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You're Sorry: The Sam Sheppard Case and the Meaning of  
Wrongful Imprisonment**

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# BEING THE GOVERNMENT MEANS (ALMOST) NEVER HAVING TO SAY YOU'RE SORRY: THE SAM SHEPPARD CASE AND THE MEANING OF WRONGFUL IMPRISONMENT

Jack P. DeSario and William D. Mason. *Dr. Sam Sheppard on Trial: The Prosecutors and the Marilyn Sheppard Murder*. Kent, Ohio: Kent State University Press, 2003. xii + 388 pages.

*Jonathan L. Entin\**

Sam Sheppard was at the center of the highest profile crime in Ohio history. It contained “[m]urder and mystery, society, sex and suspense.”<sup>1</sup> In the early morning hours of July 4, 1954, Marilyn Sheppard, four months pregnant with her second child, was beaten to death in her bed in the Cleveland suburb of Bay Village. The authorities quickly focused their suspicion on her husband, Sam, a prominent osteopathic physician, and charged him with first-degree murder. He was convicted of second-degree murder and sentenced to life imprisonment. The state courts affirmed, and the Supreme Court denied direct review.<sup>2</sup> Then in 1966, on habeas corpus, the Supreme Court set aside the conviction in a landmark ruling that held that the original trial had been tainted by prejudicial publicity.<sup>3</sup> Sheppard was acquitted later that year at what has been called “The Retrial of the Century”<sup>4</sup> and died in 1970. A quarter-century after his death, representatives of Sam Sheppard’s estate filed suit for a declaration of innocence that would serve as a predicate for seeking compensation for his wrongful

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1. *State v. Sheppard*, 135 N.E.2d 340, 342 (Ohio 1956).

2. *State v. Sheppard*, 128 N.E.2d 471 (Ohio Ct. App. 1955), *aff’d*, 135 N.E.2d 340 (Ohio), *cert. denied*, 352 U.S. 910 (1956).

3. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

4. JAMES NEFF, *THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE* 246 (2001). This work is one of many books spawned by the Sheppard case. See *infra* note 7 and accompanying text.

imprisonment. The moving force behind this lawsuit was Sam Reese Sheppard, who as a seven-year-old boy slept soundly through the night in the bedroom adjacent to the one where his mother was murdered. The Ohio Supreme Court allowed this civil case to go to trial.<sup>5</sup> In April 2000, a jury ruled against the estate, and the state courts once more affirmed.<sup>6</sup>

This much is uncontroverted. Almost everything else about the *Sheppard* case has been a matter of intense debate. Skeptics have consistently argued that the crime scene was not properly secured, the authorities failed to test blood found in the bedroom and elsewhere in the house and did not properly examine other physical evidence, alternative suspects were ignored or superficially investigated, and the prosecutor succumbed to extraordinary media pressure to charge an innocent man with killing his wife. More than a dozen books and many documentaries and movies have focused at least in part on the case.<sup>7</sup> The latest entry is a new volume that gives the government's side of the story. This work, by lawyer-political scientist Jack DeSario, and William Mason, the prosecutor who successfully fended off the civil suit, serves as a useful primary source but will not end the debate. It is an advocacy document that presents the case against Sam Sheppard in very strong terms. Precisely because it is an advocacy document, however, this book probably will not persuade many who continue to harbor doubts.

At the same time, the appearance of this book might stimulate larger questions. Part I of this essay assesses the book. Some of the larger questions are considered next. Part II addresses the absence of a system of interlocutory appeal in Ohio civil cases, which unfortunately prevented pretrial resolution of the controlling legal questions in the third *Sheppard* case: whether the statute of limitations had run on the innocence action and whether the claim had died with Sam Sheppard. Part III uses this case to ponder further questions about the meaning of innocence and the government's responsibilities to persons who are

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5. State *ex rel.* Tubbs Jones v. Suster, 701 N.E.2d 1002 (Ohio 1998).

6. See Murray v. State, No. 78374, 2002 WL 337732 (Ohio Ct. App. Feb. 21, 2002), *appeal not allowed*, 772 N.E.2d 1202 (Ohio 2002).

7. For a detailed listing, see Patricia J. Falk, *Introduction to Symposium, Toward More Reliable Jury Verdicts?: Law, Technology, and Media Developments Since the Trials of Dr. Sam Sheppard*, 49 CLEV. ST. L. REV. 385, 385-86 n.3 (2001). It is also widely, though perhaps mistakenly, believed that the Sheppard case was the basis for "The Fugitive," a popular ABC television series that ran from 1963 to 1967 and a successful 1993 Warner Brothers movie starring Harrison Ford and Tommy Lee Jones. The original script was a Western; the creator updated it to focus on a falsely accused contemporary physician when the first version languished for several years. See NEFF, *supra* note 4, at 234-35.

wrongfully imprisoned.

### I. THE PROSECUTOR'S PERSPECTIVE IN PERSPECTIVE

As befits a book that focuses on the government's approach to the civil case, this volume begins with William Mason's ascension to the office of Cuyahoga County Prosecutor in January 1999.<sup>8</sup> Many readers will hope for a more complete explanation of the circumstances of Mason's selection by the county Democratic party rather than by the voters. The authors do not explain that his predecessor, Stephanie Tubbs Jones, resigned after her election to Congress in November 1998<sup>9</sup> or that Ohio law authorized the county Democratic party to name an interim prosecutor to serve until the next general election.<sup>10</sup>

Starting with Mason's rise to office also puts the focus on him rather than on the case or on Marilyn Sheppard, "the true victim."<sup>11</sup> Readers learn about Marilyn Sheppard's murder and Sam Sheppard's criminal trials from the prosecutor's perspective. Mason initially "had no opinion about Dr. Sheppard's guilt or innocence"<sup>12</sup> and "set out to learn everything about the case"<sup>13</sup> in preparation for the civil trial. Although the new prosecutor might have approached the matter with an open mind, he apparently did not consult with Carmen Marino, the first assistant prosecutor under Tubbs Jones who had developed some doubts about Sam Sheppard's guilt after reviewing the file but refused to settle the civil case.<sup>14</sup> Before long, Mason concluded that Sheppard was almost certainly the real killer and litigated accordingly.<sup>15</sup>

8. JACK P. DESARIO & WILLIAM D. MASON, *DR. SAM SHEPPARD ON TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER 1* (2003).

9. NEFF, *supra* note 4, at 339.

10. See OHIO REV. CODE ANN. § 305.02 (West 1994). Mason was unopposed in the 2000 general election. See Rich Exner, *Democrats Still Rule in Cuyahoga Offices*, PLAIN DEALER, Nov. 8, 2000, at 5B.

11. DESARIO & MASON, *supra* note 8, at 90. See also *id.* at 324 ("But primarily, fundamentally, Mason was consumed by a vision of Marilyn Sheppard," who was "the real victim"); *id.* at 326 (Marilyn Sheppard's stepmother describing her as "the real victim").

12. *Id.* at 4.

13. *Id.* at 5.

14. See NEFF, *supra* note 4, at 339; see also *id.* at 321-22, 331-32. One might infer from Neff's account that Mason ignored Marino because he had unsuccessfully sought the top job that Mason ultimately won. See *id.* at 339. In fact, Mason tapped another of his early rivals, Steven Dever, as co-counsel at the civil trial. See DESARIO & MASON, *supra* note 8, at 57.

15. See DESARIO & MASON, *supra* note 8, at 53. Because he was "convinced of Dr. Sam Sheppard's guilt," Mason refused to consider a settlement. *Id.* at 140. The possibility of a mid-trial settlement became a source of public contention, but the case proceeded to final judgment after the judge considered imposing sanctions against the prosecutor for disclosing the terms of the Sheppard estate's settlement proposal. See *id.* at 138-41, 373-76.

The prosecutor's theory of the case was straightforward: Sam Sheppard, a serial philanderer whose wife was frustrated by his infidelity, argued with Marilyn in their bedroom, beat her to death (probably with a bedroom lamp), and invented a tale of a bushy-haired intruder who slugged him unconscious when he responded to Marilyn's calls for help, then knocked him out again when he struggled with him on the Lake Erie beach behind the family home. After killing his wife, Sam called his brother Steve to help him fix up the murder scene, which apparently was wiped clean of fingerprints,<sup>16</sup> and pulled out some drawers and tipped over his medical bag on the first floor of the house in a clumsy effort to simulate a burglary. Then Steve took charge of Sam's treatment at Bay View, the nearby osteopathic hospital that was founded by their father and where all three Sheppard brothers were on staff. Steve restricted the authorities' access to Sam and substituted an x-ray of another person in an attempt to show that Sam had suffered a broken neck while fending off the murderer.<sup>17</sup>

Much of the prosecution's theory in the civil case rested on the testimony of three witnesses. One was Sheppard himself, who testified at the first criminal trial in 1954 but not at the retrial in 1966.<sup>18</sup> The second was Gregg McCrary, a former FBI agent with wide experience investigating sex crimes.<sup>19</sup> The third was Robert White, a prominent neurosurgeon and professor at Case Western Reserve University's

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16. The police actually found many unidentifiable fingerprints in the house, and some surfaces that appeared to have been wiped had been cleaned to remove soot and smoke after a 1953 fire in the house. See NEFF, *supra* note 4, at 73.

17. Neighbors reported that Steve Sheppard's car sped away from his home at 4:30 a.m. the day of the murder; others told of a car running stop signs in town around that time. See DESARIO & MASON, *supra* note 8, at 47-48. The prosecutor's office noted that Steve arrived at Sam and Marilyn's home neat and clean only twelve minutes after saying that he was awakened by a telephone call from his sister-in-law informing him of the murder. *Id.* at 22, 48, 94. This seemed suspicious because Mason and the retired Bay Village police chief, who was the first law enforcement officer to arrive at the scene, found that it took twelve minutes just to drive from Steve's house to the murder scene when they reenacted the trip very early on a Sunday morning in 1999. See *id.* at 48. No testimony about the reenactment was presented at the civil trial, perhaps because the driving conditions in Bay Village had changed in the more than four decades since the crime occurred.

Moreover, although Mason's team questioned why Steve Sheppard did not testify at the civil trial despite his central role in the events following the murder, see *id.* at 316-17, the prosecutor seems not to have tried very hard to obtain his version of the story. The authors note that Mason's office conducted a telephone interview with him. *Id.* at 73. They do not point out, nor did the jury learn, that the prosecutor's office cancelled two scheduled deposition appointments with him. See NEFF, *supra* note 4, at 377.

18. See DESARIO & MASON, *supra* note 8, at 63.

19. See *id.* at 65-66.

medical school.<sup>20</sup>

Using Sheppard's prior testimony posed no Fifth Amendment problem at the civil trial, although the authors do not fully explain why this was so. They misleadingly say that the privilege against self-incrimination "does not extend to civil trials."<sup>21</sup> In fact, the privilege can apply in civil proceedings, but only when criminal liability might ensue.<sup>22</sup> Because Sheppard had long since died, there was no possibility that his 1954 testimony, which was completely voluntary, could lead to criminal punishment after the 2000 civil trial.

Mason wanted to use that testimony because he was convinced that Sheppard came across as "evasive, sarcastic, and arrogant."<sup>23</sup> His comments about his wife's menstrual problems and other health matters seemed "distasteful, even boorish."<sup>24</sup> Sheppard gave authorities a series of statements that "he had subtly tried to change as new evidence was uncovered;" eventually, the prosecutor argued, "some of the embellishments would become inconsistent, the details of the stories confused."<sup>25</sup> Moreover, Sheppard had lied at a public inquest about his relationship with Susan Hayes, a medical technician at Bay View Hospital with whom he carried on a notorious three-year affair ending in the spring of 1954, behavior that prompted Marilyn Sheppard to contemplate a divorce.<sup>26</sup> Indeed, so central is this testimony that the authors devote approximately thirty-five pages to direct quotations from the trial transcript.<sup>27</sup>

The two main live witnesses also played a key role in Mason's case. McCrary, the former FBI agent, quickly concluded that Marilyn Sheppard's death was "your garden-variety domestic violence homicide,"<sup>28</sup> not a sexually motivated crime as the estate maintained, and offered a detailed explanation for this conclusion at trial.<sup>29</sup> Dr.

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20. *See id.* at 297.

21. *Id.* at 60.

22. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2254, at 331 (John T. McNaughton rev. 1961); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1280, at 512-14 (2d ed. 1990).

23. DESARIO & MASON, *supra* note 8, at 273.

24. *Id.* at 253.

25. *Id.* at 202. The prosecutor also noted a change in the Sheppard team's treatment of blood spots elsewhere in the house. During the 1954 trial, the defense treated them as irrelevant to the murder by suggesting that family members and the dog might have bled there. At the civil trial, the estate argued that those spots might have come from the real killer. *See id.* at 253.

26. *Id.* at 16-19, 277. For additional details, see NEFF, *supra* note 4, at 61-66.

27. *See* DESARIO & MASON, *supra* note 8, 239-73.

28. *Id.* at 66.

29. *See id.* at 293-94.

White, the neurosurgeon, testified that Sam Sheppard's injuries were not nearly as serious as had been claimed. He particularly emphasized that the chip fracture of Sheppard's C-2 vertebra that had been observed in an x-ray taken on July 4, the day of the murder, did not appear on x-rays taken on July 7.<sup>30</sup> On redirect examination, he explained the discrepancy as follows: "It was a simple fact that the films were substituted. It was perfectly obvious."<sup>31</sup> In other words, the prosecutor suggests, Sam Sheppard had never suffered a fractured vertebra; someone (presumably his brother Steve, his attending physician, or someone acting at his behest) had produced an x-ray of another patient on July 4 to support Sam Sheppard's concocted story about the bushy-haired intruder.<sup>32</sup>

Despite the importance of this testimony, it contained potentially significant gaps and rested on controversial assumptions. For example, Sam Sheppard's unattractive personality on the witness stand and cavalier disregard of his marriage vows did not necessarily make him a murderer.<sup>33</sup> He had affairs not only with Susan Hayes but also with one of his patients and, during his medical residency in California, with several other women.<sup>34</sup> Promiscuity, or at least infidelity, was common among surgeons at that time, particularly among the established men who served as teachers and role models for new doctors such as Sheppard and his peers.<sup>35</sup> Accordingly, Mason explored the possibility that Sam Sheppard was not the father of Marilyn's unborn child. If this were true, then perhaps he exploded in a murderous rage when she told him so. Such a scenario would provide a motive for the killing.<sup>36</sup> The authorities in 1954 had looked into the possibility that someone else had

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30. *Id.* at 297, 299. Dr. White also could find no basis for Sheppard's other allegedly serious injuries. *See id.* at 299-300.

31. *Id.* at 303. Mason's co-counsel, Steven Dever, emphasized this point during closing arguments. *See id.* at 317.

32. To be sure, Mason believes that Sam Sheppard suffered genuine injuries but that they were much less serious than he claimed and were inflicted by Marilyn while resisting his attack on her. *Id.* at 124-25.

33. As Justice Frankfurter observed in a different context, "the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

34. *See* DESARIO & MASON, *supra* note 8, at 19, 77-78; NEFF, *supra* note 4, at 48-49, 52, 94.

35. *See* NEFF, *supra* note 4, at 4, 48.

36. Rumors of Sam Sheppard's sterility persist to the present. A taxi driver offered this explanation of the murder to a participant in a recent symposium on the Sheppard case. In fact, Sheppard impregnated his second wife after his release from prison; that pregnancy ended in a miscarriage. *See* Lawrence M. Solan, *Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the Sheppard Case*, 49 CLEV. ST. L. REV. 465, 467 n.10 (2001). For further details about the pregnancy and miscarriage, *see* NEFF, *supra* note 4, at 237-38.

impregnated Mrs. Sheppard but could not confirm it.<sup>37</sup> Scientific advances in the intervening years held out the prospect of resolving the issue, so the prosecutor had both Marilyn Sheppard and her fetus exhumed in late 1999.<sup>38</sup> In the end, though, the coroner had to concede that Sam Sheppard was probably the father.<sup>39</sup>

There were analogous pitfalls with the two key live witnesses. For instance, McCrary's conclusion that Marilyn Sheppard was the victim of a domestic homicide rested on his experience applying the FBI's crime classification manual hundreds of times; he claimed never to have gone wrong in using the manual's criteria.<sup>40</sup> But McCrary's former FBI supervisor, manual co-author John Douglas, rejected McCrary's assessment. Douglas, who did not testify, reportedly saw no evidence of escalating rage culminating in explosive violence that is typical of domestic homicides.<sup>41</sup> Moreover, McCrary apparently assumed that Marilyn Sheppard's body had been repositioned on the bed to suggest that she had been sexually assaulted.<sup>42</sup> That assumption is inconsistent with the view of the prosecutor's blood-spatter expert, who testified that she was beaten exactly where her body was found.<sup>43</sup>

Similarly, Dr. White's suggestion that the first x-ray had been switched overlooked testimony at the 1954 trial about the circumstances under which Sheppard's x-rays had been taken. The July 4 x-ray was taken under different conditions and using different techniques than

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37. See NEFF, *supra* note 4, at 26-27. Ironically, Sheppard's defense lawyer at the first trial introduced the sterility question in what in retrospect appears to have been a strategic blunder. See *id.* at 137-38.

38. See DESARIO & MASON, *supra* note 8, at 50. Although the prosecutor's public statement announcing the exhumation was silent on the point, one of the questions to be investigated was paternity. See *id.* at 45-46, 49; NEFF, *supra* note 4, at 341 (characterizing the fetus as "the true prize").

39. See DESARIO & MASON, *supra* note 8, at 215. On direct examination at the civil trial, the coroner characterized the DNA tests on the paternity of the fetus as "inconclusive." *Id.* at 213. This was technically accurate, because the test could not be run a second time due to the lack of sufficient genetic material for a confirming retest. The initial test suggested a 99.99 percent likelihood that Sam Sheppard was the father. See NEFF, *supra* note 4, at 345.

40. See DESARIO & MASON, *supra* note 8, at 290, 296.

41. See NEFF, *supra* note 4, at 332-33, 370-71. The estate did present expert testimony from Dr. Emanuel Tanay, a well-known professor of psychiatry at Wayne State University. Dr. Tanay contended that Marilyn Sheppard had died in a sexually motivated homicide perpetrated by a sadistic third party, not in a domestic homicide committed by her spouse. See DESARIO & MASON, *supra* note 8, at 149-53; NEFF, *supra* note 4, at 357-61.

42. See DESARIO & MASON, *supra* note 8, at 294; NEFF, *supra* note 4, at 370, 382.

43. See DESARIO & MASON, *supra* note 8, at 219; NEFF, *supra* note 4, at 368, 381-82. One of the estate's experts also testified that the body had not been moved. See DESARIO & MASON, *supra* note 8, at 166. Although he was vigorously cross-examined on other aspects of his testimony, the authors do not report that he was questioned about this conclusion. See *id.* at 171-75.



were the July 7 x-rays. The methodological change on July 7 was a mistake, according to the radiologist who had ordered the x-rays on both days, but he didn't learn of the error until later.<sup>44</sup> This does not necessarily resolve the x-ray discrepancy, but it might explain why the later images failed to show the chip fracture that was seen on the earlier one.

Of course, the invalidity of the other-man-as-father-of-the-fetus theory does not necessarily exonerate Sam Sheppard. Perhaps he and his wife argued about something else before he killed her. That is speculation, however, because the authorities have no direct evidence on this subject. Moreover, even if Terry Gilbert, the lawyer representing the estate, had more effectively cross-examined or otherwise rebutted the two key witnesses than he apparently did, the result of the trial might still have been the same. There was, after all, more to the case than this. In particular, Gilbert organized his argument around the claim that the real killer was a man named Richard Eberling, who had been the Sheppards' window washer and was working in the house a couple of days before the murder. Eberling died in prison in 1998 while serving a life sentence for murdering an elderly widow for whom he was caring.<sup>45</sup> Gilbert's focus on Eberling might have rested on the assumption that "it takes a theory to beat a theory,"<sup>46</sup> but it also helped to focus the

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44. See NEFF, *supra* note 4, at 353-54.

45. See *id.* at 293-94, 304-06, 338.

46. Whether this notion applies to trial advocacy, see *infra* note 182 and accompanying text (discussing the relevance of identifying the real perpetrator to the success of wrongful-imprisonment claims), it has attracted support from some prominent legal scholars. Perhaps its most prominent academic proponent is Richard Epstein. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 15 (1992); Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983); Richard A. Epstein, *A Last Word on Eminent Domain*, 41 *U. MIAMI L. REV.* 253, 275 (1986). Other scholars associated with law and economics and rational choice also endorse this position. See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *J.L. & ECON.* 425, 434 (1993); Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 *CORNELL L. REV.* 907, 915 (1989); Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 *GEO. L.J.* 1075, 1076 (1998). The argument is controversial, however. See, e.g., Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 *U. PA. L. REV.* 851, 913 n.214 (1992) (describing "it takes a theory to beat a theory" as "an intellectual version of the child's game 'king of the hill'" and noting that "[t]he idea that law must be based on the best-tested social scientific theory, no matter what the level of doubt accompanying it (or that no form of regulation should exist unless based on a scientifically validated theory), employs a method of legal reasoning that is hardly mainstream and is exceedingly political"); Theodore J. St. Antoine, *How the Wagner Act Came to Be: A Prospectus*, 96 *MICH. L. REV.* 2201, 2208 (1998) ("I have always thought that facts trump theories."); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 *U. ILL. L. REV.* 875, 887 n.47 (rejecting "it takes a theory to beat a theory" as inaccurate and noting that intellectual advances typically occur when "anomalies arise and are either

government's trial preparation.<sup>47</sup> Much of Gilbert's case rested on scientific evidence placing Eberling at the murder scene, which in turn presumed that Marilyn Sheppard had drawn blood from her assailant either by biting or scratching him. The prosecutors caught the estate's experts unawares by pointing out that only Type O blood, which was Marilyn Sheppard's blood type, was found in the bedroom and that Eberling had Type A blood.<sup>48</sup> Mason's team also raised questions about the validity of the estate's DNA analysis of the blood at the scene,<sup>49</sup> which was particularly ironic because the estate's main DNA expert had been asked to train the Cuyahoga County coroner's staff to do such testing.<sup>50</sup> Dental experts for both sides testified that tooth fragments found near Marilyn Sheppard's body had to have been knocked out by a

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explained within an amended paradigm or serve as observations that make a case for another paradigm (as yet undefined)"); see also Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 277 n.92 (1994) (criticizing "the old saw of legal scholarship that 'it takes a theory to beat a theory'" for "view[ing] scholarship as litigation with burdens of proof"); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 254 & n.11 (1992) (noting that "it takes a theory to beat a theory" reflects a tendency to "discuss[] law as if it were a scientific enterprise").

47. See DESARIO & MASON, *supra* note 8, at 42, 61.

48. See *id.* at 173, 179. A rebuttal witness for the estate explained that blood tests sometimes falsely produce Type O results for Type A blood, but by then the damage to the estate's case was probably irreparable. See *id.* at 305.

Nor was this the only potential problem with the Eberling theory. Although Eberling was said to have admitted to killing Marilyn Sheppard, Mason's team raised questions about the credibility of certain aspects of the testimony of the one witness who appeared at trial. See *id.* at 143, 317. The prosecutor's office was also prepared to raise serious questions about the veracity of a confession that Eberling reportedly made to a fellow prisoner. See *id.* at 43.

Finally, journalist James Neff cites similarities between the killings of Marilyn Sheppard and Ethel Durkin, for which Eberling was sentenced to life imprisonment. In addition, Durkin's two sisters (both of whom Eberling knew) died violently in circumstances suggesting Eberling's involvement. One of those deaths was more similar to Marilyn Sheppard's than was Durkin's. See NEFF, *supra* note 4, at 294, 317. There is, however, one important difference between Marilyn Sheppard and the other women. Durkin and her sisters were elderly and obese, see *id.* at 294, 318, whereas Mrs. Sheppard was young, athletic, and attractive. See DESARIO & MASON, *supra* note 8, at 13; NEFF, *supra* note 4, at 43. Indeed, Neff suggests that Eberling viewed Marilyn Sheppard "both as a sex object and as the perfect mother he never had." *Id.* at 384. Whatever Eberling's interest in Durkin and her sisters, it is extremely unlikely that he regarded any of them in sexual or maternal terms. Indeed, Eberling and one of Durkin's sisters strongly disliked each other. See *id.* at 317-18.

49. See DESARIO & MASON, *supra* note 8, at 178-79, 180-81. The estate's expert added that Eberling might have been the source of sperm found in Mrs. Sheppard's body. *Id.* at 177-78. He conceded that the sperm could have been deposited two or three days before the murder. *Id.* at 179.

50. See NEFF, *supra* note 4, at 342. In addition, the first DNA expert consulted by the prosecutor's office in connection with this case, a respected Defense Department scientist who agreed to test Marilyn Sheppard's fetus to determine whether Sam was the father, generally agreed with the findings of the estate's expert. See *id.* at 341, 368.

blow rather than forced out by biting the killer,<sup>51</sup> but other experts disagreed about whether a scar on Eberling's wrist could have come from a scratch or gouge inflicted by Marilyn Sheppard in the course of defending herself.<sup>52</sup>

Beyond these and other scientific disputes, the prosecutor's office relied on less technical and seemingly more easy-to-grasp notions. Of particular significance was the silence of the Sheppard family dog during the crime. Mason's team repeatedly asked why the dog failed to bark if an intruder committed this brutal murder.<sup>53</sup> Less important but quite dramatic was the last-minute production of a lamp that supposedly matched the pattern embedded in a blood stain on Marilyn Sheppard's pillow to suggest that a missing bedroom lamp was the murder weapon.<sup>54</sup> In support of this notion, a retired handyman testified that he had repaired a lamp for the Sheppards and returned it to their bedroom two days before the murder.<sup>55</sup> Fortunately for the prosecution, Gilbert did not notice that the impression on the pillow was actually much smaller than the harp of the lamp that the government displayed.<sup>56</sup>

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51. See DESARIO & MASON, *supra* note 8, at 163, 216. On cross-examination, the government's expert conceded that she might have bitten her assailant before her teeth were knocked out. *Id.* at 216-17.

52. See *id.* at 164, 211, 232. One difficulty with the scar theory is that police records note the presence of the scar in Eberling's 1959 arrest record but not in a 1956 record when he was merely a suspect. After being arrested in 1959, Eberling confessed to stealing items from the homes of his customers. Among the loot were two rings that had belonged to Marilyn Sheppard; he stole them in 1958 from the home of Sam's brother Richard. See *id.* at 42, 148; NEFF, *supra* note 4, at 195. A Bay Village police officer testified that the 1956 record might have been incomplete because Eberling was not arrested. DESARIO & MASON, *supra* note 8, at 148.

53. See DESARIO & MASON, *supra* note 8, at 38, 75, 92, 315. This point apparently made a deep impression on the jurors. See *id.* at 325. Neither the lawyers in the courtroom nor the authors in this book allude to the famous Sherlock Holmes story about a dog that "did nothing in the nighttime." ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335, 347 (1930). Cf. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 596, 602 (1980) (Rehnquist, J., dissenting) (citing this story and remarking on "the fact that a watchdog did not bark in the night").

54. See DESARIO & MASON, *supra* note 8, at 308. An assistant prosecutor had come up with this theory during trial preparation. See *id.* at 68-70.

55. See *id.* at 286-87. The jurors apparently did not mention the lamp to Mason during post-trial interviews, although they emphasized the testimony of McCrary and White as well as the silence of the dog. See *id.* at 325; see also NEFF, *supra* note 4, at 382 (reporting two jurors' skepticism about the lamp theory).

56. See NEFF, *supra* note 4, at 375. Nor was that all that Gilbert seems to have missed. Evidence from 1954 suggested that there was no lamp in the guest bedroom the Sheppards were using at the time of the murder. That room had twin beds, whereas the master bedroom that the Sheppards had previously been using had a double bed. The authors note that this move reflected tensions in the marriage during the spring of 1954. See DESARIO & MASON, *supra* note 8, at 19. A neighbor who sometimes babysat for young Sam Reese Sheppard and stayed in that room when Sam and Marilyn were sleeping in the master bedroom told the police that she had not seen a lamp there. Sam Reese told the coroner that there was a small lamp in the master bedroom but none in

In the end, the jury quickly returned a verdict in favor of the state, thereby rejecting the claim that Sam Sheppard had been wrongfully imprisoned.<sup>57</sup> How could the civil jury, in less than an afternoon, reach a conclusion that seemed diametrically opposite to that reached by the jury at Sam Sheppard's retrial with only a few more hours of deliberation?<sup>58</sup> The authors carefully explain the different burden of proof: at the criminal trial the state had to prove Sam Sheppard guilty beyond a reasonable doubt, whereas at the civil trial the estate had to prove by a preponderance of the evidence that Sheppard was innocent.<sup>59</sup> In other words, the jurors at the criminal retrial might have suspected that Sheppard murdered his wife but perhaps were not sufficiently confident that he had done so. This is a far cry from concluding that he probably had not killed her.<sup>60</sup>

Nevertheless, the prosecutor at the civil trial was not content to argue that the estate had not carried its burden of proof. Mason was "sure, beyond any doubt, of Sam Sheppard's guilt."<sup>61</sup> Accordingly, he set out to prove that point. Moreover, he sought to vindicate the honor and reputation of his office and of the other law enforcement agencies that had handled the *Sheppard* case from the beginning.<sup>62</sup> To this end, the book contains scarcely a hint of criticism directed toward Dr. Samuel Gerber, the coroner who conducted a rowdy and unusual public inquest into Marilyn Sheppard's death,<sup>63</sup> repeatedly claimed that the time of death was considerably earlier than the autopsy suggested,<sup>64</sup> and insisted

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the guest bedroom. The Sheppards' cleaning woman told detectives that she did not notice anything missing from the room where Marilyn was killed. See NEFF, *supra* note 4, at 370.

57. See DESARIO & MASON, *supra* note 8, at 323-24.

58. See NEFF, *supra* note 4, at 279-80 (noting that the judge at the two-week retrial charged the jury at 10:30 a.m. and the jury returned its verdict at 10:45 p.m.), 378 (noting that the civil jury left the courtroom at 11:15 a.m. following a nine-week trial and delivered its verdict by 4:30 p.m.).

59. See DESARIO & MASON, *supra* note 8, at 58-59. They also quote the judge's statement to the jurors at the beginning of the civil trial that they were "the first jury to ever be called upon to answer the question whether Samuel H. Sheppard was innocent of the murder of Marilyn Sheppard." *Id.* at 84.

60. Indeed, the jury foreman at the second criminal trial said: "I had the impression he wasn't guilty beyond a reasonable doubt." NEFF, *supra* note 4, at 281. Another juror explained: "I can't say that I know he *didn't* do it." *Id.* at 281.

61. DESARIO & MASON, *supra* note 8, at 53.

62. See *id.* at 200 (noting that, after the estate rested its case in the civil trial, Mason would "[f]inally, after years, even decades, of public attacks on the integrity of the Cuyahoga County Prosecutor's Office" have a chance "to dispel the ugly myth that the law enforcement community somehow had conspired to get Sam Sheppard"); *id.* at 304 (noting that, after the state rested its case, "no one could validly argue that the law enforcement community had acted in an arbitrary or unprofessional manner").

63. See NEFF, *supra* note 4, at 87-91.

64. See *id.* at 17-18, 73, 167.

that the murder weapon was some sort of surgical instrument,<sup>65</sup> all of which had the effect of implicating Sam Sheppard as the culprit.<sup>66</sup> And while the authors explain that the Supreme Court set aside Sheppard's conviction due to prejudicial publicity,<sup>67</sup> during the civil trial Mason elicited testimony from at least two witnesses to the effect that the 1954 trial courtroom was orderly.<sup>68</sup>

Precisely because this book presents prosecutor Mason's perspective, it reads like a lawyer's brief. Like all good briefs, it is hardly impartial. Facts and arguments are presented in a way that supports the government's position. For example, the Supreme Court decision setting aside the conviction is described as "not suggesting that Sheppard was innocent, only that the procedure used to convict him was improper."<sup>69</sup> This statement is technically accurate, but it glosses over the difficulties posed by the original trial. The book does not mention that, on direct appeal, the Ohio Supreme Court described the trial as having been conducted in an "atmosphere of a 'Roman holiday' for the news media,"<sup>70</sup> or that two justices dissented from the affirmance of Sheppard's conviction in part because they found at least reasonable doubt as to his guilt.<sup>71</sup> Nor do the authors refer to Justice Frankfurter's pointed statement that the U.S. Supreme Court's denial of certiorari in the original case "in no wise implies that this Court approves the decision of the Supreme Court of Ohio."<sup>72</sup>

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65. See *id.* at 142. On cross-examination at Sheppard's second trial, Dr. Gerber was forced to concede that he could not produce any surgical instrument that matched the blood stain pattern on Marilyn Sheppard's pillow and might have been used against her despite his having searched all over the country before the first trial to locate the type of instrument he had in mind. See *id.* at 261. DeSario and Mason reproduce portions of this cross-examination, see DESARIO & MASON, *supra* note 8, at 197-98, but suggest that it had less impact than did most contemporary observers. See *id.* at 198; NEFF, *supra* note 4, at 262. The prosecutor's office conceded during final argument at the civil trial that Dr. Gerber had been wrong about the murder weapon. See DESARIO & MASON, *supra* note 8, at 317.

66. The notion that Gerber focused on Sam Sheppard as the culprit in a "rush to judgment" was a key element of his defense from the very beginning. See NEFF, *supra* note 4, at 162. Gerber allegedly disliked the Sheppards at least in part because they were osteopaths rather than M.D.s. See DESARIO & MASON, *supra* note 8, at 311; NEFF, *supra* note 4, at 15; see also *infra* notes 75-76 and accompanying text. Gerber further suspected, correctly as it turned out, that the Sheppards had been performing abortions for many years at a time when abortion was prohibited. Although Gerber strongly objected to this practice, many Cleveland area physicians routinely referred patients who wanted abortions to the Sheppards. See NEFF, *supra* note 4, at 37.

67. See DESARIO & MASON, *supra* note 8, at 6.

68. See *id.* at 285, 288.

69. *Id.* at 7.

70. *State v. Sheppard*, 135 N.E.2d 340, 342 (Ohio 1956).

71. See *id.* at 348 (Taft, J., joined by Hart, J., dissenting).

72. *Sheppard v. Ohio*, 352 U.S. 910, 911 (1956) (memorandum of Frankfurter, J.).

Similarly, Dr. Charles Elkins, one of the physicians who examined Sam Sheppard and documented his injuries on the day of the murder, is referred to as a "Bay View doctor."<sup>73</sup> In fact, Elkins was an M.D., not an osteopath, and had no connection with Bay View Hospital. Both of these facts help explain why the Sheppards asked him to examine Sam.<sup>74</sup> The medical establishment, made up of M.D.s, looked down on osteopaths as inferior physicians if not quacks.<sup>75</sup> These attitudes were shared by many Cleveland M.D.s.<sup>76</sup> Bringing in Dr. Elkins meant that not all the examining physicians were osteopaths. Moreover, his independence from Bay View might have been intended to blunt claims that the Sheppard family was simply protecting one of its own.<sup>77</sup>

The book also contains some gratuitous characterizations of Sheppard and members of his family. Perhaps the only person who receives praise is Jane Reese, Marilyn Sheppard's stepmother, who always believed that Sam committed the crime and who testified for the state at the civil trial.<sup>78</sup> As for everyone else, Mason found it "bizarre" that Sam Sheppard got involved in organized wrestling while in prison,<sup>79</sup> a curious criticism from someone who had wrestled competitively in

Frankfurter's separate statement addressed only the question of prejudicial publicity that allegedly deprived Sheppard his right to a fair trial. It did not consider any issue relating to guilt. *Id.*

73. DESARIO & MASON, *supra* note 8, at 96. Nor do they report that Dr. Elkins, a neurosurgeon on the medical faculty at Case Western Reserve University, met with Dr. Gerber after examining Sheppard or that the coroner delayed Sam's interrogation for two days as a result of their conversation. See NEFF, *supra* note 4, at 28-29.

74. See NEFF, *supra* note 4, at 28-29. Although Dr. Elkins did not document the existence of a chip fracture of the C-2 vertebra, see DESARIO & MASON, *supra* note 8, at 127, he did report that Sheppard's neck muscles went into spasms when his neck was pressed at that vertebra. See NEFF, *supra* note 4, at 29.

75. The American Medical Association regarded osteopaths as "cultists" rather than physicians for many years. See NORMAN GEVITZ, THE D.O.S: OSTEOPATHIC MEDICINE IN AMERICA 101-02, 104, 106, 108, 110-11, 114 (1982). The AMA backed off slightly from its hard-line position when it acquiesced in the 1962 merger of the California Medical Association with the California Osteopathic Association, although tensions between M.D.s and osteopaths continued. See *id.* at 117, 123-29. On other tensions between M.D.s and osteopaths, see *id.* at 26-28, 39-42, 82, 95.

76. See NEFF, *supra* note 4, at 35-37. Indeed, the first osteopathic medical school in Ohio was not established until 1977. See GEVITZ, *supra* note 75, at 135.

77. Elkins' examination did not in fact prevent criticism to this effect. During his opening statement at the civil trial, Mason emphasized that Steve Sheppard "whisked Sam from the murder scene, taking him to the family hospital." DESARIO & MASON, *supra* note 8, at 94. One of his expert witnesses, Dr. Robert White, testified: "I have never seen a case like this where an individual is taken off to a hospital that is owned by a family and is literally treated, examined, and buttressed by the family." *Id.* at 301. Similar sentiments were widespread in 1954. See NEFF, *supra* note 4, at 55, 84-85.

78. See DESARIO & MASON, *supra* note 8, at 47, 285, 326.

79. *Id.* at 78.

both high school and college.<sup>80</sup> The authors add that neither Steve, the brother whom the authorities suspect of orchestrating the family cover-up, nor Sam Reese, the surviving son, attended Sam Sheppard's funeral in 1970.<sup>81</sup> Perhaps this was intended to suggest that Sheppard had alienated his close relatives. In fact, both of them were in Europe when he died.<sup>82</sup> Mason also regarded as "macabre" Sam Reese's desire to reunite the remains of his parents and his unborn brother after the final exhumation.<sup>83</sup> The prosecutor apparently has little sympathy for someone involved with a religion he regards as exotic<sup>84</sup> and cannot comprehend why the younger Sheppard might have wanted to make some gesture reinforcing the familial bonds that were shattered when he was seven years old. Perhaps this is an understandable reaction to Sam Reese's harsh criticism of law enforcement agencies, including the prosecutor's office, but in light of the outcome of the trial Mason might have foregone the opportunity to score this particular rhetorical point.<sup>85</sup>

## II. WHY THE CIVIL CASE WENT TO TRIAL: SOME QUIRKS OF OHIO PROCEDURE

The book ends with the jury verdict, but the case did not. The Sheppard estate appealed unsuccessfully. Without addressing the merits, the Ohio Court of Appeals for the Eighth District held that the claim was barred because the statute of limitations had run and the wrongful-

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80. *See id.* at 2.

81. *See id.* at 79.

82. *See* NEFF, *supra* note 4, at 289.

83. DESARIO & MASON, *supra* note 8, at 49.

84. *See id.* at 49-50 (emphasizing Sam Reese's desire to invite his Zen master and other Buddhist friends to solemnize Marilyn Sheppard's exhumation and noting his attire on the day of the exhumation).

85. There are also a few editorial lapses. The word "waver" is consistently misspelled as "waiver." *Id.* at 83, 93, 166, 224, 311. The court that granted Sam Sheppard's habeas corpus petition is described as "the U.S. District Court of Ohio." *Id.* at 6. It was actually the U.S. District Court for the Southern District of Ohio. *See* Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966). Marilyn Sheppard is said to have attended Skidmore College "in Pennsylvania." DESARIO & MASON, *supra* note 8, at 14. Skidmore is actually located in Saratoga Springs, New York. A sentence announcing the date on which trial testimony began introduces a discussion of the second day of testimony. *See id.* at 107; *see also id.* at 101-06 (summarizing the first day of testimony). Finally, some of the writing is inelegant. A particularly awkward sentence relates to the arrest of Richard Eberling for theft in 1959: "Indeed, a search of his home revealed hundreds of stolen items, including Marilyn Sheppard's ring, which in 1958 was reported stolen from jewelry boxes stored at Richard Sheppard's house (another of Eberling's clients)." *Id.* at 42. Presumably Eberling was hired by Richard Sheppard rather than by Sheppard's house. These are small problems, but their cumulative effect is distressing.

imprisonment claim did not survive Sam Sheppard's death in 1970.<sup>86</sup> Under Ohio law, a claim based on a statute must be brought within six years.<sup>87</sup> A claim for wrongful imprisonment could not have been brought at common law, so this claim was based on a statute and was governed by the six-year limit. The case was filed about thirty years after Sheppard's acquittal and hence was untimely.<sup>88</sup> Moreover, the wrongful-imprisonment claim had abated with Sheppard's demise for two reasons. First, such claims were not encompassed by the Ohio survival law, which covers "injuries to the person";<sup>89</sup> that term includes only physical injuries, not the deprivation of individual rights at issue in this case.<sup>90</sup> Second, the statutory language refers only to "the individual who was actually imprisoned," which prevented the administrator of Sheppard's estate from maintaining the action.<sup>91</sup> In short, the case never should have gone to trial.

This is an unsatisfactory resolution. For one thing, the grounds relied on by the court of appeals were precisely those that former prosecutor Stephanie Tubbs Jones advanced in her unsuccessful effort to get the complaint dismissed before she left office.<sup>92</sup> In a 4-3 decision, the Ohio Supreme Court declined to intervene.<sup>93</sup> Questions about the statute of limitations and standing, the majority reasoned, were properly addressed on appeal from a final judgment rather than through the extraordinary remedy of prohibition, which is appropriate only where the lower court clearly lacked jurisdiction to act.<sup>94</sup> The time and expense of

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86. *Murray v. State*, No. 78374, 2002 WL 337732, 4 (Ohio Ct. App. Feb. 21, 2002), *appeal not allowed*, 772 N.E.2d 1202 (Ohio 2002).

87. OHIO REV. CODE ANN. § 2305.07 (West 1994).

88. *See Murray*, 2002 WL 337732. The opinion did not discuss any basis for tolling the statute of limitations, nor did it even allude to the subject. That was a curious omission. Unless the statute had been tolled, the claim was untimely even if it accrued in 1986, when the Ohio wrongful-imprisonment law was passed. *See Act of June 3, 1986*, 141 Ohio Laws 5351. That law applies to persons charged with felonies before September 24, 1986. *See OHIO REV. CODE ANN. § 2743.48(A)(1)* (West 1994 & Supp. 2004).

89. OHIO REV. CODE ANN. § 2305.21 (West 1994).

90. *See Murray*, 2002 WL 337732 at \*3 (citing *Witcher v. City of Fairlawn*, 680 N.E.2d 713, 715 (Ohio Ct. App. 1996); *Village Oakwood v. Makar*, 463 N.E.2d 61, 64 (Ohio Ct. App. 1983)).

91. *Id.* at \*4.

92. The authors do note Tubbs Jones's efforts to get the case dismissed. They characterize one of her arguments as being based on "the tolling of the statute of limitations." DESARIO & MASON, *supra* note 8, at 8. They should have said "running" or "expiration." *See BLACK'S LAW DICTIONARY* 1495 (7<sup>th</sup> ed. 1999) (defining "toll" as "to stop the running of; to abate" and using as an illustration "toll the limitations period"); *cf. id.* at 1334 (defining "run" as "to expire after a prescribed period" and using as an illustration "the statute of limitations had run, so the plaintiff's lawsuit was barred").

93. *State ex rel. Tubbs Jones v. Suster*, 701 N.E.2d 1002 (Ohio 1998).

94. *See id.* at 1008-09.



litigation so long after the fact also did not justify departure from ordinary procedures.<sup>95</sup> This reasoning makes sense in an ordinary case because it avoids piecemeal appeals that could indefinitely prolong routine litigation. To be sure, it means that time, energy, and resources might be wasted on a proceeding that amounts to a legal nullity. In general, this is not especially troublesome. Trial judges sometimes mistakenly deny motions to dismiss or for summary judgment and thereby incorrectly allow cases to go to trial. When this happens it simply takes longer for a case to be resolved. But this was not an ordinary case. The *Sheppard* case was unique, a subject of controversy for nearly half a century. The wrongful-imprisonment lawsuit was ballyhooed as the last chapter in this long-running affair, the one that would clear the air about Sam Sheppard.

This in turn leads to a more important problem with dismissing the case on statute-of-limitations and lack-of-standing grounds after it had gone through a full trial. Allowing the case to go to trial left open the possibility that a verdict finding Sam Sheppard innocent might be overturned on appeal based on what the public could perceive to be legal technicalities. Overturning a ruling in his favor on the basis of the statute of limitations or standing would simply confirm the worst suspicions of those who have long believed that Sam Sheppard was the victim of a law enforcement vendetta from the very beginning.<sup>96</sup> Perhaps avoiding public cynicism about the judicial system is not a sufficient justification for ruling on these potentially dispositive issues before trial, although the jurisprudence establishing a First Amendment presumption of public access to criminal trials rests explicitly on the notion that open proceedings enhance the legitimacy of the judicial system in the eyes of the people.<sup>97</sup>

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95. *See id.* at 1009.

96. Most of the out-of-town media were very surprised by the jury verdict in the first criminal trial. *See NEFF, supra* note 4, at 168.

97. *See Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984); "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982) ("Public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) ("A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."); *id.* at 595 (Brennan, J., concurring in the judgment). Open trials assure the public that procedural rights are respected, and that justice is

Of course, we know in retrospect that this scenario did not come to pass because the jury ruled against Sheppard. But the Ohio Supreme Court could not have known that this would happen when it decided whether to allow the trial to proceed.<sup>98</sup> Prospectively, the scenario outlined in the previous paragraph was certainly plausible. Even in retrospect, however, the court of appeals' affirmance of the common pleas court's judgment leaves the *Sheppard* case in a troubling state. Because the court of appeals held that the matter never should have gone to trial, it did not address the estate's assignments of error.<sup>99</sup> Finding merit in any of them would have necessitated a new trial. As matters stand, the jury verdict therefore has only symbolic significance. But it is an ambiguous symbol. It does not appear to have persuaded those who believe that Sam Sheppard was innocent.<sup>100</sup> On the other hand, those who think that he did kill his wife, such as the authors of this book, regard the jury verdict as definitive. The book jacket carries the legend, in large red block letters: "CASE CLOSED."

How, then, could the case have been ended before trial despite the trial court's denial of the motion to dismiss? The statute of limitations and standing were "controlling question[s] of law" as to which immediate resolution by a higher court would have "materially advance[d] the ultimate termination of the litigation."<sup>101</sup> This is the federal standard for interlocutory appeals.<sup>102</sup> That is not the Buckeye

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afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. *Id.*

98. Perhaps the four-justice majority assumed that popular attitudes about Sam Sheppard were so entrenched that nothing that happened in the wrongful-imprisonment case would change any minds. On this view, there was nothing to gain by premature intervention in the proceedings. Alternatively, the majority might have thought that preventing a trial on the basis of technicalities like standing and the statute of limitations before the estate had its day in court might have reinforced whatever cynicism already existed.

99. *See Murray v. State*, No. 78374, 2002 WL 337732, at \*4 (Ohio Ct. App. Feb. 21, 2002), *appeal not allowed*, 772 N.E.2d 1202 (Ohio 2002).

100. The jury verdict does not seem to have persuaded those who were convinced that someone else killed Marilyn Sheppard. For example, Terry Gilbert, the lawyer for the estate, characterized the jury verdict as "the latest mockery of justice." DESARIO & MASON, *supra* note 8, at 326. And James Neff, the journalist who spent more than five years independently researching the case, remains convinced that "Dr. Sam Sheppard did not kill his wife." NEFF, *supra* note 4, at 382.

101. 28 U.S.C. § 1292(b) (2000).

102. Section 1292(b) also provides that there must be "substantial ground for difference of opinion" about the "controlling question of law." *Id.* If those criteria are satisfied, the district court may certify the question for interlocutory review, and the court of appeals in its discretion may entertain the issue. It has been suggested that "a relatively low level of uncertainty" should satisfy the "substantial ground for difference of opinion requirement" in cases where questions such as the

State's approach.<sup>103</sup> As relevant to the *Sheppard* case, Ohio law allows interlocutory appeals only in circumstances where a pretrial ruling prevents a case from going to trial.<sup>104</sup> The denial of a motion to dismiss for lack of standing or the running of the statute of limitations apparently does not fall within the strict statutory requirements for interlocutory review.<sup>105</sup> Because those issues could be reviewed on appeal from a final judgment on the merits, Tubbs Jones tried unsuccessfully to invoke the Ohio Supreme Court's original jurisdiction with a petition for a writ of prohibition to stop the trial from proceeding.<sup>106</sup> This required her to stretch traditional doctrine by arguing that the common pleas court lacked jurisdiction over the case because the statute of limitations had

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statute of limitations are at issue. 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3930, at 422, n.15 (2d ed. 1996).

103. Nevertheless, there have been suggestions that Ohio adopt the federal approach to interlocutory appeals. See *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 676 N.E.2d 890, 894 n.2 (Ohio 1997); *Dayton Women's Ctr. v. Enix*, 555 N.E.2d 956, 960 (Ohio 1990) (Brown, J., concurring), cert. denied, 498 U.S. 1047 (1991); Mark J. Chumley, Comment, *Fairness and Finality: Rethinking Final Appealable Orders Under Ohio Law*, 64 U. CIN. L. REV. 143, 184-85 (1995).

An alternative federal approach allows for interlocutory review of collateral orders, those "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Ohio does not recognize the collateral-order doctrine. *Celebrezze v. Netley*, 554 N.E.2d 1292, 1295 (Ohio), cert. denied, 498 U.S. 967 (1990); but cf. *City of Lakewood v. Pfeifer*, 613 N.E.2d 1079, 1081 (Ohio Ct. App. 1992) (relying on a federal collateral-order case to find appellate jurisdiction to address the legal standard that a trial court should use in deciding whether to grant a prosecutor's motion to dismiss a criminal case), review denied, 609 N.E.2d 171 (Ohio 1993). Even if Ohio did recognize that doctrine, it would not apply to the *Sheppard* case because the standing and statute-of-limitations issues were not "separable from the merits." See *Anderson v. City of Boston*, 244 F.3d 236, 240-41 (1st Cir. 2001).

104. OHIO REV. CODE ANN. § 2505.02(B)(1)-(2) (West Supp. 2004). No other provision of § 2505.02 could have applied.

105. The Ohio Supreme Court has never directly addressed this question, but its restrictive interpretation of § 2505.02 suggests that the statement in text is accurate. See, e.g., *Polikoff v. Adam*, 616 N.E.2d 213, 218 (Ohio 1993) (holding that the denial of motion to dismiss a shareholders' derivative suit for failure to make a timely prelitigation demand on the board of directors was not appealable); *Chef Italiano Corp. v. Kent State Univ.*, 541 N.E.2d 64, 67-68 (Ohio 1989) (holding that orders granting partial summary judgment under OHIO R. CIV. P. 54(B) were not appealable). The leading case on the denial of a motion to dismiss on statute-of-limitations grounds held that this issue is not appropriate for interlocutory review because it does not "conclusively determine the action." *State v. Torco Termite Pest Control*, 500 N.E.2d 401, 402 (Ohio Ct. App. 1985). The opinion in that case was written by then-Judge Thomas J. Moyer the year before he was elected chief justice of the Ohio Supreme Court, a position that he still holds. No reported Ohio decision addresses the availability of interlocutory review of a ruling that upholds a plaintiff's standing. Because the denial of a motion to dismiss for lack of standing also does not resolve the case, such a ruling presumably would not be appealable under § 2505.02.

106. See *supra* notes 92-95 and accompanying text.

run and the claim had abated on Sam Sheppard's death.<sup>107</sup> These arguments were not frivolous; they persuaded three members of a seven-justice court.<sup>108</sup> If Ohio took a more flexible approach to interlocutory appeals, though, such creative lawyering would not have been necessary. Under federal standards, both issues would have been appropriate questions for pretrial appellate review.<sup>109</sup>

Even under state standards, there was an argument for preventing the trial from taking place. The Ohio Supreme Court has been less fastidious about procedural niceties than its opinion denying the writ of prohibition implies. In other settings it has recognized the value of early resolution of key issues before litigation proceeds too far. For example, the Court has promulgated a rule under which it will answer certified questions from federal courts about unresolved issues of state law.<sup>110</sup> These matters arise outside the normal appellate process.<sup>111</sup> Perhaps for this reason, the Court has frequently declined to answer such questions.<sup>112</sup> Nevertheless, several major decisions have been handed down in response to certified questions. Among them are cases involving high-profile tort issues<sup>113</sup> as well as important rulings on individual liability for employment discrimination<sup>114</sup> and the authority of local boards of health to promulgate anti-smoking rules.<sup>115</sup>

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107. The majority of the Ohio Supreme Court refused to treat these arguments as bearing on the trial court's subject-matter jurisdiction. See *State ex rel. Tubbs Jones v. Suster*, 701 N.E.2d 1002, 1008 (Ohio 1998).

108. See *id.* at 1011 (Douglas, J., joined by Resnick & Sweeney, JJ., dissenting).

109. Federal courts have addressed both issues in interlocutory appeals. See 16 WRIGHT ET AL., *supra* note 102, § 3930, at 422-23 & n.15, § 3931, at 453-54 & n.29 (collecting cases).

110. See OHIO SUP. CT. PRAC. R. XVIII.

111. See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 170-71 (2003).

112. See, e.g., *In re Miller*, 762 N.E.2d 368 (Ohio 2002); *Comella v. St. Paul Mercury Ins. Co.*, 756 N.E.2d 110 (Ohio 2001); *Eabens v. USAir, Inc.*, 670 N.E.2d 1000 (Ohio 1996); *Allstate Ins. Co. v. Cutcher*, 654 N.E.2d 980 (Ohio 1995); *Copper v. Buckeye Steel Castings*, 621 N.E.2d 396 (Ohio 1993).

113. See *Sutowski v. Eli Lilly and Co.*, 696 N.E.2d 187, 188, 193 (Ohio 1998) (rejecting market-share liability in DES cases); *Sorrell v. Thevenir*, 633 N.E.2d 504, 507, 513 (Ohio 1994) (invalidating a law that abrogated the collateral source rule); *Burgess v. Eli Lilly and Co.*, 609 N.E.2d 140, 141, 143 (Ohio 1993) (invalidating a law providing that a cause of action for DES-related injuries accrued when the plaintiff learned that she had an injury that might have been related to DES exposure rather than when she knew or should have known that she had actually been injured by DES exposure); *Morris v. Savoy*, 576 N.E.2d 765, 767, 771 (Ohio 1991) (overturning a statutory cap on general damages in medical malpractice cases).

114. See *Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 784, 787-88 (Ohio 1999) (holding that individual supervisors and managers may be held jointly liable with their employers for employment discrimination under Ohio law).

115. See *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 773 N.E.2d 536, 540, 547 (Ohio 2002) (holding that local boards of health do not have such authority).

In addition, the Ohio Supreme Court has recently entertained original actions involving facial challenges to controversial legislation. For example, in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,<sup>116</sup> the Court allowed an organization of plaintiffs' lawyers, the state labor federation, and their leaders to pursue an original action in prohibition and mandamus challenging a comprehensive tort-reform statute containing numerous provisions that conflicted with a series of recent state Supreme Court rulings based on the Ohio Constitution. More recently, in *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*,<sup>117</sup> the Court allowed two labor organizations and one of their officers to maintain an original action in mandamus contesting the validity of statutory amendments authorizing private employers to test injured workers for drugs. In both cases the Court struck down the challenged legislation without awaiting appeals in the ordinary course of litigation. The issues were said to be "of such a high order of public concern"<sup>118</sup> that they should be resolved in a "public action" that was designed "to vindicate the general public interest."<sup>119</sup>

The dissenters in *Tubbs Jones*, who were part of the majority in these cases, saw a substantial public interest in resolving the statute-of-limitations and standing issues before a trial in the *Sheppard* civil case.<sup>120</sup> They reasoned that these issues were so easy to resolve that the lack-of-jurisdiction argument for pretrial dismissal was "both 'patent and unambiguous.'"<sup>121</sup> Perhaps a stronger argument would have combined the rationales for answering certified questions and entertaining public

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116. 715 N.E.2d 1062 (Ohio 1999).

117. 780 N.E.2d 981 (Ohio 2002).

118. *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1062, 1084; see also *Ohio AFL-CIO*, 780 N.E.2d at 984-85.

119. *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1083. The Court's expansive jurisdictional approach in these cases has been controversial. See *Ohio AFL-CIO*, 780 N.E.2d at 993 (Moyer, C.J., dissenting) (collecting critical law review commentary about *Ohio Academy of Trial Lawyers*); Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 541-50 (2004). For a defense of the Court's willingness to entertain *Ohio Academy of Trial Lawyers*, see Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 534-35 (2002).

120. The fourth member of the *Ohio Academy of Trial Lawyers* and *Ohio AFL-CIO* majority, Justice Paul E. Pfeifer, did not sit in *Tubbs Jones*. See *State ex rel. Tubbs Jones v. Suster*, 701 N.E.2d 1002, 1010 (Ohio 1998). Pfeifer recused himself because the trial judge in the wrongful-imprisonment case, Ronald Suster, was his opponent in the 1998 Ohio Supreme Court election. See T.C. Brown, *Judge to Sub for Justice in Sheppard Deliberations*, PLAIN DEALER, July 29, 1998, at 5B.

121. *Tubbs Jones*, 701 N.E.2d at 1010 (Douglas, J., dissenting) (quoting Dep't of Admin. Servs., Office of Collective Bargaining v. State Employment Relations Bd., 562 N.E.2d 125, 129 (Ohio 1990)).

actions. Advocates of certification emphasize the savings in time and energy that can flow from authoritative determinations of state-law questions in cases heard in federal courts.<sup>122</sup> And the Ohio Supreme Court has emphasized that public actions are “rare and extraordinary matters that justify departure from normal procedures.”<sup>123</sup>

By analogy to certified questions, there was “no controlling precedent in the decisions of [the Ohio] Supreme Court” with respect to the statute of limitations and standing for wrongful-imprisonment claims.<sup>124</sup> The analogy to public actions is less direct but certainly plausible. The public interest in the *Sheppard* case differed significantly from the public interest in *Ohio Academy of Trial Lawyers* and *Ohio AFL-CIO*. Those cases involved laws that could have affected many potential litigants. The tort-reform statute in *Ohio Academy of Trial Lawyers* could be seen as an obviously invalid attempt to overrule by legislation a series of judicial interpretations of the state constitution.<sup>125</sup> As long as that statute remained on the books, some persons with otherwise meritorious tort claims might be deterred from pursuing their legal remedies out of concern that the statute would make litigation futile.<sup>126</sup> Similarly, the drug-testing scheme in *Ohio AFL-CIO* might prevent injured workers from seeking compensation for their injuries in the only forum in which they could obtain relief.<sup>127</sup> Resolving these issues quickly therefore had obvious benefit for the public. The *Sheppard* case did not necessarily affect many other potential litigants, but it raised questions that had festered for decades about the integrity and legitimacy of the system of law enforcement in Ohio.

The public interest would have been better served by truncating the proceedings rather than by allowing the ordinary course of litigation to unfold only to ignore a jury’s verdict. Although providing a forum for addressing those legitimacy questions might seem to hold out the prospect of closure, it is difficult to believe that allowing the case to go to trial only to hold the trial superfluous on appeal would further that

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122. See 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4248, at 164-65 (2d ed. 1988).

123. *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1079, 1104.

124. OHIO SUP. CT. PRAC. R. XVIII, § 1.

125. See *Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1084 (“Here, the General Assembly has . . . reenacted legislation which this court has already determined to be unconstitutional . . . . To say the least, this is not how our system of government operates.”).

126. See *id.* at 1111-12 (Pfeifer, J., concurring).

127. See *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers’ Comp.*, 780 N.E.2d 981, 985 (Ohio 2002) (“[The measure in question] affects every injured worker who seeks to participate in the workers’ compensation system. It affects virtually everyone who works in Ohio.”).

goal. If anything, allowing the case to linger could further damage the legitimacy of the legal system in the eyes of the skeptical, especially if the threshold questions concerning the statute of limitations and standing were as clear-cut as the court of appeals found them to be.

### III. SOME REALISM ABOUT WRONGFUL IMPRISONMENT

The *Sheppard* civil case arose under the Ohio law relating to wrongful imprisonment. The authors perhaps understandably do not focus on statutory details,<sup>128</sup> but those details warrant further attention for at least two reasons. First, understanding how the law works can illuminate the behavior of the litigants in that case. Second, the workings of the Ohio law, which has been characterized as among the nation's most beneficent,<sup>129</sup> might have more general implications for the way we think about society's obligations to those who have been unjustly incarcerated. This section begins with an overview of the statute as it existed when the *Sheppard* civil case was litigated, then examines how the courts have applied it, and concludes by raising questions about the assumptions embodied in the law and by suggesting an alternative perspective on the subject, one that is partially but problematically embodied in a recent statutory amendment.

#### A. *The Law on the Books*

The statute that governed the *Sheppard* litigation, the main features

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128. They allude to the statute briefly but do not explain its specific provisions. See DESARJO & MASON, *supra* note 8, at 2-3, 7, 59.

129. See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 386 n.268 (1995) (describing Ohio as "particularly generous"); Alberto B. Lopez, *\$10 and a Denim Jacket: A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 704 (2002) (portraying Ohio's as among the "more liberal statutory schemes"). There is also a federal wrongful-imprisonment statute, and 15 other states as well as the District of Columbia have such laws. See 28 U.S.C. §§ 1495, 2513 (2000); ALA. CODE §§ 29-2-150 to -165 (2003); CAL. PENAL CODE §§ 4900-4906 (West 2000 & Supp. 2004); 705 ILL. COMP. STAT. ANN. § 505/8(c) (West 1999); IOWA CODE ANN. § 663A.1 (West 1998); ME. REV. STAT. ANN. tit. 14, §§ 8241-8244 (West 2003); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (2001 & Supp. 2003); N.H. REV. STAT. ANN. § 541-B:14(II) (1997 & Supp. 2003); N.J. STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT §§ 8-b, 9(3-a) (McKinney 1989); N.C. GEN. STAT. ANN. §§ 148-84 (2003); OKLA. STAT. ANN. tit. 51, §§ 154(B), 155(2), 156(H) (West Supp. 2004); TENN. CODE ANN. § 9-8-108(a)(7) (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001-.154 (Vernon Supp. 2004); W. VA. CODE ANN. § 14-2-13a (Michie 2000); WIS. STAT. ANN. § 775.05 (West 2001); D.C. CODE ANN. §§ 2-421 to -425 (2001 & Supp. 2004). North Dakota was one of the first states to enact a wrongful-imprisonment statute, in 1917. See Act of Feb. 12, 1917, ch. 172, 1917 N.D. Laws 237. That measure was repealed in 1965. See Act of Mar. 20, 1965, ch. 203, § 86, 1965 N.D. Laws. 373, 406. There were no reported decisions applying or interpreting this statute while it was on the books, which leaves unexplained why the legislature eliminated the provision.

of which remain in effect, requires a person seeking compensation from the State of Ohio for wrongful imprisonment to proceed in two stages. First, the individual may file suit in the court of common pleas seeking a declaration of innocence.<sup>130</sup> Only someone who was found guilty of a felony and sentenced to prison is authorized to file suit; felons who pled guilty and misdemeanants are not covered by this law.<sup>131</sup> Moreover, the conviction must have been vacated, dismissed, or reversed on appeal, and there must be no possibility of further criminal proceedings relating to the conduct associated with the conviction.<sup>132</sup> Most important, the court of common pleas must determine that “the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.”<sup>133</sup>

130. See OHIO REV. CODE ANN. § 2305.02 (West 1994).

131. See *id.* § 2743.48(A)(1)-(3) (West 1994 & Supp. 2004) (limiting coverage to cases involving “an aggravated felony or felony”). This provision disqualifies the more than 90 percent of felony defendants who plead guilty rather than go to trial. See *Blakely v. Washington*, 124 S. Ct. 2531, 2556 (2004) (Breyer, J., dissenting) (citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150, n.330 (2001)). To what extent this exclusion reduces the number of potential claimants is difficult to determine. Persons who plead guilty probably are guilty, but some innocent persons who entered guilty pleas are known to have made false confessions. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 478-81 & n.412 (1998). No reliable data exist about the number and frequency of false confessions, although there is evidence that such confessions “occur regularly.” Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, in 16 STUDIES IN LAW, POLITICS, AND SOCIETY 189, 191 (Austin Sarat & Susan S. Silbey eds., 1997). Concerns about the phenomenon of false confessions therefore are “significant, recurrent, and deeply troubling.” Leo & Ofshe, *supra*, at 430.

The provision excluding claims arising from guilty pleas also disqualifies anyone who entered a so-called *Alford* plea (i.e., a guilty plea entered by a competently represented defendant in order to avoid more serious charges, see *North Carolina v. Alford*, 400 U.S. 25 (1970)). See *Ruff v. State*, No. 9SAPE02-243, 1995 WL 546896 (Ohio Ct. App. Sept. 14, 1995), *appeal not allowed*, 661 N.E.2d 754 (Ohio 1996). In addition, the statute does not apply to juvenile court matters, see *Wright v. State*, 591 N.E.2d 1279, 1283-84 (Ohio Ct. App. 1990), *appeal dismissed*, 569 N.E.2d 505 (Ohio 1991), or to improper parole revocation resulting in erroneous incarceration, see *Dragon v. State*, 548 N.E.2d 246 (Ohio Ct. App. 1988).

132. See OHIO REV. CODE ANN. § 2743.48(A)(4) (West Supp. 2004) (“The individual’s conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with the conviction.”). The previous version of this provision was substantively identical to the current one. The recent statutory amendment rewrote this sentence to make it gender neutral. See *id.* (West 1994).

133. *Id.* § 2743.48(A)(5) (West Supp. 2004). Again, the prior version of this language was substantively identical to the current version, which rendered this passage gender neutral. That



Second, an eligible person who obtains such a determination from the court of common pleas may then file an action in the Ohio Court of Claims for compensation.<sup>134</sup> The compensation includes a fixed amount per year of incarceration, originally \$25,000; the current figure is in excess of \$40,000 and is adjusted biennially for inflation.<sup>135</sup> In addition, a wrongfully imprisoned individual may recover lost income, fines, court costs, assessments for housing, board, medical, and ancillary services while in custody, and reasonable attorney's fees.<sup>136</sup>

Despite the apparently favorable provisions of Ohio's wrongful-imprisonment scheme, claimants have found it difficult to obtain compensation.<sup>137</sup> This has resulted primarily from restrictive judicial interpretations of the statute, a subject to which we now turn.

### B. *The Law in Action*

At one level, the wrongful-imprisonment law is extremely generous. Because of the relatively high annual compensation figure, together with the provisions for lost income, attorney's fees, and other costs, six-figure awards are not unheard of.<sup>138</sup> Awards of any kind are

recent amendment also provides that a person whose release occurred due to "an error in procedure" may also qualify as wrongfully imprisoned. Act of Dec. 10, 2002, § 1, 2002 Ohio Legis. Serv. L-3131, L-3131 (Banks-Baldwin). On the implications of this addition, which has not yet been applied in a reported decision, see *infra* notes 185-89 and accompanying text.

134. See OHIO REV. CODE ANN. § 2743.48(B)-(D) (West 1994 & Supp. 2004).

135. See *id.* §§ 2743.48(E)(2)(b), 2743.49 (West 1994 & Supp. 2004); see also *id.* § 117.52 (West Supp. 2004). The higher figure and the indexing procedure were included in a recent statutory amendment. See Act of Dec. 10, 2002, 2002 Ohio Legis. Serv. L-3131 (Banks-Baldwin). The Sheppard estate sought the lower figure in the civil trial, which occurred before the amendment was adopted. See NEFF, *supra* note 4, at 324; DESARIO & MASON, *supra* note 8, at 376.

136. See OHIO REV. CODE ANN. § 2743.48(E)(2)(a), (c)-(d), (F)(2) (West 1994 & Supp. 2004). The estate proposed a settlement, incorporating all of the statutory bases for compensation, exceeding \$3,000,000. There is some confusion about the actual figure. The document embodying this proposal called for a total payment of \$3,264,300, but the sum of its individual elements came to \$3,314,000. Undoubtedly because nothing turned on the resolution of this point, the authors do not note the discrepancy or explain how it can be reconciled. See DESARIO & MASON, *supra* note 8, at 376. Whatever the correct figure might be, it is about four times the maximum figure that has ever been awarded under the Ohio statute. See *infra* note 138 and accompanying text.

137. This phenomenon is not unique to Ohio. There have been few awards in other states that have even more restrictive statutes. See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 105-06 (1999).

138. See *Williams v. State*, No. 2002-09064-WI, 2003 WL 22285920 (Ohio Ct. Cl. Sept. 29, 2003) (awarding \$834,583.85 for wrongful imprisonment of nine and a half years); *Cox v. State*, 552 N.E.2d 970 (Ohio Ct. Cl. 1988) (awarding \$110,000 for wrongful imprisonment of one year and 267 days); see also Connie Schultz, *City to Pay \$1.6 Million for Man's Prison Time: Cleveland Also Agrees to Review Old Cases*, PLAIN DEALER, June 8, 2004, at A1 (noting that the state had paid Michael Green "about \$1 million in compensation for 13 years of wrongful imprisonment"); Connie Schultz, *An Unfair Burden: Ohio Is Balking at Paying Michael Green Money Owed Him for*

unusual, however, as Ohio courts have required strict compliance with the terms of the wrongful-imprisonment law.<sup>139</sup> This is so because that measure represents a limited waiver of the state's sovereign immunity.<sup>140</sup> For example, plaintiffs may not bypass the court of common pleas and file an original action in the court of claims.<sup>141</sup> More significant, plaintiffs must affirmatively establish their innocence in order to prevail at the first stage of the wrongful-imprisonment process.

The state courts have focused on two main aspects of the innocence question. The first point about innocence relates to the burden of proof. Initially, claimants invoking the wrongful-imprisonment law argued that the state was precluded from relitigating the question of guilt because

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*13 Years of Imprisonment for a Rape He Didn't Commit*, PLAIN DEALER, May 22, 2003, at F1 [hereinafter *Schultz, An Unfair Burden*] (providing additional details about Green's case); Dan Horn, *The Truth Set Him Free, Freedom Broke His Heart*, CIN. ENQUIRER, Sept. 14, 2003, at A1 (noting an award of \$380,000 for wrongful imprisonment of ten years); *Man Wrongfully Imprisoned Adjusts to Life on the Outside*, PLAIN DEALER, Jan. 10, 1991, at 3-C (noting an award of \$367,700 for wrongful imprisonment of nine years); James Bradshaw, *State Must Pay Legal Fees for Man Cleared of Rapes*, COLUMBUS DISPATCH, Mar. 27, 2001, at 10C (noting an award of approximately \$340,000 for nearly six years of wrongful imprisonment); James Ewinger, *Inmate Wins Payoff Over Wrongful Imprisonment*, PLAIN DEALER, Mar. 5, 1997, at 1B (noting an award of \$106,597 for wrongful imprisonment of three years); James F. McCarty, *Man Wrongly Imprisoned Gets Check*, PLAIN DEALER, July 14, 1995, at 1B (noting an award of \$105,000 for wrongful imprisonment of four years); *Wrongly Imprisoned Man to Get \$65,592*, PLAIN DEALER, Feb. 10, 1993, at 6B (noting an award of \$65,592 for wrongful imprisonment of more than two years); *Fay v. State*, 610 N.E.2d 622 (Ohio Ct. Cl. 1988) (awarding \$64,201 for wrongful imprisonment of two years and 80 days); *cf. Wrongly Imprisoned Man Remains Bitter*, PLAIN DEALER, Aug. 31, 1997, at 5B (noting an award of \$717,500 for wrongful imprisonment of five years, entered pursuant to a special bill enacted before the adoption of § 2743.48).

By way of comparison, the maximum possible award is \$5,000 under the federal statute, *see* 28 U.S.C. § 2513(e) (2000); \$20,000 in New Hampshire, *see* N.H. Rev. Stat. Ann. § 541-B:14(1) (1997); \$25,000 in Wisconsin, *see* WIS. STAT. ANN. § 775.05(4) (West 2001); and \$35,000 in Illinois, *see* 705 ILL. COMP. STAT. ANN. § 505/8(c) (West 1999). As recently as 2000, the maximum possible award in California was \$10,000. *See* CAL. PENAL CODE § 4904 historical and statutory note (West Supp. 2004).

139. Between 1975 and September 2003, only 41 persons had obtained compensation for wrongful imprisonment under § 2743.48 or under the special bills that were used before 1986; about 20 inmates a year have their convictions overturned or are otherwise released in circumstances that might provide a basis for seeking compensation under the statute. *See* Horn, *supra* note 138, at A12.

140. *See* *Bennett v. Ohio Dep't of Rehab. and Corr.*, 573 N.E.2d 633, 637 (Ohio 1991).

141. *See* *Dvorak v. Pickaway Corr. Inst.*, 2002 WL 31656236, at \*3 (Ohio Ct. App. Nov. 26, 2002) (holding that a federal court's granting of habeas corpus does not represent a declaration of innocence and that such a declaration, which can only be made by a court of common pleas, is prerequisite to an action in the court of claims); *cf. Seiber v. State*, 2002 WL 31771250, at \*3-4 (Ohio Ct. App. Dec. 12, 2002) (disagreeing, "[w]ith all due respect, with a federal court's granting of habeas relief" but noting that a state court must give effect to the federal court's precise holding); *Williams v. State*, 1999 WL 254447, at \*2 (Ohio Ct. App. Apr. 1, 1999) (holding that a common pleas court had erroneously dismissed a wrongful-imprisonment case on the ground that the action should have been filed in the court of claims but affirming the dismissal on the merits).

the reversal of the prior conviction, acquittal at retrial, or dismissal of charges by prosecutors unable or unwilling to retry the defendant established that the claimant had not committed a crime. The Ohio Supreme Court correctly rejected this argument in *Walden v. State*,<sup>142</sup> its first decision interpreting the statute. The Court explained that an acquittal at a criminal trial shows only that the prosecution failed to establish guilt beyond a reasonable doubt, but it "is not necessarily a finding that the accused is innocent."<sup>143</sup> The wrongful-imprisonment statute directed that the courts "actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability."<sup>144</sup> Allowing plaintiffs to invoke the doctrine of collateral estoppel would make the first proceeding in the court of common pleas superfluous. If the legislature meant to make acquittal on retrial or dismissal of charges after reversal of a conviction conclusive on the question of innocence, the statute would have allowed plaintiffs to go directly to the court of claims, bypassing the court of common pleas altogether.<sup>145</sup>

Having concluded that a wrongful-imprisonment plaintiff could not rely on issue preclusion, the *Walden* Court proceeded to hold that the plaintiff's burden of proof was the preponderance of the evidence, the standard burden in civil cases, rather than clear and convincing evidence.<sup>146</sup> Although the Court's rejection of preclusion clearly affected the resolution of wrongful-imprisonment claims, it is not at all clear that choosing the preponderance standard rather than a higher one

142. 547 N.E.2d 962 (Ohio 1989).

143. *Id.* at 966. The court noted that "the qualitative differences between civil and criminal proceedings . . . militate against giving criminal judgments preclusive effect in civil or quasi-civil litigation." *Id.* at 966-67. This formulation overstates the situation. Issue preclusion does not apply when "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action [or] the burden has shifted to his adversary." RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982). As the court of appeals had observed in *Walden*, in a criminal case the government bears the burden of proof beyond a reasonable doubt, whereas in a civil action for wrongful imprisonment the claimant bears the burden of proof by a preponderance of the evidence. *Walden*, 547 N.E.2d at 966. Accordingly, the Restatement provision quoted above "will almost always have the effect of withholding preclusion as to an issue of fact when the criminal trial that provides the basis for the wrongful-imprisonment resulted in an acquittal." RESTATEMENT (SECOND) OF JUDGMENTS, *supra*, § 85, cmt. g. On the other hand, a judgment of conviction can have preclusive effect in subsequent civil litigation involving the defendant. *See id.* § 85(1)-(2).

144. *Walden*, 547 N.E.2d at 967.

145. *See id.* The court added that the prosecution's inability to appeal from a final judgment in criminal cases deprived the state of "a fair opportunity to litigate the issue of . . . innocence because it cannot seek correction of errors by the trial court which might have led to erroneous acquittals." *Id.*

146. *See id.* at 967-68.

has made any difference to the resolution of wrongful-imprisonment claims.<sup>147</sup>

Regardless of the formal burden of proof, plaintiffs have run afoul of the stringent judicial definition of innocence. The cases have focused on two aspects here as well. First, they have drawn on the distinction between actual innocence and the avoidance of liability emphasized in *Walden* to suggest that persons who are acquitted for insufficient proof of guilt beyond a reasonable doubt are unworthy of compensation. The Ohio Supreme Court used this approach in *Ellis v. State*,<sup>148</sup> which was initially heard in tandem with *Walden* and was appealed again following the remand from that ruling. The defendant in *Ellis* was acquitted on the basis of self-defense at his retrial for assault and sought compensation for wrongful imprisonment.<sup>149</sup> The Court carefully examined the facts that gave rise to the assault charge and concluded that the defendant had failed to prove the elements of self-defense by a preponderance of the evidence and therefore was not entitled to compensation.<sup>150</sup> *Ellis* entered a business establishment after his stepson got into a fight with the son of the owner. The owner swung at *Ellis*, who hit the owner back in what he claimed was self-defense.<sup>151</sup> Because the owner had a right to use non-lethal force to protect his business from trespassers and the stepson had initiated the fight, *Ellis* failed to prove that the landlord had no justification for trying to repel him.<sup>152</sup>

Similarly, the Ohio Court of Appeals has rejected many wrongful-imprisonment claims for failure to prove innocence. For instance, *Ratliff v. State*<sup>153</sup> rejected a claim by a man whose conviction for carrying a concealed weapon had been reversed for insufficient evidence.<sup>154</sup> The court, affirming the common pleas judge, held that the claimant's

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147. The experience in other states suggests that the choice of preponderance or clear and convincing makes little difference to the outcome of wrongful-imprisonment claims. See Bernhard, *supra* note 137, at 108.

148. 596 N.E.2d 428 (Ohio 1992) (per curiam).

149. *Id.* at 428-29. The Court's reexamination of the facts might seem problematic at first glance. In Ohio, self-defense is an affirmative defense that the defendant must establish by a preponderance of the evidence. See *State v. Martin*, 488 N.E.2d 166, 167-68 (Ohio 1986), *aff'd*, 480 U.S. 228 (1987). This might suggest that an acquittal based on self-defense should preclude the state from relitigating the issue in a subsequent wrongful-imprisonment action. As indicated above, however, the Ohio Supreme Court properly held in *Walden* that issue preclusion does not apply in this situation. See *supra* notes 142-45 and accompanying text.

150. See *Ellis*, 596 N.E.2d at 431.

151. See *id.* at 429.

152. See *id.* at 431.

153. 640 N.E.2d 560 (Ohio Ct. App.), *appeal not allowed*, 638 N.E.2d 88 (Ohio 1994).

154. See *id.* at 561.

admission that he was carrying his pocket knife in an open position rather than in its normal closed position, combined with other evidence adduced in the trial court, supported the conclusion that he had failed to establish his innocence.<sup>155</sup>

More recently, in *Massey v. State*,<sup>156</sup> an appellate court held that a mother of four young children whose conviction for felony child endangerment had been overturned for lack of evidence was not wrongfully imprisoned because she had failed to prove her innocence. While she was feeding the children, her two-year-old daughter soiled herself. She placed the girl into the bathtub to clean her up and then put her on the toilet seat when a sibling began throwing things into the tub. The wet child slipped off the seat and struck her head, after which the woman tried to put her daughter back on the toilet seat only to see her slip off and hit her head once more. The girl was hospitalized for observation for three days, then released to her mother.<sup>157</sup> The appellate court affirmed the common pleas judge's finding that the mother had not proven her innocence of recklessly endangering her daughter's health or safety. Unless there was more to the situation than the opinion suggests, this is a notably harsh result. However foolish this woman's decision to put her wet daughter on the toilet seat even once might have been, treating Cheryl Massey as a felon and sending her to jail for a year seems extraordinarily cruel.<sup>158</sup> A stern lecture or counseling might have been a more constructive response. The dissenter accurately described her as "an innocent person, not just a not-guilty one."<sup>159</sup>

Nor are these isolated examples. Numerous other courts have also closely scrutinized the facts and concluded that wrongful-imprisonment plaintiffs have failed to prove their innocence.<sup>160</sup>

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155. See *id.* at 562-63. Among the other evidence, the claimant was carrying the knife in a dark alley behind a bar at a suspicious hour, he conceded that he had lied to the arresting officer about why he was carrying the knife and that he had once been arrested for carrying a switchblade, he had been told not to carry a knife when he was placed on probation on an unrelated charge several years earlier, and he had earlier pleaded guilty to carrying a straight razor as a concealed weapon. See *id.* at 562.

156. *Massey v. State*, No. C-010325, 2002 WL 252434 (Ohio Ct. App. Feb. 22, 2002).

157. See *id.* at \*2-3.

158. See *id.* at \*1 (noting that Ms. Massey "spent approximately one year in prison before her conviction was reversed on appeal").

159. *Id.* at \*3 (Painter, J., dissenting).

160. A notable illustration involves Dale Johnston, who spent nearly seven years on death row before his conviction was set aside and the charges were dropped. The common pleas court concluded that Johnston was not entitled to compensation for wrongful imprisonment because he had failed to prove his innocence. See *Conviction Reversed, But Money Denied*, PLAIN DEALER, Aug. 11, 1993, at 3-B. For the rulings setting aside his conviction and excluding unlawfully obtained evidence from any retrial, see *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988); *State v.*

The second major basis on which wrongful-imprisonment claims have foundered is the statutory requirement that the claimant be innocent of any crime relating to the events in question. The statute refers to “the offense of which the individual was found guilty, including all lesser-included offenses,”<sup>161</sup> but courts have construed this language in very broad terms. The leading case is *Gover v. State*,<sup>162</sup> in which the Ohio Supreme Court held that a man whose conviction for safecracking had been overturned could have been charged with burglary and therefore was not innocent within the meaning of the wrongful-imprisonment statute.<sup>163</sup> The conviction was set aside because the claimant had broken a plexiglass cover of an otherwise open safe that was located in a restaurant’s private dining area. Accordingly, the theft was not covered by the safecracking law.<sup>164</sup> The prosecutor did not charge the thief with burglary, which is not a lesser-included offense of safecracking,<sup>165</sup> but the Court read the innocence requirement to mean that wrongful-

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Johnston, 580 N.E.2d 1162 (Ohio Ct. App. 1990). For further analysis of the Johnston case, see William S. Lofquist, *Whodunit? An Examination of the Production of Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 174 (Saundra D. Westervelt & John A. Humphrey eds., 2001). For other examples, see *Seiber v. State*, No. 81314, 2002 WL 31771250 (Ohio Ct. App. Dec. 12, 2002) (finding insufficient evidence of innocence despite state’s decision not to retry a defendant whose conviction had been set aside on federal habeas review); *Palmer v. State*, No. 2878-M, 1999 WL 820758 (Ohio Ct. App. Oct 13, 1999) (finding insufficient evidence of innocence of child molestation where the conviction was set aside after the claimant’s daughter, the victim, recanted her accusation, where the common pleas judge gave great weight to inculpatory testimony by a physician and a psychologist both at trial and at the hearing on the claimant’s motion for a new trial); *Miller v. State*, No. L-97-1009, 1997 WL 728641 (Ohio Ct. App. Nov. 21, 1997) (finding insufficient evidence of innocence of a claimant whose conviction for aggravated robbery and felonious assault was set aside on the basis of ineffective assistance of appellate counsel and the prosecutor declined to retry the case, where the common pleas judge credited the testimony of robbery victims and disbelieved the claimant’s alibi witnesses), *appeal not allowed*, 690 N.E.2d 1290 (Ohio 1998); *Morris v. State*, No. L-97-1009, 1996 WL 307235 (Ohio Ct. App. June 10, 1996) (finding insufficient evidence of innocence of a claimant whose conviction for aggravated vehicular homicide was overturned on appeal for lack of evidence that the claimant was driving the car at the time of the fatal accident and the prosecutor declined to retry the case, where there was some evidence that the claimant was the driver of the car); *Gough v. State*, No. 92-CA-15, 1992 WL 173317 (Ohio Ct. App. July 15, 1992) (finding insufficient proof of innocence of a claimant whose conviction for possession of LSD was overturned on appeal and charges were subsequently dismissed, where the claimant admitted that LSD was found in his possession), *appeal dismissed*, 600 N.E.2d 683 (Ohio 1992), *cert. denied*, 507 U.S. 931 (1993).

161. OHIO REV. CODE ANN. § 2743.48(A)(5) (West 1994 & Supp. 2004); *see also id.* § 2305.02 (West 1994) (conferring jurisdiction on the court of common pleas to hear wrongful-imprisonment claims and using virtually identical language).

162. 616 N.E.2d 207 (Ohio 1993).

163. *Id.* at 209.

164. *See id.* at 208.

165. Ohio law defined burglary as the more serious crime. Safecracking was a third-degree felony, burglary a second-degree felony. *See id.* at 208, 209.

imprisonment claimants “must prove that at the time of the incident for which they were initially charged, they were not engaging in *any other criminal conduct* arising out of the incident for which they were initially charged.”<sup>166</sup>

Lower courts have applied *Gover* to reject wrongful-imprisonment claims where there was evidence that the claimant might have been committing other crimes. For example, in *State v. Harman*<sup>167</sup> a man whose conviction for voluntary manslaughter had been overturned on appeal was held not to be innocent. The prosecutor dismissed the manslaughter charge in exchange for his guilty plea in a separate matter.<sup>168</sup> The claimant admitted to having fought with and stabbed the victim, so he had committed offenses other than manslaughter in the incident.<sup>169</sup> Moreover, the original conviction had been reversed due to a trial error rather than because of a failure of proof.<sup>170</sup> There was no reason to regard Harman as a victim of rank injustice, as he had effectively gotten off under a plea bargain rather than because he had been mistakenly accused.

No such explanation can account for the ruling in *Chandler v. State*,<sup>171</sup> where the Ohio Court of Appeals held that a man whose conviction for possession of criminal tools had been overturned was not innocent because there was evidence that he possessed instruments of drug abuse at the time of his arrest.<sup>172</sup> Chandler was sitting in his van with another man when he was arrested. On the floor between them was a bag containing syringes, pills, powder, and cash.<sup>173</sup> The other man took full responsibility for the bag and everything in it.<sup>174</sup> Nevertheless,

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166. *Id.* at 209 (emphasis added).

167. 724 N.E.2d 1247 (Ohio Ct. App.), *appeal dismissed*, 708 N.E.2d 724 (Ohio 1999).

168. *Id.* at 1248.

169. *Id.* at 1250.

170. *See id.* at 1248, 1250 (noting that the original conviction had been set aside because the claimant had been denied his right to confront and impeach a witness). *See also* Cotton v. State, No. 67403, 1995 WL 168547, at \*4 (Ohio Ct. App. Apr. 6, 1995) (finding that a claimant whose conviction for receiving stolen property was reversed due to erroneous jury instructions and failure to prove guilt beyond a reasonable doubt was not innocent because he was arrested in an area where stolen cars were located while working on automobiles with peeled steering columns and changed vehicle identification numbers, suggesting that he “was engaged in some kind of illegal conduct”).

171. 641 N.E.2d 1382 (Ohio Ct. App.), *appeal not allowed*, 639 N.E.2d 794 (Ohio 1994).

172. *See id.* at 1385-86. Chandler was acquitted of three counts of drug abuse, a second-degree misdemeanor, but convicted of one count of possession of criminal tools, a fourth-degree felony. The court of appeals overturned the criminal-tools conviction because it was based on a general statute rather than on the more specific statute prohibiting possession of instruments of drug abuse. *Id.* at 1383.

173. *See id.* at 1384.

174. *See id.* at 1384, 1386.

the open bag was “well within [Chandler’s] reach, and the common pleas court was therefore entitled to disbelieve his claim of innocence.”<sup>175</sup> Even more remarkable, the appellate court added that, because the other man “committed the offense, or any of the lesser included offenses, for which [Chandler] was found guilty,” it followed that “*someone* committed the crime for which [he] was convicted and therefore Chandler could not be deemed to be wrongfully imprisoned.”<sup>176</sup> To put it kindly, this is a counterintuitive reading of the statutory provision that “the offense of which the individual was found guilty . . . either was not committed by the individual or *was not committed by any person*.”<sup>177</sup> If the fact that someone else committed the crime can defeat a wrongful-imprisonment claim, the statute will be rendered a virtual nullity. Only if the conduct for which the claimant was jailed turns out not to be a crime of any kind or if the alleged offense never happened at all could a wrongful-imprisonment claim prevail even if a completely innocent person were erroneously convicted and incarcerated.

### C. *Rethinking Wrongful Imprisonment*

Despite some of the criticism offered in the previous section, the Ohio courts seem in general to have construed the wrongful-imprisonment statute in accordance with its meaning and purpose. The provision for a declaration of innocence in a proceeding in the court of common pleas as a prerequisite to obtaining compensation from the court of claims clearly contemplates an independent judicial determination in which the claimant bears the burden of proof. Accordingly, the judicial refusal to apply issue preclusion and the concomitant endorsement of the preponderance standard in cases beginning with *Walden* make sense. Similarly, the statutory requirement that a claimant be innocent not only of the crime charged but also of lesser-included offenses makes it appropriate for courts to focus on whether other crimes occurred. The *Gover* and *Chandler* courts might have read this requirement more expansively than its language will bear, but the provision itself clearly prevents some claimants from prevailing.

Why should the wrongful-imprisonment statute limit eligibility for compensation as it does? Perhaps the legislature was concerned with

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175. *Id.* at 1387.

176. *Id.* (emphasis added).

177. OHIO REV. CODE ANN. § 2743.48(A)(5) (West Supp. 2004) (emphasis added). The italicized language also appeared in the prior version of the statute. *See id.* (West 1994).



protecting the state treasury from unpredictable and uncontrollable payments.<sup>178</sup> This is at best only a partial explanation. After all, fewer than two dozen persons annually have their convictions overturned.<sup>179</sup> Moreover, the legislature could have put a cap on compensation into the statute.<sup>180</sup> The emphasis on innocence, especially the requirement that the claimant affirmatively prove that he or she did not commit a crime, strongly suggests an ambivalence about the whole subject. On this view, some ex-convicts – those who are truly innocent – are deserving of public sympathy and compensation, whereas others – those who (like Sam Sheppard?) are suspected of having gotten off on so-called technicalities such as failure to prove guilt beyond a reasonable doubt, but who nevertheless probably did something wrong – are unworthy of consideration.<sup>181</sup>

This hypothesis is consistent with the pattern of judicial rulings in wrongful-imprisonment cases. For the most part, claimants have prevailed only when some other person has confessed or been persuasively identified as the actual perpetrator.<sup>182</sup> Some mistakenly

178. Cf. *Ratliff v. State*, 640 N.E.2d 560, 563 (Ohio Ct. App.) (Grey, J., dissenting) (lamenting the court's refusal to find a claimant to have been wrongfully imprisoned "because [this proceeding] involves a monetary interest"), *appeal not allowed*, 638 N.E.2d 88 (Ohio 1994).

179. See Horn, *supra* note 138, at A12.

180. Other wrongful-imprisonment statutes contain such limitations. See 28 U.S.C. § 2513(e) (2000) (limiting compensation to \$5,000); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 1999) (limiting compensation to \$35,000, subject to adjustment for inflation); ME. REV. STAT. ANN. tit. 14, § 8242(1) (West 2003) (limiting compensation to \$300,000); N.H. REV. STAT. ANN. § 541-B:14(II) (1997) (limiting compensation to \$20,000); N.C. GEN. STAT. ANN. § 148-84 (2003) (limiting compensation to \$500,000); OKLA. STAT. ANN. tit. 51, § 154(B)(4) (West Supp. 2004) (limiting compensation to \$175,000); TEX. CIV. PRAC. & REM. CODE § 103.052(a)(2) (Vernon Supp. 2004) (limiting compensation to \$500,000); WIS. STAT. ANN. § 775.05(4) (West 2001) (limiting compensation to \$25,000).

181. Cf. EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* 393 (1932) (noting that early wrongful-imprisonment statutes adopted in Europe and a handful of American states "have endeavored to restrict the indemnity to those only who clearly appear to deserve it"); Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 208 (1941) (proposing a model wrongful-imprisonment statute that would be limited to victims of "the grossest injustice" who were "most deserving" of compensation).

182. See, e.g., *Fay v. State*, 610 N.E.2d 622, 622 (Ohio Ct. Cl. 1988) ("[F]urther investigation led to proof that other individuals committed the crime."), discussed in MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 218-29 (1992); *Cox v. State*, 552 N.E.2d 970, 971 (Ohio Ct. Cl. 1988) (noting that another person confessed); *Man's Rape Charge Dismissed After Recantation: Victim Says Threats Kept Truth Hidden*, PLAIN DEALER, Aug. 28, 1999, at 7B (noting that the complainant in a child-rape case subsequently admitted that she had falsely accused a neighbor of raping her because of threats from her late father, the actual perpetrator); Horn, *supra* note 138, at A12 (providing additional details about the same child-rape case); Schultz, *An Unfair Burden*, *supra* note 138, at F3 (noting that another person confessed to the crime a week after publication of a series of newspaper articles about the wrongly imprisoned suspect); *Man Wrongfully Imprisoned Adjusts to Life on the Outside*, *supra* note 138 (noting that

convicted individuals have been exonerated by DNA evidence that eliminated them as suspects.<sup>183</sup> Occasionally, a plaintiff has established that no crime at all was committed. For example, in the case that led to the largest single compensation award on record in Ohio, a woman who accused a man of raping her when she was twelve years old admitted more than a decade later that she had made up her accusation in response to her mother's questions about marks on her neck.<sup>184</sup>

The Ohio legislature recently amended the wrongful-imprisonment statute to expand the class of persons eligible for compensation, but the revised version presents additional difficulties that might well frustrate the General Assembly's apparent generosity. Under a provision that took effect in April 2003, individuals released due to "an error in procedure" as well as those who are judicially determined not to have committed a crime are allowed to file a claim against the state.<sup>185</sup> The precise meaning of the new language remains unclear. No court has yet interpreted this provision, and the legislative history is unilluminating.<sup>186</sup>

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another man confessed to crime for which the claimant had been convicted); *Wrongly Imprisoned Man Remains Bitter*, *supra* note 138 (noting that two crime victims recanted their eyewitness identification after seeing a newspaper picture of the actual perpetrator following his arrest for another crime).

These cases might explain why the Sheppard estate devoted so much effort to implicate Richard Eberling as the real murderer. *See supra* notes 45-52 and accompanying text.

183. *See* Bradshaw, *supra* note 138; McCarty, *supra* note 138.

184. *See* Donna J. Robb, *For Freed Man, Hearing Is Like New Trial*, PLAIN DEALER, Aug. 16, 2002, at B3; Donna J. Robb, *State Must Pay Wrongfully Imprisoned Man*, PLAIN DEALER, Oct. 1, 2002, at A1, A8.

Another possible example involves Nathaniel Lewis, who was convicted of rape in connection with a sexual encounter that he claimed was consensual and who is now seeking up to \$600,000 in compensation for wrongful imprisonment. Lewis served five years in prison for rape before his conviction was overturned because the trial judge improperly excluded portions of the complainant's journal that cast doubt on her credibility. *See* Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002). He was recently declared innocent by a common pleas judge in circumstances where other courts might have ruled against him. *See supra* note 160 (discussing cases in which courts have ruled that claimants had failed to prove their innocence). The state chose not to retry Lewis because he had already served most of his sentence and the complainant declined to testify at a second criminal trial; she did return for his wrongful-imprisonment hearing and reiterated her testimony at the original trial. *See Accused Rapist Gets Vindication*, AKRON BEACON JOURNAL, June 4, 2004, at A1; Karen Farkas, *Wrongfully Imprisoned Man in Line for State Restitution*, PLAIN DEALER, June 4, 2004, at B1. The state has appealed the innocence ruling, however. *See* Karen Farkas, *State Appeals Ruling Saying Man Wrongly Imprisoned*, PLAIN DEALER, June 25, 2004, at B2.

185. Act of Dec. 10, 2002, § 1, 2002 Ohio Legis. Serv. L-3131, L-3131 (Banks-Baldwin) (codified at OHIO REV. CODE ANN. § 2743.48(A)(5) (West Supp. 2004)).

186. The original bill was intended only to increase the amount of compensation to take account of inflation since the wrongful-imprisonment statute was enacted in 1986. *See* S.B. 149, 124th Ohio Gen. Assemb. (2001); Ohio Legis. Serv. Comm'n, S.B. 149 Bill Analysis (2001). Language establishing a procedure for indexing the payment for future cost-of-living increases as

Even a cursory reading suggests that claimants relying on the new language need not establish their innocence in order to obtain compensation, because the amended provision makes procedural error and judicial determination of innocence alternative grounds for relief.<sup>187</sup> Only a few claimants who have been denied relief for failure to prove their innocence would have benefited from the procedural-error provision, and those cases have not involved especially sympathetic facts suggesting that those persons are particularly worthy of compensation.<sup>188</sup>

Whatever the new language means, however, the amended statute creates a very peculiar process. Under the amended version of the wrongful-imprisonment statute, claimants who are actually innocent must continue to prove that they did not commit a crime in order to obtain compensation. On the other hand, claimants who might be guilty of an offense but whose convictions were overturned for procedural reasons are entitled to compensation without demonstrating their lack of guilt. In other words, those who are most deserving – individuals who did not commit a crime – will have more difficulty establishing their right to compensation from the state than will less deserving individuals – those who were released due to procedural errors, who presumably did commit a crime but whose guilt beyond a reasonable doubt cannot be proved because of a governmental blunder.<sup>189</sup> It is perhaps understandable that the state might want to limit the number of persons who may receive payments from the public fisc, but it is perverse to

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well as the expansion of eligibility for compensation to those released due to a procedural error was added by the House Committee on Civil and Commercial Law. See Sub. S.B. 149, 124th Ohio Gen. Assemb. (2002); Ohio Legis. Serv. Comm'n, Sub. S.B. 149 Bill Analysis (2002). The analyses accompanying the House substitute and the bill on final passage focus mainly on the inflation provisions and simply refer to the expansion of eligibility without explaining the meaning of the new language.

187. The amended provision reads:

Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

OHIO REV. CODE ANN. § 2743.48(A)(5) (West Supp. 2004) (emphasis added).

188. Perhaps the only case discussed here in which the procedural error would have justified an award of compensation despite the claimant's inability to prove his innocence was *Harman*, which involved trial errors. See *supra* note 170 and accompanying text. Other rejected claimants with much more compelling grounds for compensation could not have relied on procedural error as an alternative basis for relief. See *supra* notes 148-60 and accompanying text.

189. Cf. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered") (criticizing the exclusionary rule).

make it easier for those with weaker grounds for relief to obtain compensation than those with more compelling claims.

There is, however, another way to think about wrongful imprisonment. Compensation for wrongful imprisonment serves at least two important functions. First, it recognizes that society has perpetrated an injustice on an individual who was incarcerated in violation of applicable legal standards.<sup>190</sup> Second, it provides the recipient an opportunity for rehabilitation and a return to a reasonably normal life,<sup>191</sup> although compensation does not guarantee a happy outcome for a claimant who suffered a serious injustice at the hands of society.<sup>192</sup> Persons who cannot prove their innocence might not have as powerful a moral claim to compensation from the state as persons who unquestionably did not commit a crime, but surely they have at least as strong a claim as offenders whose convictions are set aside on the basis of procedural error.

From this perspective, the concern should be with providing some compensation to all persons who were wrongfully imprisoned for whatever reason. This does not necessarily mean that every claimant should receive the same amount of compensation or that every claimant is equally deserving. Whatever the equities of individual situations, however, the government may not incarcerate anyone without a fair trial and proof of guilt beyond a reasonable doubt. By definition, the original proceeding in wrongful-imprisonment cases failed to satisfy at least one of those standards. Once a conviction has been overturned, the prosecution has a choice between properly retrying the accused and dismissing the charges. Suppose instead that the government did things right the first time. There are only two possibilities: the accused would never have been tried or would have been acquitted. In either case, the claimant would not have been imprisoned but would have remained at liberty. This is so whether the accused was actually innocent or the authorities lacked sufficient evidence to prove guilt beyond a reasonable doubt.

The government may have no legal obligation to compensate

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190. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (warning that "government is the potent, the omnipresent teacher" and that "[i]f the government becomes a lawbreaker, it breeds contempt for law"); Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1627 (1961).

191. See, e.g., Anders Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. PA. L. REV. 833, 841 (1961).

192. See, e.g., Horn, *supra* note 138 (describing the problems that beset Johnny Reeves despite compensation of \$380,000 for ten years of wrongful imprisonment for a crime of which he was falsely accused).

wrongfully imprisoned individuals,<sup>193</sup> but surely the state has some moral obligation to those whose freedom it has denied without justification.<sup>194</sup> Because the government has greater fact-finding resources than does the typical private individual, the law should not require a mistakenly convicted person to prove her innocence.<sup>195</sup> Instead, anyone released from incarceration after having a conviction overturned should receive compensation for wrongful imprisonment. There is some precedent for such a system in Scandinavia, where expansive compensation arrangements for persons improperly held in custody have existed for over a century.<sup>196</sup> For example, the Norwegian Criminal Procedure Act contains a provision originally adopted in 1887 under which an individual acquitted at a retrial following the reversal of a conviction is entitled to compensation “even if grounds for suspicion still exist.”<sup>197</sup>

It does not necessarily follow, however, that all claimants are entitled to the same amount of compensation.<sup>198</sup> The current version of Ohio’s wrongful-imprisonment statute, whatever its defects,<sup>199</sup>

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193. See *Bennett v. Ohio Dep’t of Rehab. and Corr.*, 573 N.E.2d 633, 637 (Ohio 1991) (noting that enactment of the wrongful-imprisonment statute was necessary in order to waive the state’s sovereign immunity); *Walden v. State*, 547 N.E.2d 962, 968 (Ohio 1989) (noting the state’s common-law sovereign immunity absent a statutory waiver); *Wright v. State*, 591 N.E.2d 1279, 1281 (Ohio Ct. App. 1990) (noting that statutory waivers of sovereign immunity “must be strictly construed”), *appeal dismissed*, 569 N.E.2d 505 (Ohio 1991); *Bernhard*, *supra* note 137, at 86-92 (summarizing the obstacles to suits against law enforcement officials and other potential defendants in tort actions); *Lopez*, *supra* note 129, at 690-98 (discussing barriers to suits under 42 U.S.C. § 1983 against prosecutors and police officers and to malpractice claims against defense attorneys).

194. See Note, *supra* note 190, at 1627.

195. See Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1110-11 (1970).

196. These laws, adopted between 1886 and 1888 in Denmark, Norway, and Sweden, provide compensation not only for wrongful imprisonment following the reversal of a conviction but also authorize awards under some circumstances in the event of acquittal at a first trial and for wrongful detention if charges are dropped without any trial at all. *Bratholm*, *supra* note 191, at 833, 835-37. The claimant must establish her innocence in order to obtain compensation for wrongful detention. *Id.* at 836-37.

197. *Id.* at 836. The current version of this law is embodied in §§ 444-451 of the Act of 22 May 1981, No. 25, Relating to Legal Procedure in Criminal Cases as amended (unofficial English translation by the Ministry of Justice, Oslo, 1998). According to § 444, “If a sentence of imprisonment or other custodial sanction has already been executed, any damage resulting from this shall be compensated for without regard to what has been shown to be probable. In other words, a claimant acquitted at retrial need not prove her innocence of the charge.” Similar measures were adopted in Denmark and Sweden in 1886 and 1888. *Bratholm*, *supra* note 196, at 834.

198. *Cf. McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring) (stating that “[i]n for a calf is not always in for a cow” and explaining that a conclusion in one case does not necessarily control the disposition of another case raising somewhat different concerns).

199. See *supra* notes 185-89 and accompanying text.

recognizes that a conviction might be overturned either because a person was not guilty of a crime or because procedural errors fatally infected the verdict. Individuals in the former category have a more compelling moral claim for compensation than do those in the latter category. This conclusion does not reflect a simple concern for preserving public funds, especially in difficult economic and budgetary times. It reflects a more general distinction about the extent of desert or blameworthiness. A couple of examples will illustrate the point. Consider first the debate over how to treat Vietnam War resisters. Some people advocated an amnesty as a way of restoring national unity in the wake of a divisive conflict, while others strenuously objected to any policy that would reward those who had chosen to avoid military service at a time of national need.<sup>200</sup> Ultimately, Presidents Ford and Carter adopted more limited programs that provided relief to only a small minority of those who would have been covered by a general amnesty.<sup>201</sup> Now consider the legal significance of pardons. There are two approaches to this question. The first contends that a pardon “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 offence.”<sup>202</sup> The second views a pardon as “carr[ying] an imputation of guilt [and] acceptance a confession of it.”<sup>203</sup> The overwhelming weight of judicial authority has rejected the first view,<sup>204</sup> although there have been vigorous dissents in some cases.<sup>205</sup> The reluctance to treat a pardon as conclusively

200. See LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 203-10 (1978).

201. President Ford’s program required performance up to two years of alternative service as a prerequisite to obtaining clemency. *Id.* at 212-13; see generally *id.* at 210-26. President Carter offered pardons to draft resisters, who were largely white and middle class, but not to deserters, who were disproportionately black and lower class. *Id.* at 230-31; see generally *id.* at 226-35.

202. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867).

203. *Burdick v. United States*, 236 U.S. 79, 94 (1915); see also *id.* at 91 (noting the “confession of guilt implied in the acceptance of a pardon” and observing that a person may therefore reject a pardon). This is not a purely hypothetical observation. To cite one notable example, Eugene Debs, who was sentenced to ten years’ imprisonment for a speech opposing American involvement in World War I, see *Debs v. United States*, 249 U.S. 211 (1919), refused to accept a presidential pardon and ultimately had his sentence commuted in December 1921. See RAY GINGER, *THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS* 405-06, 413 (1949); NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* 327-28 (1982).

204. *In re Abrams*, 689 A.2d 6, 13-16 (D.C.) (en banc), cert. denied sub nom. *Abrams v. Office of Bar Counsel*, 521 U.S. 1121 (1997).

205. See, e.g., *In re North* (George Fee Application), 62 F.3d 1434, 1439-40 (D.C. Cir. 1994) (Sneed, J., dissenting); *In re Abrams*, 689 A.2d at 28-40 (Terry, J., dissenting in a 5-4 decision). Cf. *In re Borders*, 797 A.2d 716 (D.C. 2002) (rejecting a claim that a presidential pardon automatically entitled a disbarred lawyer to reinstatement but allowing the applicant to seek reinstatement through the normal petition process and specifically stating that he could adduce the pardon as evidence

determining that the recipient did not commit a crime reflects unease over ignoring evidence that the individual might actually have engaged in dishonorable or unlawful conduct that might bear on his character or fitness in the future.<sup>206</sup>

These examples suggest that a wrongful-imprisonment regime should provide more compensation to those with the strongest moral claims against the state and less compensation to those with weaker but still legitimate claims. On this view, those with less compelling cases might be limited to lost income and perhaps attorney's fees as well as fines, court costs, and assessments for housing, board, medical, and ancillary services while in custody, all of which are available under Ohio's current statute to claimants who prove their innocence;<sup>207</sup> they would not be eligible for compensation for the time they were wrongfully imprisoned. Under this approach persons with weaker claims for compensation would be limited to actual financial losses, while those with stronger claims would also be indemnified for the time they were wrongfully held in prison. As a practical matter, this would substantially limit the payments to individuals who cannot prove their innocence because most of the money that has been awarded under the wrongful-imprisonment statute has provided recompense for the period of incarceration.<sup>208</sup>

At first glance, that statute contains a basis for distinguishing stronger from weaker claimants through its identification of two separate bases for compensation: procedural error and judicial declaration of innocence.<sup>209</sup> Things are not as straightforward as they might appear,

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supporting reinstatement). For other recent cases addressing the legal significance of pardons, see, e.g., *United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001) (en banc) (per curiam) (holding that a presidential pardon moots pending appeals); *Wilson v. Lawrence County*, 154 F.3d 757 (8th Cir. 1998) (holding that a person who received a gubernatorial pardon could pursue a civil rights action for wrongful imprisonment under 42 U.S.C. § 1983); *Anderson v. Commonwealth*, 107 S.W.3d 193 (Ky. 2003) (holding that a pardon did not restore a man's right to serve as a juror); *Catanese v. La. Gaming Control Bd.*, 712 So. 2d 666 (La. Ct. App. 1998) (holding that a person who had been pardoned for a drug offense could be denied a permit to work in a state-regulated facility), *writ denied*, 726 So. 2d 30 (La. 1998); *State v. Baucom*, 531 S.E.2d 922 (S.C. 2000) (holding that previous convictions for which the defendant had been pardoned could not be considered for sentencing purposes). These issues do not arise only in the United States. See, e.g., *Re Therrien*, [2001] 2 S.C.R. 3 (Can.) (upholding the removal of a provincial judge who had failed to disclose a conviction for which he had been pardoned years earlier).

206. See Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915).

207. See OHIO REV. CODE ANN. § 2743.48(E)(2)(a), (c)-(d), (F)(2) (West 1994 & Supp. 2004); *supra* notes 135-36 and accompanying text.

208. See *supra* note 138 (discussing the cases that had the largest compensation awards).

209. See OHIO REV. CODE ANN. § 2743.48(A)(5) (West Supp. 2004); *supra* note 185 and

however. To begin with, the statute actually treats persons with weaker claims – based on procedural error – more favorably than it treats individuals with stronger claims – based on innocence.<sup>210</sup> Moreover, procedural error is only an imperfect proxy for identifying weaker but nonetheless colorable claims of innocence. This is so because the errors encompassed by this ground are likely to have rendered a trial unfair but not necessarily to have resulted in an incorrect determination of guilt.<sup>211</sup>

The most troublesome claims involve persons whose convictions have been overturned, but who cannot prove their innocence despite at least reasonable (and, in some instances, substantial) doubt as to their guilt. Examples include *Massey*, where it was not clear that any crime at all had occurred;<sup>212</sup> *Chandler*, where there was significant evidence that another person who took responsibility for the crime had in fact committed the offense;<sup>213</sup> *Gover*, where the prosecutor failed to charge the claimant with a crime that the common pleas court subsequently

accompanying text.

210. See *supra* note 189 and accompanying text.

211. Trial errors can arise in various contexts, such as: (1) improper advocacy, see, e.g., *Romine v. Head*, 253 F.3d 1349, 1366-71 (11th Cir. 2001) (collecting cases on improper prosecutorial references to the Bible during criminal trials), *cert. denied*, 535 U.S. 1011 (2002); *Arnett v. Jackson*, 290 F. Supp. 2d 874, 878 (S.D. Ohio 2003) (granting habeas corpus relief because the trial judge relied on the Bible in imposing sentence); *Redman v. Watch Tower Bible and Tract Soc'y of Pa.*, 630 N.E.2d 676 (Ohio 1994) (reversing a judgment because the trial court allowed use of religious beliefs to impeach a witness); (2) improper evidentiary rulings, see, e.g., *State v. Harman*, 724 N.E.2d 1247 (Ohio Ct. App. 1999) (reversing a conviction because the trial judge impermissibly limited the defendant's right of confrontation at trial), *appeal dismissed*, 708 N.E.2d 724 (Ohio 1999); see *supra* notes 167-70 and accompanying text; (3) improper jury selection procedures, see, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that gender-based peremptory challenges to prospective jurors are unconstitutional); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that race-based peremptory challenges to prospective jurors are unconstitutional); see generally Eric L. Muller, *Resolving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996); and (4) improper jury instructions, see, e.g., *State v. Lessin*, 620 N.E.2d 72, 78-79 (Ohio 1993) (overturning a conviction for incitement of violence based on the defendant's burning of an American flag during a protest demonstration on the basis of the trial judge's refusal to instruct the jury about the First Amendment), *cert. denied*, 510 U.S. 1194 (1994); see generally Jonathan L. Entin, *Right, Wrong in Lessin Decision*, PLAIN DEALER, Nov. 3, 1993, at 7-B.

It is possible that mistakes by the police, such as failure to give the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), or unlawful searches and seizures might fall into the category of procedural error, although that conclusion is not obvious. Because the remedy for such violations is suppression of any resulting evidence, a conviction overturned on either of these grounds will likely fail for lack of evidence rather than as a result of procedural error. *But cf.* *State v. Miranda*, 450 P.2d 364 (Ariz. 1969) (affirming Ernesto Miranda's conviction following his retrial based solely on evidence that had not been deemed inadmissible by the Supreme Court), *cert. denied*, 396 U.S. 868 (1969). Resolving this matter is beyond the scope of the present paper.

212. See *supra* notes 156-59 and accompanying text.

213. See *supra* notes 171-77 and accompanying text.



determined he had committed even though the latter crime was not a lesser included offense of the one for which the conviction had been overturned;<sup>214</sup> and the many cases in which courts have ruled that claimants failed to prove their innocence by a preponderance of the evidence even though their convictions had been set aside.<sup>215</sup> The jury verdict in the civil case suggests that Sheppard fits into this category as well, although DeSario and Mason clearly disagree.<sup>216</sup>

In short, the two bases for compensating wrongfully imprisoned persons – acknowledging injustice that those individuals have suffered at society’s hands and enabling them to put their lives back together – argue powerfully for providing monetary relief even to those claimants who cannot prove their innocence. Accordingly, Ohio’s new statutory line between claimants freed as a result of procedural mistakes and those freed due to actual innocence should not serve as the basis for distinguishing between those persons who receive full compensation and those who receive partial compensation.

Even critics of a presumptive entitlement to compensation for persons who have been wrongfully imprisoned but cannot prove their innocence should recognize that the structure and implementation of the Ohio statute leave much to be desired. At a minimum, the standard for establishing innocence under that law should be interpreted less stringently than it has been so far. The recent amendment expanding the basis for compensation to cover claimants freed due to procedural error rather than innocence should be revised to make it no easier to obtain compensation on the basis of procedural error than on the basis of innocence, and the legislature should consider a sliding scale of payments based on the strength of the moral claim for compensation.

#### IV. CONCLUSION

It is perhaps understandable why Dr. Sam Sheppard’s estate sought a declaration of innocence under Ohio’s wrongful-imprisonment statute,

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214. See *supra* notes 162-66 and accompanying text.

215. See *supra* note 160 (collecting cases).

216. See *supra* note 15 and accompanying text. One respect in which the *Sheppard* case differs from these others concerns the mix of bases for compensation. Assuming that the standing and statute-of-limitations problems had not precluded the wrongful-imprisonment claim, Sheppard’s financial losses, primarily lost income and attorney’s fees, would have vastly surpassed the amount of compensation for the period during which he was wrongfully imprisoned. See DESARIO & MASON, *supra* note 8, at 376. Thus, even if he or the estate could not have established his innocence, the compensation award under the system proposed here would have been substantial. That this aspect of the case might be atypical of wrongful-imprisonment claims should come as no surprise. As noted at the outset, the *Sheppard* case was unique in the annals of Ohio law.

but the effort was probably misguided from the outset. The passage of time made it almost impossible to determine with confidence what actually happened on that awful night half a century ago. In any event, public attitudes about the case have become sufficiently settled that the outcome of a lawsuit probably could not persuade very many people to change their minds. Prosecutor Mason and political scientist DeSario have marshaled the strongest arguments for Sheppard's guilt, but it would be wrong to suggest that they have provided the last word on the controversy.

The *Sheppard* case reveals some troubling aspects of Ohio's legal system. Aside from the prejudicial publicity that infected the first trial, the wrongful-imprisonment case should never have gotten past the pleading stage if the ultimate disposition was correct. If the claim died with Dr. Sheppard or the statute of limitations had long since expired, going through yet another trial served no constructive purpose. The prosecutor's office and other law enforcement agencies might claim a measure of vindication from the jury verdict, but the debate has hardly ended as a result.<sup>217</sup> There was no legally plausible reason to conduct a third trial other than the rigidities of Buckeye State appellate procedure, rigidities that the Ohio Supreme Court has finessed in recent years when doing so seemed convenient.

In the end, the final Sam Sheppard trial served one truly valuable function: it gave us a chance to look carefully at Ohio's wrongful-imprisonment law and ask some hard questions about what it means and how it works. As generous as the statute appears, at least compared with others in this country, it rests on some dubious premises and rewards too many of the wrong people at the expense of more deserving claimants. Perhaps this last trial and the commentary it has spawned will enable us to improve that law.

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217. See, e.g., NEFF, *supra* note 4, at 381-86 (criticizing the verdict and insisting both that Sam Sheppard was innocent and that Richard Eberling murdered Marilyn Sheppard).