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## UNCONVICTING THE INNOCENT\*

RICHARD C. DONNELLY†

"INNOCENT MAN IS UNABLE TO CLEAR RECORD AFTER 7½ YEARS IN PRISON." Under this headline, the New York Times recently reported the courthouse tragedy of Nathan Kaplan, 49-year-old salesman.<sup>1</sup> Mr. Kaplan's brush with the law began on September 28, 1937, when the Federal Government indicted him under the name of Nathan Kaplan, alias "Kitty," for the sale of heroin to a government undercover agent. Although he vigorously proclaimed his innocence from the day of his arrest, he did not take the witness stand at his trial. He was represented by able counsel and other due process requirements were fully observed. His defense was that Max Kaplan, alias "Brownsville Kitty," then a fugitive, had committed the crime. Mistaken identity was thus the central issue.

The government's case rested chiefly upon the testimony of three witnesses: Laura Miller, a prostitute and drug addict turned government informer; Murphy, the government agent to whom the sales were made; and another government agent who had observed the transactions. The jury believed the government's witnesses and found Nathan Kaplan guilty. He was sentenced to twelve years' imprisonment, fined \$2500, of which \$500 was remitted, and placed on five years' probation to follow the prison term. He appealed, lost<sup>2</sup> and began serving his sentence in 1939. He served six years in prison, was released on conditional parole for the remaining six years and then placed on probation until June, 1956.

More than a year after Nathan Kaplan's conviction, Max Kaplan surrendered and pleaded guilty to the same narcotics violation.<sup>3</sup> He was sentenced to eighteen months which he served in the Milan, Michigan, penitentiary where Nathan was serving his time, but Nathan never had an opportunity to talk with Max. For eighteen months two men were in the same penitentiary for a crime only one of them committed.

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1. N.Y. Times, Nov. 15, 1951, p. 1, col. 2.

2. United States v. Kaplan, 102 F.2d 1019 (2d Cir. 1939).

3. The indictment on which Nathan Kaplan was convicted was the second of three indictments, all based on the same facts—possession and sale of narcotics on two occasions. The first indictment, filed on April 23, 1937, charged Hyman and Levine with two sales of heroin to a government agent. It also contained a conspiracy count. Hyman and Levine pleaded guilty to this indictment. The second indictment, filed on September 28, 1937, named Nathan Kaplan, alias "Kitty," as the sole defendant although Hyman and Levine were named as co-conspirators. It was identical in phraseology with the first indictment except for the overt acts in the conspiracy count. The third indictment, filed on January 5, 1938, named as defendants: Max Kaplan, "alias Brownsville Kitty;" Nathan Kaplan, alias "Kitty;" and two others. The substantive counts were

The two Kaplans, although not related, were remarkably alike in appearance. Both were 5 feet 2 inches tall and slight of build. It is understandable why Nathan was the victim of mistaken identity at his trial.

Released in 1946, Nathan began a painstaking search for the man who resembled him. Finally in March, 1950, he saw Max walking along the Avenue of the Americas in New York City. Max confessed that it was he and not Nathan who had committed the offense and agreed to help him clear his name. Other evidence also disclosed that Max was the guilty one. The Assistant United States Attorney who had prosecuted both defendants expressed the view that Nathan Kaplan had been mistakenly convicted for Max Kaplan. He stated that if he had had the newly found facts at the time of Nathan's trial he would not have prosecuted but would have moved to dismiss the indictment.

Nathan filed a motion to set aside the judgment of his conviction and to vacate the sentence. After a full hearing Judge Edward R. Weinfeld was persuaded "that the prosecutor's view that an innocent man has been convicted is correct and that a grave miscarriage of justice has taken place."<sup>4</sup> Nevertheless, Nathan's motion was denied. Judge Weinfeld reluctantly concluded that he had no power to grant relief; that Nathan's only source of redress was executive clemency.<sup>5</sup>

The case of Nathan Kaplan is not unique. When, some twenty years ago, a Massachusetts district attorney smugly denied that innocent men are ever convicted, Professor Edwin Borchard replied by publishing his great book, *Convicting the Innocent*. He presented a lucid but shocking account of sixty-five cases of erroneous convictions selected from a much greater number of known miscarriages of justice.<sup>6</sup> These

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the same as those in the first two indictments except that the conspiracy count and the overt acts differed. At Nathan's trial under the second indictment he and Max were both referred to under the same aliases, "Kitty" or "Kitty Kaplan." It was the third indictment to which Max Kaplan pleaded guilty. A *nolle prosequi* on this third indictment was entered as to Nathan Kaplan in 1946. *United States v. Kaplan*, 101 F. Supp. 7, 9 (S.D.N.Y. 1951).

4. *United States v. Kaplan*, 101 F. Supp. 7, 11 (S.D.N.Y. 1951), 36 *MINN. L. REV.* 533 (1952).

5. "Upon the evidence, the Court, if it had the power, would set aside the conviction since, as the United States District Attorney now acknowledges, the facts now known nullify the theory upon which the defendant was convicted and render that conviction erroneous and unjust. It is with extreme reluctance that the Court is forced to the conclusion that it is without power to grant the application, but it may not exceed the limits of authority. . . .

"Although avenues of judicial redress are closed here to the defendant, he is not without remedy. In those exceptional cases where rules of law of broad application work an injustice in an individual case, our institutions provide redress through the pardoning power." *United States v. Kaplan*, 101 F. Supp. 7, 14 (S.D.N.Y. 1951).

6. Sixty-two of these cases occurred in the United States, two in England and one in Scotland. In all, the innocence of the person convicted was later conclusively established, but often after considerable time spent in the penitentiary with attendant misfortunes. The cases fall readily into representative groups, each with its recurring pattern of causes of error. In about half the cases mistaken identifications play a leading role. The next largest group involved perjured testimony. In others the error was largely attributable to

tragedies persist—the *Kaplan* case, among others,<sup>7</sup> being a recent verification of Bochar'd's thesis.

Judge Weinfeld discussed the applicability of only two judicial remedies: (1) A motion under Section 2255 of the Judicial Code,<sup>8</sup> and (2) a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. He concluded that the former afforded no relief since the newly discovered evidence presented no jurisdictional or constitutional question. The latter was unavailable because the motion was not made within two years of the final judgment.<sup>9</sup> This article will consider these two remedies as well as others that may be open to a person who has been convicted of a crime he did not commit.

#### MOTION FOR A NEW TRIAL

There is little uniformity among the states as to the proper grounds for a new trial although "material new evidence" which the defendant

mistaken inferences from circumstantial evidence, over-zealous prosecution and combinations of these. See also, Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201 (1941). Wrongful convictions are by no means peculiar to the United States. Similar problems exist in European countries, despite differences in procedure. For a discussion of many foreign cases and a classification of causes of error, consult Hirschberg, *Wrongful Convictions*, 13 ROCKY MT. L. REV. 20 (1940). Also see REIK, *THE UNKNOWN MURDERER* 175 et seq. (1945).

7. The daily papers disclose other contemporary examples. See N.Y. Times, Sept. 3, 1952, p. 38, col. 6; New Haven Evening Register, Aug. 8, 1952, p. 19, col. 8. Also see Shephard, *They Swore My Life Away*, Reader's Digest, Nov., 1950, p. 35. The motion picture "Call Northside 777" was based upon the case of Joseph Majczek who was convicted in 1935 of the murder of a Chicago policeman and sentenced to 99 years' imprisonment. The prosecution's chief witness was the owner of the speakeasy in which the officer had been shot during an attempted robbery. The Illinois Supreme Court affirmed the conviction, holding that the testimony of one witness was adequate upon the question of identity and sufficient to sustain a conviction even though denied by the accused. *People v. Majczek*, 360 Ill. 261, 195 N.E. 653 (1935). On October 11, 1945, a classified advertisement appeared in a Chicago paper offering \$5,000 reward, the life savings of the accused's mother, for evidence leading to the arrest of the murderer. This prompted an investigation by two reporters, who, in a series of articles, disclosed that the state's witness had later recanted and admitted that her testimony had been perjured in order to obtain police protection for her speakeasy; and that counsel for the defendant, subsequently twice disbarred, had been intoxicated during the trial. Majczek was granted a pardon and the Illinois legislature appropriated \$24,000 in compensation for 13 years' imprisonment. 15 U. OF CHI. L. REV. 773, 775 n.13 (1948). Of course, many erroneous convictions are unreported and undetected, their disclosure being dependent upon the fortuity of press notoriety. A few, however, have gotten into law reports. *Campbell v. State*, 186 Misc. 586, 62 N.Y.S.2d 638 (Ct. Cl. 1946). Campbell was indicted and convicted for forgery. After he had served three years and two months in Sing Sing another man confessed to the commission of the crime. Campbell was granted a pardon and the New York legislature authorized him to maintain an action against the state. He subsequently recovered \$115,000 as damages. The case is discussed in Note, 37 J. CRIM. L. & CRIMINOLOGY 408 (1947). Also see *Mooney v. Holohan*, 294 U.S. 103, 55 Sup. Ct. 349, 79 L. Ed. 791 (1935) (perjured testimony), and the cases arising under Indemnity Statutes, discussed *infra*. It is not without interest to note that Sir Arthur Conan Doyle, creator of Sherlock Holmes, on two occasions established the innocence of convicted men by employing Holmesian methods of deduction. CARR, *THE LIFE OF SIR ARTHUR CONAN DOYLE* 178, 216 (1948) (the cases of George Edalji and Oscar Slater).

8. 62 STAT 967 (1948), 63 STAT 105 (1949), 28 U.S.C.A. § 2255 (1950).

9. *United States v. Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951).

"could not with reasonable diligence have discovered and produced at the trial" is a common one.<sup>10</sup> The proposed code of the American Law Institute gives an elaborate and detailed catalog of grounds which includes "new and material evidence, which if introduced at the trial would probably have changed the verdict or finding of the court" providing the defendant "could not with reasonable diligence have discovered and produced [it] upon the trial."<sup>11</sup> It then concludes with a sweeping provision authorizing the court to grant a new trial "when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."<sup>12</sup> Rule 33 of the Federal Rules of Criminal Procedure provides simply that the "court may grant a new trial to a defendant if required in the interest of justice."<sup>13</sup>

Notwithstanding technical and rigorous applications of the tests for determining whether additional evidence is in fact "new,"<sup>14</sup> a new trial is a satisfactory remedy for an innocent person. The proceedings at the former trial are vacated and the conviction set aside. Presumably the indictment will be nolle prossed or the new trial, if held, will result in an acquittal. On the other hand, the availability of this remedy is generally subject to a time limitation.<sup>15</sup>

The American Law Institute's *Model Criminal Code*<sup>16</sup> recommends a one-year limit in the case of new evidence "or at a later time if the court for good cause so permits." The Advisory Committee appointed by the Supreme Court to assist in the formulation of the Federal Rules of Criminal Procedure, following the Model Code, proposed that no limit be placed on a motion for a new trial based on new evidence.<sup>17</sup> It was willing to rely upon the sound discretion of the

10. For a review of state provisions governing the granting of new trials, time limitations on the motion, and grounds for the motion, see ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 494-514 (1947); A.L.I., *CODE OF CRIMINAL PROCEDURE* 1038 (1931) (Commentaries to §§ 361-65).

11. A.L.I., *CODE OF CRIMINAL PROCEDURE* § 364 (1931).

12. *Id.* § 365 (1931).

13. This sentence "is declaratory of the power to grant a new trial 'in the interest of justice' instead of for reasons catalogued as they might have been." *United States v. Smith*, 331 U.S. 469, 472, 67 Sup. Ct. 1330, 91 L. Ed. 1610 (1947).

14. A motion on the ground of newly discovered evidence must meet the following tests: (1) the evidence must, in fact, be newly discovered; (2) there must be a showing of due diligence prior to the first trial; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the new evidence must be of such a nature as probably to result in an acquittal. *Coates v. United States*, 174 F.2d 959 (D.C. Cir. 1949); *Evans v. United States*, 122 F.2d 461 (10th Cir. 1941); *People v. Mindeman*, 318 Ill. 157, 149 N.E. 27 (1925). As a general rule courts will not grant a new trial solely on sworn statements of a witness that his trial testimony was perjured. These recantations are deemed merely impeaching. Much more effect is given to confessions of honest mistake. *Bolton v. Indiana*, 223 Ind. 308, 60 N.E.2d 742, 158 A.L.R. 1057 (1945). Also see NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON CRIMINAL PROCEDURE* 43 (1931).

15. The state provisions are collected in A.L.I., *CODE OF CRIMINAL PROCEDURE* 1040 (1931) (Commentary to § 362).

16. A.L.I., *CODE OF CRIMINAL PROCEDURE* § 362 (1931).

17. *FED. R. CRIM. P.* 31(c) (Prelim. Draft 1943); *FED. R. CRIM. P.* 35 (Second Prelim. Draft 1944).

district judge as sufficient protection against ill-founded motions and felt that relief against erroneous criminal convictions should be available at any time.<sup>18</sup> As finally promulgated by the Supreme Court, Rule 33 represents a compromise between the Advisory Committee proposal and the sixty-day limit formerly in effect.<sup>19</sup> It requires a motion for a new trial on the ground of newly discovered evidence to be made within two years after final judgment. Under Rule 33, as before, motions for a new trial are addressed to the sound discretion of the trial court whose action on the motion is reviewable only for abuse of discretion.<sup>20</sup> The time limitation has been rigidly enforced and is jurisdictional.<sup>21</sup>

Unfortunately, new evidence sufficient to establish innocence does not often turn up within the short period of time allowed. The two year limitation was particularly harsh in the *Kaplan* case since much of the vital evidence presented at the hearing before Judge Weinfeld was unavailable to the defendant until thirteen years after his conviction.<sup>22</sup>

#### WRIT OF ERROR CORAM NOBIS

The common law writ of error *coram nobis* is a remedial device for correcting or vacating a judgment which is erroneous because of facts, not in issue at the trial and unknown to the defendant at the time, which affect the validity and regularity of the proceedings. It was available at any time in both civil and criminal cases and was filed with the court rendering judgment.<sup>23</sup> The writ was of limited

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18. Compare the discussion of Rule 33 in FEDERAL RULES OF CRIMINAL PROCEDURE, NOTES AND INSTITUTE PROCEEDINGS 229-230 (Holtzoff ed. 1946): "HONORABLE JAMES V. BENNETT: . . . I don't know quite how they arrived at the term of two years. It is not infrequent for one in my business to find out that people—few people—really are innocent and get into the penitentiary, and they can't get the case up or get it to attention until some time more than two years. Of course, in those cases, if they can be brought up, sometimes they are taken care of by executive clemency.

"HONORABLE ALEXANDER HOLTZOFF: Our Committee in its final report included no time limit on the motion for a new trial on the ground of newly discovered evidence. We thought that the sound judgment of the district judge was sufficient protection against frivolous and ill-founded motions, and actual meritorious motions for a new trial on the ground of newly discovered evidence are rare, and in those few cases a time limit was not necessary. However, there was considerable opposition to having no time limit, and the Supreme Court put the two year time limit in its final action on the Rules."

19. Rule II(3) of the former Criminal Appeals Rules. In capital cases a motion for new trial on the ground of newly discovered evidence could be made at any time before execution of judgment. Rule 33 makes no exception for capital cases.

20. See, e.g., *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950); *United States v. Memolo*, 152 F.2d 759 (3d Cir. 1946), 60 HARV. L. REV. 145.

21. *Marion v. United States*, 171 F.2d 185, 186 (9th Cir. 1948), *cert. denied*, 337 U.S. 944 (1949).

22. Also see *Campbell v. State*, 186 Misc. 586, 62 N.Y.S.2d 638 (Ct. Cl. 1946).

23. For discussions of the origin and development of the writ see Freedman, *The Writ of Error Coram Nobis*, 3 TEMP. L.Q. 365 (1929); Moore and Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 669 *et seq.* (1946); Comment, 34 CORNELL L.Q. 596, 598 (1949); Note, 37 HARV. L. REV. 744 (1924).

value at early common law, however, because the fact situations where it could be used were few and infrequent. It would lie where a party died pending suit and before judgment; where an infant party had not been properly represented by a guardian; where a female party was under the common law disability of coverture; and where a party was insane at the time of trial.<sup>24</sup>

But the state courts have gradually expanded the writ to cover cases of guilty pleas obtained by fraud, duress, mistake or induced by fear of mob violence.<sup>25</sup> and to situations where the defendant was deprived of counsel.<sup>26</sup> Most have refused to extend it to cases of newly discovered evidence contradicting or putting in issue any fact adjudicated at the trial, or to convictions based upon perjured testimony unless knowingly used by the prosecution.<sup>27</sup> On the other hand, there is a strong minority of states which recognizes it even in these situations<sup>28</sup>

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24. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 523 *et seq.* (1947).

25. *E.g.*, *Dobosky v. State*, 183 Ind. 488, 109 N.E. 742 (1915); *Sanders v. State*, 85 Ind. 318 (1882); *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38 (1893). Also see Note, 30 A.L.R. 686 (1924).

26. *Fluty v. State*, 224 Ind. 652, 71 N.E.2d 565 (1947), 45 MICH. L. REV. 1049; *Bojinoff v. People*, 229 N.Y. 145, 85 N.E.2d 909 (1949); *Lamb v. Florida*, 91 Fla. 396, 107 So. 535 (1926), contains a good summary of the situations where common law *coram nobis* was available.

27. *E.g.*, *Humphreys v. State*, 129 Wash. 309, 224 Pac. 937, 33 A.L.R. 78 (1924), 24 COL. L. REV. 797. See also, Comment, 39 MICH. L. REV. 963, 969 (1941). If a conviction based on perjured testimony is obtained by the connivance of the prosecution the accused is deprived of due process. *Hysler v. Florida*, 315 U.S. 411, 62 Sup. Ct. 688, 86 L. Ed. 932 (1941), *rehearing denied*, 316 U.S. 642 (1942); *Mooney v. Holohan*, 294 U.S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791 (1935). But mere recantation of testimony is not in itself ground for invoking the due process clause against a conviction. *Hysler v. Florida*, *supra*. At least one federal court would extend the scope of "due process" to cover all cases where a defendant's conviction was based on perjured testimony and no state remedy is available. *Jones v. Commonwealth of Kentucky*, 97 F.2d 335 (6th Cir. 1938). In this case defendant was convicted of murder. He appealed to the Kentucky Court of Appeals on the ground that he was denied due process in that his counsel had inadequate time to prepare for his trial. The conviction was affirmed. *Jones v. Commonwealth*, 267 Ky. 465, 102 S.W.2d 345 (1936). Subsequently it developed that he had been convicted on perjured testimony. The governor, who had been elected on the promise that he would not use the pardon power, refused a pardon at noon of the day set for execution. That afternoon application was made to the federal district court for habeas corpus. That court granted a temporary stay of execution directing defendant to exhaust his remedies in the state courts. He then filed separate petitions for habeas corpus in the Kentucky Court of Appeals and for *coram nobis* in the trial court. The denial of the latter petition was appealed and the Kentucky Court of Appeals denied both petitions. *Jones v. Commonwealth*, 269 Ky. 772, 108 S.W.2d 812 (1937); *Id.*, 269 Ky. 779, 108 S.W.2d 816 (1937). The federal district court then certified the case to the circuit court of appeals. That court said that since defendant had no remedy in the state courts he should be discharged on the ground that the lack of time for his attorney to prepare for a trial was a denial of due process. However, in its opinion the court laid great emphasis on the fact that perjured testimony convicted the defendant and indicated that that alone would violate due process. In 1943, the Kentucky court reversed *Jones v. Commonwealth* in *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48 (1943), and held that perjured testimony was a ground for the writ of error *coram nobis*.

28. "If, however, the newly discovered evidence be of such a conclusive nature as to demonstrate it to be practically impossible, under all circumstances, that the judgment was right upon the merits, then the writ of error

and it is not improbable that more courts will expand the writ to cover those cases where the innocence of a convicted person is clearly established by new evidence.

Although most states recognize the writ in varying forms,<sup>29</sup> its status in the federal courts is not entirely clear.<sup>30</sup> Both the Federal Rules of Criminal Procedure and the new Judicial Code have left open its availability in criminal procedure. Indeed, a preliminary draft of the Rules specifically states that no provision is made regarding *coram nobis* and that the power of courts to grant relief not provided for in the Rules is left intact.<sup>31</sup> And, although the Revisor's note to Section 2255 of the Judicial Code asserts that the section, "restates, clarifies, and simplifies the procedure in the nature of the ancient writ of error

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*coram nobis* will lie." *George v. State*, 211 Ind. 429, 439, 6 N.E.2d 336, 340 (1937). "And we do not undertake hereby to lay down a general rule of law that a writ of error *coram nobis* should be granted whenever a material witness recants and admits perjury, but in the sound discretion of the court, where, as here, it appears that the verdict most probably would not have been rendered except for such testimony and that there is a strong probability of a miscarriage of justice unless the writ is granted, it should be granted." *Davis v. State*, 200 Ind. 88, 161 N.E. 375, 382 (1928). Also see *Ex parte Welles*, 53 So.2d 708 (Fla. 1951) (available when mistaken identity established by new evidence); *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48 (1943), Note, 32 Ky. L.J. 296 (1944) (perjured testimony made a ground for *coram nobis*).

29. A few cases flatly state that the writ is not available in criminal cases. *Commonwealth v. Phelan*, 271 Mass. 21, 171 N.E. 53 (1930); *Hendricks v. State*, 122 Tex. Crim. App. 429, 55 S.W.2d 839 (1933). Apparently it is not recognized in Tennessee. TENN. CODE ANN. §§ 8971-8979 (Williams 1934); *Green v. State*, 187 Tenn. 545, 216 S.W.2d 305 (1948) (denying existence of the writ in criminal cases). The demands of constitutional due process as recently envisioned by the United States Supreme Court and its injunction that the states afford prisoners some clearly defined corrective judicial process for raising claims of denial of federal rights have revitalized the writ of *coram nobis* in the states. Perhaps the most important decision re-ushering *coram nobis* onto the contemporary scene was *Mooney v. Holohan*, 294 U.S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791 (1935). See also *Young v. Ragen*, 337 U.S. 235, 69 Sup. Ct. 1073, 93 L. Ed. 1333 (1949); *Rice v. Olson*, 324 U.S. 786, 65 Sup. Ct. 989, 89 L. Ed. 1354 (1945). For examples of state response, see *Skipper v. Schunacher*, 124 Fla. 384, 169 So. 58 (1936), Note, 26 NEB. L. REV. 102 (1947). Also see *State v. Blackford Circuit Court*, 229 Ind. 3, 95 N.E.2d 556 (1950), holding unconstitutional as violative of due process a statute placing a 5 year statute of limitations on *coram nobis*. Since there is no habeas corpus in Indiana, *coram nobis* is the only way to attack a judgment on constitutional grounds.

30. The writ has definitely been abolished from federal civil procedure. FED. R. CIV. P. 60(b).

31. "No express provision is made with respect either to providing for relief or to barring relief under the common law writ of error *coram nobis*. . . . Nothing in the rules limits existing power of the court to grant any type of relief from judgments or orders which is not expressly provided for in the rules." FED. R. CRIM. P., Second Preliminary Draft, Note to Rule 35, p. 131 (Feb. 1944). The nearest thing to *coram nobis* in the Federal Rules is Rule 35 providing that the court "may correct an illegal sentence at any time." But an innocent convict is not interested in "correcting" a sentence but in being relieved of it altogether and Rule 35 hardly seems to give an effective remedy. *In re Shepherd*, 195 F.2d 157 (1st Cir. 1952); *United States v. Rockower*, 171 F.2d 423 (2d Cir. 1948). On the other hand, in *Byrd v. Pescor*, 163 F.2d 775 (8th Cir. 1947), cert. denied, 333 U.S. 846 (1948), 1 VAND. L. REV. 292, a petitioner for habeas corpus contended that he had been insane at the time of his trial and conviction. At that time he was an escapee from a mental institution and therefore presumptively insane. The court first decided that a federal district court has the power upon a petition for habeas corpus to inquire into



*coram nobis*,"<sup>33</sup> the section adopts only a part of its procedural characteristics.<sup>33</sup> It neither codifies the writ nor extends it to cover conclusive new evidence.

While the Supreme Court has declined to rule on the availability of *coram nobis* in the federal courts,<sup>34</sup> it has been recognized by the

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the mental status of a petitioner who was presumptively insane at the time of his conviction and who asserts that the sentencing court was without jurisdiction for that reason. The court then held that Rule 35 gave the petitioner an adequate remedy in the sentencing court and that under the exhaustion doctrine it was proper for the district court where the petition for habeas corpus was filed to refuse to issue the writ. In discussing Rule 35, Judge Sanborn said: "While it made no change in what had become existing law . . . we think the rule did have the effect of making the remedy of moving to vacate to correct a sentence because of illegality an ordinary remedy instead of a somewhat unusual and exceptional one. Prior to the pronulgation of Rule 35, a motion to vacate or correct a sentence was frequently met with the contention by the Government that, because of the ending of the term at which the judgment under attack had been entered, the court could not disturb it, or that the motion was in the nature of a writ of error *coram nobis* and such a writ was not available in federal criminal proceedings, or that the question raised was not one which could be brought up upon such a writ." *Id.* at 779. By interpreting the first sentence of Rule 35 as affording relief when a sentence is illegal because the court was without jurisdiction or because of an invasion of the constitutional rights of the defendant the court, in effect, construed it as codifying the common law writ of error *coram nobis*. *Accord*, *Berkoff v. Humphrey*, 159 F.2d 5 (8th Cir. 1947) (invalidity of statute); *Brown v. Pescor*, 74 F. Supp. 549 (W.D. Mo. 1947) (defendant unconscious at time of plea of guilty); *D'Ostroph v. Pescor*, 7 F.R.D. 569 (W.D. Mo. 1947) (insanity of defendant). Even if Rule 35 is construed as codifying *coram nobis*, which the draftsmen certainly did not intend, it would still be inadequate for an innocent convict since he is usually in no position to raise jurisdictional or constitutional issues. The additional step of expanding *coram nobis* would have to be taken and this can be done, as will appear, without getting involved in discussions as to the meaning and purpose of Rule 35. Another confused decision is *United States v. Landicho*, 72 F. Supp. 425 (D. Alaska 1947), 1 VAND. L. REV. 137. More than five years after conviction petitioner filed a motion to set aside the judgment on the ground that he was insane at the time of his trial. The court held that the motion was in the nature of a petition for writ of error *coram nobis*; that this writ is analogous to a motion for a new trial on the ground of newly discovered evidence; and that, in the absence of a specific provision in the Federal Rules of Criminal Procedure, it is governed by the two-year limit applicable to motions for a new trial under Rule 33.

32. 62 STAT. 967 (1948), as amended, 63 STAT. 105 (1949), 28 U.S.C.A. § 2255 (1950).

33. The only procedural similarity is that a motion under § 2255 is brought in the sentencing trial court. There similarity ends. Section 2255 is available only to "a prisoner in custody" while *coram nobis* is available to persons in or out of confinement. *E.g.*, *State ex rel. Lopez v. Killigrew*, 202 Ind. 397, 174 N.E. 808 (1931) (released); *Bojinoff v. People*, 299 N.Y. 145, 85 N.E.2d 909 (1949) (confined); *Matter of Hogan v. Court of General Sessions*, 296 N.Y. 1, 68 N.E.2d 849 (1946) (released). The meaning of the Revisor's note is uncertain. In view of the broad statement in the draft of the Federal Rules of Criminal Procedure (note 31 *supra*), it does not seem that *coram nobis* was abolished. In *United States v. Rockower*, 171 F.2d 423, 425 (2d Cir. 1948), the Second Circuit specifically declared that neither the Code nor the Rules answered the question. In *Bruno v. United States*, 180 F.2d 393, 395 (D.C. Cir. 1950), the court stated that § 2255 is in the nature of *coram nobis* but is not that writ and its nature and meaning must be ascertained in terms of the statute. And Judge Parker, Chairman of the Judicial Conference Committee which proposed § 2255, has recently stated that the statute "is but an extension of the remedy already existing in the writ of error *coram nobis*." *Close v. United States*, 198 F.2d 144, 146 (4th Cir. 1952).

34. "[E]ven if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases — as an incident to

lower federal courts. Some have entertained and granted hearings on motions in the nature of *coram nobis*;<sup>35</sup> others have escaped ruling on its availability by assuming its existence *arguendo* and then denying issuance on the grounds asserted,<sup>36</sup> or because of laches.<sup>37</sup>

In the *Kaplan* case, Judge Weinfeld did not discuss the common law writ of *coram nobis* as a possible remedy. Instead, he devoted the bulk of his opinion to the applicability of Section 2255 of the Judicial Code which does not codify the writ.

#### SECTION 2255 OF THE JUDICIAL CODE

This section, which became effective as part of the new Judicial Code for the United States on September 1, 1948, deals with vacation of sentences in criminal cases by a prisoner "in custody" who claims that his sentence was imposed "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." The motion may be made at any time and the court, if it finds the judgment vulnerable to collateral attack, "shall vacate and set the judgment

their powers expressly granted—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* . . . as to which we express no opinion, that authority would not reach the present case [prejudicial misconduct of a United States Attorney and concealed bias of juror on voir dire examination]." *United States v. Mayer*, 235 U.S. 55, 69, 35 Sup. Ct. 16, 59 L. Ed. 129 (1914). The Court then said that this power exists, if at all, only "in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *But cf. United States v. Smith*, 331 U.S. 469, 475 n.4, 67 Sup. Ct. 1330, 91 L. Ed. 1602 (1947): "Although this Court has reserved decision on whether the federal district courts are empowered to entertain proceedings in the nature of *coram nobis* . . . [citing the *Mayer* case] it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate." The *Kaplan* case supplies the refutation.

35. *Allen v. United States*, 162 F.2d 193 (6th Cir. 1947) (insanity at time of plea); *Roberts v. United States*, 158 F.2d 150 (4th Cir. 1946) (mental incompetence to plead, denial of counsel); *Garrison v. United States*, 154 F.2d 106 (5th Cir. 1946) (material witnesses forced by intimidation by federal officers to commit perjury); *United States v. Steese*, 144 F.2d 439 (3d Cir. 1944) (denial of counsel); *Tinkoff v. United States*, 129 F.2d 21 (7th Cir. 1942) (perjured testimony with connivance of prosecuting officers); *United States v. Mahoney*, 43 F. Supp. 943 (W.D. La. 1942) (denial of counsel). And see WHITMAN, FEDERAL CRIMINAL PROCEDURE § 336 (1950).

36. *E.g., Story v. Waters*, 195 F.2d 734 (10th Cir. 1952); *Barber v. United States*, 142 F.2d 805 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944) (newly discovered evidence); *United States v. Gardzielewski*, 135 F.2d 271 (7th Cir. 1943) (newly discovered evidence). Compare *Meredith v. United States*, 138 F.2d 772 (6th Cir. 1943) (perjured testimony), with *Jones v. Commonwealth of Kentucky*, 97 F.2d 335 (6th Cir. 1938), discussed in note 27 *supra*.

37. *United States v. Rockower*, 171 F.2d 423 (2d Cir. 1948) (18 years after conviction); *United States v. Moore*, 166 F.2d 102 (7th Cir. 1948) (same period); *United States v. Buhler*, 48 F. Supp. 159 (M.D. Pa. 1942) (6 years after conviction). Cf. *United States v. Landicho*, 72 F. Supp. 425 (D. Alaska 1947), discussed in note 31 *supra*, where the court held *coram nobis* to be governed by the two-year period of limitations applicable to motions for a new trial under Rule 33. *Contra: United States v. Steese*, 144 F.2d 439 (3d Cir. 1944) (9 years after conviction).

aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."<sup>38</sup>

The procedure is similar to *coram nobis* in that the attack is made in the sentencing court. But the purpose of this requirement was not to adopt the writ of *coram nobis* but to avoid the serious administrative problems that had arisen in habeas corpus proceedings.<sup>39</sup> In fact, the main purpose of Section 2255 is to curtail the number of habeas corpus petitions since this writ is available only if a motion under Section 2255 is "inadequate or ineffective to test the legality" of the imprisonment.<sup>40</sup> Furthermore, the test of a motion under the statute is whether, prior to its enactment, the issue was one that could have been raised on an application for a writ of habeas corpus.<sup>41</sup> For that reason, a motion under the statute and habeas corpus are substantive equivalents — available only for jurisdictional and constitutional errors at the trial. The statute may not be used, therefore, to attack any matter litigated in the original trial<sup>42</sup> despite the conclusiveness of the new evidence upon which the attack is grounded.<sup>43</sup> Consequently, the discovery of new evidence establishing mistaken identity or perjured testimony does not fit the shoe of jurisdictional or constitutional error.

Despite the fact that neither Section 2255 nor habeas corpus requires timely application, neither is adequate to the needs of the innocent convict. Nor would an amendment of Section 2255 encompassing cases

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38. 62 STAT. 967 (1948), as amended, 63 STAT. 105 (1949), 28 U.S.C.A. § 2255 (1950).

39. See *United States v. Hayman*, 342 U.S. 205, 72 Sup. Ct. 263 (1952), for an elaborately detailed discussion of § 2255. Also see Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949); Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949).

40. "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 62 STAT. 967 (1948), as amended, 63 STAT. 105 (1949), 28 U.S.C.A. § 2255 (1950).

41. *United States v. Hayman*, 342 U.S. 205, 72 Sup. Ct. 263 (1952). See *Risken v. United States*, 197 F.2d 959, 961 (8th Cir. 1952); *United States v. Kaplan*, 101 F. Supp. 7, 11 (S.D.N.Y. 1951). See Note, 59 YALE L.J. 1183 (1950).

42. *E.g.*, *United States v. Riccardi*, 188 F.2d 416 (3d Cir. 1951) (new evidence not ground for invoking § 2255); *United States v. Gallagher*, 183 F.2d 342 (3d Cir. 1950), *cert. denied*, 340 U.S. 913 (1951) (cannot be used to review questions of fact). Judge Parker has described the extent of a court's jurisdiction and authority as follows: "It is elementary that neither habeas corpus nor motion in the nature of application for writ of error *coram nobis* can be availed of in lieu of writ of error of appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error *coram nobis* or under 28 U.S.C.A. 2255." *Howell v. United States*, 172 F.2d 213, 215 (4th Cir. 1949).

43. *E.g.*, *Hauck v. Hiatt*, 141 F. 2d 812 (3d Cir. 1944) (confession by another inmate). For an exhaustive annotation collecting the cases construing § 2255 see Note, 20 A.L.R.2d 976 (1951).

of newly discovered evidence establishing innocence always be adequate since the movent must be a "prisoner in custody."<sup>44</sup> The incarcerated victim of an erroneous conviction certainly deserves his freedom but the victim who has served his time is likewise deserving since the completion of his sentence does not erase the stigmata of a conviction.

Nathan Kaplan filed his motion to set aside his conviction while he was on parole. His parole period had expired by the time of the hearing but he was then on probation. Notwithstanding a conflict in the decisions, Judge Weinfeld considered him to be a "prisoner in custody."<sup>45</sup> But the federal procedure provides no relief for one who has fully served a sentence pursuant to an unjust conviction except for the "remedy" of executive pardon.

#### PARDON

"A pardon is an act of mercy flowing from the fountain of bounty and grace. . . . Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, Justice will pause, and, forgetting the offense, bid the pardoned man go in peace."<sup>46</sup>

"The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."<sup>47</sup>

"In those exceptional cases where rules of law of broad application work an injustice in an individual case, our institutions provide redress through the pardoning power."<sup>48</sup>

When claims of unjust conviction do not fit within existing judicial remedies, the courts, admitting their own impotence to right the ju-

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44. Although § 2255 provides that a "motion for such relief may be made at any time," it is apparently limited by the previous paragraph limiting relief to a "prisoner in custody under sentence of a court . . . claiming the right to be released."

45. Judge Weinfeld pointed out that under 18 U.S.C. § 4203 a parolee is in "legal custody" and indicated that the broad supervisory powers of 18 U.S.C. § 3653 retained a probationer in custody. *United States v. Kaplan*, 101 F. Supp. 7, 11 n.3 (S.D.N.Y. 1951). On the other hand, habeas corpus is generally unavailable to parolees. Note, 148 A.L.R. 1243 (1944). In *Owens v. United States*, 174 F.2d 469 (5th Cir.), *cert. denied*, 338 U.S. 906 (1949), it was held that one out on conditional release had no standing under § 2255. If a prisoner is sentenced under two counts, the sentences to run consecutively, a petition attacking the second sentence before he has begun to serve it is premature, the prisoner not being in custody under such sentence. *Crow v. United States*, 186 F.2d 704 (9th Cir. 1950); *United States v. Young*, 93 F. Supp. 76 (D.C. Wash. 1950); *accord*, *Lopez v. United States*, 186 F.2d 707 (9th Cir. 1950). Also see Notes, 24 CORNELL L.Q. 270 (1939), 59 YALE L.J. 786, 790 (1950), 20 A.L.R.2d 976, 992 (1951).

46. Judge Erskine in *United States v. Athens Armory*, 24 Fed. Cas. No. 14, 473, at 884-85 (N.D. Ga. 1868).

47. THE FEDERALIST, No. 23 at 482 (Sesquicentennial ed. 1937).

48. Judge Weinfeld in *United States v. Kaplan*, 101 F. Supp. 7, 14 (S.D.N.Y. 1951).

dicial wrong, piously rebuff the petitioner and refer him to the pardoning power for relief. A pardon on the ground of innocence is not without irony. If such a pardon is to be a substitute for judicial remedies it should at least have the effect of a judicial reversal.

In relegating the innocent convict to executive clemency, the courts apparently have been misled by the following unfortunate dictum of the United States Supreme Court in *Ex parte Garland*:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender . . . it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."<sup>49</sup>

The assertion that a pardon "blots out guilt" has often been repeated by the Supreme Court and by state courts.<sup>50</sup> Yet, in determining the consequences of a pardon the same courts frequently abandon it. First of all, they rarely distinguish between a pardon granted for innocence and one granted for other reasons, such as preventing a prison-break.<sup>51</sup> In either case the record fact of guilt remains and the courts are prone to treat the convictions alike. Although a pardon remits the specific sentence and usually restores such citizenship rights as the right to vote and to hold office,<sup>52</sup> the conviction may still be used to discredit a witness.<sup>53</sup> A pardon will not prevent disbarment proceedings nor will one granted after disbarment entitle a lawyer to reinstatement.<sup>54</sup> The pardoned conviction may still be the basis for disqualifying one as a judge, refusing his application for naturalization, or refusing his request for a license to engage in a business or to enter

49. 4 Wall. 333, 380, 18 L. Ed. 366 (U.S. 1866). *But cf.* *Burdick v. United States*, 236 U.S. 79, 94, 35 Sup. Ct. 267, 59 L. Ed. 476 (1915), where the same court speaks of the "confession of guilt implied by the acceptance of a pardon."

50. See Weihofen, *The Effect of a Pardon*, 88 U. OF PA. L. REV. 177 (1939).

51. See *id.* at 178. See also 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, *Pardon* 270 (1939).

52. 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, *Pardon* 270-71 (1939); Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949); Note, 1951 WIS. L. REV. 378.

53. *United States v. Richards*, 91 F. Supp. 323 (D.D.C. 1950), *aff'd sub nom. Richards v. United States*, 192 F.2d 602 (D.C. Cir. 1951). See especially dissenting opinion of Fahy, J. 192 F.2d at 608 *et seq.* See also Note, 25 TULANE L. REV. 281 (1951); 32 B.U.L. REV. 231 (1952). Although the pardoned conviction can be used to impeach a witness, the pardon may be introduced for purposes of rehabilitation, the credibility of the witness being left to the jury. *United States v. Richards*, *supra*.

54. *In re Rudd*, 310 Ky. 630, 221 S.W.2d 688 (1949). The same is true of other professions. *Page v. Watson*, 140 Fla. 536, 192 So. 205, 126 A.L.R. 249 (1938) (medicine); *Morris v. Hartsfield*, 186 Ga. 171, 197 S.E. 251 (1938) (policeman). Of course, the court proceedings for disbarment or upon application for reinstatement of a disbarred attorney may take into consideration the fact that the crime involved has been pardoned, especially if the pardon was granted on grounds of innocence. While this factor is not controlling, it may influence the court in deciding the case. See *In re Kaufmann*, 245 N.Y. 423, 157 N.E. 730, 732 (1927).

a profession.<sup>55</sup> "Only by judicial decree can the judgment of earlier conviction be set aside or denied all effect."<sup>56</sup>

An especially harsh case involved Martin Prisament. He was convicted on June 14, 1937, in a federal district court in Georgia of robbing a bank and was sentenced to imprisonment for three years. His defense was an alibi; that he was in New York City on the day of the robbery. Two years later his innocence was established by the apprehension of the guilty parties. He was then granted "a full and unconditional pardon" by the President which specifically recited that he was "innocent of the offense for which he is now being held."<sup>57</sup> His claim for indemnity in the United States Court of Claims was denied on technical grounds.<sup>58</sup>

On March 11, 1940, Prisament was convicted in a New York court upon his plea of guilty of attempted robbery. He was sentenced as a second offender under the habitual criminal law — the pardoned conviction being counted as a first offense. By a writ of habeas corpus he questioned the power of the court to sentence him to increased punishment. The Appellate Division upheld his claim<sup>59</sup> but the Court of Appeals reversed.<sup>60</sup> The latter held that only a judicial finding of innocence made by a court of proper jurisdiction could operate to wipe out a conviction for the purposes of the habitual criminal statute. The court conceded that, ideally, a person should be able to prove his innocence before a judicial tribunal and obtain an elimination of the conviction. But, in the absence of such a procedure or a statute giving an executive finding the effect of a judicial acquittal, it considered itself powerless to mitigate the punishment prescribed by the legislature.<sup>61</sup> Again, Prisament was counselled to seek executive clemency.

55. 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, *Pardon* 270-94 (1939). In Tennessee, persons convicted of certain specified crimes are rendered "infamous" and are thereby disqualified as voters and as witnesses in any judicial proceeding. TENN. CODE ANN. § 11762 (Williams 1934). The Supreme Court of Tennessee has held that a convicted infamous felon does not regain his competency as a result of an executive pardon. *Evans v. State*, 66 Tenn. 12 (1872). Infamy can be removed only by a judicial process in strict compliance with the terms of § 7183 of the Code. See Note, *Infamy as Ground of Disqualification in Tennessee*, 22 TENN. L. REV. 544 (1952).

56. Chief Judge Lehman in *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E.2d 468, 472 (1941).

57. The pardon is set out in full in *Prisament v. United States*, 92 Ct. Cl. 434, 435 (1941).

58. *Prisament v. United States*, 92 Ct. Cl. 434 (1941). The federal indemnity statute is discussed *infra*.

59. *People ex rel. Prisament v. Brophy*, 261 App. Div. 495, 26 N.Y.S.2d 193 (4th Dep't 1941).

60. *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E.2d 468 (1941), *cert. denied*, 317 U.S. 625 (1942), 51 YALE L.J. 699 (1942).

61. The Prisament case was the first involving the effect to be given a pardon for innocence under an habitual criminal law. Where the pardon is granted for some other reason there is a clear split of authority as to whether the pardoned offense is counted. *Groseclose v. Plummer*, 106 F.2d 311 (9th Cir. 1939); 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, *Pardon* 281 (1939). A few states have adopted statutes specifically providing that the habitual criminal statutes shall not apply to a pardoned offense. *E.g.*, IOWA CODE § 747.7 (1950); MASS. GEN. LAWS c. 279, § 25 (1932); N.H. REV. LAWS c.

Clearly, a pardon is not a sufficient remedy for miscarriages of justice.<sup>62</sup> A pardon on the ground of innocence, if it is to be effective, must be given the same result as a judicial exoneration.

#### INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

If Nathan Kaplan should obtain a Presidential pardon he could then, under the Federal Erroneous Convictions Act,<sup>63</sup> bring a suit against the United States in the Court of Claims for compensation not to exceed \$5000. Despite the optimistic reception which greeted the passage of this act after a campaign of more than twenty-six years by two of the nation's foremost legal scholars, it has been strictly, even harshly, construed.<sup>64</sup> Furthermore, \$5000 would be small compensation

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460, § 2 (1942); R. I. GEN. LAWS c. 625, § 64 (1938); UTAH CODE ANN. § 103-1-18 (1943). *Contra*: ME. REV. STAT. c. 136, § 3 (1944). See also Note, 48 COL. L. REV. 238, 243 (1948).

62. Another defect of a pardon is the slow and cumbersome procedure in many jurisdictions. See 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, *Pardon* 142-85 (1939), for a collection of state provisions. The federal procedure is discussed in HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 82 *et seq.* (1941). The Kaplan case was decided on November 14, 1951. Notwithstanding Judge Weinfeld's strong recommendation, Kaplan's application had not been acted upon by Nov. 5, 1952. Letter from Samuel W. Altman, Esq., Kaplan's attorney.

63. 62 STAT. 978 (1948), 28 U.S.C.A. § 2513 (1950), formerly 18 U.S.C. §§ 729-32 (1940): "(a) Any person suing under section 1495 of this title must allege and prove that: ¶ (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and ¶ (2) He did commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution. ¶ "(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received. ¶ "(c) No pardon or certified copy of a pardon shall be filed with the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired. ¶ "(d) The Court may permit the plaintiff to prosecute such action in forma pauperis. ¶ "(e) The amount of damages awarded shall not exceed the sum of \$5,000." This act stems largely from the efforts of Wigmore and Borchard. The first bill for relief of persons erroneously convicted in the federal courts was introduced into the Senate in 1912 by Senator (later Justice) Sutherland. The history of the bill is set out in *United States v. Keegan*, 71 F. Supp. 623, 626 (S.D.N.Y. 1947). It was adopted on May 24, 1938, and revised on September 1, 1948. The revision was made for purposes of clarity and made no substantive changes. See *Weiss v. United States*, 95 F. Supp. 176, 178 (S.D.N.Y. 1951).

64. Even though Kaplan should obtain a Presidential pardon on the ground of innocence it is not certain that he could successfully maintain a suit in the Court of Claims. Under the Erroneous Convictions Act the only evidence admissible on the issue of innocence is either a pardon, or a certificate of innocence by the court in which the accused was adjudged not guilty. The certificate or pardon must contain the following recitals of findings: (1) Petitioner did not commit any of the acts charged; or (2) his conduct in connection with the charge did not constitute an offense against the United States or any State, Territory or the District of Columbia; and (3) he did not by misconduct or neglect cause or bring about his own prosecution. In *Prisament v. United States*, 92 Ct. Cl. 434 (1941), the Court of Claims denied compensation because the

indeed for Nathan Kaplan who spent 7 1/2 years in prison and nearly as long on parole and probation.<sup>65</sup>

European codes have long recognized the government's obligation to compensate the innocent who have been mistakenly convicted and punished by the state.<sup>66</sup> But if Kaplan had been convicted in any state

pardon failed to contain recitals under both (2) and (3), ignoring the disjunctive "or" between (1) and (2). On the other hand, in *United States v. Keegan*, 71 F. Supp. 623 (S.D.N.Y. 1947), which involved the first request under the statute for a certificate of innocence, the court concluded that (1) alone would provide a sufficient basis for the issuance of a certificate, without reference to negligence or misconduct. Similarly, a pardon reciting (1) alone should be enough to support a claim for compensation. Notes, 36 CALIF. L. REV. 329 (1948), 15 U. OF CHI. L. REV. 773 (1948), 57 YALE L.J. 1135 (1948). Most suits under indemnity statutes have been unsuccessful. *Weiss v. United States*, 91 F. Supp. 743 (Ct. Cl. 1950); *Ekberg v. United States*, 76 F. Supp. 99 (Ct. Cl. 1948); *Cratty v. United States*, 75 F. Supp. 1005 (Ct. Cl. 1948); *Hadley v. United States*, 101 Ct. Cl. 112 (1944), 106 Ct. Cl. 819 (1946); *George v. United States*, 106 Ct. Cl. 195 (1946); *Viles v. United States*, 95 Ct. Cl. 591 (1942); *Prisament v. United States*, 92 Ct. Cl. 434 (1941); *Plum v. State Board of Control*, 51 Cal. App.2d 382, 124 P.2d 891 (1942); *Lefevre v. Goodland*, 247 Wis. 512, 19 N.W.2d 884 (1945); *Long v. State*, 176 Wis. 361, 187 N.W. 167 (1922); *Becker v. Green County*, 176 Wis. 120, 184 N.W. 715 (1921). In only two cases has compensation been granted under the Federal Act. *Brunner v. United States*, 102 F. Supp. 909 (Ct. Cl. 1952) (\$500. petitioner's prior criminal record taken into account in determining damage); *Andolschek v. United States*, 77 F. Supp. 950 (Ct. Cl. 1948) (\$5000).

65. Borchard recommended that the maximum recovery be \$5000. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201, 208 (1941). He also suggested that no attempt be made to compensate for moral injury, i.e., damage to reputation and mental suffering. He feared that to permit recovery for these items would seriously burden state treasuries. Maximum recovery under the North Dakota act is \$2000 and under the Wisconsin and California acts it is \$5000. The New York act places no limit. If wrongful convictions are as infrequent as assumed, the "state treasury" argument makes little sense. The Federal Tort Claims Act, which is more frequently invoked, has no limit. 62 STAT. 982-84 (1948), 28 U.S.C.A. §§ 2671-2680 (1950). *Campbell v. State*, 186 Misc. 586, 62 N.Y.S. 2d 638, 642 (Ct. Cl. 1946) expresses a more humane point of view:

"Claimant was tried in accordance with the orderly processes of criminal proceedings. There was no malice toward him upon the part of any official connected with the proceedings. His conviction was the result of mistaken identity. But claimant suffered grievously during his long term in prison and while on parole resulting from his arrest, conviction and confinement for the commission of crimes of which he was innocent. He was branded as a convict, given a prison number and assigned to a felon's cell. He was deprived of his liberty and civil rights. He was degraded in the eyes of his fellowmen. His mental anguish was great by reason of his separation from society and from his wife and family and in being deprived of the opportunity to afford them a living which they were compelled to seek from public authorities. He suffered the miseries of prison life and his confinement was doubly hard because he was innocent. He was the victim of a miscarriage of justice but fortunately for him the state has undertaken to rectify the mistake as far as possible. . . .

"It is conceded that his damages caused by loss of earnings amount to the sum of \$40,000. He is clearly entitled to substantial additional damages. The amount is not easy to determine. The prior cases upon that question are of little value in fixing the amount."

The Court then awarded Campbell \$115,000.

66. BORCHARD, CONVICTING THE INNOCENT 375-407 (1932); Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U.L. REV. 201 (1941).



other than California,<sup>67</sup> North Dakota,<sup>68</sup> Wisconsin<sup>69</sup> or New York,<sup>70</sup> his only chance for compensation would be a special legislative act. Not only do these special statutes face constitutional difficulties but few victims of wrongful convictions have the necessary friends or influence to bring about legislation in their own behalf.<sup>71</sup>

The widespread indifference to the plight of the victims of unjust convictions in this country may be due to the notion that these tragedies are too rare to justify public concern. On the other hand, the very fact that there will be few demands on the public treasury is all the more reason that appropriate legislation providing for indemnity on a generous scale should be adopted.

Although statutes providing for the indemnity of persons erroneously convicted and imprisoned should be a part of every modern penal code, indemnity alone is not enough. Rectification of errors of criminal justice should also entail a public acknowledgment of error by which the character of the innocent victim is vindicated by a nullification of the record of conviction.

#### CONCLUSION

The difficulties and failures characterizing attempts to cope with professional and organized crime have obscured for many the problem of protecting the innocent who may be erroneously or wrongfully accused, tried and convicted. When many are agitated over the social danger of widespread criminal activities, too little attention is paid to safeguarding the rights of accused persons. Crime waves often produce an hysterical atavism in which the interest of the individual is submerged in the determination to reduce the volume of crime. Bor-

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67. CAL. PEN. CODE §§ 4900-4906 (Deering 1941). The California statute is discussed in Note, 36 CALIF. L. REV. 329 (1948).

68. N.D. REV. CODE §§ 12-5701 *et seq.* (1943).

69. WIS. STAT. § 285.05 (1949).

70. N.Y. CT. OF CLAIMS ACT § 9 (3a), as amended, Laws 1946, c. 10. The operation of this statute is reviewed in 21 N.Y.U.L.Q. REV. 422 (1946).

Massachusetts provides for compensation for loss of earnings to persons kept in confinement more than six months following indictment and finally acquitted or discharged without trial, provided such persons did not request or consent to the delay and the judge approves the payment. MASS. ANN. LAWS c. 277, § 73 (1933).

71. BORCHARD, CONVICTING THE INNOCENT xxiv (1932) lists the special grants made in the cases he discussed. Special grants run into constitutional objections against appropriating public money for private purposes. *Allen v. Board of State Auditors*, 122 Mich. 324, 81 N.W. 113 (1899); *State ex rel. Coole v. Sims*, 133 W. Va. 619, 58 S.E.2d 784 (1950). In the later case *Coole* was pardoned on the ground that investigation showed "strong indication of a miscarriage of justice." He filed a petition in the State Court of Claims for damages and the court made an award of \$10,000. This award was subsequently presented to the legislature which appropriated \$5000 to be paid him. The State auditor refused to honor *Coole's* requisition and he brought a mandamus proceeding to compel the auditor to recognize it. The Supreme Court denied the writ holding that the record before it, the Court of Claims and Legislature, did not clearly disclose innocence, and that there was no basis for the legislative finding of a moral obligation on the part of the state to compensate *Coole*.

chard's observation is undoubtedly as true today as it was twenty years ago:

"While it is true that our lax methods of administering the criminal law, the possibility of acquittal on technical grounds, and the usual requirement of unanimity on the part of twelve jurymen bring about nine cases of unjust acquittal to one case of unjust conviction, still that fact is no excuse for a failure to acknowledge the principle and to remedy the evil."<sup>72</sup>

Although unprosecuted crime is a serious social menace, few disasters are more tragic than the condemnation of an innocent person to imprisonment or to death. Convictions of the innocent raise a moral problem of the first magnitude. It is strange that students of jurisprudence have largely ignored Borchard's book. Most legal philosophers have been concerned with "systems,"<sup>73</sup> with "social engineering"<sup>74</sup> or with "frameworks of inquiry." In their search for systematization, for universals or generalized postulates they have tended to ignore the problem of the particular case. But, as Judge Frank has pointed out,<sup>75</sup> any study of a legal system which neglects the fate of individual litigants who lose specific lawsuits through mistaken fact-finding is cruel and immoral.

But the philosophers are not the only ones who are derelict. Others assert that these tragedies are the price we must pay in a complex society. For example, an able writer on the law of evidence has said:

"Our system does not guarantee either the conviction of the guilty or the acquittal of the innocent. Certain safeguards are erected which make it more difficult to convict the innocent than to acquit the guilty, but all that our system guarantees is a fair trial. It is a price which every member of a civilized community must pay for the erection and maintenance of machinery for administering justice, that he may become the victim of its imperfect functioning."<sup>76</sup>

Although the author of this statement is not advocating that nothing be done about erroneous convictions he is nevertheless expressing a point of view which, in lesser minds, leads to the abnegation of responsibility. A more humane and enlightened outlook is that of Judge Frank:

"When, in any area directly affecting human beings, there exists a grave unsolved problem and when the absence of a solution leads to many tragedies,

72. BORCHARD, *CONVICTING THE INNOCENT* 407 (1932).

73. For a penetrating criticism of this trend in contemporary jurisprudence see Frank, "*Short of Sickness and Death*": *A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L.Q. REV. 545 (1951).

74. For a criticism of Pound's metaphor of "engineering" as suggesting a system of merely mechanical expedients mechanically administered to social exigencies, see 2 VINOGRADOFF, *COLLECTED PAPERS* 324 (1928).

75. Frank, *supra* note 73, at 603.

76. Edmund M. Morgan in JOUGHIN AND MORGAN, *THE LEGACY OF SACCO AND VANZETTI* vi (1948).

then those who, well aware of the problem, seek to conceal or belittle its importance, may be considered morally irresponsible. Why? Because they tend to create a mood of complacency towards the tragedies, and because such complacency impedes efforts that may, at least partly, help to solve the problem."<sup>77</sup>

One of the first steps that should be taken to avoid these tragedies is the improvement of fact-finding techniques.<sup>78</sup> Even so, not all miscarriages of justice could be avoided since some of the mistakes derive from human frailties that are ineradicable.<sup>79</sup> But that is all the more reason for procedures to correct an error when it has occurred. Another direction can be taken; that is to consider the erroneous conviction as a datum and then develop an effective unconvicting procedure.

Understandably, there is a strong reluctance to admit that the state, which maintains right and justice, can commit mistakes and that the machinery of law enforcement sometimes violates its own rules. This reluctance is revealed in the techniques and rationalizations used by the courts in limiting habeas corpus to jurisdictional and (later) constitutional questions, in refusing to extend *coram nobis* to cover newly discovered evidence, in applying the doctrine of laches to the latter, and in the Supreme Court's two year limitation on a motion for a new trial for newly discovered evidence.

This writer can suggest no meritorious reason why relief against erroneous criminal convictions — whether by *coram nobis* or motion for new trial — should be barred by time limitations. The familiar counter-arguments are stated in terms of expediency: (1) The need for finality; that legal relationships should be definitely and permanently settled. This need is more apparent in civil cases involving property rights and commercial transactions than in criminal proceedings where the purpose and effect of a conviction is to remove the defendant from the community. To say that it is more important to decide criminal cases and leave them undisturbed than to decide them justly is — to this writer — a reprehensible way to vindicate the judicial process. (2) With the passage of time, proof may be dissipated, rendering review impracticable. Although this difficulty is not imaginary, it is a rather large compromise automatically to bar judicial relief in all cases merely because determination of the facts will be impracticable in some. The similar possibility with respect to petitions for habeas corpus and motions under Section 2255 has not been an in-

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77. Frank, *supra* note 73, at 546.

78. Borchard makes several suggestions for reform. BORCHARD, CONVICTING THE INNOCENT xiii-xxiii (1932). More detailed and far-reaching proposals appear in the writings of Judge Jerome Frank. See, e.g., FRANK, COURTS ON TRIAL 422-23 (1949).

79. See, Reik's penetrating analysis of a number of these tragedies in psychological terms: REIK, THE UNKNOWN MURDERER 175 *et seq.* (1945). A profound study of the part played by psychological factors in the genesis of these errors is DOSTOEVSKY, THE BROTHERS KARAMAZOV.

surmountable obstacle to review. Furthermore, this article assumes that the innocence of the convict has been clearly demonstrated as in the *Kaplan* case. (3) The courts will be swamped with an avalanche of motions. And so they might. This argument is based upon what Judge Frank calls the "fatigue theory of justice." The specter of judicial overwork often fails to materialize, and even if it does it should not be determinative of an innocent man's freedom. The comments of Judge Evans are pertinent here:

"That there has been a vast increase in [habeas] petitions . . . which have imposed great burdens upon the courts, I cannot deny. Even though there were thrice this increase in number, the argument that we are too busy to hear applications . . . leaves me cold. Enforcement or protection of the rights of an individual is surely not adequate if it turns on the amount or increase of the judicial labors in the Federal courts. It may be true that ninety-nine out of every hundred petitions of these convicts, who allege that the rights of the Federal Constitution were denied them, are mistaken, and the applications are without merit. On the other hand, it may be that one in a hundred is entitled to the relief. Clearly, no Federal court may say nay, before hearing, to any petitioner who, in or out of jail, asserts his confinement resulted from a denial of a right so treasured as those found in the Federal Constitution."<sup>80</sup>

This article has tried to show the need for post conviction procedures that will return an innocent convict to *status quo ante*. This entails not only indemnity on a generous scale but public vindication of his character and a nullification of the record of conviction. More particularly, there is need for a remedy that will permit setting aside a conviction at any time on grounds of new evidence establishing innocence, such as proof of mistaken identity or perjured testimony. Of the alternatives, some would require either statutory changes or modifications in rules of procedure; others call for judicial creativeness.

The most effectual means of meeting the problem of erroneous convictions would be the acceptance of either the recommendation of the Advisory Committee on the Federal Rules of Criminal Procedure, that there be no time limitation on a motion for new trial based on new evidence, or the position of the American Law Institute's *Model Code of Criminal Procedure* that for "good cause" the court can allow a new trial at any time.

Another method, at the federal level, would be to amend Section 2255 of the Judicial Code to make newly discovered evidence a ground for a motion and also to eliminate the "prisoner in custody" requirement.

A third possibility is the example set by New York in 1946 when a statute was enacted providing that when a pardon by the governor is based on a finding of innocence from evidence discovered after the judgment of conviction and after the time for a motion for a new trial,

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80. *Potter v. Dowd*, 146 F.2d 244, 249 (7th Cir. 1944) (concurring opinion).

upon motion the judgment of conviction must be set aside and the indictment dismissed by the court in which the defendant was convicted. This "shall place the defendant in the same position as if the indictment . . . had been dismissed at the conclusion of the trial by the court because of the failure to establish the defendant's guilt beyond a reasonable doubt."<sup>81</sup> This statute, by eliminating the conviction, accomplishes what the pardon alone does not, *i.e.*, gets rid of the consequences of conviction.

The problem of the erroneously convicted is one that the courts themselves should meet with decisiveness and forthrightness. One method would be to distinguish between a pardon on the grounds of innocence and one granted for other reasons. They could thus resolve the conflict between the dicta that a pardon "blots out guilt" and that the acceptance of a pardon implies a confession of guilt. A more effective technique, however, would be, first, an unqualified recognition of the existence of the common law writ of *coram nobis*, and, second, the expansion of the writ to include cases of newly discovered evidence establishing innocence due to mistaken identity, perjured testimony or other causes. It should be available to those who have served their time as well as to those who are under restraint. It should not be subject to time limitations since application of laches unjustly penalizes the impecunious and the ignorant who lack the aid of competent counsel. Although Judge Weinfeld did not discuss this alternative in the *Kaplan* case, Justice Terrel of the Florida Supreme Court has. In authorizing the use of *coram nobis* in a recent mistaken identity case he made certain observations that are a fitting epilogue to this article:

"There is resistance to the petition by way of suggestion and argument that the desired relief could be secured on application to the Pardon Board, that since the judgment of conviction has become final, the time to apply for a rehearing passed, the term of this court in which the judgment of conviction was affirmed has ended and the judgment become final, it would establish a precedent that would give us no end of trouble to grant the petition and permit a re-examination of the case at this time.

"To one confronted with a five year sentence to the penitentiary for a crime that it now appears he had nothing whatever to do with, such resistance must sound like fatalism gone to seed. Even if the Pardon Board saw fit to consider the case it could do no more than remit the sentence and restore civil rights. The mark of a criminal and the fact that petitioner had been convicted of a heinous crime would remain to smite him. If the re-examination results in an acquittal, an exoneration and removal of the charge from the record will necessarily follow and this will go far to remove the stain from his character. If rules of procedure have become

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81. N.Y. CODE CRIM. P. § 697 (Cum. Supp. 1952). In Note, 59 HARV. L. REV. 1174 (1946), it is suggested that this statute may encounter constitutional difficulties as violating the principle of separation of powers. On the other hand, the opinion of the New York Court of Appeals in *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E.2d 468 (1941), discussed *supra* note 61, indicates that a statute of this type would be upheld.

so rigid and inflexible that an error like this cannot be corrected for fear of establishing a precedent that will plague us, then we have lost the creative faculty that we have always thought to be resident in the judiciary. If we admit that it cannot be done to cope with new situations as they arise, then we must conclude that the law has matured and that it no longer expands to meet human needs. . . .

"When one is faced with a five year sentence to the penitentiary for a crime he did not commit, his conviction being due solely to mistaken identity, this court should not quibble over trifles in devising a formula to correct the injustice. The strength of our jurisprudence is due to the fact that it readily accommodates itself to all classes of controversies. Justice is its dominating purpose and we are led to that by rules of procedure. They are not sacrosanct, in fact, when they fail to lead to justice, the time for change has arrived."<sup>82</sup>

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82. *Ex parte Welles*, 53 So.2d 708, 710-11 (Fla. 1951).