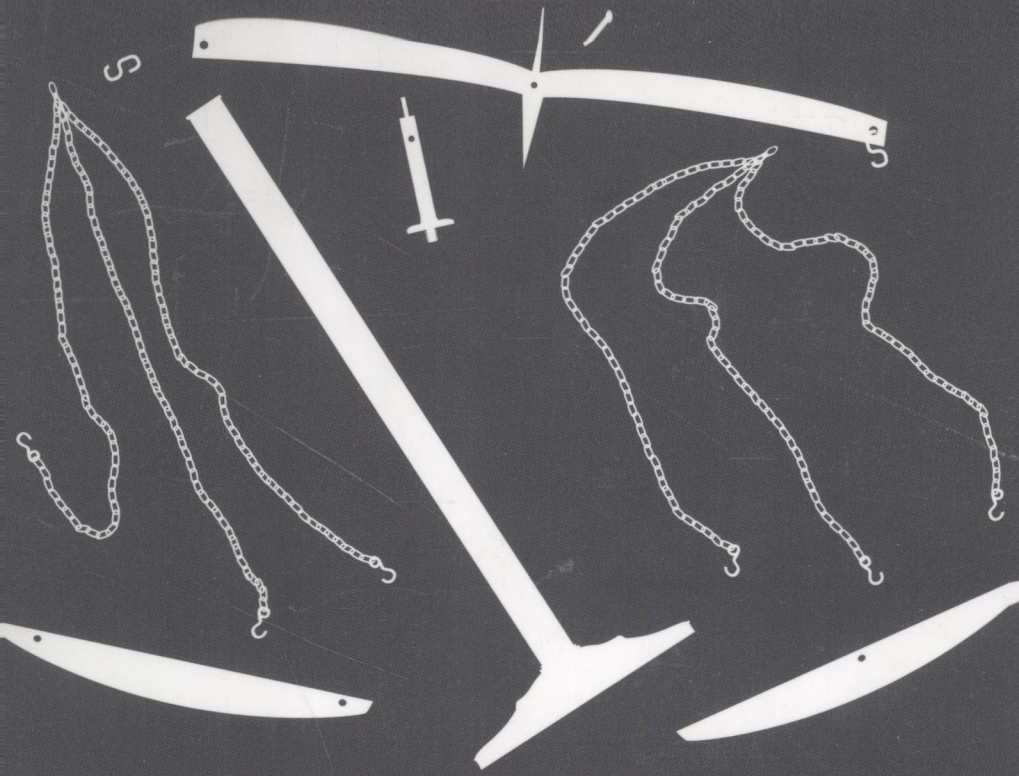

ANATOMY OF INJUSTICE

A Murder Case Gone Wrong

RAYMOND BONNER

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A MURDER CASE GONE WRONG

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ALFRED A. KNOPF · NEW YORK
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Anatomy of Injustice

In memory of my mother,
Marjorie De Mund Bonner
(1912–2000),
who instilled the values in the beginning,
and for
Susannah and Fiona,
who give me hope for the future

[The prosecutor's duty] is not that [the government] shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

—JUSTICE GEORGE SUTHERLAND,
BERGER V. UNITED STATES, 1935

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.

—JUSTICE BYRON WHITE,
UNITED STATES V. WADE, 1967

AUTHOR'S NOTE

IN THE FIRST month of the twenty-first century, Governor George Ryan of Illinois dramatically thrust the death penalty into the national debate. Investigative work by reporters at the *Chicago Tribune* and by a joint project at the schools of law and journalism at Northwestern University had resulted in several condemned men having their convictions reversed, one only hours before he was to be executed. Ryan, a longtime proponent of capital punishment, was shaken. "Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate," said Ryan. A conservative Republican, Ryan said he still believed in the death penalty, but was compelled to suspend executions in the face of the state's "shameful record of convicting innocent people and putting them on Death Row."

Two weeks later, another conservative Republican governor, George W. Bush of Texas, was asked about capital punishment when he appeared on *Meet the Press* as his party's leading presidential candidate. As governor, Bush had presided over more executions than any state chief executive in history. Indeed, under his watch, from 1995 to 2000, Texas put more men and women to death than the next five states combined (Virginia, Oklahoma, South Carolina, Florida, and Alabama). Toward the end of the

hour-long program, the host, Tim Russert, raised the subject of the death penalty.

Would Bush join Governor Ryan in invoking a moratorium until the system could be analyzed "so you don't make a mistake?" Russert asked, noting that Ryan was the head of Bush's campaign in Illinois.

"No, I won't," Bush said without hesitation. "Because I'm confident that every person that has been put to death in Texas under my watch has been guilty of the crime charged and has full access to the courts. I'm confident." He went on, "I've reviewed every case, Tim, and I'm confident that every case that has come across my desk—I'm confident of the guilt of the person who committed the crime."

BUSH WAS THROWING DOWN the gauntlet, in a move reminiscent of Senator Gary Hart's challenge to the media during the 1984 primaries to prove his marital infidelity. But Bush's boast was far more serious: that no innocent man had been executed in Texas, that every death row inmate had enjoyed "full access to the courts."

In response, *The New York Times* sent me to Texas to investigate and report on the matter. My colleague Sara Rimer and I spent several weeks traveling around the state—San Antonio, Brownsville, Austin, Dallas, Houston—talking to death penalty lawyers, prosecutors, victims' families, and members of the Texas Board of Pardons and Paroles, and reviewing cases of men who had been executed. We did not find any case where we could say with certainty that an innocent man had been executed. Our efforts to do so were severely hampered by the fact that once a man is executed, his lawyers and investigators turn their attention to clients who are still on death row, rather than pursuing evidence of a former client's innocence. But we found state officials involved in the Texas criminal justice system who were not as sanguine as their governor that the system was rendering justice in every case. "I worry that we may execute an innocent person," said Paddy Lann Burwell, who had been appointed by Bush to the parole board. "Any person

would know that is a possibility. I think our system needs to be improved." Our lengthy article appeared on the front page, and it was accompanied by brief summaries of five cases.

The *Times* editors considered that capital punishment was a topic worthy of further reporting, and Sara and I continued to examine the various issues that marked the debate. We made repeated visits to Texas's death row in Livingston. After passing through security, we'd sit in a rather large room with vending machines dispensing soft drinks, coffee, and candy bars, waiting for a prisoner to be brought from his cell. He'd be on the other side of thick glass, and we'd talk through a telephone. We interviewed John Paul Penry, whose case was twice argued before the United States Supreme Court. It was November, and when we asked Mr. Penry, fifty-six years old, if he believed in Santa Claus, he said, "They keep talking about Santa Claus being down in the North Pole. . . . Some people say it's not true. I got to where I do believe there's a Santa Claus."

One of our front-page articles, "Executing the Mentally Retarded Even as Laws Begin to Shift," was cited by both the majority and the dissent in *Atkins v. Virginia,* the landmark Supreme Court case that held it was unconstitutional to execute a person who was mentally retarded. We were given unexpected insight into the generally poor quality of trial representation provided defendants facing the death penalty when we interviewed a gregarious Houston lawyer named Ronald Mock. He had had more clients executed or awaiting execution than any other lawyer in the country, which didn't seem to shame him at all. Mock boasted that he had flunked his criminal law course and was a heavy drinker. "I drank whiskey with judges," he said. "I drank whiskey in the best bars." He insisted it didn't affect his performance, and judges kept appointing him to represent defendants in capital cases.

We reported beyond the South. I went to Idaho when Charles Fain, who had been on death row for eighteen years, was released after DNA established his innocence.

At some point, I heard about the South Carolina case of Edward Lee Elmore. After a trial lasting seven days, he had

been sentenced to death in 1982 for the murder of a wealthy widow, Dorothy Ely Edwards. His conviction was overturned on appeal; he was retried and reconvicted; that sentence was also reversed; after a third trial, he was again sentenced to death. Then, in 2000, his lawyers found evidence that state officials had sworn repeatedly had been lost. The evidence raised questions about Elmore's guilt.

In many ways, Elmore's is a garden-variety death penalty case: a young black male of limited intelligence convicted of murdering a white person after a trial in which his lawyers' performance was so poor that it could barely be called a defense. But the case is also exceptional, and not just because it involved "sex, violence, and racism," as one of Mrs. Edwards's neighbors put it, convinced that this was the only reason reporters were interested. Elmore's story raises nearly all the issues that mark the debate about capital punishment: race, mental retardation, bad trial lawyers, prosecutorial misconduct, "snitch" testimony, DNA testing, a claim of innocence. "While lots of cases have one of these aspects, it's a case that has all of them," John Blume, head of the South Carolina Death Penalty Resource Center, which represented death row inmates, told me.

For this reason, I felt the desire to write Elmore's story more than that of any of the other men Sara and I met on death row. But that wasn't the only factor leading to this book. For me, as a lawyer and as a journalist, what transformed the story was the character, dedication, and determination of his appellate lawyer, Diana Holt, an intense native of Texas whose conversations are punctuated by flailing arms and eye rolls. She's sui generis, her life having more in common with Elmore's than with Ivy League–educated death penalty lawyers. Listening to her speaking with her death row clients is surreal. Using words like "pokie wokie" and "peachie," she talks as if she were at the mall with friends. She is as much a mother, big sister, or friend to these men—most of whom have been abandoned by their families—as she is their lawyer. In the summer of 1993, at the age of thirty-four, Diana, with pure grit and the blossoming of innate intelligence, had overcome Sisyphean odds and finished her

second year of law school. As an intern at the South Carolina Death Penalty Resource Center, she was given the Elmore file. By then, he had been on death row for eleven years.

Elmore's case, and Holt's effort to save his life, is a textbook study of how our criminal justice system works in capital cases, as well as how it doesn't. Americans consider their criminal justice system to be the best in the world. Some conservatives may carp that it coddles criminals, and some liberals may believe that there are not enough protections for suspects, particularly indigent ones. By and large, however, the system yields justice. As a former prosecutor and defense counsel, however, I know the system is only as good as the lawyers who administer it—prosecutors, defense counsel, judges. If prosecutors abuse their authority, if defense lawyers are lazy or incompetent, if judges are weak or biased, the result is injustice, and in capital cases that can spell death.

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BOOK ONE

Rush to Judgment

CHAPTER ONE

Greenwood, South Carolina, 1982

A FEROCIOUS SNOWSTORM hit the South in January 1982. An Air Florida 737 crashed into the Fourteenth Street Bridge in Washington, D.C., and then plunged into the icy Potomac River, killing seventy-eight people. In Atlanta, temperatures fell to near zero. Some 160 miles east, two inches of snow covered buildings, lawns, and cars in Greenwood, South Carolina. On the front page of the Greenwood *Index-Journal,* there appeared a picture of Emily James, two and a half years old, bundled in a snowsuit, watching "in amazement as her family went sledding." Government offices and schools were closed. In a graceful hand, Dorothy Edwards wrote "Snow" in the squares on her calendar for Wednesday and Thursday, the thirteenth and fourteenth.

Along with some ten thousand homeowners, Mrs. Edwards was without power for thirty-six hours. She jumped rope to keep warm. She was seventy-six years old but could have passed for fifty-six, a petite five foot three, size 6. Every morning, she pulled on her leotards for thirty minutes of exercise. She was a handsome woman, reserved, very much a lady—"elegant in a comfortable sort of way," in the eyes of her daughter, Carolyn. There had been no TV dinners or fast food when Carolyn was growing up; the dining room table was set with china and silver for every meal, breakfast included.