Foreword

by Honorable Nancy Gertner (Ret.)

Joel Cohen has compiled riveting narratives of injustice in the justice system, but not the usual ones—the ones the public has been hearing about far too often. These are not simply accounts of DNA exonerations stemming from botched investigations or official misconduct. The stories he recounts are equally troubling, if that is even possible. These are narratives of injustice imbedded in the justice system and all too often ignored. And they are told through actual interviews with a variety of participants—the wrongly convicted, to be sure, but also the prosecutor whose advocacy blinded him to the unfairness of a conviction, the defense lawyer who battled for a client that everyone agreed should not be in jail, and the judge who is not reelected after ruling for gay marriage.

One story had special resonance for me; I was a U.S. district court judge for 17 years and presided over challenges to state and federal convictions. The writ of habeas corpus, which should have provided a meaningful review of serious charges and substantial penalties, devolved into running the gauntlet of procedural barrier after procedural barrier, too

1. Judge Nancy Gertner sat on the U.S. District Court in Massachusetts for 17 years until her return to the practice of law in 2011. She writes and speaks on many issues, including civil liberties, sentencing, forensic evidence, and the jury system. Judge Gertner authored In Defense of Women: Memoirs of an Unrepentant Advocate and is currently writing a book about criminal justice. She serves on the faculty of the Harvard Law School, and has received numerous awards, including the Thurgood Marshall Award from the American Bar Association’s Section of Individual Rights and Responsibilities.
often masking outcomes that in some cases I strongly believed to have been unjust. It was an Alice in Wonderland of technical trip wires, barring access to the courts for those wrongly convicted and providing opportunities for the prosecutors who happily took advantage of them.

Michael Wayne Haley was one such case, portrayed by Cohen through an interview with his lawyer, Eric M. Albritton. Haley was guilty of stealing a calculator from Walmart, but he was wrongly tried as a habitual offender. Texas’s three strikes’ law required two prior sequential felony convictions; his record—while surely not admirable—did not fit the statute’s requirements so that he was innocent of being a habitual offender. The difference was critical—a petty crime with two years in jail, or a habitual offender sentenced to 16-and-a-half years. Working pro se, Haley read the statute carefully; apparently, no one else did—not the trial judge, the prosecutor, or the defense lawyer. He filed motions claiming that he was erroneously convicted as a habitual offender. The state courts and then the federal court rejected the claim, at the insistence of the prosecutor, not because it wasn’t true; everyone agreed it was. But rather because of a “procedural default,” which, to lay ears, must surely sound like something out of Heller’s *Catch 22*: The procedural default was the failure to raise the issue, but the issue had not been raised precisely because everyone had missed it. Ultimately, the case went to the Supreme Court (argued by Texas’s Solicitor General Ted Cruz), and through its procedural machinations, Haley was resentenced to the two years—*after he had served six*.

What the lawyers and judges were doing from the moment they realized that Haley had been wrongly convicted may have looked like justice; the judges in their robes, the lawyers citing to cases, the American flag behind them. But it was not justice, as Albritton said: The State of Texas was “myopically” focused on the principle that no matter how wrong or how unfair, federal courts ought not interfere in state convictions. And he added, “What I find outrageous is that policy considerations eclipsed common sense.”

And then there is the opposite, the story of the prosecutor in the Glenn Ford case, A. Martin Stroud III, who took responsibility for Ford’s wrongful conviction, not because he hid exculpatory evidence or tainted the investigation. Indeed, at the time of Cohen’s interview with him, Stroud didn’t even know the facts of Ford’s exoneration, only that the then dis-
strict attorney believed that there was conclusive evidence that the wrong man had been convicted. Rather, Stroud believed he should have done something to prevent the injustice, taking to heart the view that the prosecutor’s role is not simply advocacy but to make certain that “justice be done.” Stroud knew only that Ford’s lawyers were completely inexperienced in criminal cases and were wholly ineffective in his defense. After Ford’s exoneration, Stroud worked to oppose the death penalty publicly, and went so far as to turn himself in to the disciplinary committee asking to be disciplined for his role in the wrongful conviction.

And then there are the high-profile and not so high-profile stories that should resonate with all of us. Steven Pagones, an assistant district attorney in Dutchess County New York, was wrongly accused of the Tawana Brawley rape, an accusation that was splashed across New York headlines for years. Kenneth Ireland, wrongly convicted of capital murder in a small Connecticut town, was exonerated by DNA, but only after he had served decades in prison. Miriam Moskowitz was convicted and sentenced in the 1950s for conspiracy to lie about Soviet-related activities, but was never formally exonerated even when grand jury testimony released decades after her conviction established her innocence. Abdallah Higazy, who falsely confessed to having a transceiver device that authorities linked to the 9/11 attacks, after a hotel employee lied about where the device was found, was finally exonerated when an airline pilot staying at the same hotel claimed the device. Their interviews help us understand what it is like to suffer false accusations, to be at risk for extraordinary punishments, even death, and to have the legal system finally recognize their innocence (or not in the case of Miriam Moskowitz) after substantial suffering and sometimes only by happenstance.

Cohen also deals with cases where the issue may not be wrongful conviction but wrongful prosecution or punishment. Jeffrey Alexander Sterling, who had previously charged the CIA with race discrimination, was convicted under the Espionage Act and sentenced to three-and-one-half years in prison for passing secret information to a New York Times reporter, when former CIA director David Petraeus received probation for giving his mistress confidential information.

Finally, Cohen interviews those who were not convicted at all, but whose stories tell us something about the extraordinary pressures put
on legal system participants who seek to act in a principled manner, or bring diverse perspective to adjudication. Chief Justice Ternus of Iowa lost reelection after she ruled in favor of same sex marriage. Judge A. Ashley Tabaddor, an immigration judge, is recused from hearing cases involving Iranians because she was born in Iran, even though she had lived in the United States for 30 years. Adam Sirois tells of the experience of being the lone juror holdout in a high-profile murder case.

These cases force us to ask, How could this happen? How can these incidents be prevented? And in Cohen’s revealing interviews with exonerées, their lawyers, judges, and a juror, perhaps we can find the seeds of an answer.