-McMillian case did a tremendous disservice to the people of Monroeville, especially the Morrisons and the McMillians. They also have wrought tremendous burdens on Walter McMillian and on the state fisc. Rather than fully investigate Morrison's murder, police, prosecutors, and the judge compromised their duty to the public and convicted McMillian. Apparently, the case against McMillian was a total fabrication from the beginning, implicating the police and the prosecutors in unlawful conduct and fraud upon the court. In their zeal to attribute Morrison's murder to someone, they found a vulnerable Black defendant and they constructed a case against him. The fraud was ultimately revealed when the principal witnesses for the state recanted their trial testimony.

Until this writing, I had not been completely opposed to the death penalty, but rather only to its disproportionate application against poor, Black men accused of killing Whites. However, the McMillian case is a compelling example of the worst kinds of abuses within our criminal justice system and offers persuasive evidence that we probably do execute innocent persons. That reality places all of us at some risk, but it makes most vulnerable citizens who live at the margins of society, especially those who are despised and presumed guilty because of their race or class. This concern for executing the innocent persuades me that we need to re-examine the costs and benefits of long-term imprisonment in comparison to the costs and benefits of the death penalty. Wrongful convictions, like McMillian's, offer the most persuasive challenge to any use of the death penalty because it is impossible to ensure that someone like him has not been

railroaded to death row for a crime he did not commit.¹⁶⁷

A. *The Crime*

On Saturday morning, November 1, 1986, at approximately 9:00, Ronda Morrison arrived for work at Jackson Cleaners in downtown Monroeville, Alabama, where she had been employed part-time for about one year.¹⁶⁸ At 11:00 a.m., three customers found Morrison dead.¹⁶⁹

Further police investigation revealed that Morrison had parked her automobile beside the building and entered the building carrying a small money bag.¹⁷⁰ Shortly thereafter, Ray Owens entered the establishment to pick up some clothes that he had previously left for cleaning.¹⁷¹ Owens reported that he

167. The late Justice Thurgood Marshall made this point eloquently in *Furman v. Georgia*, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring). He wrote: "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some." *Id.*

168. *McMillian v. State*, 570 So. 2d 1285, 1287 (Ala. Crim. App. 1990). The evidence presented by the state is summarized in *McMillian*, 570 So. 2d at 1287-91. That official summary, however, does not contain significant facts that were known to law enforcement agents or prosecutors at the time of trial and that were withheld from the defense lawyers. Therefore, I frequently cite to other original sources, such as the Reporter's Official Trial Transcript from the 1988 trial in *State v. McMillian*, police records, forensics reports relating to the crime, the summary of facts from the 1993 appeal, or stories in the *Monroe Journal*.

169. Reporter's Official Transcript on Appeal [hereinafter Transcript] at 105-07.

170. Transcript at 85. Ray Owens testified that he was at the cleaners when Morrison arrived at approximately 9:05 a.m. He said he waited for Morrison to assist another customer before he went in. Transcript at 85. He said she was putting money in the register when he entered the cleaners. Transcript at 86. He gave her a \$20 bill and she put the money in the register and gave him change. Transcript at 85-86. Owens said Morrison was fine when he left, Transcript at 86, and he did not see anyone else working in the cleaners that morning. Transcript at 90.

On cross-examination, defense lawyers asked Owens if he knew Miles Jackson or Rick Blair. Transcript at 94-95. Owens said that he knew Miles Jackson as the former owner of the cleaners and that he thought Rick Blair was the new owner. Transcript at 94-95. He testified that he had seen Blair in the cleaners before when he picked up his clothes, but that he did not see Blair on that Saturday morning. Transcript at 95.

171. Transcript at 85.

paid Morrison \$13.00.¹⁷² As he left, he noticed that Morrison was putting other money in the cash register.¹⁷³

Around 10:10 or 10:15 a.m., Jan Owen entered the establishment and left a skirt with Morrison for cleaning.¹⁷⁴ She did not see anyone else and did not observe anything unusual.¹⁷⁵

Around 10:40 or 10:45 a.m., Jerrie Sue Dunning entered the establishment, and no one came to assist her.¹⁷⁶ She called out several times, "Is anyone here?" She received no answer.¹⁷⁷ She noticed that the cash register was open, and she testified that she observed bills and change in the cash register.¹⁷⁸ Shortly thereafter, Florence Masons entered the establishment, and a few minutes before 11:00 a.m., Coy Stacey entered.¹⁷⁹ Dunning, Masons, and Stacey began a search and discovered Morrison's body lying on the floor under a rack of clothing.¹⁸⁰ They called the police.¹⁸¹

One of the first officers to arrive at Jackson Cleaners was Lieutenant Woodrow Ikner of the Monroeville Police Department.¹⁸² He arrived around 11:05 a.m.¹⁸³ He recognized Morrison as his son's classmate.¹⁸⁴ Ikner said she was lying face-down, and there were blood stains on her face and on the back of her shirt.¹⁸⁵ He checked for a pulse, but found none, and discovered that the body was "cool."¹⁸⁶

Deputy Sheriff William Gibson took photographs of Morrison.¹⁸⁷ Her pants and shirt were unbuttoned, and her undergarments were visible.¹⁸⁸ Three spent bullet casings and a part

172. Transcript at 86.

173. Transcript at 84-99.

174. Transcript at 99-100.

175. Transcript at 99-103.

176. Transcript at 104-05.

177. Transcript at 105.

178. Transcript at 106.

179. Transcript at 105.

180. Transcript at 107.

181. Transcript at 108.

182. Transcript at 124.

183. Transcript at 127.

184. Transcript at 125.

185. *McMillian v. State*, 570 So. 2d 1285, 1288 (Ala. Crim. App. 1990).

186. *Id.*; Transcript at 126-28.

187. Transcript at 151-53.

188. Transcript at 153. The condition of Morrison's clothing suggests that someone might have attempted to sexually assault her in the bathroom; that she

of a bullet were found near the body. Another spent casing was found in the bathroom in the rear of the establishment, about fifty feet from the body, and one was found outside the bathroom door.¹⁸⁹

The bathroom showed signs of a scuffle. There was a bullet hole in the bathroom ceiling, the victim's gold necklace was found on the bathroom floor, a brick was found in the bathroom with hair on it, and an impression in the wall was discovered that had apparently been made by the brick being hurled against the wall.¹⁹⁰ There was dust on the victim's clothing and some indication that she had been dragged to the spot where her body was found.¹⁹¹ Ikner discovered one drop of blood on the floor near the cash register.¹⁹² He dusted the cash register and the area around it for fingerprints and found only unidentifiable smudges.¹⁹³

Morrison was pronounced dead by Monroe County Coroner Farrish Manning at 11:45 a.m.¹⁹⁴ Dr. Gary Dean Cumberland, a state pathologist with the Alabama Department of Forensic Sciences, performed an autopsy on the victim's body the following day.¹⁹⁵ He found numerous scratches and bruises on the right side of her neck and forehead.¹⁹⁶ Three gunshot wounds were discovered: one to the back side of her right shoulder, one to the left side of her back, and one to the back side of her left

fled her attacker and was shot in the back. Yet, there is nothing in the trial transcript to indicate that police evaluated the case as a possible sexual assault or attempted rape. The prosecutor, District Attorney Ted Pearson, did suggest in his closing argument to the jury that McMillian might have tried to take advantage of Morrison. Transcript at 534. Thus, one of the images left with the jury before its deliberations was that of a Black man attempting to sexually assault a young White woman.

189. Transcript at 145-46.

190. Transcript at 142-43.

191. Transcript at 142, 154.

192. Transcript at 142.

193. Transcript at 126-27. The State Fingerprint Examiner in the Alabama Department of Forensic Sciences testified that none of the evidence submitted to him for examination had the requisite characteristics to make an identification. Transcript at 169-71.

194. Transcript at 169.

195. Transcript at 241-56.

196. Transcript at 243.

upper arm.¹⁹⁷ Three bullets were recovered from her body.¹⁹⁸ The pathologist found that the cause of death was the three gunshot wounds.¹⁹⁹

A ballistics expert concluded that the three bullets recovered from the victim's body were .25 caliber and that all were fired from the same gun, probably from a semi-automatic manufactured by Raven Arms Company.²⁰⁰ He examined the bullet holes in the victim's shirt and discovered powder residue around one bullet hole.²⁰¹ He concluded that that bullet was fired from within six inches of the victim's body.²⁰²

From the statements of Owen, Dunning, and Stacey, the police set the time of the robbery and murder between 10:15 and 10:45 a.m. Moreover, the inference created by the statements of Owen and Dunning was that Owen was the last person known to have seen Morrison alive.

However, according to an Alabama Department of Public Safety Case Report, Miles Jackson, a prior owner of Jackson Cleaners, was in the cleaners at 10:30 a.m.²⁰³ Therefore, Miles Jackson, not Jan Owen, was the last person known by police to have seen Morrison alive. This narrowed the window of time for the Morrison crime to approximately fifteen minutes, between 10:30 and 10:45 a.m.

Who is Miles Jackson? Why was he at Jackson Cleaners that morning? Did he have a personal relationship with the victim? Why was he not a suspect in Morrison's murder or a witness at McMillian's trial? None of these questions were raised by defense lawyers because they were unaware of Jackson's presence at the cleaners. Neither the police nor the prosecution notified defense lawyers about Jackson's presence in the cleaners on the morning of Morrison's murder, and they failed to disclose the police report containing that information to

197. Transcript at 243.

198. Transcript at 251.

199. Transcript at 251-52.

200. Transcript at 174.

201. Transcript at 125.

202. Transcript at 175-76.

203. See Alabama Department of Public Safety Report, File No. 2100-102001-451866, Oct. 7, 1987, at 2 (on file with the author). This report, which was an exhibit in McMillian's appeal (Def.'s Ex. 7 at 199), identifies Miles Jackson as the last person in Jackson Cleaners to see Morrison alive.

McMillian's lawyers.²⁰⁴ Defense lawyers did ask Ray Owens if he knew Miles Jackson, and Owens responded that he knew Jackson as the prior owner of the cleaners.²⁰⁵ Had McMillian's lawyers known that Jackson was in the cleaners on the morning Morrison was murdered, they surely would have asked him and others many more questions. Thus, significant information was intentionally concealed from the defense and jury. The concealment of the police report was just part of a much larger set of acts by the police and prosecutors directed at convicting McMillian despite the existence of exculpatory evidence and McMillian's claims of innocence.

The crime attracted statewide attention from law enforcement agencies, including the Monroeville Police and Sheriff's Departments, the Alabama Bureau of Investigation, and the state Department of Forensic Sciences.²⁰⁶ In addition, local companies, the Monroeville City Council, and the Governor offered reward money totaling \$16,000 for information leading to the arrest and conviction of Morrison's killer.²⁰⁷

The police had no solid leads or suspects because there was no physical evidence at the crime scene or forensic evidence found on the victim suggesting who had murdered Morrison. William Dailey, the Monroeville Chief of Police, told the *Monroe Journal* that his officers were interviewing every person they could identify who had gone to the cleaners on November 1.²⁰⁸

Within four days of Morrison's murder, law enforcement officials submitted fingerprints, clothing, and blood samples to the Alabama Department of Forensic Sciences from a suspect named Albaro Banos.²⁰⁹ The forensic report initially described

204. *McMillian v. State*, 616 So. 2d 933, 942 (Ala. Crim. App. 1993). McMillian's trial lawyers, J.L. Chestnut and Bruce Boynton of Selma, must share in the blame for his conviction. Neither did an adequate job to investigate McMillian's claims of innocence. Their lack of effort was magnified by the deliberate misconduct of the prosecutor and law enforcement agencies.

205. Transcript at 94.

206. See Patrice Stewart & Mary F. Lett, *No Arrest Made in Murder*, *MONROE J.*, Nov. 6, 1986, at A1 [hereinafter *No Arrest*].

207. See Patrice Stewart & Mary F. Lett, *Murder Reward is \$16,000*, *MONROE J.*, Nov. 13, 1986, at A1 [hereinafter *Reward*].

208. *No Arrest*, *supra* note 206, at A1.

209. See Alabama Department of Forensic Sciences Report, Case No. 87-30271, Nov. 6, 1986 [hereinafter *DFS Report*] (on file with the author).

Banos as a White adult male, but the racial classification was subsequently changed to Oriental.²¹⁰ On November 10, 1986, the forensic specialists examined several strands of head hair from Maria Diaz.²¹¹ It is unclear what led police to either Banos or Diaz, or if there was some relationship between them. There is no mention of either person in the trial transcript.²¹² After November 19, 1986, it appears that the forensic experts concluded there was insufficient evidence to link Banos to the Morrison murder.²¹³

While Monroe Countians were organizing Ronda Morrison Day and raising money for a scholarship in her memory,²¹⁴ police investigators continued to pursue leads. Former District Attorney Ted Pearson, who was the prosecutor in the trial against Walter McMillian, told the *Monroe Journal* in early December, 1986, that despite rumors to the contrary, police had not found a witness to the crime, although they had heard from additional people who had been in Jackson Cleaners that morning.²¹⁵

B. The Arrest

Police did not make an arrest in the Morrison case until early June, 1987, seven months after her murder. The events leading to the arrest of Ralph Myers and Walter McMillian are illustrative of how police sometimes conduct investigations directed at proving one suspect's guilt rather than towards identifying who among possible suspects committed the crime. When police do the former, there is a greater likelihood that they will ignore or conceal exculpatory evidence, fabricate evidence, physically or mentally abuse suspects, or in some other way violate the rights of the accused and the trust placed in them by soci-

210. DFS Report, Nov. 12, 1986.

211. DFS Report, Nov. 10, 1986.

212. The absence of any reference of Banos or Diaz from the trial transcript suggests that McMillian's trial lawyers missed the evidence or that the forensic reports were not disclosed to the defense prior to the trial.

213. See DFS Memorandum to File, Dec. 3, 1986, at 2-3 (on file with the author).

214. Rhoda W. King & Patrice Stewart, *Scholarship Committee Sets Saturday Cookout*, *MONROE J.*, Dec. 4, 1986, at A2.

215. Mary F. Lett, *Escapee Remains at Large*, *MONROE J.*, Dec. 4, 1986, at A2.

ety.²¹⁶

Police were led to Ralph Myers while investigating another murder in a nearby county. Vicki Lynn Pittman, also eighteen years old, was reported missing in late February, 1987, from Escambia County. Her body was found on a dirt road in the Brooklyn community near East Brewton on March 29, 1987.²¹⁷

Isaac Charles Dailey of Atmore, arrested in Monroe County on March 25, 1987, on forgery charges, was charged with Pittman's murder.²¹⁸ Dailey made statements to the police that implicated Ralph Myers and Karen Kelly in the Pittman murder.²¹⁹ He suggested that Myers and Kelly had murdered Pittman and that they were planning to put it off on another person, Johnnie D. Williams.²²⁰ Neither the police nor the prosecution gave defense counsel the Dailey statement.²²¹

In late May or early June, 1987, police arrested Ralph Myers as a second suspect in the Pittman murder.²²² Agent Simon Benson of the Alabama Bureau of Investigation and Investigator Larry Ikner of the Monroe County District Attorney's office took a sworn statement from Myers regarding his involvement in the Pittman murder and his prior statements to police in East Brewton.²²³

Benson informed Myers that he knew Myers had lied in earlier statements.²²⁴ He told Myers that he had testimony

216. For a summary of other wrongful convictions involving corrupt law enforcement or prosecutor practices, see RADELET ET AL., *supra* note 88, at 141-93.

217. Mary F. Lett, *Forgery Ring Linked to Death in Escambia*, MONROE J., June 11, 1987, at A1.

218. *Id.*

219. Statement of Isaac Charles Dailey, Aug. 27, 1987 (on file with the author).

220. *Id.* at 2.

221. *McMillian v. State*, 616 So. 2d 933, 942 (Ala. Crim. App. 1993).

222. There is some uncertainty about this date. The Alabama Court of Criminal Appeals indicated that Myers was arrested on June 3. *McMillian*, 616 So. 2d at 942. The transcript also indicates early June. Transcript at 371. However, Ikner indicates that Myers was arrested on May 29. Statement of Ralph Myers, June 1, 1987, at 5 (on file with the author).

223. Statement of Ralph Myers, June 1, 1987. Apparently, Myers had provided police with some information relating to the Pittman murder prior to his arrest, perhaps in the capacity of a police informant.

224. See *id.* at 4-36. Most of Myers's statement relates to questions from Benson about evidence connecting Myers to the Pittman murder. Benson alleged that he had evidence implicating Myers, Isaac Dailey, Karen Kelly, and Johnnie D. Williams (aka Walter McMillian) in Pittman's death. *Id.*

from Isaac Dailey and Karen Kelly relating to Myers's participation in Pittman's murder. Benson also informed Myers that he had personal knowledge that Myers had lied to him and another officer regarding the whereabouts of a gun that had been used to beat Pittman.

Most significantly, Benson told Myers that he had new information connecting Myers to the Ronda Morrison murder.²²⁵ Benson said that Myers's wife had told him that Myers had asked her if she knew Ronda.²²⁶ This exchange between Benson and Myers was the first indication that the police would link the Pittman and Morrison murders.

Just as Isaac Dailey had warned, Myers told Benson and Ikner that Karen Kelly and Johnnie D. (McMillian) had killed Pittman over a drug deal.²²⁷ He told them he had loaned Kelly and Johnnie D. his truck one evening and that when he got it back he noticed blood in the back of it.²²⁸ He reported that when he inquired about the blood, Kelly and Johnnie D. threatened him and his family.²²⁹ With respect to Myers asking his wife whether she knew Ronda, Myers said he was asking about a person who had worked at a Piggly Wiggly and Waffle House in Evergreen.²³⁰ Myers's statement of June 1, 1987, was withheld from McMillian's lawyers.²³¹ Since Larry Ikner was then the investigator for Ted Pearson, the decision to withhold the Myers's statement probably was made by Pearson.

Two days later, in a second statement at the Monroe County Jail, Benson, Larry Ikner, and Sheriff Tom Tate questioned Myers.²³² During that interrogation, the police suggested that they believed Myers, Dailey, Kelly, and Johnnie D. were involved in not only the Pittman murder, but also the Morrison

225. *Id.* at 36.

226. *Id.*

227. *Id.* at 43-44.

228. Statement of Ralph Myers, June 1, 1987, at 53-60.

229. *Id.* at 60-64.

230. *Id.* at 36.

231. *McMillian v. State*, 616 So. 2d 933, 942 (Ala. Crim. App. 1993).

232. Statement of Ralph Myers, June 3, 1987, at 1 (on file with the author). In this statement Myers alleged that Johnnie D. (aka Walter McMillian) and another man raped him. *Id.* at 3. Police arrested McMillian for criminal sodomy based on Myers's allegations. Mary F. Lett, *McMillian is Charged with Sodomy*, *MONROE J.*, June 16, 1987, at A2.

murder.²³³ They asked Myers to tell them "why Johnnie D. had you kill Ronda Morrison."²³⁴ Myers responded that he "didn't kill Ronda Morrison" and that "Johnnie D. didn't get me to kill Ronda Morrison."²³⁵ Myers categorically denied any involvement in the Morrison murder.²³⁶ When the police informed him that they had witnesses who would testify that Johnnie D. hired Myers to kill Morrison, Myers said that the witnesses were lying and that he would be willing to take a polygraph test about the Morrison murder.²³⁷ Myers's statement from June 3, 1987, that he and Johnnie D. had had nothing to do with the Morrison murder was also withheld from the defense lawyers.²³⁸ The egregious concealment of Myers's second statement implicates not only the prosecutor, but also the sheriff and an agent of the Alabama Bureau of Investigation in fraud upon the court and the public. Their conduct evidences a disdain for the rights of the criminally accused and a contempt for the rule of law.

The June 3 statement did not provide the police with any direct evidence about the Morrison murder. However, the nature of the questioning made it plain that the police had decided to resolve the Morrison case by attributing it to Isaac Dailey, Karen Kelly, Ralph Myers, and/or Johnnie D. (aka Walter McMillian). They first needed a parrot to mimic their tale, and Ralph Myers was almost perfect. He learned their tale as sedulously as one with only an elementary education could and eventually parroted the tale in two subsequent statements.

As the police strategy unfolded, Walter McMillian became the scapegoat. Why the police chose to blame McMillian rather than one of the others for Morrison's murder is anyone's guess, but it should not be overlooked that McMillian is Black and uneducated, and, therefore, vulnerable. He was also allegedly having an affair with a White woman, which probably did not make him very popular in local circles.²³⁹ A case could be made

233. Statement of Ralph Myers, June 3, 1987, at 5.

234. *Id.*

235. *Id.* at 5-6.

236. *Id.*

237. *Id.* at 7-8.

238. *McMillian v. State*, 616 So. 2d 933, 942 (Ala. Crim. App. 1993).

239. Transcript at 379. The prosecution made a point to have Myers describe Karen Kelly, a White woman, as McMillian's girlfriend. Transcript at 380.

against him without much objection from anyone who mattered.

On June 7, 1987, police arrested Walter McMillian on sodomy charges arising from the statements made by Ralph Myers four days earlier.²⁴⁰ McMillian was taken into custody and the police impounded his truck. While the truck was outside the Monroe County Jail, it was apparently shown to Ralph Myers and William Hooks and later to Joe Hightower. They would ultimately testify against McMillian and identify his vehicle as having been at the crime scene on the morning Morrison was killed. It is now obvious that the police tampered with the evidence because Myers and Hooks described the truck with modifications that were not made until six months after Morrison's murder. The truck that they described did not exist in November 1986.²⁴¹

While McMillian was in custody, a second warrant was issued, charging him and Myers with the Morrison murder. On June 9, 1987, Ralph Myers gave a third statement to the police.²⁴² In this statement, Myers incriminated McMillian in the Morrison murder.²⁴³ The statement reads as if Myers had been poorly coached to testify against McMillian, and there are segments of the statement where law enforcement officers essentially tell Myers what to say.²⁴⁴ Unlike the prior exculpatory statements by Myers, his June 9 statement was given to the defense.²⁴⁵

The police needed more than a statement from Myers to

240. Since the police arrested McMillian on the sodomy charge, they presumably did not have sufficient evidence to link him to the scene of the Morrison crime. That information would be provided later in subsequent statements by Ralph Myers and William Hooks.

241. For a discussion of how the truck was impounded and defense lawyers' objection to the identification evidence regarding McMillian's truck, see *McMillian v. State*, 594 So. 2d 1253, 1268-69 (Ala. Crim. App. 1991). Myers's, Hooks's, and Hightower's testimony was discredited because at the trial they described McMillian's truck as a low rider. On appeal, McMillian produced evidence that he did not have his truck modified to sit low to the ground until May, 1987, over six months after Morrison was killed. The police were unaware of that fact when they showed McMillian's truck to the principal prosecution witnesses.

242. Statement of Ralph Myers, June 9, 1987 (on file with the author).

243. *Id.* at 3-8.

244. *Id.* For example, when the police asked Myers about the route he and McMillian had travelled to Monroeville, Myers could not provide an answer without guidance from them. *Id.* at 3-4.

245. *McMillian v. State*, 616 So. 2d 933, 941 (Ala. Crim. App. 1993).

obtain a conviction against McMillian.²⁴⁶ Interestingly, also on June 9, 1987, William "Bill" Hooks gave a statement to Benson and Ikner that he had seen McMillian's truck outside Jackson Cleaners on November 1, 1986, the morning that Ronda Morrison was killed.²⁴⁷ Hooks said that Ralph Myers was driving the truck and he saw McMillian running to the truck and the two of them speeding away from the cleaners.²⁴⁸ Hooks said he recognized McMillian because he had previously worked for him as a mechanic.²⁴⁹ He also said that he recognized Myers from a picture in the paper.²⁵⁰ Hooks was in jail at the time for unrelated criminal charges, and he was released from jail the same day that he made his statement incriminating McMillian.²⁵¹

In July, 1987, the District Attorney filed a motion to transfer McMillian from Monroe County Jail to a more secure state prison.²⁵² Ostensibly, the reason for the transfer was that threats allegedly had been made against McMillian. McMillian spent most of the next six years at Holman Prison in Atmore, Alabama on Death Row.

In a related matter, the Monroe County District Attorney's office and local law enforcement officials recommended to the local judge that charges and fines pending against Bill Hooks be dropped.²⁵³ Hooks also collected approximately \$5000 in reward money for his testimony against McMillian.²⁵⁴ McMillian claimed at his trial and appeal that Hooks had received favor-

246. Testimony of a codefendant must be independently corroborated. ALA. CODE § 12-21-222 (1986).

247. Statement of William Hooks, June 9, 1987 (on file with the author). Hooks said that on the morning of November 1, 1986, he was working at a used car lot and had to go to a parts store. *Id.* at 6. He said that as he returned to the lot, he passed by Jackson Cleaners and saw Walter McMillian and Ralph Myers in a green truck. *Id.*

248. *Id.* at 1-5.

249. *Id.* at 3.

250. *Id.* at 6. Hooks's statement also reveals that he saw McMillian's truck at the Monroe County Jail on June 9, 1987. He said the truck had since been painted black, but he had seen green paint in the tailgate area that confirmed for him this was the same truck he had seen at Jackson Cleaners. *Id.* at 7-8. Hooks also said that he saw the truck parked in the driveway on the south side of the cleaners. *Id.* at 6-7.

251. *McMillian v. State*, 594 So. 2d 1253, 1258-60 (Ala. Crim. App. 1991).

252. Transcript at 637.

253. *McMillian*, 594 So. 2d at 1258-60.

254. Statement of William Hooks, Jan. 18, 1993 (on file with the author).

able consideration from the prosecution and therefore was not a credible witness.²⁵⁵

On September 14, 1987, Myers gave yet another statement to the police.²⁵⁶ It too incriminated McMillian. Myers's September statement was the essence of his total testimony. The essential difference between the third and fourth statements by Myers was that he said nothing about entering the cleaners in the third.²⁵⁷

In October, 1987, a Monroe County grand jury indicted McMillian and Myers on capital murder charges.²⁵⁸ For his agreement to testify against McMillian, the prosecution made a deal with Myers that his life would be spared, and he would be permitted to plead guilty to a lesser offense and serve a limited sentence for the Pittman murder.²⁵⁹

Lawyers for the defendants sought to sever the trials and moved for a change of venue because of extensive pretrial publicity.²⁶⁰ The judge agreed to sever the trials and granted a change of venue to Bay Minette, Alabama, in Baldwin County.²⁶¹ In November, 1987, McMillian's lawyers, J.L. Chestnut and Bruce Boynton of Selma, filed a motion for discovery pursuant to *Brady v. Maryland*.²⁶² *Brady* requires the prosecution to give the defense all evidence in its possession favorable to the defendant on the issue of guilt upon request.²⁶³ The prosecution's failure to disclose exculpatory evidence that is material to either guilt or punishment violates the Due Process

255. *McMillian v. State*, 570 So. 2d 1285, 1295 (Ala. Crim. App. 1990).

256. Statement of Ralph Myers, Sept. 14, 1987 (on file with the author).

257. Transcript at 350, 353-54. Since Myers's first two statements had not been disclosed, the defense counsel refers to Myers's third and fourth statements as the first and second statements.

258. Transcript at 641. Because of a defect in the first indictment, McMillian and Myers were reindicted in December, 1987. See *McMillian*, 570 So. 2d at 1286.

259. There was no dispute that Myers received a deal in exchange for his testimony. Instead, a dispute arose regarding whether the prosecution disclosed the terms of its agreement with Myers to defense counsel. McMillian's lawyers would allege that the prosecution did not reveal the terms of its agreement with Myers as the law required. In January, 1989, Myers entered a plea of guilty for his alleged role in the Morrison crime. He was sentenced to 30 years imprisonment. *McMillian*, 570 So. 2d at 1293.

260. Transcript at 663-64.

261. Transcript at 666-67.

262. 373 U.S. 83 (1963).

263. *Brady*, 373 U.S. at 87.

Clause.²⁶⁴ The Supreme Court has said that evidence is material if there is a reasonable probability that disclosure of the evidence would have caused a different result by the jury.²⁶⁵ The failure to disclose exculpatory witness statements would serve as a principal part of McMillian's appeals and was ultimately the basis for the reversal of his conviction and death sentence.²⁶⁶

C. *The Trial*

The trial finally began on August 15, 1988.²⁶⁷ The trial lasted only two and one-half days, including the time necessary to empanel a jury. Undoubtedly, it was shortened in part by the failure of the prosecution to disclose material, exculpatory evidence to the defense. Moreover, a review of the trial transcript suggests that the trial judge seemed interested in quickly completing the trial.²⁶⁸

The prosecution's case was simple: McMillian killed Morrison during the course of a robbery. He may also have tried to take advantage of her sexually.²⁶⁹ His crime was punishable by death, and the prosecutor determined that a death sentence was appropriate. It strikes me as extraordinary that a prosecutor would conceal exculpatory evidence from the defense in violation of *Brady* and then seek the death penalty against the defendant. Regrettably, this type of conduct appears far more prevalent

264. *Id.*

265. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

266. *McMillian v. State*, 616 So. 2d 933, 947-48 (Ala. Crim. App. 1993).

267. The trial had been scheduled to begin in February, 1987; however, the prosecution requested a continuance when Ralph Myers, its chief witness, refused to testify. *See* Transcript at 350-52, 743. Myers was then ordered to undergo psychological evaluations at Taylor Hardin Secure Medical Facility to determine if he was competent to stand trial. *McMillian*, 616 So. 2d at 938. While at Taylor Hardin, Myers told four doctors during separate evaluations that he was being coerced to testify falsely about the Morrison murder. *Id.* There is no indication in the record that McMillian's lawyers sought to discover the Taylor Hardin records, and those records were not disclosed to the defense lawyers until after McMillian's conviction. *Id.* at 948.

268. *See, e.g.*, Transcript at 84, 123, 144, 205-06, 303-04, 331.

269. The prosecution made this point in its summation. Transcript at 534. In doing so, it invoked one of the principal myths about Black men as brutes with insatiable sexual desires for White women. *See* FREDRICKSON, *supra* note 72, at 276-82.

than I ever imagined, and it appears prosecutors who commit such acts go unpunished.²⁷⁰

The principal prosecution witnesses were Ralph Myers, William Hooks, Joe Hightower, and, on rebuttal, Ernest Welch. Myers testified that, on the day Morrison was murdered, McMillian asked him to drive McMillian's green Chevrolet truck from Evergreen to Monroeville so McMillian could "take care of some business."²⁷¹ He said that he drove for McMillian because McMillian's arm was "hurting."²⁷²

According to Myers, after they arrived in Monroeville, McMillian directed him to park in a shopping center parking lot near a Piggly Wiggly store and next to Jackson Cleaners.²⁷³ Myers said McMillian got out of the truck, said he would be back in a minute, and went toward Jackson Cleaners.²⁷⁴ In a few minutes, McMillian returned to the truck and said that he was sorry it was taking so long and that "they had not found what he was looking for."²⁷⁵ Myers said McMillian went back into Jackson Cleaners and, a short time later, came out again.²⁷⁶ He again said he was sorry it was taking so long and that Myers should go to a store if he needed anything.²⁷⁷ After McMillian went back toward Jackson Cleaners, Myers said he drove to a gas station and bought some cigarettes.²⁷⁸

Myers said he returned in about ten minutes and parked in approximately the same location.²⁷⁹ He observed an automobile parked in front of the cleaners and observed two men go inside and come back with some clothes.²⁸⁰ Then he heard "popping noises" coming from inside the building and, in two or three seconds, heard them again.²⁸¹ The noises sounded like firecrack-

270. For a recent article regarding the debate over the effectiveness of the *Brady* rule, see Cris Carmody, *The Brady Rule: Is It Working?*, NAT'L L.J., May 17, 1993, at 1, 30.

271. Transcript at 313-91.

272. Transcript at 315.

273. Transcript at 319.

274. Transcript at 320.

275. Transcript at 320.

276. Transcript at 320-21.

277. Transcript at 321.

278. Transcript at 321-22.

279. Transcript at 322.

280. Transcript at 323.

281. Transcript at 323-24.

ers.²⁸² Myers testified that he went into the cleaners, where he saw McMillian kneeling down behind the counter, taking money out of a paper sack, and putting it in a brown "zip-up case."²⁸³ He also saw a young girl lying on the floor with her mouth about half open.²⁸⁴ Myers said McMillian had a small caliber automatic pistol in his hand.²⁸⁵

Myers said he returned to the truck and, in a few minutes, McMillian came out and "told me to get [him] out of there, [h]is arm was hurting."²⁸⁶ He said McMillian was carrying a "little brown satchel," which was bulging out from "stuff that was in it" and, from the imprint on the satchel, it looked like there was a gun in it.²⁸⁷ They were back in Evergreen before lunch.²⁸⁸

There are several issues raised by Myers's testimony. First, much of it conflicted with pretrial statements Myers made to the police. Myers's statements evolved from a total denial of any knowledge about the Morrison case into a detailed account of the crime.²⁸⁹ Therefore, when the prosecution told the jury that Myers had told essentially the same story from the very beginning, that was untrue.²⁹⁰ Second, only two of the four state-

282. Transcript at 323-24.

283. Transcript at 324-25.

284. Transcript at 325. This testimony contradicted statements by Woodrow Ikner that Morrison's body was lying face down until he turned her over. Transcript at 126-28.

285. Transcript at 325. Myers said when McMillian saw him, McMillian grabbed him and shoved him against the wall. Transcript at 327. Myers said he heard the voice of another person in the back of the cleaners, and he observed the back of a White man with shoulder-length, "[b]lackish-grayish hair," who was carrying something in his hand that looked like a piece of pipe. Transcript at 331-32. The man hollered for McMillian and said, "How am I going to get out of here without him seeing me?" Transcript at 333. Myers heard "mumbling" and voices in the rear of the cleaners and heard someone say, "Get the stuff and get out of here." Transcript at 333. A voice said, "You need to get rid of him too." Transcript at 333. McMillian said, in response, that he could not because he was "out of something." Transcript at 333-34. Myers said McMillian threatened him, telling him he would kill him, his wife, and his kids if he ever said anything and told him to go outside. Transcript at 334.

286. Transcript at 335.

287. Transcript at 335-36.

288. Transcript at 338.

289. In all, Myers made four statements to law enforcement personnel about the Morrison case. Statements of Ralph Myers, June 1, 3, and 9, 1987, and September 14, 1987.

290. Transcript at 542-43.

ments from Myers were disclosed to the defense, preventing McMillian from fully attacking Myers's credibility. Thus, the prosecution had information from Myers that was inconsistent with his trial testimony, and they kept that information from the defendant, the jurors, and the judge.

What is most remarkable about Myers's testimony is the amount of time that he suggested elapsed between their arrival and departure from the cleaners. Myers said that McMillian went in and out of the cleaners at least three times. Myers said that McMillian returned to the truck twice and apologized for it taking him so long. Myers also testified that he left for ten minutes to go buy cigarettes. It seems ludicrous that in the course of a robbery and murder, the assailant would invite his driver to go buy cigarettes. Yet that was the nature of Myers's testimony.

None of the lawyers at the trial pinned Myers down for a specific estimate of the length of time he and McMillian were allegedly in Jackson Cleaners. The implication from Myers's testimony was that they were at the cleaners for perhaps thirty to forty-five minutes. Thus, the difficulty with Myers's testimony is that other evidence from the police, and from Jan Owen and Jerrie Sue Dunning suggested that this crime occurred within a period of fifteen minutes, between 10:30 and 10:45 a.m. McMillian's lawyers were unaware of the evidence regarding Miles Jackson's presence in the cleaners at 10:30 a.m., and none of the prosecutors bothered to note this discrepancy to the jury.

William Hooks testified that on the day of Morrison's murder, he was working at Kenny Blanton's Car Repair about three or four miles from Jackson Cleaners;²⁹¹ that "about the middle of the morning" he went to Taylor's Parts in Monroeville to buy some parts for an automobile that he was working on;²⁹² and that as he was passing Jackson Cleaners on his way back to Blanton's, he saw McMillian's truck parked there.²⁹³ Hooks said he saw Ralph Myers in the truck on the driver's side, and

291. Transcript at 257.

292. Transcript at 258.

293. Transcript at 258. This testimony was controversial because Myers testified that he had parked in the lot adjacent to the cleaners rather than at the cleaners. Again, it appears that McMillian's lawyers failed effectively to raise this discrepancy to the jury.

McMillian was getting in the truck.²⁹⁴ He said he knew McMillian because he had done work for him.²⁹⁵ He was familiar with McMillian's truck; he described it as a green, low, down-to-the-ground Chevrolet truck; and he had never seen anyone besides McMillian drive the vehicle.²⁹⁶

Hooks testified that the truck "speeded out" and went on down the highway and, about five minutes later, he heard the police and ambulance sirens going up the road toward Jackson Cleaners.²⁹⁷ He said, sometime later, he saw the truck at the Monroe County Jail and noted that it had been painted black, but that the interior of the truck bed was still green.²⁹⁸

Joe Hightower, a twenty-two-year-old welder, testified that "sometime up in the morning" on the day of the killing, he was passing by Jackson Cleaners and observed McMillian's truck "sitting at the cleaners."²⁹⁹ He said he knew the truck well, having seen it "[a] good number of times."³⁰⁰ He testified that he had been to McMillian's house and had seen the truck there.³⁰¹ He described the truck as a green, low-rider type.³⁰² He observed no other vehicles at the cleaners at that time.³⁰³ After observing the truck, he went home and, around noon or 1:00 p.m., his wife told him about hearing of the incident that had just occurred at the cleaners.³⁰⁴ He remembered that he had seen McMillian's truck at the cleaners, but he did not report it.³⁰⁵

On cross-examination, Hightower testified that he gave the information to the sheriff a few days before the commencement of the trial and, when asked why he had not come forward soon-

294. Transcript at 258.

295. Transcript at 259-60.

296. Transcript at 260-61.

297. Transcript at 261.

298. The record does not report that Hooks and another prosecution witness were the principal recipients of reward money offered for their testimony against McMillian. See Statement of William Hooks, Jan. 18, 1993, at 2.

299. Transcript at 224.

300. Transcript at 224.

301. Transcript at 224.

302. Transcript at 224.

303. Transcript at 228.

304. Transcript at 227.

305. Transcript at 228.

er, he stated that he was scared.³⁰⁶ On redirect, the prosecutor asked him why he was scared, and he stated, "Just because the reasons I have been to his house."³⁰⁷ The prosecutor then asked, "Mr. Hightower, why were you scared to come forward with this information?" He replied, "Because when you fool with drugs and you don't know, if you get involved with something like that it could cause [sic] you your life, too."³⁰⁸ Hightower's testimony about drugs had to influence the jurors' view of McMillian and defense lawyers sought a mistrial, but their request was refused.³⁰⁹

McMillian did not testify. However, he called several witnesses in an effort to cast doubt upon the testimony of Myers, Hooks, and Hightower and to establish an alibi.

William Tidmore was called as a defense witness and, on direct examination, testified that Hooks told him sometime after the date of the murder that he may have seen McMillian's truck parked at Jackson Cleaners on that date, but did not give him the names of any persons he may have seen.³¹⁰ However, on cross-examination, he testified that he had previously told Sheriff Thomas Tate about Hooks's coming back from Monroeville after going for automobile parts on the date of the incident, about hearing sirens "going off," and about Hooks's saying something must have happened at Jackson Cleaners.³¹¹ On redirect, Tidmore said Hooks never told him that he had seen Myers and McMillian at Jackson Cleaners.³¹²

Minnie McMillian, McMillian's wife, testified that Hooks came to her home a few days after McMillian was arrested for the murder and said nothing about seeing McMillian and Myers at Jackson Cleaners on the date of the incident.³¹³ She also testified that, on the date of the murder, McMillian was home all day except for about ten minutes when he went to his brother's to borrow a pot for frying fish; that the transmission

306. Transcript at 226-39.

307. Transcript at 236.

308. Transcript at 239.

309. Transcript at 224-26, 236-39.

310. Transcript at 391-97.

311. Transcript at 393-96.

312. Transcript at 397.

313. Transcript at 397-98.

had been removed from his truck on that date; and that a fish fry was held at McMillian's home on that date.³¹⁴ She testified that she was certain about the date because Ernest Welch, a man who collects for a furniture company in Monroeville, came out that day to collect from her mother; that he always comes on the first of the month; and that he never missed coming on the first.³¹⁵ She also testified that Welch stopped by where Jimmy D. Hunter and McMillian were working on McMillian's truck and told them that Welch's niece had been killed that day at Jackson Cleaners.³¹⁶

Jimmy D. Hunter testified that he worked on the transmission of McMillian's truck on the date of the murder; that McMillian was home all day; that Welch, the collector for a furniture company, came by; that he knew Welch and had an account with him; and that Welch told him and McMillian about his niece being killed at Jackson Cleaners.³¹⁷

James Franklin McMillian, McMillian's brother, testified that he saw McMillian and Hunter about 7:00 a.m. at McMillian's home on the date of the murder; that they were working on McMillian's truck; that he passed McMillian's house several times that day and that he saw him on each occasion; that McMillian came to his house and borrowed a pot for frying fish; that when he came for the pot, he was driving a vehicle other than his truck; and that McMillian was at home all morning.³¹⁸

Evelene Smith, McMillian's sister, testified that she arrived at McMillian's home on the date of the incident at about 10:15 a.m.; that he was there when she arrived; that she did not see him leave that morning; and that she saw Hunter and Welch there.³¹⁹ She further testified that Louise Gibbs came and said, "Sister, we would have done been [sic] over here but the reason we [are] late [is] because Ronda got killed right there where you work at the cleaners."³²⁰ Smith also testified that FBI men had

314. Transcript at 405-06.

315. Transcript at 406.

316. Transcript at 406.

317. Transcript at 411-22.

318. Transcript at 423-31.

319. Transcript at 432-34.

320. Transcript at 435.

come to the house that morning and had stopped her daughter-in-law as she drove into McMillian's driveway and asked if she had loaned her car to anyone.³²¹

Doris Stevens Hand, who is married to McMillian's nephew, testified that she observed McMillian at his home on the date of the incident from 10:30 a.m. to noon; that he never left his house; and that she and McMillian talked with the "fish man."³²²

Carolyn McMillian, who is married to the son of McMillian's sister, Evelene Smith, testified that she saw McMillian at his home when she arrived between 10:00 and 11:00 a.m. on the date of the incident; that she remained there until it became dark; that McMillian was there the entire time; that she saw the "fish man" and the "furniture man," who are both White, come by; and that, about noon, Louise Gibbs came by and told them about the killing.³²³ She also testified that she and her mother-in-law, Evelene Smith, had gone to the courthouse the day after the incident and told Sheriff Tate and other officers that McMillian was at home all day on the day of the incident.³²⁴

Sheriff Tate was called as a witness for the defense and asked if he remembered Carolyn McMillian and her mother-in-law coming to the courthouse and telling him and other officers that on the date of the incident, McMillian was at home all day.³²⁵ Tate testified that he had seen Mrs. Smith talking with one of the officers, but he could not recall such a conversation.³²⁶

The state called Ernest Welch in rebuttal.³²⁷ Welch testified that he had been a furniture salesman for twenty-two years; that the victim was his niece; that she was killed on Saturday, November 1, 1986; that he did not see McMillian on the date that his niece was killed; that he did not go to McMillian's house on that date, but had gone to his house on Friday, October 31, 1986, to collect from McMillian's mother-in-law, Ida Bell Ander-

321. Transcript at 436-40.

322. Transcript at 440-47.

323. Transcript at 447-51.

324. Transcript at 458-60.

325. Transcript at 461.

326. Transcript at 461-62.

327. Transcript at 467-88.

son, who lived behind McMillian; that he did not see Hunter and the others who testified that they had seen him at McMillian's house on November 1, 1986, because he did not go there on that date; and that government checks "come out" on Friday when the first of the month is on Saturday, which was why he had called on Anderson to collect on Friday, October 31.³²⁸ He identified the collection records of the furniture company, which were kept in the ordinary course of business, and the records showed that he collected payment for furniture from Anderson on October 31, 1986.³²⁹

On August 17, 1988, a Baldwin County jury found McMillian guilty of the capital murder during the course of a robbery.³³⁰ The jury apparently believed Myers, Hooks, Hightower, and Welch despite the fact that Myers made a deal with prosecutors; Hooks and Hightower both obtained portions of the reward money for information leading to a conviction in the Morrison case; and Welch was Morrison's uncle.

A sentencing hearing immediately followed the guilt phase of the trial, in accordance with sections 13A-5-43 to -46 of the Alabama Code, and the jury returned an advisory verdict recommending that the penalty be life imprisonment without the possibility of parole. Five jurors recommended the death penalty, and seven recommended a sentence of life imprisonment without parole.³³¹ Since Alabama law requires at least ten jurors to concur in an advisory verdict recommending death, McMillian's jury was five votes short.³³² However, the jury verdict is only advisory. The trial judge has the final word.

On September 19, 1988, the trial judge held another sentencing hearing, in accordance with sections 13A-5-47 to -52 of the Alabama Code, and after weighing the aggravating and mitigating circumstances and considering the jury's recommendation, overrode the jury verdict and sentenced McMillian to

328. Transcript at 468-81.

329. Transcript at 479-81.

330. Transcript at 578.

331. Transcript at 610.

332. Section 13A-5-46(f) of the Alabama Code requires that an advisory verdict recommending death be based on a vote of at least 10 jurors, and a verdict recommending life imprisonment without the possibility of parole must be based on a vote of a majority of the jurors. ALA. CODE § 13A-5-46(f) (1982).

death.³³³ Alabama is the only death penalty state that permits a trial judge to override the jury verdict without requiring any level of deference.³³⁴ It is estimated that a quarter of prisoners on death row in Alabama were sent there by trial judges after juries voted for verdicts of life imprisonment without parole.³³⁵ This enormous power is subject to abuse when judges, like other agents of the criminal justice system, are imbued with racial animus, or when they act in the face of perjured or concealed information.

To the end, McMillian proclaimed his innocence. When asked if he had anything to say before his sentence was imposed, he said, "Well, the only thing I can say, I am not guilty. I like for that girl's parents to know that I did not kill their daughter. I want them to know that."³³⁶

D. The Appeal

In a paradoxical way, Judge Key's override of the jury verdict was McMillian's first break in the case. There are so few indigent defense agencies working on capital murder cases that it is most unlikely that any agency would have taken special note of the McMillian case if the judge had let stand a jury verdict of life imprisonment without parole. The resources simply are not available to represent every death row inmate. This is partly true because in Alabama there is no state-wide public defender agency to provide counseling or direct representation. It is also the case because private lawyers have few economic incentives for taking on such specialized cases given the statutory caps on what can be billed.³³⁷ Finally, defense lawyers must petition the court to approve funds to investigate the defense

333. Transcript at 616-28. The trial judge said that aggravating circumstances existed, namely the commission of murder in the course of a robbery and the killing was especially heinous, atrocious, and cruel. He found no mitigating circumstances other than the jury's verdict. He concluded: "In the mind of this Court, the only appropriate sentence in this case is death by electrocution." Transcript at 626.

334. See Friedman & Stevenson, *supra* note 45, at 14 nn.64-65.

335. Friedman & Stevenson, *supra* note 45, at 14-15 n.67.

336. Transcript at 626.

337. The state pays capital attorneys \$20 per hour for out-of-court work and \$40 per hour for in-court representation. In addition, a capital attorney can be paid no more than \$1000 for out-of-court work. ALA. CODE § 15-12-21(d) (1982).

and approval is discretionary with the court.³³⁸

McMillian's second break came when Bryan Stevenson and Eva Ansley began an initiative in Alabama in the fall of 1988 to assist recently sentenced death row prisoners who were indigent and requesting legal assistance. In 1989, the Alabama Capital Representation Resource Center was founded with Stevenson serving as Executive Director.

After meeting with McMillian, Stevenson and staff, along with Resource Center volunteers, led the effort to reinvestigate the Morrison murder and McMillian's claims that he did not kill her. During thousands of hours of interviews and examinations of the trial and appellate record,³³⁹ the Resource Center uncovered significant exculpatory evidence that had not been disclosed to the defense or reported to the jury.³⁴⁰ For example, it was the Resource Center that accidentally found a recording of Myers's exculpatory statements about McMillian. The Resource Center confirmed that McMillian's truck was not a low-rider on November 1, 1986. It found evidence that Myers did not know McMillian in March, 1987, some four months after they allegedly committed the Morrison crime. The Resource Center found evidence that before McMillian's trial, Myers told four doctors during a court-ordered psychological examination that he was about to frame an innocent man for murder; the reports of Myers's evaluation were sent to the prosecutor and to the court clerk, but were never disclosed to the defense lawyers or the jury. The Resource Center also found a report prepared by the Alabama Bureau of Investigation from October, 1987, which confirmed that Miles Jackson was in Jackson Cleaners at 10:30 a.m. on the morning of the murder and that he had told police Morrison was fine at the time. The ABI report was not disclosed to the defense or the jury. Finally, Myers contacted the Resource Center in 1991 and said that he had been pressured by law enforcement officers to testify falsely against McMillian; and now even the Alabama Attorney General admits that all the prosecution witnesses against McMillian have recanted their

338. See *id.* § 15-12-21(e).

339. *Innocence and the Death Penalty: Hearings Before the Sen. Comm. on the Judiciary*, 103d Cong., 2d Sess. 42-48 (1993) (statement of Bryan A. Stevenson).

340. A summary of the findings of the Resource Center is found in *McMillian v. State*, 616 So. 2d 933, 941-49 (Ala. Crim. App. 1993).

trial testimony.³⁴¹

The work of the Resource Center is remarkable for many reasons. It illustrates how difficult and time-consuming it is to prove a wrongful conviction claim in our appellate courts, and it reveals how inadequately McMillian was represented at his capital murder trial. In their 1957 book on wrongful convictions, Judge Jerome Frank and his daughter Barbara Frank described the "Upper Court Myth" in their book.³⁴² They perceptively critiqued the still popular notion that if an innocent person is convicted, the appellate court will surely set the conviction aside. Appellate courts in fact have numerous limitations on the scope of their review which prevent them from any *de novo* review of trial facts or credibility determinations.

The work of the Resource Center also underscores the amount of time, skill, and specialized knowledge required to effectively investigate and prepare a capital murder defense. The trial record does not disclose the extent of the investigation undertaken by McMillian's trial lawyers or how much time they spent in Monroeville preparing his defense. There is little question, however, that any pretrial investigation on McMillian's behalf was cursory at best. Some of the information located by the Resource Center should have been found by McMillian's lawyers. They should have requested and examined the Taylor Hardin records, for example, and they should have been able to establish that McMillian's truck was not a low-rider in November, 1986. The concealment of exculpatory evidence by police and prosecutors therefore does not wholly excuse the half-hearted defense presented by McMillian's lawyers.

Based on its discovery of this undisclosed exculpatory and impeachment evidence, the Resource Center took over the appellate representation of McMillian. But the appellate courts were extraordinarily resistant to McMillian's grounds for appeal.³⁴³

341. Letter from Alabama Attorney General Jimmy Evans to Bryan Stevenson, Executive Director, Alabama Capital Representation Resource Center (Feb. 25, 1993) (on file with the author). Ironically, the additional exculpatory evidence was mailed to Stevenson two days after the court reversed McMillian's conviction and death sentence.

342. JEROME FRANK AND BARBARA FRANK, NOT GUILTY 32-33 (1957).

343. See *McMillian v. State*, 570 So. 2d 1285 (Ala. Crim. App. 1990); *McMillian v. State*, 594 So. 2d 1253 (Ala. Crim. App. 1991); *Ex parte McMillian*, 594 So. 2d 1288 (Ala. 1992); *McMillian v. State*, 594 So. 2d 1289 (Ala. Crim. App. 1992);

It took McMillian nearly five years and four rounds of appeals to convince the Alabama Court of Criminal Appeals that he had received an unfair trial, even though he had presented some seventeen grounds of appeal to that court within two years of his conviction.³⁴⁴ Indicative of that resistance is the fact that even after Myers testified that he had perjured himself during McMillian's trial, the appellate court was unwilling to believe that McMillian's conviction had been obtained by perjured testimony.³⁴⁵ The court's response to McMillian was that the credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal.³⁴⁶

The court could not so easily dismiss McMillian's *Brady* violation claims. Through the exceptional legal assistance from the Resource Center, McMillian proved that his due process rights were violated by the state's failure to disclose exculpatory and impeachment evidence.³⁴⁷ The court concluded that there was a reasonable probability that had the exculpatory and impeachment evidence been disclosed prior to trial, the results of the proceedings would have been different.³⁴⁸ On February 23, 1993, the court reversed McMillian's conviction and death sentence and remanded the case for a new trial.³⁴⁹ On March 2, 1993, McMillian was released from Alabama's Death Row, which had been his home since July, 1987.³⁵⁰

V. SUGGESTIONS FOR CRIMINAL JUSTICE REFORM

McMillian's story reads like so many other wrongful conviction cases. Police personnel investigated the crime incompetently and negligently and law enforcement agencies collaborated to coerce incriminating statements from jailhouse informants who

McMillian v. State, 616 So. 2d 933 (Ala. Crim. App. 1992). For a summary of McMillian's appellate ordeal, see *McMillian*, 616 So. 2d at 935-36.

344. *McMillian*, 594 So. 2d at 1253. For a summary of the appellate history, see *McMillian*, 616 So. 2d at 935-36.

345. *McMillian*, 616 So. 2d at 936-41.

346. *Id.* at 941.

347. *Id.* at 941-42.

348. *Id.* at 949.

349. *Id.* at 933.

350. Peter Applebome, *Alabama Releases Man Held On Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1.

were known criminals and liars willing to parrot anything to the police in exchange for personal deals or reward money. The prosecution selectively disclosed contradictory statements and the terms of special agreements between the prosecution and state witnesses. Because police and prosecutors impeded full disclosure of the evidence, McMillian's lawyers could not provide him effective assistance of counsel. Moreover, because Alabama does not have an indigent defense program to provide poor people with adequate lawyer services, even if McMillian's lawyers had received the exculpatory information, they would have had limited time and resources to prepare his defense. All of these factors made McMillian's trial unfair, his conviction wrongful, and him a victim. He cannot regain the six years that he was incarcerated, nor can he live with his family or work in his former community.

Walter McMillian is lucky to be alive and out of prison. The criminal justice system did not work for him. He was found innocent in spite of the criminal justice system.³⁵¹ He was fortunate to receive postconviction assistance from very able and diligent counsel and investigators at the Resource Center. Without agencies like the Resource Center, McMillian would very likely still be on Death Row or would by now have been executed. To date, McMillian has received no form of indemnity from the state.

Cases like McMillian's will continue to occur until we do much more to ensure that every criminal defendant receives a fair trial, with meaningful assistance of counsel not only in the all-important initial capital trial, but also throughout his or her appeal. Over seventy years ago, Edwin Borchard, a Yale law professor, advocated reforms in criminal procedures designed to reduce the number of wrongful convictions.³⁵² Among them, Borchard recommended that (1) no confession be introduced as evidence unless it was given before a magistrate and in the presence of witnesses; (2) expert witnesses should be in the employ of the public and not retained solely by the defense or

351. Many of the wrongful conviction cases discussed in *In Spite of Innocence* were corrected by persons outside the criminal justice system. See RADELET ET AL., *supra* note 88, at 279-80.

352. RADELET ET AL., *supra* note 88, at 278-79.

prosecution; (3) indigent defendants should have the services of a public defender; (4) in cases where a conviction may have been erroneous, an independent investigative body should be appointed to review the case; (5) appellate courts should be empowered to review not only the law under which the defendant was convicted, but also the facts introduced into evidence against him or her; (6) no death sentence should issue against a defendant convicted solely on circumstantial evidence; and (7) the state should indemnify the accused and publicly vindicate him or her.³⁵³ Borchard's proposals have not received broad adoption. They are worthy of further consideration and would likely have eliminated some of the wrongful convictions that have occurred in the last sixty years. But many others would likely still have fallen through the cracks because Borchard did not address all the problems of corrupt practices by police or prosecutors or perjury by witnesses like Myers, Hooks, or Hightower.

Twenty-five years later, the Franks revisited the problem of wrongful convictions and cautioned us to be wary of the myth of infallibility.³⁵⁴ The wrongful conviction of Walter McMillian is just another reminder that we are not only fallible, but sometimes overzealous in our attempt to make someone pay for a crime.

Radelet, Bedau, and Putnam published still another wake-up call for those who refuse to believe that people are wrongfully convicted and that some of these movements have been executed. Their concern over the execution of the innocent persuades them that we should abandon the death penalty and use long-term incarceration in the alternative. As much as I am now persuaded by the wisdom of this conclusion, it seems unlikely that this nation will move away from its sanction of the death penalty any time soon.

More recently, Ruth Friedman and Bryan Stevenson have written a compelling article about capital defense issues in Alabama.³⁵⁵ Friedman and Stevenson are correct that improving capital defense requires (1) the elimination of statutory limits on

353. RADELET ET AL., *supra* note 88, at 278-79. For a full discussion of Borchard's proposals, see EDWIN BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* 367-78 (1932).

354. FRANK & FRANK, *supra* note 342, at 199-249.

355. Friedman & Stevenson, *supra* note 45.

compensation for appointed counsel in capital cases; (2) improvement of the rates of compensation for appointed counsel; (3) development of better training for appointed counsel; and (4) establishment of a statewide public defender office for consultation services and direct representation.³⁵⁶ These reforms could help immensely in improving the trial process by ensuring that lawyers who are appointed to capital defense cases have the requisite skill, experience, and time to fully defend the accused.

The reforms proposed by Borchard, the Franks, Radelet, Bedau and Putnam, and Friedman and Stevenson merit serious consideration and discussion. They might protect all of us from similar encounters. Yet even with these reforms, McMillian probably would have been convicted because law enforcement officials and the prosecution concealed exculpatory evidence from the defense with impunity.

If we are serious about reducing the number of wrongful convictions, we need to make it a crime to conceal exculpatory evidence. Thus, a rule that places an affirmative duty on law enforcement personnel and prosecutors to disclose all their evidence to both the defense and the prosecution is essential. It only makes sense to continue to stack public resources in favor of the prosecution if we are simply interested in obtaining convictions.

Alabama has now adopted an open file policy in response to numerous cases in which prosecutors failed to disclose exculpatory or impeachment evidence.³⁵⁷ That policy could still be inadequate when documents do not make it into the prosecution file. A more effective policy would be to criminalize the failure to disclose such reports and make proof of nondisclosure an automatic ground for reversal of a conviction and death sentence. It is time to take the problem of wrongful convictions seriously. An exculpatory rule and criminal prosecutions of persons who participate in concealing exculpatory evidence would give a weak *Brady* rule significance.³⁵⁸

356. Friedman & Stevenson, *supra* note 45, at 40-59.

357. *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989).

358. See Carmody, *supra* note 270. As stated earlier, *Brady* gives prosecutors the discretion to determine what evidence is material or which potential witnesses are credible. The result is that exculpatory evidence goes unnoticed by the jury and the judge.

We also need to be far more suspicious of testimony from interested witnesses who themselves may have committed the crime or who make deals or receive reward money in exchange for their testimony. Why do we repeatedly believe the likes of Ralph Myers or David Harris, whose lies incriminated Randall Adams?³⁵⁹ Such witnesses have incentives to lie, and they are under the coercive control of agents of the criminal justice system who have demonstrated a willingness to conceal exculpatory evidence. It is so easy to fabricate such evidence that maybe we cannot trust such testimony at all. Or perhaps we should require that it be independently corroborated. As long as we treat such evidence as credible, we will continue to discover that another interested witness has lied.

Agencies like the Alabama Capital Representation Resource Center are indispensable to our efforts to reduce the number of wrongful convictions. The Resource Center serves in the role of a private attorney general and is independent of the criminal justice system. Because of its important work, it should have a method available to obtain reimbursement for its reasonable attorney's and investigator's fees. Such agencies help oversee agents of the criminal justice system who too frequently abuse the rights of the criminally accused and conceal the truth.

McMillian's ordeal continued in the appellate courts and his experience makes a strong case for effective legal representation for the criminally accused throughout postconviction proceedings until all legal grounds for appeal have been exhausted. Only then is the indigent criminal defendant accorded an equal opportunity to prove his innocence.

As for the issue of innocence, there should be no time limit on the presentation of new evidence relating to the innocence of the defendant. We will likely never know if James Adams was in fact innocent of killing Edgar Brown, or if Roger Coleman or Leonel Herrera were innocent of their alleged crimes. They were executed in 1984, 1992, and 1993, respectively.³⁶⁰

Alabama gives defendants only thirty days to present new

359. For a full discussion of the Adams case, see RANDALL D. ADAMS ET AL., ADAMS V. TEXAS (1991).

360. For a good discussion of recent cases in which defendants claiming innocence have been executed, see Friedman & Stevenson, *supra* note 45.

evidence that might reverse their convictions.³⁶¹ Sixteen states require new trial motions based on new evidence be filed within sixty days of the judgment; others have time limits from one to three years.³⁶² Nine states have no time limits.³⁶³ Thus, an opportunity to present new evidence depends significantly on the place where one is convicted. That does not make sense. We need a federal rule that places no limit on the presentation of evidence of innocence.

VI. CONCLUSION

There are too many Tom Robinsons among us. Walter McMillian was fortunate. Before reading about what happened to him, I was not aware of the frequency of wrongful convictions or the haste and zeal with which we have been willing to convict and sometimes execute some criminally accused. Hardly a day passes without some reference to proposals shortening the time between sentencing and execution. Here, I have in mind the continual increase in restrictions on federal habeas corpus relief and the procedural emphasis of the Court.³⁶⁴ We have somehow forgotten about the possibility of the substantive innocence of the accused and that no clock or procedural error should preclude substantive proof of innocence. Moreover, any haste and zeal to execute a convicted person seems grossly inappropriate within a criminal justice system that is prone to error or intentional abuse.

I shall reserve my full critique of our use of the death penalty for another project, but here wish to make plain my doubts that the death penalty can be applied without arbitrariness or racial discrimination in our criminal justice system. Meanwhile, other mockingbirds are crying out for our help.³⁶⁵

361. ALA. CODE § 15-17-5 (1982).

362. See *Herrera v. Collins*, 113 S. Ct. 853, 865-66 nn.8-11 (1993).

363. *Herrera*, 113 S. Ct. at 865-66.

364. See Friedman & Stevenson, *supra* note 45, at 15-20 and accompanying notes.

365. At this writing, Adolph Munson is on death row in Texas for a crime committed by someone else. His now-familiar story recently appeared in Richard L. Fricker, *Reasonable Doubts*, A.B.A. J., Dec. 1993, at 8.