Against this factual background, it is regrettable that the court in the *Hunt* case concluded that the legislative classification which singles out Cook County is "unreasonable." It is not consistent with an earlier decision which recognized that the greater problem of juvenile delinquency and dependency in Cook County required a special Juvenile Court in that circuit alone.[21] Divorce and delinquency are intimately related; "80% of the cases appearing before the Juvenile Court of Cook County and the Boys Court of Chicago can be traced to divorce-broken homes."[22] This same Juvenile Court Act was allowed to give another and indirect recognition of the relation of population congestion and delinquency in providing that the salary scale for probation officers would be fixed on the basis of the size of the county.[23]

No doubt, ideally, the state's policy of preventing family dissolution should be implemented with machinery capable of dealing with each and every case. On the other hand, legislation which gives some practical assistance where the problem is greatest cannot fairly be discarded as arbitrary, especially where, as here, no individual rights are directly concerned and the effect is merely on administrative conveniences.[24]

ELIGIBILITY FOR CERTIFICATE OF INNOCENCE UNDER FEDERAL ERRONEOUS CONVICTIONS ACT

The plaintiff, counsel for the German-American Bund, and twenty-four others were indicted in 1942 for conspiring to counsel evasion of the draft in violation of the Selective Service and Training Act of 1940.[1] At the trial, evidence was introduced to indicate that the defendants had promulgated and distributed National Bund Command Order Number 37 urging members of the organization to register for Selective Service but "to refuse to do military duty" until repeal of Section 8 (c) of the Act, which declared the "policy of Congress" to be opposed to filling vacancies in private employment created by induction under

[21] Lindsay v. Lindsay, 257 Ill. 328 (1913), sustaining the constitutionality of the Juvenile Court Act, Ill. Rev. Stat. (1945) c. 23, § 192.

[22] Note 7 supra.

[23] Ill. Rev. Stat. (1945) c. 23, § 195.

[24] Another example of the sterile approach to family relations problems which the Illinois court has been taking is illustrated by the holdings in Heck v. Schupp, 394 Ill. 296, 68 N.E. 2d 464 (1946), that the 1935 act outlawing "heart balm" suits was unconstitutional and the decision in Johnson v. Luhman, 330 Ill. App. 598, 71 N.E. 2d 810 (1947), that alienation of affections actions can be brought by minor children. See 15 Univ. Chi. L. Rev. 400 (1948), noting the Johnson case, supra.

Family relations law in Illinois would be better able to deal with the volume of litigation now crowding the courts if the Supreme Court were less interested in reading into the Constitution the sociology of a hundred years ago to protect technical and largely useless common law tort actions and more interested in the practical effects of procedural changes of considerable benefit in the area where volume makes the problem greatest.

[1] 54 Stat. 885 § 11 (1940); 50 U.S.C.A. App. §§ 301, 311 (1944).

the act with persons who were members of the Bund or the Communist Party. Twenty-three of the defendants and the petitioner were convicted and sentenced to terms of imprisonment ranging from one to five years, which they began serving immediately. The conviction was affirmed by the Second Circuit Court of Appeals[2] but was reversed by the Supreme Court for want of sufficient evidence.[3] Discharged from custody after serving over two and one-half years of his sentence,[4] plaintiff applied for a certificate of innocence as a condition precedent to maintaining a claim against the United States for wrongful imprisonment under the provisions of the Federal Erroneous Convictions Act.[5] The statute provides that any person convicted of a crime against the United States, who, having served all or part of the sentence imposed, shall upon appeal or at a new trial or rehearing be found not guilty of the crime of which he was convicted, or receive a pardon on the ground of innocence, be permitted to maintain suit against the United States in the Court of Claims for damages not to exceed $5,000. The only evidence admissible in the Court of Claims is a certificate from the court in which the claimant was adjudged not guilty, or a certificate of the pardon, which must contain recitals that the plaintiff a) did not commit any of the acts with which he was charged; or b) that his conduct in connection with the charge did not constitute a crime against the United States or against any of the states, and c) that he has not contributed to his arrest or conviction. Petition for the certificate was here denied, the court holding that it could not certify that the claimant had not committed the acts with which he was charged; that while such acts might not constitute conspiracy, they could be regarded as non-conspiratorial counselling of evasion; and that plaintiff, by reading Command Number 37 at a Bund meeting, and by perjured

[2] 141 F. 2d 248 (C.C.A. 2d, 1944).

[3] Keegan v. United States, 325 U.S. 478 (1945). Justice Roberts, joined by Justices Frankfurter and Murphy, in speaking for the majority of the Court, held that "the evidence and oral statements of the various petitioners at committee meetings and unit meetings of the bund did not supply the basis for a finding beyond a reasonable doubt, of counselling, or intending to counsel, or conspiring to counsel evasion of military service within the meaning of § 11 of the statute." Ibid., at 494, 495. The Court drew a distinction between counselling refusal to serve, urged in Bund Order Number 37, and counselling evasion, which it was said denoted "stealth, fraud, and artifice," not applicable where defendants advocated registration. In separate concurring opinions, Justice Black argued that Bund Order 37 should be construed as a protest against the constitutionality of Section 8(c), and Justice Rutledge dismissed the statements attributed to the defendants as "sheer political discussion." Justice Stone, joined in dissent by Justices Reed, Douglas, and Jackson, held that evasion referred to "any refusal to comply with statutory duty" and that counselling refusal to serve, as well as counselling refusal to register, could be regarded as prohibited by the terms of the Act. The dissent held that there was sufficient evidence to sustain a conspiracy conviction.

[4] While the precise term of imprisonment is not indicated in any of the reports or briefs, it appears that Keegan was committed to prison for 2 years and 8 months. He was indicted on Aug. 26, 1942; the trial began on Sept. 17, 1942, and was concluded on Oct. 19, 1942; he was imprisoned immediately following its conclusion; and the Supreme Court opinion of reversal was not rendered until June 11, 1945. Discharge from custody followed soon after.

[5] 52 Stat. 438 (1938), 18 U.S.C.A. § 729–32 (Supp., 1946).

and evasive testimony before the grand jury, was guilty of wilful misconduct which contributed to his arrest and conviction. *United States v. Keegan.*[6]

This, the fifth case to arise under the Erroneous Convictions Act, presents for the first time the applicability of the statute to persons serving their sentences pending appeal.[7]

The need for legislation providing for indemnity for errors in the administration of criminal justice was recognized in Europe from the time of Voltaire, but enactment was delayed until late in the nineteenth century by bitter dispute among legal philosophers, who could not agree whether compensation was a duty of the sovereign or only a moral obligation.[8] Such legislation is now widespread in Europe,[9] but apart from the federal act such statutes have been adopted in only three states—California,[10] North Dakota,[11] and Wisconsin.[12] The widespread indifference to the plight of the victim of an unjust conviction in this country is probably attributable to the notion that occurrences of this kind are too rare to justify public concern. Two dramatic cases within the past two years in two of our largest states,[13] and a carefully documented study of

[6] 71 F. Supp. 623 (N.Y., 1947).

[7] By its terms the statute is not applicable to those who have been convicted but not imprisoned. See note 30, infra.

[8] See Borchard, Convicting the Innocent 380–92 (1932). The first legislative expression of the obligation of the state to indemnify unjustly arrested and detained persons was recorded in Prussia in 1766. Ibid., at 381.

[9] Translations of the European statutes are reproduced in 3 J. Crim. L. & Criminol. 706 et seq. (1913).

[10] Cal. Penal Code (Deering, 1941) § 4900–4906.

[11] N.D. Rev. Code (1943) c. 12–57.

[12] Wis. Stat. (1943) § 285.05.

[13] See Campbell v. State, 186 N.Y. Misc. 586, 62 N.Y.S. 2d 638 (1946). Plaintiff was indicted and convicted for forgery, and after he had served 3 years and 2 months in Sing Sing penitentiary another man confessed to commission of the crime. Campbell was granted a gubernatorial pardon, and the New York legislature adopted legislation permitting him to maintain an action against the state. He subsequently recovered $125,000.

For a detailed account of the background leading to such a conviction and efforts to establish innocence see the Chicago Times, Nov. 28–Dec. 5, 1944; March 28–April 10, 1945. Joseph Majczek was convicted in March 1935 of the murder of a Chicago policeman and sentenced to 99 years' imprisonment. The bulk of the evidence submitted by the state consisted of the testimony of the owner of the speakeasy in which the officer had been shot during an attempted robbery. In affirming the conviction, the Illinois Supreme Court held that the testimony of one witness was adequate upon the question of identity and sufficient to sustain a conviction even though denied by the accused. People v. Majczek, 360 Ill. 261, 195 N.E. 653 (1935). On October 11, 1945, a classified advertisement published in the Times offering $5,000 reward, the life savings of the accused's mother, for evidence leading to the arrest of the murderer, prompted an investigation by two reporters, who, in a series of articles, disclosed that the state's witness had, when first queried immediately after the crime, denied ability to identify the killers but had readily done so 36 hours later following a conference with Chicago police; that after the conviction the witness told one of her intimate friends that her testimony had been perjured and given to obtain police protection for her speakeasy; and that the trial

sixty-five convictions indubitably proved wrongful,[14] are eloquent testimony to the contrary.

Because of the traditional doctrine of governmental immunity, relief for victims of unjust conviction and imprisonment is ordinarily limited to special legislative action and to the common law tort for malicious prosecution. Both are clearly inadequate remedies. Few victims of wrongful convictions have the necessary friends, finances, or influence to bring about passage of a special legislative act, and in some jurisdictions such special grants would present serious constitutional questions.[15] The tort of malicious prosecution is an action which runs counter to manifest policies of the law in favor of encouraging proceedings against those who are apparently guilty and of letting finished litigation remain undisturbed.[16] "It is notable how rarely an action is brought at all, much less a successful one, for this tort."[17] The cause of action is of little avail to those erroneously convicted since persons most intimately associated with the prosecution are exempt from liability, and because of the heavy burden of proof imposed on malicious prosecution plaintiffs. The principle of immunity for judges from civil liability for their judicial acts, even though done maliciously or corruptly, is deeply imbedded in the common law[18] and has frequently been upheld under the Constitution.[19] The same protection has been extended to

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judge had indicated to several of the witnesses and to his family that he believed the accused was innocent and personally intended to see that he was granted a new trial. Counsel for the defendant, subsequently twice disbarred, was, according to statements of the bailiff, under the influence of liquor during the trial. Majczek was granted a pardon and the Illinois legislature appropriated $24,000 in compensation for 13 years' imprisonment. See the Chicago Sun, § 1, p. 5, col. 2 (June 29, 1947).

[14] Borchard, op. cit. supra note 7. The cases include convictions of innocent persons in 26 states, the District of Columbia, and England.

[15] See Campbell v. State, 186 N.Y. Misc. 586, 62 N.Y. Supp. 638 (1946), in which the constitutionality of the New York act permitting the maintenance of an action against the state was under attack.

[16] See Green, Judge and Jury 338–39 (1930). "There is no other cause of action which is more carefully guarded. . . . . The reasons are not hidden far beneath the surface. They are mostly administrative: 1) To encourage citizens to seek the protection of their interests and the interests of the community in the courts without fear of being themselves subjected to the hazards of litigation; 2) to question the integrity of the law's administration is a serious matter not to be lightly sustained; 3) it is desirable to let the settlement of the principal litigation settle all collateral matters."

[17] Winfield, The Law of Tort 644 (1937).

[18] See Winfield, The Present Law of Abuse of Legal Procedure 176–228 (1921).

[19] Randall v. Brigham, 7 Wall. (U.S.) 523 (1868); Bradley v. Fisher, 13 Wall. (U.S.) 335 (1871); Alzua v. Johnson, 231 U.S. 106 (1913). A judge may, however, be subject to criminal prosecution where he violates a criminal statute. Craig v. United States, 81 F. 2d 816 (C.C.A. 9th, 1936); United States v. Manton, 107 F. 2d 834 (C.C.A. 2d, 1938). And he will be liable for ministerial acts which contravene federal statutes. Ex parte Virginia, 100 U.S. 339 (1879).

prosecuting attorneys,[20] witnesses,[21] grand jurors,[22] and to justices of the peace,[23] even though there is evidence of bad faith and maintenance of a prosecution without probable cause. Members of the executive branch of the government are immune from liability for acts performed in the discharge of their official duties.[24] As a necessary condition to maintaining his action the plaintiff must establish absence of probable cause for instituting the original proceedings, and in those jurisdictions which adhere to the majority doctrine that a trial court conviction, even though subsequently reversed, is conclusive evidence of probable cause, malicious prosecution would be a futile remedy to a person unjustly convicted and imprisoned.[25] Indicative of the hostility to this cause of action is the newly enacted Federal Tort Claims Act, which exempts claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process.[26]

Despite the optimistic reception which greeted passage of the Federal Erroneous Convictions Act after a campaign of more than twenty-six years by two of the nation's foremost jurists,[27] no award has yet been granted under the statute. The petitions of three claimants were rejected for failing to allege facts required by the statute[28] while a fourth petitioner unsuccessfully sought to ap-

[20] Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896); Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917); Yaselli v. Goff, 8 F. 2d 161 (D.C., N.Y., 1925), aff'd 12 F. 2d 396 (C.C.A. 2d, 1926), aff'd 275 U.S. 503 (1927).

[21] McClarty v. Bickel, 155 Ky. 254, 159 S.W. 783 (1913); King v. Martin, 150 Va. 122, 142 S.E. 358 (1928).

[22] Turpen v. Booth, 56 Cal. 65 (1880).

[23] Landseidel v. Culeman, 47 N.D. 275, 181 N.W. 593 (1921); Curnow v. Kessler, 110 Mich. 10, 67 N.W. 982 (1896).

[24] Cooper v. O'Connor, 99 F. 2d 135 (App. D.C., 1938); Lang v. Wood, 92 F. 2d 211 (App. D.C., 1937).

[25] Addington v. Bates, 101 Col. 293, 73 P. 2d 529 (1937), noted in 22 Minn. L. Rev. 740 (1938); Schnider v. Montross, 158 Mich. 263, 122 N.W. 534 (1909); Saunders v. Baldwin, 112 Va. 431, 71 S.E. 620 (1911); see Rest., Torts § 667 (1) (1939), where a conviction although subsequently reversed is regarded as conclusive evidence as to the existence of probable cause. A minority of courts hold that a reversed conviction is but prima facie evidence of probable cause which can be rebutted by proof of fraud, perjury, subornation or other competent evidence. McElroy v. Catholic Press Co., 254 Ill. 290, 98 N.E. 527 (1912); Skeffington v. Eylward, 97 Minn. 244, 105 N.W. 638 (1906).

[26] 60 Stat. 842 (1946), 28 U.S.C.A. §§ 921, 943(r) (Supp., 1946).

[27] The present Federal Erroneous Convictions Act stems largely from the efforts of Professors J. W. Wigmore and Edwin M. Borchard. The first bill for relief of persons erroneously convicted was introduced into the Senate in 1912 by Senator Sutherland. 49 Cong. Rec. 356 (1912).

[28] In Prisament v. United States, 92 Ct. Cl. 434 (1941), petitioner introduced as evidence the certificate of a presidential pardon which recited that plaintiff had been charged and convicted of robbing a member bank of the Federal Deposit Insurance Corporation in violation of the Federal Bank Robbery Act, that the guilty parties were subsequently apprehended, and that petitioner was "innocent of the offense for which he is now being held." Although the pardon indicated that Prisament had been in another state at the time of the robbery, the court held that the pardon contained no statement that he had not committed any of the acts with

ply the act retroactively.[29] The order denying claimant's petition in the present case is supported by ample evidence indicating that the lawmakers did not intend the act to apply to those whose innocence is based on technical or procedural grounds such as insufficiency of proof.[30] Failure properly to label the acts detailed in the indictment does not establish the innocence of the accused, but only that the evidence was insufficient to establish beyond a reasonable doubt that he committed the offense with which he was charged. The burden of proof is upon the claimant under the Act, and, although his conduct may not have been sufficient to justify an appellate court in upholding his conviction and subjecting him to punishment, it may well be adequate to estop him from claiming damages for the prosecution. Thus the evidence against the accused may make it more probable that he was guilty of the crime than that he was innocent, and still fall measurably short of removing all reasonable doubt of his guilt. Appropriate analogy may be found in the law of malicious prosecution, where the question of plaintiff's guilt may be collaterally raised by the defendant, even though the plaintiff has been adjudged not guilty in the criminal prosecution.[31] Moreoever, the fact that the Federal Erroneous Convictions Act requires a judge to issue a certificate of innocence is persuasive that the dismissal of the charges on the grounds of insufficient proof, by itself, should not qualify the claimant for indemnification. In Europe, imprisonment is usually not essential for indemnification, and a claimant may recover even if he was only detained pending trial, if he is later acquitted or discharged.[32] The scope of the American statutes would appear to be more limited. They are largely intended to apply to cases of mistaken identity, the appearance alive of the alleged victim of the

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which he was charged, and that while such an averment in itself would have been adequate, in its absence the certificate must fulfill the requirements of both Sections (b) and (c) of the Erroneous Convictions Act. There was no statement in the pardon that petitioner had not contributed to his arrest as required by Section (c), and the court did not determine whether the assertion that he was "innocent of the offense" complied with the proviso that his conduct must not constitute a crime against the United States or a state.

Plaintiff in Hadley v. United States, 101 Ct. Cl. 112 (1944), was convicted of having entered a national bank with intent to pass a forged check. While he was in prison, the Supreme Court, in Jerome v. United States, 318 U.S. 101 (1943), ruled that entry into a national bank for the purpose of committing a felony against the laws of the state in which the bank was located did not come within the terms of the Bank Robbery Act, under which the plaintiff had been convicted. A writ of habeas corpus was granted which was introduced as evidence of innocence. The petition was insufficient since it did not allege non-commission of the acts or that the acts charged were not a violation of state law. The claimant instituted a second proceeding for false imprisonment, claiming $250,000 in damages, and the petition was dismissed for the same reasons. Hadley v. United States, 66 F. Supp. 140, 106 Ct. Cl. 819 (1946).

[29] Viles v. United States, 95 Ct. Cl. 591 (1942), cert. den. 317 U.S. 629 (1942). Plaintiff based his claim on a pardon which was granted on March 2, 1933, whereas the act was to apply to cases arising only after its enactment.

[30] See H.R. Rep. No. 2299, 75th Cong., 3d Sess., Sec. 4 (4) (1938); Sen. Rep. No. 202, 75th Cong., 1st Sess. (1938).

[31] See Harper, Malicious Prosecution, False Imprisonment, and Defamation, 15 Tex. L. Rev. 157, 172–73 (1937).

[32] See the indemnity statutes of Norway and Denmark, op. cit. supra note 9, at 710–11.

homicide, and proof of the discovery of new facts establishing the innocence of the convicted person.

Convictions of the innocent spring from the same factors as other defects in criminal law administration—public impatience at the escape of so many apparently guilty persons, and a "crime wave" producing police and prosecution overzealousness; the desire for vengeance, which leads to mistaken identification by witnesses and prejudiced juries; the difficulty of drawing conclusions from circumstantial evidence; the lack of public defenders and competent defense counsel; the third degree; lack of power in appellate courts to review discretionary rulings and most findings of fact; and statutory limitations on the traditional common law powers of the trial judge, as in prohibiting the expression of opinion on the weight of the evidence. Most of these practices which result in the conviction of the innocent can only be changed through an enlightened public opinion and legislative action. Although erroneous convictions acts, such as the federal statute, do not reach the causes of erroneous convictions, they nevertheless should be enacted in every state in order that society may, as far as possible, repair the wrong it has inflicted upon the convicted innocent.

CONTRIBUTORY NEGLIGENCE AS DEFENSE TO STATUTORY TORT

The plaintiff's deceased made a retail purchase from the defendant grocer of kerosene distributed by the defendant oil company. In order to hasten the ignition of green firewood in a cold stove, he poured some kerosene directly from the can into the firebox. An explosion followed and the plaintiff's husband died from burns and injuries received. It was determined that the fuel sold actually was an explosive mixture of kerosene and gasoline[1] made possible by the defendant's routine practice of indiscriminately using the tanks of its delivery truck for hauling both gasoline and kerosene. Since this practice violated state law,[2] the plaintiff pleaded a statutory tort in her action for death damages. The defendants pleaded the deceased's contributory negligence in pouring kerosene into the stove. The trial court approved this defense, dismissed the action

[1] Flashpoint is that temperature at which a combustible fluid vaporizes and may be ignited. Expert testimony revealed that the mixture flashed at 68 degrees Fahrenheit whereas kerosene normally ignites at 145 to 160 degrees Fahrenheit. By law, Minnesota fixes the lowest permissible flashpoint of kerosene mixtures at 120 degrees Fahrenheit. Minn. Stat. (1945) § 296.01, subd. 3.

[2] Minn. Stat. (1945) § 296.22, section headed "safety requirements," subd. 3, headed "use of pump lines": "Gasoline and other products having a flash point of less than 100 degrees Fahrenheit when tested with the Tagliabue closed-cup tester shall not be pumped through the same pumps or marketing lines as are used for other petroleum products except by special permission of the commissioner." The briefs indicate that other subdivisions of the same section were violated, including requirements that gasoline filling lines be painted red and that identifying tags be placed on spigots that headed low flash point fuel conduits. However these are not within the scope of the theory of this note, nor are they mentioned in the decision. § 296.25 provides that violations of the safety requirements are misdemeanors. No penalty is stipulated.