



CONVICTING THE INNOCENT;  
SIXTY-FIVE ACTUAL ERRORS OF  
CRIMINAL JUSTICE

EDWIN MONTEFIORE BORCHARD

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*Convicting the Innocent*

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SIXTY-FIVE ACTUAL ERRORS OF  
CRIMINAL JUSTICE

*By Edwin M. Borchard*

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*TO*  
JOHN H. WIGMORE  
*AND*  
FELIX FRANKFURTER

## *Preface*

**A**LTHOUGH my major interests lie in an aspect of the law somewhat remote from criminal law, I have nevertheless long urged that the State or community assume the risks of official wrongdoing and error instead of permitting the losses resulting from such fault or mistake to be borne by the injured individual alone. Among the most shocking of such injuries and most glaring of injustices are erroneous criminal convictions of innocent people. The State must necessarily prosecute persons legitimately suspected of crime; but when it is discovered after conviction that the wrong man was condemned, the least the State can do to right this essentially irreparable injury is to reimburse the innocent victim, by an appropriate indemnity, for the loss and damage suffered. European countries have long recognized that such indemnity is a public obligation. Federal and state governments in the United States ought to adopt the same policy, instead of merely releasing the innocent prisoner from custody by pardoning him for a crime he never committed and without any admission of error or public vindication of his character.

A district attorney in Worcester County, Massachusetts, a few years ago is reported to have said: "Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility." The present collection of sixty-five cases, which have been selected from a much larger number, is a refutation of this supposition. Inasmuch as the conditions described are of interest primarily to the American public, American cases, mainly from the twentieth century, have, for the most part,<sup>1</sup> been chosen for publication. Fifty cases, by reason of their importance or some striking characteristic, have been used as principal cases; the other fifteen, more concisely reported, follow thereafter. Together, they present an interesting cross section of American life. They come from all sections of the country and, by states, may be grouped as follows: California, 8; New York, 8; Massachusetts, 7; Illinois, 4; Ala-

<sup>1</sup> There are three English cases.



bama, Minnesota, and Mississippi, 3 each; Georgia, Michigan, Missouri, New Jersey, Ohio, and West Virginia, 2 each; Arkansas, District of Columbia, Florida, Indiana, Iowa, Kentucky, Maine, Maryland, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, and Wisconsin, 1 each; England, 3. Statistically they embrace the following charged crimes: murder, 29; robbery, swindling, or larceny, 23; forgery or counterfeiting, 5; criminal assault, 4; writing of obscene letters, 2; accepting a bribe, 1; and prostitution, 1.

In the cases chosen for inclusion, the innocence was established in various ways: by the turning up alive of the alleged "murdered" person; by the subsequent conviction of the real culprit; by the discovery of new evidence demonstrating in a new trial or to the Governor or President, as the basis for a pardon, that the wrong man was convicted. There are, in practice, many cases in which pardons are granted without indication or admission of an erroneous conviction—although it seems fairly evident that the prisoner was actually innocent—presumably in order to save the prestige of prosecuting officials or for some other reason. Such cases could not be used for this collection.

The sixty-five cases, although susceptible of dramatic presentation, are set forth in simple narrative form to indicate how the error occurred and how it was later discovered and unraveled. The causes of the error are, in the main, mistaken identification, circumstantial evidence (from which erroneous inferences are drawn), or perjury, or some combination of these factors. Inasmuch as the cases reported constitute a representative group, I have ventured to draw from them certain conclusions indicating the necessity for reforms in criminal procedure. These I have endeavored to present in a concluding chapter, with reference to the cases reported. In that chapter I have undertaken a somewhat detailed analysis of the facts disclosed by the cases presented and suggested certain simple reforms in criminal procedure which might tend to mitigate if not prevent similar errors hereafter. In the original edition, published by the Yale University Press, there were included a technical analysis, as a

basis for American legislation, of the statutes of European countries providing indemnity for wrongfully convicted and arrested persons, and a draft statute for use in the United States.

The cases were taken somewhat at random, for cases of this type are not systematically reported. The research was usually begun from a clue often afforded by a governor's pardon, by the report of a trial, or by a newspaper item, and was then pursued by an examination of the record and by correspondence or interview with the attorneys for the prosecution and defense and sometimes with the presiding judge, governor, or pardon board. An earnest effort has been made to present an accurate account of the facts; after each case in the original edition there will be found a bibliography of the principal sources employed and of the persons to whom special acknowledgments are due.

Aside from this indebtedness in particular cases, there are numerous individuals without whose generous aid this collection would not have been possible. First of all, I desire to express to Mr. E. Russell Lutz of Washington, D.C., my former student and collaborator, the deepest appreciation for his painstaking and indefatigable research in many of the principal cases reported. To Mr. Chalmers Hutchison of Fort Worth, Texas, a special debt has been incurred for his personal investigations in Massachusetts, New York, and other states. Mr. Robert Horton of Washington, D.C., was helpful in revising several of the narratives. Mr. George A. Benedict, Deputy Public Defender of Los Angeles, was extraordinarily considerate in furnishing detailed information in a number of California cases and in revising the drafts. Mr. Bert Wentworth, handwriting expert of Dover, New Hampshire, was generous in making available his file of newspaper clippings, which furnished a lead for several of the most striking cases in the book. Mr. James A. Finch, Pardon Attorney of the Department of Justice, was gracious in granting access, under departmental regulations, to the files of the Department in the Federal cases reported. Mr. Douglas Arant of the Alabama Bar was of exceptional assistance in securing information and facilitating

contacts in the Alabama and Mississippi cases. Mrs. Mildred Maddox Lutz gave important aid on several cases. I cannot refrain, moreover, from expressing my immeasurable gratitude to the many district attorneys, police officials, defense attorneys, and other public-spirited citizens to whom acknowledgment is given in each individual case, and who, without any other thought than the service of truth and justice, gave so unstintingly of their time and effort in uncovering elusive facts. To the Institute of Human Relations, Yale University, special thanks are due for an appropriation which enabled the investigation to be completed; and to Messrs. Davidson, Donaldson, and Rollins of the Yale University Press, for valuable editorial advice.

Finally, a word of explanation of the dedication: Professor John H. Wigmore of Northwestern University first displayed his unremitting interest in this subject some twenty years ago by writing an introduction to an article, reprinted as Senate Document 974, Sixty-second Congress, third session, entitled, *State Indemnity for Errors of Criminal Justice*. To the persuasion of Professor Felix Frankfurter of Harvard University I owe my willingness to suspend my preoccupation with other interests and to devote the necessary time to the completion of this undertaking. Both Messrs. Wigmore and Frankfurter have distinguished themselves as American leaders in the reform of legal procedure and have made special contributions to the present subject.

E. M. B.

New Haven, Connecticut,  
January 1, 1932.

*The titles assigned to the cases and the photographs have been supplied for this edition by the Garden City Publishing Company and will not be found in the original edition published by the Yale University Press.*

## *Convicting the Innocent*

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# CONVICTING THE INNOCENT

## SEVENTEEN WITNESSES IDENTIFIED HIM

*Herbert T. Andrews.*

**I**N the summer and fall of 1913 there was a flood of forged and bad checks in Boston, Massachusetts. These were turned over to the Police Department, and particularly to Inspector Conboy, but the efforts to apprehend the forger were unsuccessful.

Sometime in October, 1913, Inspector Conboy received from a Boston merchant a check for \$30 which had been given him for a purchase by one Herbert T. Andrews. The check was signed in Andrews' own name. The merchant had received this check some weeks before but had not cashed it. When he did deposit it for payment, it was returned by his bank stamped "no account." The merchant thereupon turned the check over to the police. Inspector Conboy located Andrews on November 1, 1913.

Herbert T. Andrews was cashier for a large Boston store. He was well thought of by his employers as well as by his neighbors and many friends. He lived happily with his wife and baby on Hemenway Street, Boston. Just after he had returned home from his work on the first of November and was sitting down to his supper, there came a knock at the front door. It was Inspector Conboy and Special Officer Lyons with the message that Andrews was wanted at headquarters. Without permitting him to finish supper, the officers took Andrews to the Back Bay Station where Captain Good, after asking a few questions, sent him to police headquarters. Andrews' fingerprints and photograph were taken. The arrest of Andrews seemed like a lucky stroke, for this gave the police a genuine check irregularity to be compared with the numerous bad checks lately passed in the city. Andrews was officially charged with forging and uttering over forty checks. He was held for a hearing in the lower court, and was placed in the Tombs. The court decided that there was probable cause to hold him for indictment by the Grand Jury. The charge based upon the returned \$30 check marked "no account," because of

which he was arrested, was dismissed by the court for the reason that it was shown that Andrews had \$36 in the bank at the time the check was drawn and for some time thereafter, but had later drawn three small checks which had closed out his balance.

In the short time between his arrest and his appearance in the lower court the Police Department had, however, obtained identifications of Andrews' photograph from the victims of a number of the forged and bad checks which had been turned over to them.

Following the session in the lower court, Inspector Conboy spoke to Andrews and asked him why he had not pleaded guilty to the charges of forging and uttering checks. Andrews replied that he was innocent, whereupon the inspector told him that witnesses had been found to prove his guilt. Later when Andrews' father was endeavoring to plead for his son, the inspector stated that he was absolutely sure of his man and that he had never made a mistake in forty years. Many of the victims absolutely identified Andrews' photograph as that of the person who had passed the checks, others thought that possibly he might be the man, and still others could not identify him at all. The Police Department then arranged for a "show up." They took Andrews to police headquarters and after standing him at one end of a room brought in a number of his alleged victims. Andrews later said that the police officers took down the testimony of those who identified him and disregarded that of those who said he was not the man. After this experience, Andrews was taken to the Charles Street Jail where arrangements were made by his father and wife for his release on bail.

The Grand Jury considered the evidence against Andrews and returned an indictment against him covering forty-three counts of forging and uttering bad checks. The trial was set for February 10, 1914. During the time Andrews was out on bail awaiting trial, further checks were passed in and around Boston of exactly the same character as those attributed to Andrews. When Andrews appeared for trial on February 10, 1914, two additional charges were brought against him and his bail was raised from \$1,200 to \$4,000. Andrews, unable



to raise this additional amount, had to return to jail and await trial, which was postponed from day to day until finally on February 23, 1914, he was tried for three days before Judge Chase of the Superior Court of Suffolk County. The state was represented by Thomas D. Lavelle, Assistant District Attorney of Suffolk County, and the prisoner, by Frank M. Zottoli, attorney at law of Boston, Massachusetts.

The defendant's family and his attorney had made strenuous efforts to prove that the alleged forgeries and utterances of checks had not been committed by Andrews. In the effort Andrews' resources and those of his father were exhausted, and they went into debt to friends. They hired the Burns Detective Agency with no success. Mr. Zottoli endeavored to enlist the services of an eminent handwriting expert, who proved unable to help, in view of his opinion that Andrews' admitted handwriting and that on the forged checks was very similar, and in view of the further fact, as later discovered, that a police inspector had informed the expert that he had witnesses who had seen Andrews write the very checks for which he was being tried.

Seventeen witnesses, men and women, took the stand and identified Andrews as the man who had passed the checks upon them. Many of them were positive in their identifications and there was little that the defendant could do but deny all knowledge of or connection with the checks, and deny that he had ever seen any of the witnesses who testified against him. Andrews' attorney did his best to break down the various identifications but was unable to do so in the eyes of the jury, for they returned a verdict of guilty of uttering bad checks on seventeen counts. He was acquitted on all of the other counts, including all counts based on charges of forgery, because the state did not have sufficient evidence to establish that the checks had been written by Andrews. Andrews was found guilty on February 26, 1914, and on May 18, 1914, was sentenced to fourteen months in the House of Correction at Deer Island.

When Judge Chase sentenced Andrews in open court, Andrews again asserted his innocence, as he had done consistently since the day of his arrest. Attorney Zottoli asked