the trial that convicted Hiss had been the exhausting high point of a judicial career that began when President Harding appointed him to the federal bench almost thirty years before; for the part he had played in sending Hiss to prison, he had received praise from the press, presumed pats on the back from the political and social circles in which he moved (see his last listing in *Who's Who* for these), and popular acclaim such as a trial judge very rarely knows. Is it too far-fetched to wonder whether the newly headlined old jurist may not have been, at the least, reluctant to put all this aggregated attention in jeopardy by risking—counter to his own pretty patent predilections—having Hiss's conviction overturned by a new jury faced with Lane's new and damning material? For be it remembered here that no jury has ever passed on the stuff that Lane dug up after Hiss was in prison; it was passed on—and passed off—by one man alone: Judge Goddard. Further, the major reason Judge Goddard did give for denying another trial was that any new evidence discovered by Lane was either too trivial to warrant one *or* should have been discovered in time for the prior trial if the defense had used "due diligence." This may be good law, verbally, but it is something less than good justice. It is considerably less than good justice—and is not even good law—if Lane's flat accusation that the FBI bent every effort to *prevent* the defense from getting evidence is true.

I defy any open-minded lawyer to read reporter Cook's book (remember it?—these comments were all sparked by it) and not come away with the same conclusion I did: either Chester T. Lane should be disbarred from further practice of law or every member of the FBI, no matter how highly placed, who knowingly helped frame Alger Hiss should be exposed and fired. For it is just as impossible to believe that Lane did not lie in his new-trial motion *and* that the FBI did not help frame Hiss and keep him framed as it is to believe that Alger Hiss and Whittaker Chambers *both* told the truth.

FRED RODELL†

NOT GUILTY. By Jerome and Barbara Frank. Garden City, N.Y.: Doubleday & Company, Inc., 1957. Pp. 261. $3.75.

THIS humane and disturbing book discusses thirty-six examples, eighteen in detail, of the conviction of wholly innocent people. Clear and nontechnical descriptions of the cases by Barbara Frank are followed by critical analyses completed by her distinguished father just before his death.

To people happily situated, the phrase "miscarriage of justice" may connote little more than an idea to be vaguely deplored and then dismissed from the mind. But, for those who are devastatingly affected, it is very real and tragic. It was no fleeting abstraction to Joe Majczek, who served twelve years for a murder he knew nothing about; or to his heroic and devoted mother, who

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scrubbed floors at night for eleven years to earn enough to offer a reward for the real killers; or to Majczek's equally innocent codefendant, Ted Marcinkiewicz, who served seventeen years. Or to Nancy Botts, a young bride who lost her unborn baby due to the emotional and physical strain of being confined to jail awaiting trial because of inability to raise bail, and who left prison in broken health after serving two years for a forgery she did not commit. Or to Nathan Kaplan, who served seven and a half years for a narcotics offense with which he had no connection, and whose eighteen-year struggle to clear his name ultimately failed when his application for pardon was inexplicably denied, even though it was recommended after a full hearing in the careful opinion of a judge who, "with extreme reluctance," could find no strictly legal ground for setting aside his conviction and thus remedying "a grave miscarriage of justice."[1] *Not Guilty* describes and explains these and other grievous errors in the administration of the criminal law in a way appealing to laymen as well as lawyers. Easy to read, relatively short, and free of footnotes and technical terms, its stated purpose "is to get each of you keenly interested, to stir you to a lively sense of injustice about the plight of the wrong man convicted of a crime."[2] The book reflects throughout Jerome Frank's dynamic concern for fairness and for the dignity of the individual. If everyone were equally dedicated to these principles of democracy, the tragedies exemplified in this book would occur less frequently.

Edwin Borchard's profound and pioneering work, *Convicting the Innocent*, published in 1932, was motivated by the same fundamental objective and inevitably has some things in common with this book in identifying the reasons for erroneous convictions, as well as, of course, general attitude. But *Not Guilty* is by no means simply repetitious. Borchard's major purpose was to enlist support for governmental indemnity for errors in criminal prosecutions, the theory and comparative law of which he discussed very thoroughly, and to demonstrate by sixty-five cases of the conviction of innocent people (selected from a much larger number tracked down by long and patient investigation) that such compensation was an important and not an academic matter. Jerome and Barbara Frank support Borchard's thesis briefly but unequivocally ("a crying need"[3]) and devote their attention primarily to detailed consideration of other questions, only some of which were mentioned by Borchard. And their book not only promotes new ideas, but also adds factual fuel to the fire, since only one of their cases was also discussed by Borchard.[4]

Some of the factors that may contribute to an erroneous conviction are probably unavoidable consequences of the fallibility of human beings. As Judge Frank explains in detail, any notion that the "facts" as ultimately found in a trial necessarily correspond with the original events involves naive and illusory

1. P. 110.
2. P. 38.
3. P. 118.
4. This case involves James W. Preston, whose experience is outlined by the Franks at pp. 90-96 and by Borchard at pp. 194-200.

oversimplification. Witnesses of the same occurrence observe differently, recollect differently, and differ in the effectiveness and accuracy of their narration on the stand; testimony is the product of complex human processes and not simply a photographic reproduction of external stimuli. The observation of the victim of a crime may be seriously distorted by emotional disturbance experienced at the time of the crime's commission, and this may result in mistaken identification of the accused, a major cause of conviction of the innocent; once identification has been made, the victim may persistently adhere to it, his pride making him reluctant to admit error. Witnesses for the prosecution may be of questionable veracity. The innocent defendant may make a very poor witness, either because he is overwhelmed by his appalling situation or for other reasons; he may convey an impression of guilt and perhaps even resort to some attempt at deception in a desperate effort to avoid conviction. The liar or abnormal witness may put on a convincing show, while the truthful witness may become confused or appear otherwise unimpressive. The attentiveness and accuracy of recollection of jurors vary. These deficiencies cannot be eliminated. But their existence should be clearly recognized, and every precaution should be taken to guard against their contributing to such gross injustices as those revealed in this book.

Certainly, these tragic mistakes should not be promoted by those in charge of law enforcement. Yet *Not Guilty* describes erroneous convictions induced by official conduct ranging from the wholly indefensible to the perhaps well-meant but nevertheless misleading: third-degree confessions; perjuries coerced by threats of prosecution for some offense the witness has committed; altering a suspect's photograph to make it correspond with a description previously given by a witness asked to identify it; persistent pressure on an initially uncertain witness to make a positive identification; failure to reveal exonerating evidence; exhibiting a suspect alone instead of in a line-up with others of similar appearance; suggestive and leading interrogation of witnesses. Excessively zealous police work or prosecution are in turn caused by such factors as personal ambition, public clamor for solution of a crime or, when the murder victim is a police officer, an impelling desire to avenge his death without delay. It is difficult to tell how widespread such practices are, but that they should occur at all is a distressing commentary on what is supposed to be the administration of justice. The majority of them, at least, would be indignantly repudiated by the many highminded and intelligent people conscientiously engaged in law enforcement in this country. In fairness to such people, and by way of contrast, *Not Guilty* describes some cases of unremitting efforts by a prosecutor, the FBI or local police to clear the name of a convicted person when, after the trial, they became convinced of his innocence.

Another disturbing element in the situation, of which this book gives several examples, is the frustration of a long struggle for vindication caused by almost incredible reluctance or refusal to grant a pardon to a person whose innocence seems clearly demonstrated, the application being either flatly rejected, or met

with the compromise (described by the authors as "a sort of schizoid justice"[5]) of commutation and release on parole that fails to accomplish the major objective of exoneration, or held without action for so long that the applicant dies and is past pardoning. It is very difficult indeed to present convincing evidence of innocence to a pardoning authority which cannot act simply on the assertions of the individual involved. But when, as in the case of Nathan Kaplan, the prosecutor admits that the conviction was wrong, the trial court judge transmits in a copy of his careful opinion, written after a full hearing, his belief in the accused's innocence and his hope for a full pardon, and when the application for pardon is held for over four years and then denied, one wonders what the function of the pardoning power is supposed to be. It is impossible to make full restitution to a person in this situation. Even the governmental compensation so persuasively recommended by Borchard, probably the only practical means of trying to make amends, would be only partial atonement for the mental anguish and other nonmonetary injuries caused by erroneous arrest, trial and imprisonment. If the innocence of the individual is satisfactorily substantiated, the least that can be done for him by the government responsible for his plight is to clear his name.

Not Guilty suggests a variety of procedural reforms. Throughout the book runs Judge Frank's indignation at the callous philosophy that views a proceeding affecting the liberty, and perhaps the life, of an individual as an exciting contest of wits between opposing counsel, who may use any tactics that the rules of the game allow in attempts to destroy the credibility of honest witnesses or otherwise obscure the truth. As one step in the direction of fairer proceedings, he recommends giving the accused enlarged discovery remedies so that he may perhaps find exonerating material in the hands of the prosecution, and at least will not be trapped at trial by the production of evidence that takes him by surprise.

Judge Frank is also much concerned about the unequal positions of the prosecution and the defense. In his words, "a man may be convicted when his only crime is that of being poor."[6] And, as he points out, even the impoverished accused may be in a better position than the low-income white collar worker, whose resources may be sufficient to exclude him from representation by legal aid, a public defender or a court-appointed attorney, but insufficient to afford the fees normally charged by expert counsel. And, even with the most competent lawyer, an innocent person may be convicted because of inability to finance such vital aspects of a defense as tracing a missing witness who might convincingly support an alibi or obtaining the services of an expert whose testimony might exonerate him. The remedy proposed is to have the same government that supports the prosecutors and their investigators assume a much greater responsibility for supplying the accused with an adequate defense than many jurisdictions do at present. In so far as governments do not afford such

5. P. 82.
6. P. 86.

protection, it is all the more important for police and prosecutors to recognize the disparity between their position and that of the defense and to conduct an impartial investigation, searching for evidence of innocence as well as guilt.

Several of the erroneous convictions described in this book were attributable to the fact that the accused had a previous record. Past convictions not only increase the likelihood of arrest for a similar crime, but also, under the presently unsatisfactory and deceptive state of our law, put defense counsel in a dilemma at the trial. The defendant is supposed to be protected by his privilege not to take the stand, but the protection is largely theoretical since he is very likely to be found guilty if he does not testify—one would naturally expect an innocent person to be eager to grasp at the first opportunity to refute the evidence offered against him. The attorney for an innocent accused will therefore wish, prima facie, to put him on the stand. If his client has a record, however, he is faced with the essentially contradictory and unrealistic propositions that a prior conviction is generally inadmissible on the merits, but if the defendant testifies, it is admissible to attack his credibility. The first proposition recognizes the prejudicial effect of such evidence inherent in the exaggerated tendency of many people to assume that a person once in trouble with the law will be a repeater. The second proposition, originating, perhaps without enough consideration of its own implications, as a liberalization of the old rule of complete incompetency to testify, would, even as applied to witnesses generally, be difficult to substantiate empirically. Human beings are diverse and complicated and are not susceptible of the easy and arbitrary classification into "good" and "bad" people that such a rule envisages. The relevancy for impeachment of prior conviction of an offense involving deception is arguable, but what basis is there for assuming that the commission of a crime of violence indicates a propensity to commit perjury thereafter in some entirely different context? And, if the witness is the accused, admission of his previous record belies the supposed policy against prejudicial evidence since, regardless of any attempted precautions set out in the trial ritual, it is humanly impossible for it not to have, at least to some extent, the theoretically forbidden effect of indicating guilt of the present crime rather than merely lack of veracity. This is particularly true if the prior offenses were similar to the one for which the defendant is being prosecuted. Reasonable doubts about the credibility of the accused are much more likely to be based on his vital and obvious interest in obtaining an acquittal than on some vague inference from past transgressions. In a jury trial, as Judge Frank points out, the supposed protection of a limiting instruction may not only be ineffective, as it usually is, but may well do the defendant more harm than good. It emphasizes the past record in the juror's minds while urging them to perform the almost impossible task of adhering to a legal distinction between merits and impeachment. The innocent accused who has been previously convicted of another offense is thus placed in an especially dangerous position; guilt may be inferred from silence if he does not testify and from his record if he does. Reforms in this area, recommended by Judge Frank and repeatedly urged by other members of the legal profession, are long overdue.

The important time to try to protect a possibly innocent suspect is the period before his trial ends, and particularly before it begins. Once the case is in court, the stories of the witnesses, even if actually mistaken or perjured, will have solidified; and the prosecutor will assume the role of trial lawyer rather than that of investigator. If, when the trial ends, the accused is found guilty, the conviction may be very difficult to upset. The appellate court will frequently affirm, and other legal remedies, as shown in *Not Guilty*, are not likely to be successful. The person who has exhausted all available remedies in court may then apply for clemency, but that may raise insoluble problems for both the applicant and the pardoning authority.

The difficulties of attempting to upset a conviction by invoking the pardoning power may be illustrated by a few of the situations that have come before the Connecticut State Board of Pardons during the more than twenty years I have been a member of it. A man sentenced on a plea of guilty some time later claims that he was innocent. He was represented by counsel and otherwise legally protected at the time of his plea. No record or testimony is available. From the Board's perspective, it is conceivable that he was in fact not guilty and agreed to the plea because of fright or for some other reason, but how can it obtain data on which to base such a finding? A similar situation exists when the convicted person's attorney, seeing no chance for a reversal, took no appeal, so that the testimony was never transcribed. And, even if a transcript is available, it is very difficult to evaluate the comparative merits of conflicting testimony on the basis of the dry written word. Demeanor evidence may be misleading, but at least it affords a better opportunity for judging credibility than pages of print. Another example of the baffling problem of finding a reliable way to determine the truth of an assertion of innocence is the situation where a petitioner has been convicted partly on the testimony of an alleged accomplice and the accomplice later makes a variety of inconsistent statements, some retracting and some affirming his testimony. Which of the accomplice's conflicting assertions is to be believed, and how can the effect of his testimony at the trial be weighed against that of the other witnesses? Our Board, composed of the Governor, a member of the Supreme Court, and four others appointed by the Governor, has always made every effort to give prompt, sympathetic and conscientious attention to the claims of those appearing before it. Nevertheless, there are dead-end streets, and Judge Frank may well be right in contending that there are innocent people who are in prison, who even have been executed, because of their inability to demonstrate their innocence. It is probably impossible to devise any system of reviewing convictions that will leave its administrators satisfied that justice is uniformly accomplished. It is therefore extremely important to try to prevent an erroneous conviction from occurring in the first place.

The character and attitudes of those who administer the criminal law are far more important than the mechanical details of any system. The experience of our Board of Pardons indicates that the problems raised in this book have had less impact in Connecticut than they have apparently had in some other

jurisdictions. We are only rarely asked to grant an absolute pardon, except to prevent deportation, where a finding of innocence is no prerequisite to relief. Almost all our petitions are for reduction of a minimum sentence, based on a good prison record and indicia of rehabilitation, with the objective of making the inmate eligible for parole. All death sentences come before us to determine the desirability of commutation to life imprisonment; the arguments in these capital cases have been based on extenuating circumstances rather than on contentions that the petitioner was not implicated. Assertions of innocence have been comparatively rare. Even intimations of improper treatment by the police or prosecutor have been virtually nil. Complaints about inadequate representation by defense counsel have been more frequent, but are often obviously baseless, as when a highly emotional attack is made on the motives of an attorney known personally to the Board to be of fine character. Any advantages this state may have along these lines may be attributable to a variety of human and geographic conditions, but the most influential factor is a living and constant awareness that those who are involved in the administration of the criminal law should be understanding people of high character and intelligence; that the vital objective of protecting the members of society at large should not obscure the importance of also protecting the interests of people suspected of crime; and that the public interest is least served when the wrong man is convicted, leaving the real offender still at large. The operation of this tradition could be illustrated by numerous examples of fair-minded, sympathetic and intelligent conduct by state's attorneys, by public defenders and by other members of the bar who, sometimes at considerable personal sacrifice, have represented those accused or convicted of crime with great vigor and devotion. In such attitudes lie the strongest safeguards against wrongful conviction.

But people directly charged with criminal administration will reflect the climate of opinion surrounding them. Even the residents of a jurisdiction where the problems raised in this book seem infrequent cannot afford complacency. Moral values are not predicated on quantitative measurement. Even if only one conviction out of several hundred thousand is erroneous, the possibility of its occurrence should disturb us. It is depressingly ironical that so many Americans should entertain themselves at great length with fictional accounts of crime and that so few should interest themselves in the situations of the real people involved. In trying to alert more people to the problems of erroneous convictions, Jerome and Barbara Frank have made a fine contribution to a better understanding and, possibly, more complete achievement of the ideals of democracy.

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